

BRB Nos. 07-0306
and 07-0306A

K.H.)
)
 Claimant-Petitioner)
 Cross-Respondent)
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 v.)
)
 GULF COAST FABRICATIONS) DATE ISSUED: 10/24/2007
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 and)
)
 RELIANCE NATIONAL INDEMNITY)
 COMPANY)
)
 c/o)
)
 MISSISSIPPI INSURANCE GUARANTY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners) DECISION and ORDER

Appeals of the Decision and Order on Remand and the Order Denying Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand and claimant appeals the Order Denying Reconsideration denying an attorney's fee (2002-LHC-2722) of Administrative Law Judge Lee J. Romero, Jr., 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).

This case is before the Board for a second time. To recapitulate the facts, claimant injured his right knee on June 16, 1998, during the course of his employment for employer as an electrician. Claimant returned to work on August 3, 1998, but he stopped working in January 1999 due to right knee pain. On February 2, 1999, Dr. Flores removed the bursa from claimant's knee. Claimant unsuccessfully attempted to return to work in August 1999. He was referred to a work-hardening program where he alleged he injured his back on August 17, 1999. He has not since returned to work. Claimant fell at his church on April 28, 2001, which he attributed to his right knee buckling. Claimant underwent operations to his right hip and left foot for injuries caused by this fall. The parties stipulated that employer paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from July 17, 1998, to July 21, 2001. Employer also provided medical benefits for claimant's knee injury until it went bankrupt and the Mississippi Insurance Guaranty Association assumed coverage of the claim.

In his original decision, the administrative law judge accepted the parties' stipulation that claimant has a compensable right knee injury. The administrative law judge found that claimant's back injury while undergoing work hardening for the knee injury is also compensable. However, the administrative law judge found that this injury was only temporarily disabling until June 15, 2000, and that claimant has no continuing disability or work restrictions related to this injury. Moreover, the administrative law judge found that claimant failed to establish that his April 2001 right hip and left ankle/foot injuries are related to the June 1998 work injury. The administrative law judge found that claimant is unable to return to his usual employment as an electrician due to his right knee injury and that employer presented no evidence of suitable alternate employment. Thus, the administrative law judge found claimant entitled to temporary total disability benefits from June 17, 1998, to December 11, 1999, and for continuing permanent total disability benefits, 33 U.S.C. §908(a), thereafter.

Employer appealed and claimant cross-appealed this decision. However, while the appeals were pending, both parties filed motions for modification, and thus, the Board dismissed the appeals and remanded the case for modification proceedings. 33 U.S.C. §922. In his decision on modification, the administrative law judge found that employer is not entitled to modification inasmuch as employer could have presented evidence of suitable alternate employment at the initial hearing, but did not, and thus did not establish a change in claimant's condition. Alternatively, the administrative law judge rejected employer's evidence of suitable alternate employment. In addressing claimant's petition for modification, the administrative law judge found that claimant failed to show a mistake of fact in his determination that claimant's hip and left ankle/foot injuries from the April 2001 fall are not related to the initial work injury. However, the administrative law judge found that claimant established that he has a psychological injury related to his work injuries. The administrative law judge also found claimant entitled to medical treatment for his work-related lower back injury. Finally, the administrative law judge found claimant failed to establish that a diagnostic arthroscopy of his right knee is a reasonable and necessary medical expense.

Employer appealed and claimant cross-appealed this decision, and the Board reinstated the parties' appeals of the original decision. In reviewing the administrative law judge's original Decision and Order, the Board affirmed the administrative law judge's findings that claimant's injuries from his April 2001 fall are not related to his work injury, but that claimant's May 1999 back injury is a consequence of his June 1998 work-related knee injury. [*K.H.*] v. *Gulf Coast Fabrications*, BRB Nos. 04-0396/A, 05-0348/A (Jan. 10, 2006). The Board also affirmed the administrative law judge's finding that claimant is unable to return to his usual employment as an electrician due to his work-related right knee injury. *Id.*, slip op. at 7-8. Thus, as employer presented no evidence of suitable alternate employment, the Board affirmed the administrative law judge's award of compensation for total disability.¹ *Id.*

In reviewing the administrative law judge's Decision and Order on Section 22 Modification, the Board affirmed the administrative law judge's finding that claimant did not establish a mistake in fact regarding the cause of his injuries resulting from the fall in 2001. *Id.* at 10. However, the Board vacated the administrative law judge's determination that claimant established a work-related psychological injury and remanded the case for further findings. The Board instructed the administrative law judge on remand to address the type of back injury claimant sustained in May 1999 and its relation to claimant's psychological injury. The Board affirmed the administrative law

¹ In addition, the Board affirmed the administrative law judge's denial of relief from continuing compensation payments pursuant to Section 8(f), 33 U.S.C. §908(f). [*K.H.*], slip op. at 9.

judge's finding that claimant failed to establish that he was prevented from performing his usual employment by his temporary psychological condition. *Id.* at 10-12. In addition, under the facts of this case, the Board held that employer should have been allowed to present evidence of suitable alternate employment for the first time on modification to establish a change in condition. Therefore, the Board vacated the administrative law judge's denial of employer's petition for modification. The Board also reviewed the administrative law judge's alternative findings regarding the sufficiency of employer's suitable alternate employment evidence. The Board held that the administrative law judge erred in rejecting employer's evidence of suitable alternate employment as he may not consider the effects of any subsequent non-work-related condition to determine claimant's ability to work. *Id.* at 13-16. Thus, the Board instructed the administrative law judge on remand to determine the restrictions attributable to claimant's work injuries and any pre-existing conditions, and to compare them to the requirements of the jobs identified in employer's labor market survey. Lastly, the Board held that, on remand, the administrative law judge must address claimant's contention that Dr. Jackson's trigger point injections for mid-back pain were reasonable and necessary for the injury claimant sustained during the work hardening program.

On remand, the administrative law judge found that claimant suffered a mid-back ligamentous injury during the work hardening program and that he reached maximum medical improvement on June 15, 2000, for this injury. The administrative law judge also found that the trigger point injections were reasonable and necessary to relieve claimant's mid-back pain and that claimant has no residual limitations or restrictions from this injury which preclude employment. In addition, the administrative law judge found that claimant's ongoing treatment for his lower back pain is not related to his work hardening injury and thus, that any psychological side effects from claimant's use of Lortab medication for his low back pain is not related to his mid-back work hardening injury and, thus, is not compensable. The administrative law judge found that although claimant's psychological condition is due, in part, to his 1998 work-related knee injury and residual pain, he is not disabled by his psychological condition. The administrative law judge held employer liable for claimant's psychological treatment.

In determining whether the jobs identified by employer establish suitable alternate employment, the administrative law judge considered the following restrictions for claimant's right knee: no heavy lifting, no crawling and no ladder climbing.² The

² The administrative law judge found that the restrictions imposed for claimant's mid-back injury were temporary, and he thus did not consider them in evaluating the evidence of suitable alternate employment. *But see* discussion, *infra*. Moreover, the administrative law judge found that claimant did not have any restrictions imposed due to the psychological condition.

administrative law judge rejected Ms. Hutchins's opinion that claimant is unemployable, and concluded that employer identified a number of suitable positions which conform to claimant's physical and mental capabilities. Thus, the administrative law judge found that claimant is entitled to temporary total disability benefits from June 17, 1998, to December 11, 1999, to permanent total disability benefits from December 12, 1999, to February 8, 2004, when employer first established the availability of suitable alternate employment, and to a scheduled award under Section 8(c)(2), (19), 33 U.S.C. §908(2), (19), for a four percent impairment of the right knee. The administrative law judge also reduced claimant's previously awarded attorney's fee by 75 percent to reflect his limited success on remand. The administrative law judge found on reconsideration that claimant is not entitled to an award of any additional attorney's fees due to his lack of success on remand.

On appeal, claimant contends that the administrative law judge erred in finding that claimant has no work restrictions associated with his psychological condition and that his impaired cognitive abilities and illiteracy are not vocationally impairing. Claimant also contends that the administrative law judge erred in finding that claimant's use of pain medications, with resulting side-effects, is not related to his work injury. In addition, claimant contends that the administrative law judge erred in concluding that his mid-back injury was only temporary. Lastly, claimant contends that the administrative law judge erred in denying an attorney's fee for work performed on remand as claimant's counsel was successful in establishing the necessity of trigger point injections and psychological treatment, both of which had been contested by employer. Employer responds, urging affirmance of the administrative law judge's decision on these issues. Claimant has filed a reply brief. On cross-appeal, employer contends that the administrative law judge erred in finding that claimant's psychological condition is due, at least in part, to his work-related knee injury. Claimant has not responded to employer's cross-appeal.

MID-BACK INJURY

Claimant contends that the administrative law judge erred in finding that any disability he suffered as a result of his work-related mid-back injury resolved with no permanent restrictions. In order to be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability perform his usual work as a result of his work injury. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

The Board instructed the administrative law judge on remand to determine the restrictions attributable to claimant's work injuries and any pre-existing conditions, and then compare those restrictions to the jobs identified in employer's labor market survey.

[K.H.], slip op. at 16. The administrative law judge found that claimant reached maximum medical improvement for his mid-back injury on June 15, 2000, and that claimant suffered only a temporary mid-back injury which fully resolved. Decision and Order on Remand at 7-8. Thus, in reviewing the suitability of the alternate employment identified by employer, the administrative law judge did not consider any restrictions for this injury.

The administrative law judge's opinion cannot be affirmed inasmuch as, in evaluating the medical evidence, he mischaracterized the opinion of Dr. Jackson. The administrative law judge first noted Dr. Jackson's opinion that claimant's restrictions due to the mid-back injury are likely permanent as claimant continued to be symptomatic during his treatment. *See* Decision and Order on Remand at 7; Cl. Ex. 13. He also reported Dr. Jackson's conclusion that claimant's permanent restrictions included no more than a light level of work, lifting 30 pounds on occasion or 20 pounds with frequency, and avoiding working in a bent or stooped position.³ Decision and Order on Remand at 7. The administrative law judge quoted Dr. Jackson's opinion that these restrictions are due to "a multitude of reasons including this additional upper low back or lower mid back pain but also due to the pre-existing problems in the lumbar area and the injury to the knee." Decision and Order on Remand at 7, quoting Cl. Ex. 1. However, the administrative law judge then inconsistently characterized Dr. Jackson's opinion as concluding that claimant suffered a ligamentous injury to his mid-back which resulted in only temporary restrictions. Decision and Order on Remand at 8. The administrative law judge also stated that Dr. Jackson did not assign any restrictions to claimant's mid-back injury. *Id.* The administrative law judge concluded that claimant's mid-back injury resolved by June 15, 2000, with no residual impairment.

The record contains the medical reports or deposition testimony of Drs. Jackson, Graham, and Smith, discussing claimant's mid-back injury. As discussed, Dr. Jackson opined that claimant suffers from a permanent impairment due to his mid-back injury and the administrative law judge erred in stating he did not assign any permanent restrictions. However, Drs. Graham and Smith opined that claimant's injury would not have resulted in a permanent impairment and would have resolved within four months. *See* Emp. Ex. 1; Cl. Ex. 17. Thus, there is a conflict in the relevant evidence that must be resolved by

³ Dr. Jackson treated claimant initially and recommended trigger point injections which were performed in December 2000 and January 2001. The administrative law judge stated that the restrictions reported by Dr. Jackson in February 2006 were inconsistent with his earlier report. However, Dr. Jackson opined in his report dated June 15, 2000, that, due to his mid-back injury, claimant is restricted to a light to light-sedentary level of work and that he should avoid bending, stooping, and lifting more than 30 pounds. *See* Cl. Ex. 13.

the administrative law judge. As the administrative law judge mischaracterized Dr. Jackson's opinions, we vacate the administrative law judge's finding that claimant's work-related mid-back injury resulted in only a temporary disability, and we remand for the administrative law judge to render findings after a discussion of the conflicting evidence. *See Gremillion v. Gulf Coast Catering*, 31 BRBS 163 (1997)(Brown, J., concurring). If the administrative law judge finds on remand that claimant suffers from a permanent impairment to his mid-back which restricts his ability to work, the administrative law judge must also address the suitability of the jobs employer identified as suitable alternate employment, and the extent of claimant's loss in wage-earning capacity, if any, due to his mid-back injury. *See* 33 U.S.C. §908(c)(21), (h); *see generally Wheeler*, 39 BRBS at 54.

PSYCHOLOGICAL CONDITION

We next address employer's contention on cross-appeal that the administrative law judge erred in finding that claimant's psychological condition is due at least in part to his work-related knee injury. Section 20(a) provides claimant with a presumption that his disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), claimant must show that he sustained a harm and that either an accident occurred or working conditions existed which could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). A psychological impairment which is work-related is compensable under the Act. *See, e.g., American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1967); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997). In addition, it is sufficient if the condition is due only in part to a work-related injury. *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

After reviewing the evidence, the administrative law judge found that neither Dr. Koch nor Dr. Maggio offered an opinion regarding the cause of claimant's psychological condition.⁴ However, the administrative law judge credited the records of Gulf Coast Mental Health in which claimant reported a history of depression since having an injury in 1998. Cl. Ex2. 5. As it is within the administrative law judge's discretion to weigh the evidence, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963), the administrative law judge rationally credited the medical

⁴ Dr. Koch diagnosed claimant as suffering from an adjustment disorder, depressive disorder and pain disorder. Dr. Maggio opined that claimant suffers from an adjustment disorder, but disputed Dr. Koch's conclusion that claimant also suffers from major depression. Emp. Ex. 3.

records reporting claimant's complaints of depression since 1998. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Credible complaints of subjective symptoms and pain can be sufficient to establish the element of harm necessary for a *prima facie* case for Section 20(a) invocation. *See generally Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). Employer did not submit any evidence that claimant's psychological condition is not related to his work injury, *id.*, and we, therefore, hold that the administrative law judge properly found that claimant's psychological condition is due, at least in part, to his work-related knee injury. *See Manship*, 30 BRBS 179. Consequently, we affirm the administrative law judge's finding that employer is liable for medical treatment for claimant's psychological condition. 33 U.S.C. §907; *see Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Claimant contends that the administrative law judge erred in finding that he is not disabled as a result of his psychological condition. The administrative law judge accorded determinative weight to the opinion of Dr. Maggio, who opined that claimant's condition is neither permanent nor disabling. Emp. Ex. 3. In addition, Dr. Maggio opined that claimant is not disabled from a cognitive standpoint. *Id.*

The administrative law judge rationally rejected Dr. Koch's opinion that claimant is disabled due to his psychological condition and cognitive deficit, as Dr. Maggio and Gulf Coast Mental Health staff reported claimant as having normal or above normal intelligence and normal thought processes. In addition, the administrative law judge noted that claimant has not been assigned any restrictions due to a psychological condition, functioned well in his prior job, underwent training as an electrician, and participated in the administration of his church. Decision and Order on Remand at 12. The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). Thus, we affirm the administrative law judge's finding that claimant does not suffer from a disabling psychological or cognitive condition as it is rational and supported by substantial evidence.

SUITABLE ALTERNATE EMPLOYMENT

Claimant contends that the administrative law judge erred in finding that he is not totally disabled. Once, as here, claimant establishes that he is unable to return to his usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. Employer can meet its burden by demonstrating the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is

capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

We affirm the administrative law judge's finding that employer established the availability of alternate employment that was within the restrictions imposed for claimant's right knee injury. In the present case, the administrative law judge found that employer identified five full-time jobs which conform to claimant's physical and mental capabilities. Decision and Order on Remand. Claimant contends that the administrative law judge erred in rejecting the opinion of Kelly Hutchins that claimant is not capable of any employment given his physical limitations, chronic pain, and low intellectual activity. The administrative law judge rationally rejected Ms. Hutchins's report as it was based on limitations unrelated to claimant's work injuries and a description of claimant's intellectual disability that the administrative law judge did not accept. The administrative law judge instead rationally credited the report by Joseph Walker, who based his labor market survey on the assumption that claimant is literate, has basic mathematical skills, and can perform a range of medium, light, or sedentary jobs given the restrictions to his right knee.⁵ Cl. Ex. 8; H. Tr. at 60; *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

Moreover, we reject claimant's contention that the administrative law judge erred in not considering the favorable decision by the Social Security Administration in determining the extent of claimant's disability. *Jones v. Midwest Machine Movers*, 15 BRBS 70 (1982); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). In addition, we affirm the administrative law judge's finding that claimant's lower back pain is unrelated to his work injury as it is unchallenged on appeal. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Thus, as the pain medication prescribed by Dr. Whitecloud is for pain due to claimant's subsequent lower back, left hip and right ankle conditions which are not related to the work injury, *see* Cl. Ex. 13, we affirm the administrative law judge's finding that effects of the pain medications should not be considered in determining the extent of claimant's work-related disability. *See Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). Consequently, as it is supported by substantial evidence we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment that claimant is capable of performing given the restrictions for his right knee injury. *Turner*, 661 F.2d 1031, 14 BRBS 156.

⁵ Claimant does not contest the administrative law judge's finding that the jobs are suitable given claimant's knee restrictions.

ATTORNEY'S FEE

In his Order Denying Reconsideration, the administrative law judge rejected claimant's request for an attorney's fee for work performed before the administrative law judge on remand. The administrative law judge found that "[i]n view of the lack of success on remand, [c]laimant is not entitled to an award of any additional attorney's fees." Order Denying Reconsideration at 1. Claimant contends that the administrative law judge erred in finding that he was unsuccessful on remand as the administrative law judge found employer liable for claimant's trigger point injections and psychological treatment. The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party 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).

It is well established that employer is liable for an attorney's fee when it contests claimant's right medical benefits and claimant prevails on this issue. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). In the present case, employer continued to contest its liability for claimant's trigger-point injections and psychological treatment. On remand, the administrative law judge found that the injections were necessary for claimant's mid-back injury, which was a result of his work-related knee injury. Thus, the administrative law judge concluded that employer is liable for this treatment. In addition, the administrative law judge found that claimant's psychological condition is due, at least in part, to his work-related injuries, and that employer is liable for medical treatment for this condition.

We agree with claimant that the administrative law judge erred in finding that he is not entitled to an attorney's fee for work performed on remand due to a lack of success. The administrative law judge resolved issues in claimant's favor, and we have affirmed these findings on appeal. Thus, the administrative law judge's denial of an additional attorney's fee is vacated. On remand, the administrative law judge should address any request for additional attorney's fees filed by claimant's counsel. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001).

Accordingly, the administrative law judge's Decision and Order on Remand finding that claimant suffered only a temporary injury to his mid-back is vacated, and the case is remanded for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed. The administrative law judge's Order Denying Reconsideration finding that claimant is not entitled to an attorney's fee for work performed on remand is vacated. The administrative law judge should consider any request for additional attorney's fees filed by claimant's counsel.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge