BRB Nos. 03-0706
and 03-0706B

RICHARD SCUDERI	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
EQUITABLE/HALTER SHIPYARDS	)	DATE ISSUED: JUN 29, 2004
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
	)	
Carriers	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and the Supplemental Decision and Order Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

J. Paul Demarest and Seth H. Schaumburg (Favret, Demarest, Russo & Lutkewitte), New Orleans, Louisiana, for claimant.

Gina Bardwell Tomkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand, and employer cross-appeals the Supplemental Decision and Order Awarding Attorney Fees (99-LHC-3029), of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

This case is before the Board for the second time. To reiterate the facts, claimant, while working for employer as an electrician, began to experience pain in both wrists. Employer's safety director referred claimant for medical treatment and claimant, on July 3, 1997, was initially examined by Dr. Friedrichsen, who diagnosed probable carpal tunnel syndrome and resolving tennis elbow. On September 16, 1997, claimant was examined by Dr. Stokes, who specializes in hand and orthopedic surgery. Dr. Stokes diagnosed Stage II-III Kienbock's disease of the left arm and wrist, possible Stage I Kienbock's disease of the right arm and wrist, and bilateral carpal tunnel syndrome related to Kienbock's disease.[2]

Claimant was discharged by employer on October 6, 1997. On November 18, 1997, claimant underwent a bilateral carpal tunnel release, and on November 25, 1997, he underwent left wrist arthrodesis. Claimant returned to work for employer in February 1998, but he was forced to stop working the following month due to wrist pain. Claimant, who has a well-documented history of panic attacks, agoraphobia, and generalized anxiety disorder, subsequently asserted that his pre-existing psychological conditions were aggravated by his work-related wrist injuries and his resulting inability to work, and he thereafter sought compensation under the Act for permanent total disability due to his physical and

[1] Employer initially cross-appealed the administrative law judge's Decision and Order on Remand. BRB No. 03-0706A. Employer thereafter appealed the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. BRB No. 03-0706S. In an Order dated March 31, 2004, the Board dismissed employer's cross-appeal of the administrative law judge's Decision and Order on Remand, BRB No. 03-0706A, for its failure to file a timely Petition for Review and brief. As a result of this dismissal, employer's appeal of the administrative law judge's Supplemental Decision and Order is hereby redesignated BRB No. 03-0706B.

[2] Kienbock's disease is a condition of the lunate bone, one of the wrist bones. The disease causes the bone to lose its blood supply, and it may consequently fragment and compress.

psychological injuries. 33 U.S.C. §908(a).

In the initial decision, the Administrative Law Judge Kerr found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his Kienbock's disease, bilateral carpal tunnel syndrome, and psychological conditions to his employment, determined that employer rebutted the presumption with respect to claimant's physical maladies, and concluded that claimant's psychological problems are not caused or aggravated by his employment. Accordingly, claimant's claim for benefits was denied.

On appeal, the Board affirmed the administrative law judge's findings that claimant's Kienbock's disease, bilateral carpal tunnel syndrome, and psychological condition are not work-related, but remanded the case for the administrative law judge to address whether claimant established a compensable injury based on his symptoms such as pain, which were due to the combination of his Kienbock's disease and his working conditions, and if so, whether these symptoms resulted in disability. *Scuderi v. Equitable/Halter Shipyards*, BRB No. 01-0846 (July 30, 2002)(unpub.).

On remand, the case was reassigned to Administrative Law Judge Kennington (the administrative law judge) who, in a decision dated June 23, 2003, found that claimant sustained severe pain symptoms due to his employment which precluded claimant from returning to his usual work. He concluded that claimant reached maximum medical improvement on August 12, 1998, and that employer established the availability of suitable alternate employment as of July 28, 1999. The administrative law judge therefore awarded claimant temporary partial disability benefits for the period from May 19, 1997 through September 28, 1997, temporary total disability benefits for the period from September 29, 1997, through August 11, 1998, permanent total disability benefits for the period from August 12, 1998, through July 28, 1999, and permanent partial disability benefits thereafter for a 15 percent impairment to claimant's left wrist and a 10 percent impairment to claimant's right wrist, as well medical expenses. 33 U.S.C. §§908(a), (b), (c)(3), (e); 907.

Claimant subsequently filed a fee application with the administrative law judge requesting an attorney's fee of $63,294.15, representing 247.85 hours of services performed at an hourly rate of $200, 64.25 hours of services performed at an hourly rate of $150, and $5,967.90 in expenses. In his Supplemental Decision and Order, the administrative law judge, after initially finding that employer had filed no objections to claimant's counsel's fee request, reduced claimant's requested hourly rate of $200 to $175 per hour, approved the number of hours and costs sought by counsel, and accordingly ordered employer to pay claimant's counsel the resulting sum of $58,979.15.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to ongoing disability compensation and medical benefits. In its cross-appeal,

employer alleges that the administrative law judge erred in failing to designate the carrier responsible for the payment of claimant's counsel's attorney's fee.

Suitable Alternate Employment

Claimant initially challenges the administrative law judge's finding that employer established the availability of suitable alternate employment as of August 12, 1998. Specifically, claimant avers that the administrative law judge erred by failing to find that claimant's constant hand pain resulted in his inability to sustain any post-injury employment. For the reasons that follow, we reject claimant's allegations of error. Where, as in this case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986).

In the instant case, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment based upon the testimony of Drs. Williams, Brent, and Faust, a functional capacity evaluation (FCE), and three employment positions, specifically two unarmed security positions and an airport checker position, identified by Ms. Favaloro, employer's vocational consultant. Regarding this issue, Dr. Williams, who performed claimant's bilateral carpal tunnel release on November 18, 1997, and his left wrist arthrodesis on November 25, 1997, released claimant to return to light duty employment with no heavy lifting, leaning on his arms or repetitive use of his extremities in February 1998. Emp. Ex. 23 at 12-15. Dr. Brent, who first examined claimant in August 1998, opined that claimant was restricted from heavy work and was limited to desk type of activities. Emp. Ex. 27 at 42-43. Dr. Faust, who initially examined claimant in January 2000, subsequently opined that claimant remained employable in a position that demanded light physical work, but that claimant could not perform heavy work. Emp. Ex. 30 at 27-28. An FCE performed in March 2000 indicated that claimant retained the physical capability of performing light duty work. Emp. Ex. 29. In contrast to this medical documentation, claimant testified that, due to his ongoing pain, he is unable to use either of his hands for non-repetitive work.

After reviewing claimant's medical records, which indicated claimant's ability to perform light-duty work with limited use of his hands, Ms. Favarolo identified multiple employment opportunities that she considered to be available and within claimant's

restrictions. Emp. Ex. 13; April 29, 2003 Tr. at 117-131, 148-153. The administrative law judge, however, concluded that of the employment opportunities identified by Ms. Favarolo, only the two unarmed security positions and an airport checker position were sufficient to meet employer's burden of establishing the availability of suitable alternate employment.[3] Decision and Order at 10-11.

We affirm the administrative law judge's decision to rely upon the testimony of Drs. Williams, Brent, and Faust, Ms. Favarolo, and claimant's FCE, rather than the testimony of claimant and Mr. Meunier, in finding that employer established the availability of suitable alternate employment. It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). On this record, the administrative law judge's decision not to credit claimant's testimony that his pain precluded his performing the alternate work identified is rational and must therefore be affirmed. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). As the testimony of Drs. Williams, Brent, and Faust, and Ms. Favaloro, as well as claimant's FCE, constitute substantial evidence supporting the administrative law judge's finding that employer established the availability of suitable alternate employment, it is affirmed. *Id.; see Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Maximum Medical Improvement

Claimant next challenges the administrative law judge's finding that he reached maximum medical improvement on August 12, 1998. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant=s condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 349 U.S. 976 (1969). If surgery is anticipated, maximum medical improvement has not been reached. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). An administrative law judge may, however, rely on an opinion which rates claimant=s disability, as that is sufficient evidence of permanency. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff=d on recon. en banc*, 32 BRBS 251 (1998). Accordingly, a finding of fact establishing the date of maximum medical

[3] Although Mr. Meunier, claimant's vocational expert, testified that he did not know of any positions that claimant could obtain and perform over a period of time, he conceded that if Ms. Favaloro's description of the duties of an unarmed security officer and checker are accurate, claimant should be able to perform those positions. *See* April 29, 2003 Tr. at 88-93.

improvement must be affirmed if it is supported by substantial evidence. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

In concluding that claimant reached maximum medical improvement, the administrative law judge found that "it is clear by on August 12, 1998, Claimant was experiencing no work related symptoms," that claimant had sought no treatment since his March 9, 1998, visit with Dr. Williams,[4] and that thus from a work standpoint claimant's condition had stabilized. *See* Decision and Order on Remand at 7. In challenging this finding, claimant summarily asserts that his condition had not reached maximum medical improvement on August 12, 1998, since he continued to experience pain following his failed surgery and, moreover, additional surgeries have been recommended to alleviate his ongoing complaints. Clt's br. at 39. In our prior decision, however, we affirmed Judge Kerr's finding that claimant's working conditions did not cause or aggravate his underlying Kienbock's disease and carpal tunnel syndrome. *Scuderi*, slip op. at 3-4. Therefore, as claimant's November 18, 1997, bilateral carpal tunnel release and November 25, 1997, left wrist arthodesis were related to these underlying non-work-related conditions, Emp. Exs. 7, 23 at 12-14, the administrative law judge committed no error in finding claimant's work-related symptoms had stabilized and thus had reached permanency. Moreover, claimant has not shown that any future recommended surgical procedures are related to his work-related symptoms rather than to his underlying condition. Accordingly, we affirm the administrative law judge's finding that as claimant's work-related condition stabilized as of August 12, 1998, he reached permanency as of that date. *See generally Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989); *Leone v. Sealand Terminals Corp.*, 19 BRBS 100 (1986).

Medical Expenses

Lastly, claimant contends that employer should be required to reimburse him for all medical expenses paid for the treatment of any wrist pain, past, present or future. While an injury need not be economically disabling in order for a claimant to be entitled to medical benefits pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a), *see Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991); *Ballesteros*, 20 BRBS 184; 20 C.F.R. §702.402, medical care must be appropriate for and related to the work injury in order to be compensable. *See generally Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). In the instant case, while finding that employer is not responsible for the medical treatment claimant procured as a result of his non work-related Kienbock's disease and carpal tunnel syndrome, the administrative law judge determined that employer is

[4] Dr. Williams examined claimant on March 9, 1998, and thereafter opined that claimant had sustained a 15 percent impairment to his left upper extremity and a 10 percent impairment to his right upper extremity. Emp. Ex. 7.

responsible for medical expenses incurred by claimant which are associated with his treatment for work-related wrist and hand pain symptoms. Decision and Order on Remand at 12. Thus, the administrative law judge has in fact granted the relief requested by claimant. However, there is no indication in the record before us that claimant is currently claiming entitlement to any medical benefits which employer has declined to pay; moreover, claimant has not identified specific medical treatment for which he has sought authorization from employer and has been denied, or that he has incurred work-related medical expenses which employer refused to reimburse. *See* Clt's br. at 39. We therefore affirm the administrative law judge's award of medical expenses to claimant, as it is rational and in accordance with law. As a claim for medical benefits is never time-barred, claimant can file a claim for medical benefits if and when further treatment of a work-related condition becomes necessary, and employer refuses to authorize treatment or to reimburse claimant. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994).

Attorney Fee Award

In its cross-appeal, employer avers that the administrative law judge erred by assessing claimant's counsel's fee and costs solely against employer; accordingly, while not challenging claimant's counsel's entitlement to a fee or the amount of the fee awarded by the administrative law judge, employer argues that the Board must remand the case for the administrative law judge to make a determination as to the carrier responsible for the payment, in whole or in part, of the fee and costs awarded to claimant's counsel.[5] Er's br. at 13. We reject employer's contention of error. While, as employer correctly notes on appeal, the administrative law judge in his Supplemental Decision and Order Awarding Attorney Fees stated that "Employer shall pay claimant's counsel" the awarded fee of $53,011.25 and $5,967.90 in expenses, this statement does not require a remand of the case to the administrative law judge. Rather, the issue presented by employer on appeal is addressed by Section 35 of the Act, 33 U.S.C. §935, which states, in relevant part, that "any requirement by . . .any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer." *See also* 20 C.F.R. §703.115. Thus, we need not remand this case to the administrative law judge since, pursuant to the unequivocal language of Section 35 of the Act, employer and its respective carrier are liable for the fee and costs awarded to claimant's counsel by the administrative law judge.[6] *See generally Marks v. Trinity Marine Group*, 37 BRBS 117 (2003).

[5] Employer declared Chapter 11 bankruptcy on April 20, 2001. Thereafter, employer's insurance carrier, Reliance Nat'l Indemnity Co., was liquidated in an Order dated October 3, 2001.

[6] In his response to employer's cross-appeal of the administrative law judge's fee award, claimant urges the Board to vacate the fee award and remand the case for the administrative law judge to determine, pursuant to the Act's aggravation rule, whether

Accordingly, the administrative law judge's Decision and Order on Remand and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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employer or its prior parent company, Trinity Industries, Inc., is the employer responsible for claimant's benefits and attorney's fee. We decline to address claimant's contentions regarding the employer responsible for these payments, as this issue is raised for the first time on appeal. *See Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990).