BRB No. 99-1331

PAUL A. WILGUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARDEE SHEET METAL, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Order Awarding Attorney's Fees of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, L.L.P.), North Charleston, South Carolina, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Order Awarding Attorney's Fees (96-LHC-2085) of Administrative Law Judge Stuart A. Levin 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). 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).

Claimant, while working for employer on July 13, 1994, as a sheet metal mechanic on board the *U.S.S. Dewert* in Mayport, Florida, injured his lower back lifting a piece of ventilation duct. Claimant continued his usual work through October 1994, when the job ended. In November 1994, claimant was sent to the company physician, Dr. Williams, who diagnosed a low back strain and restricted claimant to work with no lifting over 30 pounds. Employer provided claimant with light duty jobs until he was temporarily laid off on January 2, 1995, for lack of work. Claimant eventually secured employment beginning in August 1996, as a bartender at Players Place Billiards where he worked six to twelve hours a week at an hourly rate of $6. Additionally, on December 16, 1996, claimant was provided funding to participate in a Department of Labor vocational rehabilitation program which he began in March 1997.

Claimant's continued symptoms of back pain prompted a reference by Dr. Williams to Dr. Jones, a physiatrist, who administered conservative treatment including steroid injections through the spring and summer of 1995. When this treatment proved unproductive, Dr. Jones referred claimant to Dr. Aymond, an orthopedic surgeon, for a surgical opinion.

Dr. Aymond diagnosed a herniated disc at L5-S1, and performed a discectomy on November 15, 1995. He opined on May 20, 1996, that claimant reached maximum medical improvement, and that claimant is capable of working with restrictions.[1] He approved several positions identified by employer's labor market survey dated June 26, 1996.[2] Additional pain prompted claimant's return to Dr. Aymond on March 6, 1997, and he

[1]Dr. Aymond set out the following work restrictions: no lifting of greater than 20 pounds, no repetitive bending, lifting or twisting.

[2]Employer's labor market survey identified six jobs which claimant should be capable of performing. Dr. Aymond approved of the positions at Spee Dee Oil Change & Tune Up, Keith's Auto Parts, Books-a-Million and Montgomery Ward Auto Express. He rejected the positions at Meinike and Home Depot.

provided claimant with three options for treatment, *i.e.*, 1) restart a home exercise program with anti-inflammatory medication; 2) epidural steroid injection; or 3) additional surgery. Claimant elected the least intrusive and thus restarted a home exercise program with anti-inflammatory medication.

Following an MRI in May 1998, Dr. Aymond noted changes in the left-sided laminectomy and discectomy, and scar tissue surrounding and displacing the left S1 root. He recommended additional surgery to alleviate some of the scar tissue, and subsequently testified that in light of claimant's increased pain and symptoms, he could no longer be sure if claimant could do the alternate work which he previously approved in 1996.

In his decision, the administrative law judge determined that claimant is entitled to temporary total disability benefits from January 2, 1995, through May 20, 1996, temporary partial disability benefits from May 21, 1996, through June 30, 1998, and then continuing temporary total disability benefits from July 1, 1998. He subsequently awarded claimant's counsel an attorney's fee totaling $5,925, representing 9.7 hours at an hourly rate of $300, and 20.1 hours at an hourly rate of $150, plus $153.20 in expenses.[3]

On appeal, employer challenges the administrative law judge's continuing award of temporary total disability benefits and the award of an attorney's fee. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erroneously relied on Dr. Aymond's deposition testimony to find claimant entitled to a continuing award of temporary total disability benefits commencing July 1, 1998. Specifically, employer asserts that Dr. Aymond's deposition testimony regarding claimant's inability in 1998, to perform the four positions which he previously approved in 1996, is insufficient to support the administrative law judge's finding of total disability, particularly since Dr. Aymond never testified that claimant was incapable of performing those jobs and the record contains no evidence to contradict Dr. Aymond's prior approval of those positions.

In his decision, the administrative law judge determined that Dr. Aymond's deposition testimony that the build-up of scar tissue over time has exerted nerve root pressure at L5-S1, and that he was doubtful that claimant could in 1998 perform the jobs he previously approved in 1996, indicates that further reliance on Dr. Aymond's prior job approvals is no longer

[3]The administrative law judge denied, without prejudice, 9.65 hours of work performed by two paralegals for lack of adequate documentation, and thus reduced the fee by $637.25. He did however determine that the requested hourly rates of $65 and $75 for paralegal work were reasonable provided the work was not clerical.

justified. The administrative law judge therefore concluded that claimant is entitled to temporary total disability benefits commencing on July 1, 1998, as the suitable alternate employment identified by employer was no longer viable for claimant given the present condition of his work-related back injury.

Where, as in the instant case, a claimant has established his *prima facie case* of total disability by establishing his inability to perform his usual work duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must demonstrate the availability of specific jobs which claimant is capable of performing, and the administrative law judge must determine whether there is a reasonable likelihood given the claimant's age, education, and background, he would be hired if he diligently sought the job. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's findings and inferences will be affirmed if they are rational and supported by substantial evidence. *Id.* The record in the instant case supports the administrative law judge's inference that claimant is no longer capable of performing the suitable alternate employment identified in employer's 1996 labor market survey and his consequent conclusion that claimant is entitled to temporary total disability benefits from July 1, 1998. Specifically, as the administrative law judge found, claimant's increased symptoms of lower back pain are supported by Dr. Aymond's assessment of claimant's physical condition based, in part, on the objective MRI studies. This evidence, in conjunction with Dr. Aymond's uncertainty about claimant's continued ability to perform the jobs which he previously approved,[4]

[4]Dr. Aymond's testimony regarding claimant's ability to perform the previously approved jobs is as follows:

> I haven't reviewed these lately to see if he would still be a candidate for most of them [the jobs identified in employers's labor market survey and approved by Dr. Aymond in 1996]. Which you'll see, [claimant] has now had increasing symptoms, so I'm not sure he can do these [jobs] with his subjective complaints of pain and his worsening of pain in his left buttock. These were sort of things that were decided on two years ago when he was actually doing a lot better.

demonstrates a worsening in claimant's work-related back condition such that the continued reliability of Dr. Aymond's approval of suitable alternate employment identified in 1996 is no longer reasonable. The administrative law judge therefore rationally inferred that claimant is no longer capable of performing the suitable alternate employment identified in employer's 1996 labor market survey and thus concluded that claimant is entitled to temporary total disability benefits commencing July 1, 1998. As the administrative law judge's findings are rational, in accordance with law and supported by substantial evidence, they are affirmed.

Employer also asserts that the administrative law judge erred in awarding claimant's counsel an hourly rate of $300 as there is no evidence or discussion as to the prevailing rates in the relevant geographical area. Additionally, employer argues that the administrative law judge erred in awarding claimant's counsel 14.9 hours to research and prepare claimant's post-hearing brief.

We reject employer's assertion that the administrative law judge erred in awarding claimant's counsel an hourly rate of $300. The administrative law judge fully considered the regulatory criteria of 20 C.F.R. §702.132(a),[5] and determined that this hourly rate is warranted given counsel's level of efficiency and expertise in this complex, vigorously contested proceeding. Moreover, the administrative law judge considered and rejected employer's contention that the time billed for legal research by claimant's counsel and his associate was excessive, instead finding that time is reasonable and thus compensable given the nature of the issues involved in this case. Employer has not shown that the administrative law judge abused his discretion in awarding the attorney's fee in this case. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Consequently, his award of an attorney's fee is affirmed.

Dr. Aymond's Deposition at 23.

[5]This regulation states that the fee award should take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. The regulation does not specifically require that the awarded rate comport with the prevailing rate in the relevant geographic area. *Cf.* 20 C.F.R. §802.203(a)(4).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge