BRB No. 10-0589

THOMAS MESZAROS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FEDERAL MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 06/09/2011
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order–Awarding Benefits, Order Denying Motions for Reconsideration and Requiring Adjustment of Compensation Payments, Supplemental Decision and Order Denying Attorney Fees and Costs, and Order Denying Reconsideration of Supplemental Decision and Order Denying Attorney Fees and Costs of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Robert T. Newman (Maciorowski, Sackmann & Ulrich, LLP), Chicago, Illinois, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order–Awarding Benefits, Order Denying Motions for Reconsideration and Requiring Adjustment of Compensation Payments, Supplemental Decision and Order Denying Attorney Fees and Costs, and Order Denying Reconsideration of Supplemental Decision and Order Denying Attorney Fees and Costs

(2009-LHC-01105) of Administrative Law Judge Stephen L. Purcell 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). 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).

Claimant sustained a crush injury to his right foot while working as a longshoreman for employer on July 24, 2008. Claimant filed a claim under the Act on March 24, 2009. On May 13, 2009, employer sent claimant a check for $250.66, which it alleged represented the first two weeks of permanent partial disability benefits under the schedule based on Dr. Lee's April 10, 2009, assessment that claimant had a permanent impairment of eight percent.[1] Relevant to this appeal, the administrative law judge found that claimant's work-related right foot condition reached maximum medical improvement on August 21, 2009. He found that claimant is unable to return to his usual work as a longshoreman, that employer established the availability of suitable alternate employment on March 31, 2009, and that claimant did not establish that he had undertaken a diligent search for employment. The administrative law judge thus found claimant entitled to temporary total disability benefits from July 28, 2008 to March 31, 2009, temporary partial disability benefits from March 31, 2009 to August 21, 2009, and permanent partial disability benefits under the schedule for a 14 percent permanent impairment to his right foot pursuant to Section 8(c)(4) of the Act. 33 U.S.C. §908(c)(4), (19). Employer and claimant each sought reconsideration, which the administrative law judge denied in his Order dated May 27, 2010.

Claimant's counsel thereafter filed a petition with the administrative law judge seeking an attorney's fee totaling $25,790.62, representing 114.625 hours of work at an hourly rate of $225, and expenses of $5,069.01. The administrative law judge denied claimant's counsel an employer-paid attorney's fee, finding Section 28(a) inapplicable because employer paid compensation within 30 days of its receipt of written notice of the claim, 33 U.S.C. §928(a), and Section 28(b) inapplicable because the district director did not hold an informal conference and, thus, did not issue any written recommendations, 33 U.S.C. §928(b).[2] The administrative law judge denied claimant's motion for reconsideration of the denial of an attorney's fee.

[1]Employer also paid claimant temporary total disability benefits for the period from July 25, 2008 through January 8, 2009.

[2]The administrative law judge, however, observed that counsel may be entitled to a fee payable by claimant pursuant to Section 28(c), 33 U.S.C. §928(c), and he instructed counsel and claimant that they may, within 30 days, submit written briefs in support of,

On appeal, claimant challenges the administrative law judge's findings that he is not entitled to a continuing award of total disability benefits and that the permanent impairment rating of his right lower extremity is only 14 percent. Claimant also appeals the administrative law judge's denial of an employer-paid attorney's fee. Employer responds, urging affirmance of the administrative law judge's decisions.[3]

Claimant contends the administrative law judge erred in relying on the labor market surveys conducted by Ms. Lutz to find that employer met its burden to show the availability of suitable alternate employment. Claimant argues that his age, in conjunction with his limited vocational history and his work-related right foot disability, preclude him from being a candidate for any stable placement in the competitive labor market. Claimant also contends that some of the jobs identified in the labor market surveys lack sufficient information to permit a determination as to whether he is capable of performing this work, while others require lifting and carrying beyond the scope of his permanent physical restrictions.

Once, as here, claimant establishes his inability to perform his usual work because of his work injury, the burden shifts to employer to establish that jobs exist that are reasonably available and that the disabled employee could realistically secure and perform given his age, education and restrictions. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). If employer establishes the availability of suitable alternate employment, claimant can retain entitlement to total disability benefits by showing he diligently sought, but was unable to secure, an alternate position of the type shown to be suitable and available. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

In addressing this issue, the administrative law judge initially found, based on the results of claimant's functional capacity evaluation, his testimony and the physical restrictions imposed by Drs. Grandfield and Fletcher, that claimant is capable of sedentary or light-duty work that would not require him to lift more than 40 pounds on an occasional basis, climb a ladder, jump, run, or walk on uneven surfaces. The administrative law judge found that employer's labor market surveys dated July 24, 2009, and August 11, 2009, demonstrate nine positions within the geographical area where

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or in opposition to, an award of attorney's fees payable by claimant pursuant to that provision.

[3]Employer's cross-appeal, BRB No. 10-0589A, was dismissed by the Board on December 10, 2010, on employer's motion.

claimant resides,[4] which are suitable given claimant's physical capabilities, education, and work experience, and were available between March 31, 2009, and April 15, 2009. Specifically, the administrative law judge found that only three jobs had occasional lifting responsibilities, those at Petco, Baja Fresh and Shell All Cloth, and that the maximum lifting weight was within claimant's 40-pound restriction. Additionally, the administrative law judge found that claimant's ownership and operation of a used car lot qualifies him to work as an automobile salesperson.[5] The administrative law judge further found that the remaining positions, consisting of jobs as an evening cashier at a car dealership, a building security/lobby attendant, and as a cashier at three different movie theaters, were suitable for claimant as they could be performed from a seated position and did not require any climbing of stairs. The administrative law judge's finding that employer established the availability of suitable alternate employment is rational and supported by substantial evidence. *See generally Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002). Moreover, the administrative law judge's finding that claimant did not engage in a diligent search for employment is affirmed as the administrative law judge rationally credited claimant's testimony that he had not applied for work since his injury, EX 44, Dep. at 135, and found no other evidence that

[4]The administrative law judge stated that "jobs at distances of 65 to 100 miles are too remote to be considered 'within the geographical area'" for suitable alternate employment. Decision and Order at 31. The administrative law judge applied a threshold of 65 miles from claimant's residence in Gary, Indiana. Each of the nine suitable positions is located within that distance: two positions in Merrillville, Indiana (10 miles); two positions in Chicago, Illinois (approximately 32 miles); and single positions in Illinois in Country Club Hills (22 miles), Bridgeview (35 miles), Hodgkins (39 miles), LaGrange (42 miles) and Schaumburg (63 miles). As at least some of these nine jobs are reasonably close to claimant's home, we reject claimant's argument that the employment opportunities found suitable by the administrative law judge are beyond the geographical area where he resides. *See generally Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001).

[5]Claimant's assertion that the automobile sales position cannot meet employer's burden because it is paid on "commission only" is meritless. The administrative law judge specifically considered this factor, finding that although the job description reflects that the position pays only on a commission basis, a contact person with that prospective employer explained that they are required to guarantee their sales people minimum wage, which is $6.55 under Indiana law. Decision and Order at 22; *see generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

claimant was actively searching for work. *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). We therefore affirm the administrative law judge's finding that claimant's entitlement to total disability benefits ceased as of March 31, 2009. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on recon.).

Claimant next argues that the administrative law judge erred in crediting the 14 percent permanent impairment rating of Dr. Bingham over the 71 percent permanent impairment rating of Dr. Fletcher to calculate claimant's scheduled award of permanent partial disability benefits. In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability under Section 8(c), 33 U.S.C. §908(c), is confined to the schedule in Section 8(c)(1)-(19), 33 U.S.C. §908(c)(1)-(19). *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). In a case such as this which does not involve a retiree or hearing loss, the administrative law judge is not bound by any particular standard or formula but may consider medical opinions and observations in addition to claimant's description of symptoms and the physical effects of his injury in assessing the extent of claimant's permanent impairment. *See, e.g., Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154 (1993).

Three physicians addressed the extent of claimant's impairment and the administrative law judge found that each purported to rely on the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) to arrive at his assessment. The administrative law judge accorded diminished weight to Dr. Lee's April 10, 2009, assessment of an 8 percent permanent impairment because he did not persuasively explain how he calculated his partial impairment rating,[6] and to Dr. Fletcher's July 20, 2009, assessment of a 71 percent permanent impairment because he explicitly stated that claimant had not reached maximum medical improvement as of that date. Decision and Order at 40-41; EX 23; EX 48; CX 8. The administrative law judge also found that Dr. Fletcher did not offer any evidence establishing the reliability or medical acceptance of the software he used in conjunction with the AMA *Guides* to determine claimant's rating.[7] Decision and Order at 41; Tr. at 85-86. The administrative

[6]In this regard, the administrative law judge found that while Dr. Lee testified that he based his rating on the formula provided in the AMA *Guides*, his medical opinions up until the time of his deposition did not mention any formula, and he could not recall at his deposition what tables he had relied on without assistance from employer's counsel.

[7]Moreover, the administrative law judge found that Dr. Fletcher's permanent impairment rating is not supported by the AMA *Guides* he allegedly relied upon for they indicate that a 20 percent impairment rating would mean that an individual would require

law judge found that Dr. Brigham's 14 percent impairment rating is the most credible because of his expertise on the topic of rating permanent partial disability,[8] and his opinion is thoroughly explained and supported by the medical evidence of record. It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh the evidence. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge's decision to credit the opinion of Dr. Brigham is rational, and his finding that claimant has a 14 percent permanent impairment is supported by substantial evidence, *Cotton*, 34 BRBS 88; *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978), we affirm the administrative law judge's award of permanent partial disability benefits.[9]

Claimant also contends that the administrative law judge erred in finding that counsel is not entitled to an employer-paid attorney's fee pursuant to Section 28(a), maintaining that the decisions in *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008), and *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), support his position that employer is liable for counsel's attorney's fees in this case under Section 28(a).

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay *any*

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routine use of an assistive device such as a cane, crutch, or long leg brace, apparatuses upon which, based on the record evidence, claimant does not rely.

[8]The administrative law judge found that the record establishes that Dr. Brigham is a Senior Contributing Editor to the Sixth Edition of the AMA *Guides*. EX 50.

[9]Thus, we reject claimant's reliance on *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), for the proposition that the administrative law judge should have averaged the three impairment ratings of Drs. Lee, Bingham, and Fletcher. In *Green*, the Board affirmed the administrative law judge's decision to average the results of two audiograms to determine the extent of claimant's hearing loss *when he found both audiograms credible and probative*. On reconsideration in this case, the administrative law judge distinguished *Green* as he found that the opinions were not equally credible and probative.

compensation. 33 U.S.C. §928(a);[10] *Day*, 518 F.3d 411, 42 BRBS 15(CRT); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT); *A.M.* [*Mangiantine*] *v. Electric Boat Corp.*, 42 BRBS 30 (2008); *W.G.* [*Gordon*] *v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Once the 30-day period has expired without the payment of any benefits to the claimant, fee liability shifts to the employer, and Section 28(a) applies to the entire claim, regardless of whether any benefits had been paid prior to the filing of the claim or following the expiration of the 30-day period. *Day*, 518 F.3d 411, 42 BRBS 15(CRT); *Cooper*, 274 F.3d 173, 35 BRBS 109(CRT); *Gordon*, 41 BRBS 13; *see also Mangiantine*, 42 BRBS at 33-34. The fact that employer voluntarily paid claimant benefits for his work injury prior to the filing of claimant's claim is irrelevant for purposes of determining its liability for an attorney's fee under Section 28(a). *Id.*

In this case, claimant sustained a work-related injury on July 24, 2008, and employer voluntarily paid temporary total disability benefits from July 24, 2008, through January 8, 2009. Claimant then filed his claim on March 24, 2009. The district director sent notice of the claim to employer on April 22, 2009, which it received on April 27, 2009. On April 28, 2009, employer filed a Notice of Controversion in which it "accepted as compensable" claimant's claim, and agreed to start paying claimant permanent partial disability benefits even though "the scheduled rating has not [been] accepted by the claimant." EX 6A. Employer sent a check to claimant dated May 13, 2009, for $250.66, which, employer stated, represented the first two permanent partial disability payments pursuant to the schedule, based on Dr. Lee's assessment that claimant had an 8 percent permanent impairment. Employer then filed another notice of controversion on May 27,

[10]Section 28(a), 33 U.S.C. §928(a), provides:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

2009, wherein it stated, "Compensation is suspended pending the claimant giving his position as to the extent of disability–the rating." EX 6B.

It is undisputed that employer's issuance of a check to claimant dated May 13, 2009, for $250.66, occurred within thirty days of its having received written notice of claimant's claim on April 27, 2009. The administrative law judge addressed the sufficiency of this single payment for purposes of the applicability of Section 28(a) in this case, discussing the Board's decision in *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010). In *Green*, the employer controverted claimant's claim and, upon receiving written notice of the claimant's claim from the district director, voluntarily paid claimant the amount of $1. Employer made no additional payments to claimant in connection with his injury and continued to contest the claim. The administrative law judge found that employer contested claimant's right to compensation by filing a notice of controversion before the expiration of the 30-day period in Section 28(a) and that the $1, though timely paid for purposes of Section 28(a), did not represent an intent to pay compensation. Thus, the administrative law judge found employer liable for claimant's attorney's fee under Section 28(a). *Id.* at 177.

On appeal, the employer argued that it could not be liable for claimant's attorney's fee under Section 28(a) because it paid some compensation to claimant within 30 days of its receipt of notice of the claim. The Board affirmed the administrative law judge's finding that employer's payment of $1 does not preclude the applicability of Section 28(a), as the administrative law judge rationally found that employer's payment of $1 was merely an attempt to avoid fee liability rather than the payment of compensation for claimant's injury. *Id.* Consequently, as employer did not pay claimant any compensation within the meaning of Section 28(a) of the Act, and, in fact, controverted the claim prior to receiving notice of the claim, the Board concluded that the administrative law judge properly held employer liable for claimant's attorney's fee pursuant to Section 28(a). *Id.*

In this case, the administrative law judge found "unjustified" employer's notice of controversion and suspension of compensation on May 27, 2009; nonetheless, he found that employer's prior payment of $250.66 represented payment of actual compensation. The administrative law judge distinguished this case from *Green* since employer's payment of $250.66 to claimant, in contrast to the nominal $1 payment in *Green*, represented "claimant's actual compensation rate based on 2/3 of claimant's average weekly wage."[11] Supplemental Decision and Order at 4. We cannot say that the administrative law judge reached an unreasonable result or that employer's controversion

[11]It appears that this figure represents two compensation payments based on two-thirds of the employer-calculated average weekly wage of $188.01.

of the claim and suspension of benefits after its payment of benefits is sufficient to shift fee liability to employer. Pursuant to the plain language of Section 28(a), it is employer's payment or non-payment of "any compensation" in the 30 days after its receipt of the claim on which employer's liability for a fee pursuant to Section 28(a) is predicated. *See Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009); *Day*, 518 F.3d 411, 42 BRBS 15(CRT); *Pool Co.*, 274 F.3d at 186-187, 35 BRBS at 118-119(CRT). As the administrative law judge's finding that employer paid claimant compensation within the 30-day period after its receipt of the claim is rational, supported by substantial evidence, and in accordance with law, we affirm his conclusion that claimant's counsel is not entitled to an employer-paid attorney's fee under Section 28(a).[12]

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[12]The administrative law judge's denial of an employer-paid attorney's fee pursuant to Section 28(b) is affirmed as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).