BRB No. 05-0796

PROCESA G. THOMAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY PERSONNEL COMMAND / MWR	)	
	)	DATE ISSUED: 06/26/2006
and	)	
	)	
CONTRACT CLAIMS SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Order Denying Employer's Petition for Reconsideration, and Decision and Order Concerning Attorney's Fees of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Kitty K. Kamaka, Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Order Denying Employer's Petition for Reconsideration, and Decision and Order Concerning Attorney's Fees (2004-LHC-0448) of Administrative Law Judge Russell D. Pulver 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33

U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a food services worker for employer, sustained a work-related injury to her right knee on June 20, 1999. Dr. Lee performed arthroscopic surgery on claimant's right knee on October 27, 1999. Claimant's Exhibit (CX) 11. Claimant, however, continued to have significant pain which culminated in a second arthroscopic surgery on claimant's right knee by Dr. Lee on December 8, 2001. Meanwhile, claimant began having pain in her left knee in July 2001, which Dr. Shahid diagnosed as a strain and traumatic arthritis with MCL and LCL injuries, primarily due to claimant's favoring of her right knee.

Following the accident, claimant worked intermittently for employer on light duty and received temporary total disability for several periods during which she was unable to work.[1] 33 U.S.C. §908(b). Employer also paid claimant a scheduled award totaling $1,362.78, based on a two percent permanent impairment of her right lower extremity. 33 U.S.C. §908(c)(2). After March 21, 2002, employer notified claimant that a light-duty work schedule was no longer available, and that pursuant to Dr. Smith's opinion, claimant no longer needed any work restrictions and could return to her full-duty job. Claimant did not return to work for employer and began working with vocational rehabilitation counselors to find employment more suitable to the permanent work restrictions imposed by Dr. Lee, *i.e.*, no prolonged standing, walking, pushing and pulling, and no lifting, squatting, kneeling and climbing. CX 21. She eventually obtained sedentary part-time work as a parking lot attendant as of September 1, 2004. In the interim, claimant filed a claim for benefits based on her right and left knee injuries.

In his decision, the administrative law judge found that claimant sustained work-related injuries to her right and left knees and has not yet reached maximum medical improvement with regard to either condition. The administrative law judge determined that claimant could not return to her usual employment as of May 13, 2003, and that employer established the availability of suitable alternate employment. Nevertheless, the administrative law judge found claimant entitled to temporary total disability benefits from May 15, 2003, through September 1, 2004, as he found that claimant diligently sought suitable post-injury employment, but was unsuccessful until she secured the

[1] Specifically, claimant received temporary total disability benefits for the periods from July 19, 1999, to August 2, 1999, October 27, 1999, to November 20, 1999, April 27, 2000, to September 20, 2000, and December 8, 2001, to May 14, 2003.

parking lot attendant position on September 1, 2004. The administrative law judge further found claimant entitled to temporary partial disability benefits thereafter based on her reduced earnings as a parking lot attendant. 33 U.S.C. 908(e). Lastly, the administrative law judge awarded claimant medical benefits under Section 7(a), 33 U.S.C. §907(a), including reimbursement for the cost of a left knee brace. Employer's motion for reconsideration was subsequently denied.

Claimant's counsel then sought an attorney's fee totaling $26,181.95, representing 98.65 hours of attorney work at an hourly rate of $250, 6.7 hours of paralegal work at an hourly rate of $80, and $983.45 in costs, for work performed before the administrative law judge in this case. After consideration of employer's objections, the administrative law judge awarded claimant's counsel an attorney's fee totaling $23,603.20, representing 98.15 hours of attorney work at an hourly rate of $225, plus 6.7 hours of paralegal work at an hourly rate of $80, and the requested expenses in their entirety.

On appeal, employer challenges the administrative law judge's finding that claimant has not yet reached maximum medical improvement with regard to her knee injuries, and the award of an attorney's fee. Claimant responds, urging affirmance.

Employer contends that the issue of maximum medical improvement was not properly before the administrative law judge as it was not raised or addressed at the hearing, nor by either party in their respective post-hearing briefs. Employer also avers that the administrative law judge did not properly assess Dr. Lee's opinion in finding that claimant had not reached maximum medical improvement.

We initially reject employer's procedural contention that the issue of maximum medical improvement was not properly before the administrative law judge in this case. The record establishes that the parties argued before the administrative law judge for different dates of maximum medical improvement, *i.e.*, employer argued that claimant reached maximum medical improvement as of July 30, 1999, while claimant argued, at first, that she reached maximum medical improvement as of May 13, 2003, and then later posited that she has not yet reached that point with regard to her injuries. *See* ALJXs 2, 4; Hearing Transcript (HT) at 8, 10; Employer's Post-Hearing Brief dated February 17, 2004, at 12, 14; Claimant's Post-Hearing Brief dated March 7, 2005, at 2. Additionally, the administrative law judge stated at the hearing that both "the nature and extent" of claimant's injuries were at issue. HT at 8, 10. Consequently, we hold that the issue of maximum medical improvement was properly before the administrative law judge in this case. *See generally Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. A disability is considered

permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from 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*, 394 U.S. 976 (1969). While an administrative law judge may rely on a physician's opinion to establish the date of maximum medical improvement, he need not look only for a statement regarding maximum improvement, but he may use the date the doctor assessed the claimant with an impairment rating, or assigned the claimant with permanent restrictions, as they may be sufficient evidence of permanency. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994) (Smith, J., dissenting on other grounds), *rev'd on other grounds sub nom. Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In addressing maximum medical improvement, the administrative law judge credited the opinions, dating back to 2001, of claimant's treating physicians at Portner Orthopedics, *i.e.*, Drs. Hsieh, Farooque, Portner, Shahid, and Kosuri, as well as Dr. Lee's opinions in between 2001 and 2003, regarding her need for continued treatment of her work-related knee injuries, over the contrary opinion of Dr. Smith, that claimant had reached maximum medical improvement as of July 30, 1999. In addition, the administrative law judge relied on Dr. Ma's October 2000 opinion that claimant had not reached maximum medical improvement. Consequently, he determined that claimant's knee injuries remained temporary in nature. On reconsideration, the administrative law judge reiterated that he "did not accept most of" Dr. Smith's opinion "since the other medical evidence in the record indicated that claimant could benefit from additional medical care." Order on Reconsideration at 1.

As employer suggests, the administrative law judge did not address all of the evidence relevant to the issue of maximum medical improvement, and specifically Dr. Lee's opinion, which, if credited, could establish a date for maximum medical improvement in this case. Dr. Lee stated on August 15, 2003, that claimant has a permanent impairment of her right knee, CX 12; EX 52, and he followed that up by issuing permanent physical restrictions for claimant's right knee on October 27, 2003. CX 21. Moreover, the parties agreed to a scheduled award of permanent partial disability benefits with regard to claimant's right knee injury. HT at 10. Furthermore, the administrative law judge did not address whether claimant's right knee condition has continued for such a lengthy period that it appears to be of a lasting or indefinite duration.

See Watson, 400 F.2d 649. The record establishes that almost three years had elapsed from the time of claimant's last right knee surgery in December 2001, to the date of the hearing without any apparent change in the status of claimant's condition. CX 11; EX 53. For instance, the record does not contain any further treatment by claimant's treating physicians at Portner Orthopedics, *i.e.*, Drs. Hsieh, Farooque, Portner, Shahid, and Kosuri, after October 2001,[2] CX 11; EX 53, and Dr. Lee's last statements, dated August 15, 2003, and October 27, 2003, respectively specify that claimant "has permanent impairment" and "permanent restrictions."[3] CXs 12, 21; EX 52. Thus, as the administrative law judge did not address all relevant evidence concerning the permanency of claimant's right knee condition after her second surgery, we must vacate the finding that claimant's condition is temporary and remand this case for the administrative law judge to reconsider this issue pursuant to applicable law.[4] *See generally SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-444, 30 BRBS 57, 61-62(CRT) (5th Cir. 1996); *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).[5]

[2] These physicians, as well as Dr. Ma, who were credited by the administrative law judge, gave their opinions that claimant had not reached maximum medical improvement and was in need of continued treatment of her right knee condition prior to the time of claimant's second surgery on December 8, 2001.

[3] Claimant testified that Dr. Lee informed her, in 2003, that she needed additional treatment for her knees but that he could no longer see claimant anymore as employer "stopped paying" for claimant's medical care. HT at 52, 58.

[4] We note, however, that the administrative law judge provided valid reasons for discrediting Dr. Smith's opinion that claimant reached maximum medical improvement in 1999. Decision and Order at 7; *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In light of this and as employer's arguments on appeal are focused on its position that the opinion of Dr. Lee supports a finding of maximum medical improvement, the administrative law judge need not reconsider Dr. Smith's opinion on remand.

[5] We also note that the administrative law judge incorrectly observed in addressing maximum medical improvement that any "doubt should be resolved in favor of the claimant's entitlement to benefits." Decision and Order at 7. The true doubt rule is inapplicable to cases arising under the Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996).

We further note that the record does not contain any opinions addressing a date of maximum medical improvement for claimant's left knee injury, nor does employer raise, on appeal, any contentions regarding the status of claimant's left knee injury. As evidenced by its submission of Dr. Smith's opinion,[6] employer argued that claimant's left knee condition was not work-related. The administrative law judge however rejected employer's position, instead relying on claimant's testimony in conjunction with the statements of claimant's treating physicians "attributing the injury to claimant's left knee injury to the strain from favoring her right knee following the [work] accident," to conclude that claimant's left knee condition is work-related. Decision and Order at 6. Employer has not challenged this aspect of the administrative law judge's decision. We therefore affirm the administrative law judge's finding that claimant's left knee injury has not yet reached maximum medical improvement as it is unchallenged on appeal and is otherwise supported by substantial evidence. Thus, claimant remains entitled to the awarded temporary partial disability benefits for this injury, irrespective of the administrative law judge's finding on remand concerning the nature of claimant's right knee injury. *See* 33 U.S.C. §908(e), (h); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

Employer also challenges the administrative law judge's award of an attorney's fee in this case. Initially, it asserts that the hourly rates granted by the administrative law judge in this case to claimant's counsel and his law clerk exceed the reasonable rates for similar work in Hawaii. Additionally, employer argues the fee petition is deficient as it did not include a complete statement of the extent of work performed, it did not describe the normal billing rates for counsel and his law clerk, and it did not address the complexity of the legal issues involved in this case. Employer further contends that various entries for services rendered are excessive, unreasonable, duplicative, or clerical in nature and therefore were improperly included in the fee petition.

Employer's contentions are without merit. In his supplemental decision, the administrative law judge gave "due consideration [to] the regulations" at 20 C.F.R. §702.132 in addressing claimant's petition for an attorney's fee and furthermore fully examined counsel's request in terms of employer's specific objections. Decision and Order Concerning Attorney's Fees at 2. With regard to the hourly rate, the administrative law judge addressed employer's objections and determined, based on the work performed, the quality of the request, and the complexity of the issues involved, that $225 represents "an hourly rate at or below rates previously awarded to experienced longshore

[6] Dr. Smith opined that claimant's left knee pain was unrelated to the workplace accident and that any current disability to claimant's lower extremities were 100 percent due to her pre-existing condition diagnosed as "chronic osteoarthritis and degenerative joint disease." CX 23.

counsel in similar higher cost of living areas in the country." *Id*. He similarly concluded that the hourly rate of $80 for paralegal work is reasonable in light of the relevant factors. As employer has not shown that the administrative law judge has abused his discretion in this regard, we affirm the administrative law judge's award of hourly rates of $225 for attorney work and $80 for paralegal work in this case. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Moore v. Universal Maritime Corp*., 33 BRBS 54 (1999).

Additionally, the administrative law judge explicitly determined that claimant's counsel's fee petition "provides sufficient intelligible descriptions of services in an itemized format and properly specifies who performed the work," such that it conforms to the requirements of 20 C.F.R. §702.132(a). Decision and Order Concerning Attorney's Fees at 3; *Forlong v. American Sec. & Trust Co.*, 21 BRBS 155 (1988). The administrative law judge further addressed each of employer's "specific line-by-line objections to the fee petition." *Id.* at 2-4. Consequently, as employer, on appeal, has not established that the administrative law judge's fee award constitutes an abuse of discretion, the administrative law judge's award of an attorney's fee is affirmed.[7] *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see generally Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004).

[7] In contrast to employer's contention on appeal, the administrative law judge denied counsel's request of 3.5 hours for preparation of the fee application. *But see Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996) (applying general fee-shifting law, the Ninth Circuit holds that reasonable time spent in preparing fee applications is compensable). In this regard, the administrative law judge erred in applying 20 C.F.R. §725.366(b), as this regulation is applicable only to attorney's fee awards arising under the Black Lung Act. Nonetheless, we shall not address claimant's request for inclusion of those hours in the attorney's fee award as such a contention must, under the circumstances in this case, be raised via cross-appeal. *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989); *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

Accordingly, the administrative law judge's finding that claimant's right knee injury is not at maximum medical improvement is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Concerning Attorney's 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