BRB Nos. 92-1000
and 92-1000A

MICHAEL D. SCARBOROUGH	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Supplemental Decision and Order Awarding Attorney Fees, and Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Vincent J. Castigliola, Jr. (Bryan, Nelson, Schroeder, Backstrom, Castigliola & Banahan), Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and employer cross-appeals the Supplemental Decision and Order Awarding Attorney Fees and Decision on Motion for Reconsideration (91-LHC-1067) of Administrative Law Judge C. Richard Avery awarding benefits 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 findings of fact and conclusions of law of the administrative law judge which are rational,

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee

award is discretionary and may be set aside only if the challenging party shows it 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, who worked as a sandblaster and painter for employer, injured his back on May 20, 1988 as he was pulling a sandblast line which weighed about 150 to 200 pounds up a scaffold that was about 40 feet high. His back continued to hurt that day with exertion and the pain intensified at home over the weekend. Claimant reported the injury to employer on Monday, May 23, 1988, and sought treatment. After a period of treatment, claimant returned to work for a trial period but only worked two and a half days before the back pain prevented him from returning. Claimant continued treatment and was re-released for work by his treating physician on November 18, 1988. Instead of returning to work, claimant took a one week vacation, during which he was informed that he would be laid-off when he returned. Claimant did not return to his former employment, but did begin working as a security guard for another company on January 4, 1990. Claimant sought temporary total disability benefits through January 3, 1990, and permanent partial disability benefits thereafter.

The administrative law judge found that claimant reached maximum medical improvement on November 21, 1988 with no remaining disability after that date. Thus, the administrative law judge awarded temporary total disability benefits from May 20 to November 21, 1988, but denied temporary total disability benefits past the date of maximum medical improvement and continuing permanent partial disability benefits. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge found that claimant was awarded temporary total disability benefits for approximately 24 days not voluntarily paid by employer and therefore had successfully prosecuted the claim. Thus, the administrative law judge awarded an attorney's fee in the amount of $2,291.50 for work performed before the administrative law judge to be paid by employer. Employer's Motion for Reconsideration of the fee award was denied.

On appeal, claimant contends that the administrative law judge erred in failing to award temporary total disability benefits through January 3, 1990 and continuing permanent partial disability benefits. Further, claimant contends that the administrative law judge erred in failing to apply the Section 20(a) presumption, 33 U.S.C. §920(a), and that the administrative law judge erred in ignoring the stipulation entered into by the parties that claimant was temporarily totally disabled from May 12, 1989 through July 20, 1989 without explanation. Employer responds, urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence.

On cross-appeal, employer contends that the administrative law judge erred in finding that claimant's attorney was successful in obtaining greater benefits for claimant pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), and in holding it liable for claimant's attorney's fee. Claimant did not respond to this appeal.

Claimant contends that the administrative law judge erred in finding that claimant had no

remaining disability after the date he reached maximum medical improvement, November 21, 1988.[1] To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co*, 22 BRBS 332 (1989). In order to determine whether claimant has shown total disability, the administrative law judge must compare the medical restrictions with the specific physical requirements of his usual employment. *See Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). Claimant's credible complaints of pain alone may be sufficient to meet his burden. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

In the instant case, the administrative law judge accorded the opinions of Drs. Cope, Enger, McLeod, and Mostellar dispositive weight and found that claimant reached maximum medical improvement on November 21, 1988 with no remaining disability after that date. Dr. Cope diagnosed that claimant suffered a chronic lumbar strain with no indication of a permanent partial impairment, although he recommended that claimant lose weight, improve his general physical condition and consider lighter work. Emp. Ex. 13. Dr. Enger opined that claimant reached maximum medical improvement by November 21, 1988. He noted that he could not find any objective reason to prevent claimant from working as a painter and sandblaster except for a diagnosis of chronic pain syndrome aggravated by chronic psycho-social situations. Emp. Ex. 14. Dr. McLeod stated that claimant had reached maximum medical improvement by November 25, 1988 and could return to work. Emp. Ex. 15. Dr. Mostellar diagnosed chronic pain syndrome aggravated by chronic psycho-social situations and noted that claimant's subjective complaints outweigh his objective findings. Dr. Mostellar concluded that claimant had reached maximum medical improvement and probably could have returned to work by December 21, 1988. Emp. Ex. 17. In contrast, Dr. McCloskey diagnosed that claimant suffered a compression fracture as the result of the injury sustained at work on May 20, 1988 and prescribed a body cast administered by Dr. Enger, that claimant wore from October 5, 1989 through November 22, 1989.[2] Dr. McCloskey opined that claimant continued to be disabled by pain, that he has reached maximum medical improvement, and that he is going to be limited in what he can do.[3] Cl. Ex. 1; Emp. Ex. 16.

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[1]We reject claimant's contentions regarding the Section 20(a) presumption, as this presumption does not apply to the issue of the extent of claimant's disability. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

[2]Claimant testified that the body cast caused more pain when he had it on and limited his movement. He also testified that his back hurt worse for about a month or two after the cast was removed, but the pain had subsided from that point. H. Tr. at 37.

[3]Dr. McCloskey assigned claimant a 5 percent permanent partial disability and the following restrictions: intermittent sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting, and standing from 1-2 hours a day; he limited claimant to light work, but noted that claimant can work eight hours a day. Cl. Ex. 1; Emp. Ex. 16.

We affirm the administrative law judge's finding that the opinions of Drs. Cope, Enger, McLeod and Mostellar are entitled to greater weight because their diagnoses are better supported by the objective evidence of record. *See generally Kennel*, 914 F.2d at 90, 24 BRBS at 47 (CRT). The administrative law judge also noted that Drs. Enger, Cope and McLeod are orthopedic specialists, and thus better trained than Dr. McCloskey, a neurosurgeon, to make a diagnosis regarding claimant's spine. However, we vacate the administrative law judge's finding that the evidence of record is insufficient to establish that claimant is unable to return to his former employment. Two of the physicians of record credited by the administrative law judge, Drs. Enger and Mostellar, noted that claimant suffered from "chronic pain syndrome." Emp. Exs. 14, 17. In addition, claimant testified that since the accident, he has not been able to do any heavy work without experiencing pain and that he would not be able to perform the duties of his former employment, including overhead work and sandblasting. H. Tr. at 16, 38. Inasmuch as credible subjective complaints may be sufficient to establish that claimant cannot return to his former employment, and there is relevant evidence of record on this issue which the administrative law judge did not address, we vacate the administrative law judge's finding that claimant did not meet his burden of showing he cannot return to his usual employment and remand the case to the administrative law judge for further consideration of whether claimant's pain, if credible, affects his ability to perform his regular duties.[4] *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *see also Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

In addition, employer is liable for claimant's entire resultant disability unless the subsequent progression of claimant's condition is due to the intentional or negligent conduct of claimant or a third party, in which case employer is relieved of the liability attributable to the intervening cause. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). The Board has noted with approval Professor Larson's statement that when a claimant's conduct in seeking treatment and his choice of doctor are reasonable under the circumstances, claimant may receive disability benefits for any increased disability due to failed treatment. *See* 1 A. Larson, *Workmen's Compensation Law*, §13.24 (1987); *see also Wheeler*, 21 BRBS at 36. Therefore, on remand, the administrative law judge should consider whether claimant is entitled to temporary total disability benefits for the period from October 5, 1989 through November 22, 1989 when he was in a body cast prescribed by Dr. McCloskey, and placed by Dr. Enger.

On cross-appeal, employer contends that the administrative law judge erred in finding that claimant's attorney was successful in obtaining greater benefits than those voluntarily paid by employer to claimant pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). The administrative law judge found that claimant's attorney successfully prosecuted the claim as claimant was awarded temporary total disability benefits for days not voluntarily paid by employer, as well as medical benefits. In general, a claimant's attorney's fee can be assessed against an employer pursuant to Section 28 of the Act only when the employer has controverted some aspect of the claim and the

[4]Although employer paid benefits for the period from May 12, 1989 through July 20, 1989, we reject claimant's contentions that this payment constituted a stipulation of temporary total disability as there is no evidence that the parties made this stipulation.

claimant thereafter is successful in obtaining an award. *See Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986). Moreover, Section 28(b) of the Act specifically allows liability for a claimant's attorney's fee to be imposed on the employer only where the claimant has obtained greater compensation than that originally paid or tendered by the employer. *See* 33 U.S.C. §928(b); *Kaczmarek v. I.T.O. Corporation of Baltimore, Inc.*, 23 BRBS 376 (1990).

In the instant case, employer voluntarily paid claimant temporary total disability benefits in the amount of $7,973.87, while the administrative law judge awarded benefits in the amount of $6,311.24. The administrative law judge found that claimant was awarded benefits for a period of 24 days that employer had not paid, but denied a period of temporary total disability that employer had voluntarily paid which left employer with a credit of $1,662.63. 33 U.S.C. §914(j). Furthermore, although listed on the pre-hearing statement, unauthorized medical treatment was not made an issue at the hearing and there were no outstanding medical bills. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). Thus, on the present award of benefits, claimant did not successfully prosecute the claim under Section 28(b), and we vacate the fee award. If, on remand, the administrative law judge finds that claimant is entitled to any additional compensation, he must consider whether claimant's attorney is entitled to a fee payable by employer pursuant to Section 28(b), or if no further benefits are owed, whether an attorney's fee is payable through a lien on claimant's compensation.[5] 33 U.S.C. §928(c); 20 C.F.R. §702.132.

Accordingly, the Decision and Order of the administrative law judge denying benefits is vacated, and the case is remanded to the administrative law judge for further consideration. The award of an attorney's fee is vacated, and the administrative law judge on remand should reconsider liability for claimant's attorney's fee pursuant to Section 28(b) and (c).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN

[5]We affirm, however, the administrative law judge's reduction of the hourly rate charged by claimant's attorney from $115 to$110 and affirm the finding that the hours requested were not unnecessary or excessive as the administrative law judge considered and ruled on each objection, and we decline to disturb his rational determinations. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge