BRB No. 08-0727

G.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEXCO CORPORATION	)	DATE ISSUED: 09/25/2009
	)	
and	)	
	)	
ACE FIRE UNDERWRITERS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order, the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Employer/Carrier's Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Christopher L. Zaunbrecher and Jason R. Garrot (Briney & Foret), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Employer/Carrier's Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fees (2007-LHC-01670) of Administrative Law Judge C. Richard Avery 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was struck by a three foot-tall gas cylinder on September 14, 2000, during the course of his employment for employer as an offshore pump and chemical operator. He sustained a broken leg and nose, and a laceration on his head. Claimant underwent surgery on his leg. Subsequently, he developed back symptomatology for which he underwent surgery in 2003 and 2004. Claimant alleged that his back pain is due to the work injury and that he is unable to work. Employer controverted the claim.

In his decision, the administrative law judge found that claimant's back condition is related to the September 2000 work accident. The administrative law judge found that claimant's work-related back and leg injuries reached maximum medical improvement on June 12, 2006, and that claimant is unable to return to his former employment as a pump and chemical operator. The administrative law judge found that employer did not establish the availability of suitable alternate employment, and that claimant, therefore, is totally disabled. The administrative law judge found that claimant is entitled to further medical treatment for his leg and back conditions, and that he requires psychological care as it relates to the pain management treatment he receives for his work injuries. Accordingly, claimant was awarded compensation for temporary total disability, 33 U.S.C. §908(b), from September 15, 2000 to June 12, 2006, and ongoing compensation for permanent total disability, 33 U.S.C. §908(a), as of June 12, 2006.

In his supplemental decision, the administrative law judge stated that employer had not objected to claimant's counsel's fee petition, and he awarded counsel the requested attorney's fee of $9,602.76, plus costs of $336.19. Employer filed a motion for reconsideration, attaching objections to the requested fee. The administrative law judge found that employer failed to timely object to claimant's counsel's fee petition; therefore, he denied employer's motion for reconsideration of the fee award.

On appeal, employer challenges the award of total disability compensation. Employer also contends that additional orthopedic care is unnecessary for treatment of claimant's back and leg injuries, and that psychological treatment is similarly unnecessary. Employer also challenges the attorney's fee award. Claimant has not responded to employer's appeal.

In order to establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual work due to the work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). In his decision, the administrative law judge credited the opinions of Dr. Dickerson, claimant's treating

physician and a pain management specialist, and of Dr. Varner, an orthopedic surgeon, that claimant is unable to return to work as an offshore pump and chemical operator. Decision and Order at 21; CX 2 at 39; EX 11 at 1. As the administrative law judge's finding that claimant cannot return to his usual employment is supported by substantial evidence, it is affirmed. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

If claimant is unable to return to his usual employment, employer bears the burden of establishing the availability of suitable alternate employment in order to mitigate an award of total disability benefits. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991). In order to meet this burden, employer must establish that job opportunities are available where claimant resides that claimant is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *Turner*, 661 F.2d 1031, 14 BRBS 156. The administrative law judge may reject a labor market survey if it fails to take into consideration all relevant restrictions found by the administrative law judge. *See, e.g., White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

The administrative law judge rejected employer's March 3, 2006, labor market survey as evidence of suitable alternate employment because it did not identify the employers with available positions, the location of the jobs, or their salaries. Decision and Order at 21-22; *see* EX 15 at 6-7. Employer does not challenge the administrative law judge's rejection of this survey. The administrative law judge found that employer's June 11, 2007, labor market survey identifies jobs by general location and provides specific salary information. Decision and Order at 22-23; *see* EX 15 at 9-14. The administrative law judge found, however, that employer failed to state the specific location of the identified jobs. The administrative law judge found that employer properly focused on identifying suitable alternate employment in the Franklin, Texas, area where claimant moved after his work injury. The administrative law judge found that claimant owned a house in Franklin prior to his work injury, but, while working for employer, had lived in a rental property in Santa Fe, Texas, in order to be closer to employer's job site near Galveston, Texas.[1] *See* Tr. at 11, 30-32. The administrative law judge credited claimant's testimony that Franklin is a small, rural town with few

[1] The administrative law judge found the economic advantage of residing on property one owns, as opposed to rents, and claimant's pre-existing ties to Franklin renders it the relevant labor market for purposes of establishing the availability of suitable alternate employment. *See* n.3, *infra.*

employment opportunities, and Dr. Dickerson's imposition of driving restrictions related to the work injury. *See* CX 2 at 39. The administrative law judge found that the failure of employer's June 2007 labor market survey to state the specific location of the jobs employer identified in the vicinity of Franklin does not allow him to determine whether these jobs are within Dr. Dickerson's driving restriction. The administrative law judge found that the jobs listed in the June 2007 labor market survey in the vicinity of Galveston, Texas, also do not state their specific location; therefore, he is unable to determine if the positions are reasonably close to claimant's former rental residence in Santa Fe and within Dr. Dickerson's driving restriction.[2] Accordingly, as employer did not establish the availability of suitable alternate employment, the administrative law judge found that claimant is totally disabled.

Employer argues that there is no medical evidence of a driving restriction and that it is not required to show the precise distance claimant would have to travel to work at the jobs it identified as alternate employment. We reject this contention. Dr. Dickerson completed a Form OWCP-5c, Work Capacity Evaluation Musculoskeletal Conditions on June 12, 2006. CX 2 at 39. Dr. Dickerson stated on the form that claimant should alternate sitting, standing and walking, and she limited the amount of bending and stooping. Dr. Dickerson restricted claimant from any driving at work and she limited the amount of time claimant could drive to and from work. Dr. Dickerson stated that these driving restrictions are due to claimant's medication regimen. *Id.* This regimen included narcotic medication for pain control. *See* CX 2 at 50.

Under *Turner*, employer must show that the claimant is capable of performing the identified jobs given his physical restrictions and other relevant factors. *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 165; *see also Ledet*, 163 F.3d 901, 32 BRBS 212(CRT). Without sufficient information regarding the driving distances from claimant's residence in Franklin to the jobs identified in employer's June 2007 labor market survey, the administrative law judge did not err in finding that he is unable to determine whether the identified jobs are suitable, given Dr. Dickerson's driving restriction. The administrative law judge must be able to compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine their suitability for claimant. *See, e.g., Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109, 113 (1998). In this case, the administrative law judge rationally found that the lack of specific information regarding the driving distances from claimant's home to the positions in the Franklin area identified by employer, as well as the distances from claimant's former residence in Santa Fe to the positions identified in the Galveston area, made it impossible for him to determine whether those positions are suitable for claimant in light of claimant's driving restrictions. Decision and Order at 22-23. Accordingly, the administrative law judge

[2] Claimant's mother owned the rental property in Santa Fe.

rationally found that employer failed to establish that the jobs identified in areas in Galveston and near Franklin are suitable for claimant.[3] *Ceres Marine Terminal*, 243 F.3d 222, 35 BRBS 7(CRT). As employer has not established any error in the administrative law judge's consideration of the evidence and as substantial evidence supports the administrative law judge's conclusion that employer did not demonstrate the availability of suitable alternate employment, we affirm the administrative law judge's award of total disability benefits. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Employer next challenges the administrative law judge's finding that claimant is entitled to orthopedic care for his back and leg injuries, and to psychological treatment. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. It is claimant's burden to prove the elements of his claim for medical benefits. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

In his decision, the administrative law judge found that claimant is entitled to psychological care related to the pain management treatment claimant receives for his leg and back injuries. The administrative law judge based his finding on the opinion of Dr. Weiss, a pain management specialist, who referred claimant to a psychiatrist in July 2004

[3] We note that in evaluating whether employer has established the availability of suitable alternate employment, the First and Fourth Circuits have held that the administrative law judge is afforded considerable discretion in determining the relevant labor market. *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). These courts have held that where a claimant relocates after his injury, the administrative law judge must weigh a variety of factors to determine if the new community is the relevant labor market for determining suitable alternate employment. The Board has held that this approach is not inconsistent with Fifth Circuit precedent and adopted its use in the Fifth Circuit in the absence of specific precedent. *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001). In this case, the administrative law judge rationally found Franklin to be the relevant labor market for purposes of establishing the availability of suitable alternate employment, but he also addressed the jobs employer identified in Galveston. *See id.; Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

to help him manage his pain medications. EX 12 at 2. The administrative law judge credited Dr. Dickerson's recommendation that claimant undergo a chronic pain management evaluation to determine whether he should receive mental health treatment, and the results of that evaluation. EX 13 at 1. The evaluation found that claimant was experiencing anxiety and depression related to the work injury, and a variety of treatments were suggested. *Id.* at 4. The administrative law judge further credited another pain management evaluation conducted in January 2008, which recommended treatment for possible depression. EX 17 at 1. The administrative law judge did not credit the opinion of Dr. Pearlman, who concluded that psychological treatment would not be related to the work injury. EX 14 at 6. The administrative law judge found that claimant did not choose to be seen by Dr. Pearlman, but was seen at employer's request. The administrative law judge concluded that since several pain management doctors who have seen and treated claimant recommended some form of psychological care, the care sought by claimant is reasonable and necessary. Decision and Order at 25. As the administrative law judge rationally credited medical evidence that psychological treatment is necessary for claimant's work injury, we affirm the award as it is supported by substantial evidence. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996).

Regarding claimant's leg and back conditions, claimant did not make a claim for reimbursement for past medical expenses nor did he request that the administrative law judge find him entitled to any specific future care. *See* Cl. Post-Hearing Brief. There is no evidence that claimant is currently receiving orthopedic care for his back and leg injuries.[4] Claimant's attorney stated at the hearing that claimant would like to obtain orthopedic care, but he did not have a medical referral for such treatment. Tr. at 69. Moreover, the record contains evidence that claimant's leg and back should be examined annually by an orthopedist. *See* CX 2 at 56; EX 14 at 6. The administrative law judge properly found that claimant is entitled to ongoing medical benefits for these work-related conditions. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Employer may challenge the reasonableness and/or necessity of any specific orthopedic treatment claimant receives, but the administrative law judge did not err in authorizing such treatment for claimant's work injuries. *Id.*

Finally, employer challenges the attorney's fee award, arguing that the hourly rate is excessive, and that certain attorney time expended was not reasonable or necessary. In his Supplemental Decision awarding the fee as requested by claimant's counsel, the administrative law judge noted the absence of any objections filed by employer. In his Order Denying Employer's Motion for Reconsideration, the administrative law judge

[4] Employer does not challenge the award of palliative care, including pain management, for claimant's injuries.

declined to address employer's untimely-filed objections, finding that employer had had ample time to file timely objections. On appeal, employer does not challenge the administrative law judge's rejection of its objections to the fee petition on grounds of timeliness. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Moreover, the administrative law judge acted within his discretion in awarding the requested fee in the absence of any timely-filed objections. *See generally Bankes v. Director, OWCP*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1985). Accordingly, we affirm the administrative law judge's attorney's fee award.

Accordingly, the administrative law judge's Decision and Order, Supplemental Decision and Order Awarding Attorney's Fees, and Order Denying Employer/Carrier's Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge