

BRB Nos. 96-443
and 96-443S

JAMES W. BARKER)
)
 Claimant-Petitioner)
)
 v.)
)
 BATH IRON WORKS) DATE ISSUED: _____
 CORPORATION)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Order Denying Attorney's Fee of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Gary A. Gabree (Stinson, Lupton, Weiss & Gabree, P.A.), Bath, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Order Denying Attorney's Fee (95-LHC-878) of Administrative Law Judge Jeffrey Tureck 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On December 14, 1989, claimant injured his neck and shoulder while installing a

spool during the course of his employment. He sustained a left trapezius strain. Claimant returned to work for periods of time but this exacerbated his injury. When he finally returned to work, he started in a new position which had less physical demands and offered greater pay. Tr. at 12-13. Employer voluntarily paid claimant disability benefits under the Maine Workers' Compensation Act. *Id.* at 13. However, claimant filed a claim for additional benefits pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), and for an attorney's fee.

The administrative law judge found that claimant did not sustain an injury to his left arm, so he is not entitled to benefits under Section 8(c)(1). Additionally, he held that claimant's neck and shoulder injury is not compensable under the schedule, 33 U.S.C. §908(c)(1)-(20), but rather is compensable under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). However, because the administrative law judge found that claimant did not suffer a loss of wage-earning capacity, he denied claimant benefits under Section 8(c)(21). Decision and Order at 3-4. In a supplemental decision, the administrative law judge denied claimant an attorney's fee because claimant failed to obtain additional benefits. Claimant appeals the administrative law judge's decisions.¹ Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in denying benefits pursuant to Section 8(c)(1) of the Act. Specifically, claimant argues he sustained an "actual injury" to his left arm for which he should be compensated.² Alternatively, claimant argues he is entitled to additional benefits because his arm injury is consequential to his neck and shoulder injury. In this regard, he maintains that the Board's decision in *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994), is applicable. Employer responds, asserting that the administrative law judge correctly determined there was no injury to the left arm and properly denied benefits under the schedule.

¹Claimant filed a supplemental letter of authorities. The Board hereby accepts this letter as part of the record in this case.

²Claimant does not challenge the administrative law judge's conclusion that he did not suffer a loss of wage-earning capacity and is not entitled to benefits pursuant to Section 8(c)(21).

Under *Bass*, if a claimant sustains a harm to a body part not specified in the schedule as a result of an injury to a scheduled member, he may receive benefits under Section 8(c)(21) for the consequential injury as well as benefits under the schedule for the initial injury.³ *Bass*, 28 BRBS at 17-18. Based on this premise, claimant argues that the reverse should also be true, *i.e.*, a claimant who sustains an injury to an unscheduled member which later results in an injury to a scheduled member should be entitled to benefits for both. We reject this contention. Pursuant to *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985), a claimant who sustains an injury to an unscheduled member, which later results in an impairment to a scheduled member, is entitled only to compensation under Section 8(c)(21). *Long*, 767 F.2d at 1583, 17 BRBS at 154 (CRT). The United States Court of Appeals for the Ninth Circuit reasoned that the New York workers' compensation statute, on which the Longshore Act is based, had been interpreted to preclude recovery under the schedule for an impairment to a scheduled member caused by an injury to a member not specified under the schedule. Thus, the court concluded that Congress is presumed to have enacted the same construction of the statute. *Long*, 767 F.2d at 1581-1582, 17 BRBS at 152 (CRT).

In this case, the administrative law judge found that claimant sustained an injury to his neck and shoulder and not to his arm. That finding is supported by substantial evidence. A review of the record reveals that the medical reports credited by the administrative law judge show that claimant sustained an injury to his neck and shoulder. Although some reports note claimant's complaints of shooting pain down the left arm and numbness in the left hand, the doctors concur that the injury was to the neck and shoulder and that the arm and hand complaints are but symptoms of that injury. Dr. Totta, claimant's treating physician, diagnosed chronic cervical sprain/strain, cervical facet osteoarthritis/disc degeneration, and

³Since the two injuries are being compensated separately, however, any loss of wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), *overruled on different grounds*, *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

chronic myofascial pain. Cl. Ex. 47. Dr. Vigna, the specialist to whom Dr. Totta referred claimant, diagnosed severe left upper trapezius strain and trapezius spasm, and acute brachial neuritis. Cl. Exs. 10, 17, 35. Moreover, claimant's MRI showed mild cervical spondylosis with minor spurring at C3-4, C4-5, C5-6, and C6-7. Cl. Exs. 45, 47. Thus, the record supports the administrative law judge's determination that claimant's injury occurred in his neck and shoulder.⁴

As the injury claimant sustained was not to a scheduled member, the administrative law judge properly denied benefits under Section 8(c)(1). *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981). Moreover, any impairment to claimant's arm resulting from his neck and shoulder injury is not separately compensable under the schedule. *Long*, 767 F.2d at 1582, 17 BRBS at 152 (CRT). Therefore, we affirm the administrative law judge's denial of benefits.

Next, claimant contends the administrative law judge erred in denying an attorney's fee. Claimant argues that he successfully prosecuted his claim and is entitled to a fee award. An attorney's fee may only be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928. Under Section 28(a), if the employer declines to pay any compensation within 30 days after receiving written notice of the claim from the district director, and counsel's services thereafter result in the successful prosecution of the claim, the employer is liable for a fee. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

⁴We reject claimant's contention that Dr. Totta's impairment rating establishes a disability to claimant's arm. Dr. Totta clearly assessed claimant with an 11 percent impairment to the whole person. He apportioned five percent of that rating to claimant's clerical disc disease and six percent to radiculopathy which caused a sensory loss of 15 percent breakdown related specifically to the sensory and motor loss and not to a disability in the left arm. Decision and Order at 3.

We reject claimant's assertion that he is entitled to an attorney's fee. In this case, employer voluntarily paid disability benefits under the Maine Workers' Compensation Act. Employer also voluntarily paid claimant's medical expenses related to this injury, and the parties stipulated at the hearing that the compensability of claimant's injury was not at issue. The administrative law judge then held, and we affirm, that claimant is not entitled to additional disability benefits under the Act. Moreover, we reject claimant's argument that he established employer's liability for a disputed medical bill. Claimant testified that employer voluntarily paid all his medical expenses except for one bill which he failed to submit to employer for payment. That medical bill has since been paid. Tr. at 14-16; Cl. Brief at 4. Additionally, all benefits for which employer is liable were paid to claimant pursuant to the state workers' compensation statute, and pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e), those benefits offset any entitlement under the Act. Thus, the mere finding that claimant's injury is compensable does not constitute a successful prosecution

under Section 28 in this case. Consequently, claimant's counsel is not entitled to an attorney's fee payable by employer. 33 U.S.C. §928; *see generally Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge