ANTWON E. LEMON	)	BRB No. 12-0434
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES TERMINALS, INCORPORATED	)	DATE ISSUED: 05/14/2013
	)	
Self-Insured Employer-Respondent	)	
	)	
	)	
	)	
ANTWON E. LEMON	)	BRB No. 13-0002
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES TERMINALS, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits in Part and the Order Awarding Attorneys' Fees of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Paul D. Bekman (Salsbury, Clements, Bekman, Marder & Adkins, L.L.C.), Baltimore, Maryland, for claimant.

James M. Mesnard (Seyfarth Shaw, LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Benefits in Part and employer appeals the Order Awarding Attorneys' Fees (2011-LHC-00917) of Administrative Law Judge Pamela J. Lakes 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 injured his left knee on September 11, 2009, during the course of his employment for employer as a longshoreman. Employer voluntarily paid claimant compensation for temporary total disability from September 12, 2009 to May 7, 2010, 33 U.S.C. §908(b), and for a nine percent permanent impairment of the left leg, 33 U.S.C. §908(c)(2). In a Memorandum of Informal Conference issued on December 23, 2010, the district director recommended that employer pay claimant compensation for a 20 percent permanent impairment of the left leg, pursuant to the opinion of claimant's treating physician, Dr. Lippman. Employer controverted this recommendation. The case was referred to the Office of Administrative Law Judges (OALJ) on February 17, 2011; the sole issue before the administrative law judge was the extent of claimant's left knee impairment.

In her decision, the administrative law judge found that the nine percent impairment rating of Dr. Pollock is best supported by the objective evidence, that Dr. Lippman's 20 percent rating is neither well-documented nor well-reasoned, and that Dr. Brigham's opinion that claimant has a two percent impairment is the least probative because he did not review Dr. Pollack's subsequent report or evaluate claimant himself. Decision and Order at 18-21. Accordingly, the administrative law judge found claimant entitled to a scheduled award for a nine percent permanent partial disability of the left leg.

Claimant's counsel subsequently sought an attorney's fee of $21,925, representing 43.8 hours of attorney time at a rate of $500 per hour, plus $4,228.16 in costs. In her Order Awarding Attorneys' Fees, the administrative law judge found that counsel is entitled to an employer-paid fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). The administrative law judge reasoned that, although employer voluntarily paid claimant compensation for a nine percent impairment, it argued before her that claimant had only a two percent impairment; therefore, claimant utilized the services of an attorney to obtain an award that was greater than that to which employer believed claimant was entitled. After reducing the requested hourly rate from $500 to $300, and the number of hours requested by 1.35 for time expended before the case was referred to the OALJ, the administrative law judge further reduced counsel's fee by 50 percent to account for

claimant's limited success; i.e., claimant was unsuccessful in his claim for compensation based on a 20 percent impairment. Accordingly, claimant's counsel was awarded an attorney's fee of $6,375 payable by employer. The administrative law judge reduced the compensable costs from $4,228.16 to $3,878.68. 33 U.S.C. §928(d).

On appeal, claimant challenges the administrative law judge's rejection of the opinion of his treating physician, Dr. Lippman, that claimant has a 20 percent left leg impairment. BRB No. 12-0434. Employer responds, urging affirmance. Employer appeals the administrative law judge's finding that claimant's counsel is entitled to a fee payable by employer pursuant to Section 28(b). BRB No. 13-0002. Claimant responds, urging affirmance. Employer filed a reply brief.

Claimant contends the administrative law judge erred by failing to give greatest weight to the impairment rating of Dr. Lippman, since he was claimant's treating physician for his left knee injury. We reject claimant's contention.

In determining the degree of claimant's permanent impairment, the administrative law judge is not bound by any particular formula but may rely on medical opinions and observations, in addition to a claimant's credible description of his symptoms and limitations. *Cotton v. Army & Air Force Exch.*, 34 BRBS 88 (2000); *Pimpinella v. Universal Mar. Serv., Inc.*, 27 BRBS 154 (1993). It is well-established that an administrative law judge is entitled to weigh the medical evidence and to draw her own inferences from it and that she is not bound to accept the opinion or theory of any particular witness. *See White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980). The Board may not reweigh the evidence, but must affirm the administrative law judge's findings that are supported by substantial evidence of record. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982).

In her decision, the administrative law judge found that Dr. Lippman's opinion that claimant has a 20 percent impairment is not as well-documented or well-reasoned as Dr. Pollack's opinion.[1] In this respect, the administrative law judge addressed at length the reasoning and medical documentation underlying the physicians' respective ratings for the components of knee laxity, deep vein thrombosis, tibial plateau fracture, atrophy and pain, as well as the ratings' relation to the AMA *Guides to the Evaluation of Permanent Impairment*, on which Drs. Lippman and Pollack relied. *See* Decision and Order at 18-21. Moreover, the administrative law judge explicitly addressed Dr. Lippman's status as claimant's treating physician, and she rationally found that this factor does not outweigh the deficiencies in his opinion. *See generally Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 (4th Cir. 1997). As the administrative law judge's weighing of

[1] The administrative law judge's rejection of Dr. Brigham's opinion that claimant has a two percent impairment is not challenged on appeal. *See* Decision and Order at 18.

the evidence is rational and within her discretion, and as her finding is supported by substantial evidence, we affirm the award of benefits for a nine percent leg impairment based on the opinion of Dr. Pollack. *White,* 633 F.2d 1070, 12 BRBS 598; *Brown v. National Steel & Shipbuilding Co.,* 34 BRBS 195 (2001).

In challenging the administrative law judge's finding that claimant's counsel is entitled to an attorney's fee payable by employer pursuant to Section 28(b), employer contends that claimant did not receive a greater award than it voluntarily paid him for a nine percent left leg impairment prior to the transfer of the case to the OALJ. We agree with employer that the administrative law judge's fee award is not consistent law and must be reversed.

Section 28(b) of the Act states, in relevant part:

> If the employer or carrier pays or tenders payment of compensation without an award . . . and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] or Board shall set the matter for an informal conference and following such conference the [district director] or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse (sic) to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by employer or carrier, a reasonable attorney's fee . . . shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).[2] Thus, the United States Court of Appeals for the Fourth Circuit has held that, in order for employer to be liable for an attorney's fee under Section 28(b), the district director must have held an informal conference and issued a written recommendation, the employer must have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer paid or tendered after the written recommendation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell],* 477 F.3d 123, 41 BRBS

[2]There is no contention that Section 28(a) of the Act, 33 U.S.C. §928(a), applies; employer paid claimant compensation within 30 days of the date it received the claim for compensation. EX 8; *see Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005).

1(CRT) (4th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). In this case, employer conceded that the first three elements of Section 28(b) were satisfied. Order Awarding Attorneys' Fees at 3.

With respect to the fourth element concerning claimant's success in obtaining an award greater than employer paid or tendered, the administrative law judge relied on the decision of the Fifth Circuit in *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5th Cir. 2010). The administrative law judge found that although employer voluntarily paid benefits for a nine percent left leg impairment, it subsequently argued before the administrative law judge that claimant had only a two percent impairment. Claimant was awarded benefits for a nine percent impairment. The administrative law judge thus determined that, while claimant was found to have a lower impairment rating than that recommended by the district director, he was awarded compensation based on a higher rating than that which employer believed established the correct foundation for a permanent partial disability award. The administrative law judge therefore concluded that claimant obtained a greater award and that claimant is entitled to an employer-paid fee pursuant to Section 28(b).

In *Carey,* the employer voluntarily paid the claimant benefits based on an average weekly wage of $1,424. The employer subsequently averred at the informal conference that claimant's average weekly wage was $1,169 because certain payments should be excluded from the calculation. The district director's written memorandum recommended that employer continue to pay benefits based on an average weekly wage of $1,424. The employer disagreed, and requested a formal hearing before the OALJ to argue for the lower average weekly wage; nonetheless, employer continued to pay benefits at the higher rate. The administrative law judge calculated claimant's average weekly wage to be $1,369. The administrative law judge subsequently denied claimant's counsel petition for an attorney's fee under Section 28(b), and the Board affirmed the denial, on the ground that claimant did not receive greater compensation than employer had voluntarily paid.

The United States Court of Appeals for the Fifth Circuit reversed the denial of an employer-paid fee. The court held that although the administrative law judge's calculation of claimant's average weekly wage did not exceed the amount the employer had voluntarily paid, it exceeded the amount the employer had argued was due, both before the district director and the administrative law judge. Thus, the court held that the claimant successfully established his entitlement to compensation greater than that which the employer was willing to pay after the informal conference and that the employer, therefore, was liable for the attorney's fee. Specifically, the court relied on the qualifier in Section 28(b) which states that, following the refusal of the district director's recommendation, the employer "shall pay or tender to the employee in writing the

additional compensation, if any, to which they believe the employee is entitled" and, thus, the "amount paid or tendered" is the amount to which the employer believes the employee is entitled. *Carey*, 627 F.3d at 983-985, 44 BRBS at 85-86(CRT). The court stated that as the employer paid one amount but continued to argue for a lesser amount, the claimant was forced to hire an attorney to protect his interest in the greater benefits. Although the claimant did not retain the highest amount of benefits, he successfully obtained an amount greater than the amount the employer believed was due. Accordingly, the Fifth Circuit held that all the Section 28(b) requirements were met.[3] *Id.; see Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981).

Dicta in Fourth Circuit cases states that a claimant's success is indeed measured by comparing claimant's award to what employer paid or tendered after it rejected the district director's recommendation. *See Hassell, 477* F.3d at 126, 41 BRBS at 3(CRT); *Edwards*, 398 F.3d at 318, 39 BRBS at 4(CRT). Nonetheless, we disagree with the administrative law judge that *Carey* offers a basis for an employer-paid attorney's fee in this case as it is distinguishable in several key respects. In this case, although employer rejected the district director's recommendation and continued paying benefits unconditionally based on the nine percent rating until it was fully paid, claimant, rather than employer, pursued the formal hearing unlike in *Carey*. Claimant sought permanent partial disability benefits based on Dr. Lipmann's 20 percent impairment rating.[4] In addition, employer completed its voluntary payments to claimant for a nine percent permanent partial disability at approximately the same time as the case was transferred to the OALJ. EX 8. On the facts of this case, where claimant and not employer pursued the formal hearing, employer's continued, unconditional payment of benefits for a nine percent impairment is properly viewed as the amount to which employer believed

[3]The administrative law judge found this case provides a stronger basis for an employer-paid fee under Section 28(b) than did *Carey*, as she determined that claimant was entitled to compensation based on the same impairment rating that employer utilized for its voluntary payments, whereas, in *Carey*, the claimant was awarded compensation based on a lower average weekly wage than the employer had voluntarily paid. Order Awarding Attorneys' Fees at 4.

[4]In his response brief, claimant asserts that employer requested referral of the case to the OALJ. However, the chronology of claimant's and employer's Form LS-18s and the date of referral to the OALJ show that claimant requested the hearing after employer controverted the claims examiner's recommendation on January 14, 2011. EX 7. Claimant completed his Pre-Hearing Statement, LS-18, on February 2, 2011; the case was referred to the OALJ on February 17, 2011, and employer filed its Pre-Hearing Statement, LS-18, on February 18, 2011.

claimant was entitled following its rejection of the district director's recommendation. Employer did not argue that claimant's permanent partial disability award should be set at two percent until after the case was referred to the administrative law judge; in June 2011 employer obtained an opinion from Dr. Brigham that claimant had a two percent leg impairment. *See* EX 19. Thus, it was claimant's pursuit of an award higher than nine percent that led employer to seek Dr. Brigham's opinion. Significantly, moreover, employer argued in the alternative before the administrative law judge – it urged rejection of claimant's claim to 20 percent award and it sought either a two percent award or a nine percent award. Further, it did not suggest that two percent was a more accurate figure than nine percent. *See* Emp.'s Opposition Brief and Reply Brief. Pursuant to the plain language of Section 28(b), where claimant rejects the amount employer pays or tenders following its refusal of the written recommendation, and claimant thereafter obtains greater compensation, his attorney is entitled to an employer-paid attorney's fee. 33 U.S.C. §928. In this case, claimant "rejected" employer's nine percent payment by way of his pursuit of greater benefits before the administrative law judge. The administrative law judge did not award claimant any greater benefits than employer paid after the informal conference. Consequently, on the facts of this case, which are unlike those in *Carey*, claimant did not obtain compensation greater than the amount to which employer believed claimant was entitled and in fact fully paid. *See generally Hassell*, 477 F.3d at 128, 41 BRBS at 4(CRT). As one of the Section 28(b) prerequisites has not been satisfied, employer is not liable for claimant's attorney's fee and the administrative law judge's award of an attorney fee pursuant to Section 28(b) is reversed.[5] *See generally Edwards*, 398 F.3d 313, 39 BRBS 1(CRT); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

[5]Accordingly, we need not address employer's alternate contention that, pursuant to *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986), and 22 BRBS 316 (1989), claimant's counsel is not entitled to a fee for time expended after it began voluntarily paying claimant for a nine percent impairment. Moreover, there is no need to address employer's submission of *Camden v. AMSEC Corp.*, Action No. 2:11cv554 (E.D. Va. Jan. 19, 2012), as additional authority in support of its appeal.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed. The administrative law judge's Order Awarding Attorneys' Fees is reversed.

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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JUDITH S. BOGGS
Administrative Appeals Judge