BRB No. 00-346

PATRICIA ANN LOPES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HEALY TIBBITTS BUILDERS, INCORPORATED	)	DATE ISSUED: Dec. 7, 2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of John C. Holmes, and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judges, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher, L.L.P.), Jersey City, New Jersey, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Motion for Reconsideration (1996-LHC-1760) of Administrative Law Judge John C. Holmes and the Supplemental Decision and Order Awarding Attorney Fees (1996-LHC-1760) of Administrative Law Judge Richard D. Mills 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for the second time. Claimant worked as a manual laborer for employer, hired to help rebuild a harbor on Kauai following the destruction caused by Hurricane Iniki. On January 9, 1993, she injured her right knee during the course of her employment. The claim for benefits for this injury was heard by Administrative Law Judge Richard D. Mills. He found that claimant's claim was filed in a timely manner, and he awarded her permanent partial disability benefits for a seven percent impairment to the right leg based on an average weekly wage of $473.50, as well as medical benefits.

Employer appealed the administrative law judge's decision regarding the timeliness of the claim, and claimant appealed the administrative law judge's average weekly wage finding. The Board affirmed the administrative law judge's determination that the claim was filed in a timely manner, but it modified claimant's average weekly wage to $597.54. *Lopes v. Healy Tibbitts Builders, Inc.*, BRB Nos. 98-491/A (Dec. 21, 1998). In an unpublished opinion, the United States Court of Appeals for the Ninth Circuit denied employer's appeal and affirmed the Board's decision. *Healy Tibbitts Builders, Inc. v. Lopes*, No. 99-70140 (Jan. 4, 2000).

Prior to the appeals to the Board and Ninth Circuit, claimant's counsel had filed a petition for an attorney's fee with Judge Mills totaling $7,435 for services rendered while the case was before him, and employer filed objections. Judge Mills stated that claimant's limited success on the claim warranted a reduction of the overall fee by 50 percent. He addressed employer's specific objections, reached the conclusion that a reasonable fee in accordance with the hours and the rates approved was $5,632.50, and then he halved that figure due to claimant's limited success, awarding counsel a fee of $2,816.25. Supp. Decision and Order (Aug. 31, 1998). Claimant filed a timely motion for reconsideration of the fee award. The motion was not addressed until after claimant's claim for additional medical benefits came before Administrative Law Judge Holmes. Judge Holmes consulted with Judge Mills, agreed with his decision to deny reconsideration of the fee, and issued an order to that effect on February 16, 2000. Claimant appeals the fee award and the order denying reconsideration. Employer responds, urging affirmance.

Additionally, in November 1998, claimant requested authorization from employer for an MRI of her right knee as recommended by Dr. McEleney. Emp. Ex. 3. Due to claimant's failure to explain the need for the request and the reason why the request did not come from her authorized treating physician, and due to the lack of supporting documentation, employer denied the request. Despite correspondence between the parties, supporting documentation was not forthcoming. Emp. Exs. 4, 6. On February 4, 1999, employer received another letter seeking authorization of the MRI from Dr. Williams. However, this assurance that the MRI was necessary also did not come from claimant's authorized treating physician, Dr. Fujimoto. On March 2, 1999, claimant requested an informal conference. On April 21, 1999, the claims examiner recommended immediate authorization of the medical procedure. Still lacking the information it sought, employer requested the claim be transferred to the Office of Administrative Law Judges, and it filed a pre-hearing statement. Therein, it listed the issue as claimant's entitlement to additional medical care, claiming the services were unauthorized as claimant failed to properly request them. Alternatively, employer listed as

issues the timeliness of the physician's report and the reasonableness and necessity of the treatment.

Judge Holmes determined that the sole issue before him was whether claimant is entitled to have an MRI performed on her right knee. He stated that while employer agreed that this procedure would be proper under Judge Mills' prior Decision and Order, employer asserted that claimant had not presented the documentation necessary to allow it to grant the authorization. Judge Holmes then stated that claimant brought forth reasonable evidence which might permit authorization, but that employer might have a valid argument in that neither of the doctors who requested the MRI is claimant's authorized treating physician. Holmes Decision and Order at 1-2. Judge Holmes did note, however, that the recommendation for the MRI came from doctors who worked in the same medical center as Dr. Fujimoto and who were providing coverage in his absence. *Id.* at 3. Nonetheless, Judge Holmes stated that "the only remaining issue is whether or not proper authorization for an MRI was given," and he concluded that a quick answer could be obtained simply by calling Dr. Fujimoto. Consequently, he remanded the case to the district director for appropriate inquiry and conclusions. Should Dr. Fujimoto agree with his colleagues, then the district director's order recommending authorization would be reinstated and there would be no right to seek a hearing before the Office of Administrative Law Judges (OALJ). *Id.* Claimant appeals Judge Holmes' decision, and employer responds, urging affirmance.

Claimant first challenges Judge Holmes' decision remanding this case to the district director for resolution of the question of claimant's entitlement to additional medical benefits. Specifically, she argues that the administrative law judge should have issued a decision which resolved the case. She also contends the administrative law judge erred in remanding the case to the district director without granting the parties the right to request a transfer back to the OALJ after the district director issued a decision. Employer asserts that, on the narrow issue of authorization of a medical procedure, which it says has since been resolved by the parties, Judge Holmes properly remanded this case to the district director.

A claimant's entitlement to medical benefits is governed by Section 7 of the Act. 33 U.S.C. §907. Active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors. 33 U.S.C. §907(b), (c); 20 C.F.R. §702.401 *et seq.* For example, under Section 7(b), the district director has the authority to change a claimant's physician at the claimant's request, or at the employer's request if the change is in the interest of the employee, *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); 20 C.F.R. 702.406, and under Section 7(d)(2), 33 U.S.C. §907(d)(2), only the district director may excuse a doctor's failure to file a timely first report of treatment if it is in the interest of justice. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). The Board has determined that these are discretionary acts which are directly appealable to the Board. *Toyer*, 28 BRBS at 353. Thus, if the administrative law judge's remand to the district director involved purely discretionary matters within the confines of the district director's authority, then an appeal of the district director's decision would properly come before the Board and not the administrative law

judge. *Toyer*, 28 BRBS at 353; *see generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 121 U.S. 378 (2000).

There are, however, issues with regard to medical benefits which remain in the domain of the administrative law judge. Disputes over whether authorization for treatment was requested by the claimant, whether the employer refused the request for treatment, whether the treatment obtained was reasonable and necessary, or whether a physician's report was filed in a timely manner, are all factual matters within the administrative law judge's authority to resolve. *See Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997); *Toyer*, 28 BRBS at 353. Consequently, despite the authority the district director has over certain medical matters, the Board has declined to interpret the provisions of Section 7(b) of the Act in such a manner as to exclude the administrative law judge from the administrative process when questions of fact are raised. *Sanders*, 31 BRBS at 23; *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

In this case, claimant contends Judge Holmes erred in failing to make a decision on the issue of whether employer should have authorized her request for an MRI. The administrative law judge stated that claimant brought forth sufficient evidence which might permit the authorization. Decision and Order at 2. Further, he stated that the doctors who recommended the MRI worked at the same medical facility as claimant's treating physician who happened to be absent the day claimant sought treatment. Despite having sufficient information to make a determination as to whether claimant requested authorization, whether employer refused authorization, and whether the procedure was reasonable and necessary, Judge Holmes abdicated his responsibility as the fact-finder and remanded the case for the district director to call claimant's authorized treating physician to resolve the matter. Because there was a dispute regarding claimant's medical care, the administrative law judge, who is empowered to adjudicate cases in those situations, should have made factual determinations to dispose of the disputed issues. *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Anderson*, 22 BRBS at 20; *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986); *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Although employer argues that the issue here was a narrow one of authorization over which the district director has authority, thereby potentially making remand to the district director appropriate, the record reveals that employer requested the claim be transferred to the OALJ, seeking resolution by an administrative law judge. In conjunction with the authorization issue, employer introduced the question of whether the MRI was reasonable and necessary in this instance. This question also naturally follows if a claimant is found to have requested treatment and his employer is found to have refused authorization for such treatment. *See Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). Because the record contains the facts necessary to answer these questions and conclusively resolve this claim, Judge Holmes should have reached a decision on the matter. *See Sans*, 19 BRBS at 24. Therefore, we vacate the order remanding the case to the district director, and we remand the case to the administrative law judge. Upon remand, he must issue an order which resolves the issue of whether claimant properly sought authorization for the MRI, whether employer refused authorization, and

whether the procedure is reasonable and necessary. *See Amos v. Director, OWCP,* 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied,* 120 S.Ct. 40 (1999); *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1993) (Smith, J., dissenting on other grounds).

Claimant also appeals Judge Mills' fee award. She challenges his general reduction of the fee by 50 percent based on his perception of claimant's degree of success. Employer asserts that claimant was successful on only one issue and that interpretation of the degree of success lies with the administrative law judge. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provide that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). However, if a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount which is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992).

In this case, Judge Mills addressed five issues allegedly disputed by the parties: the timeliness of the claim, whether there was a causal nexus between the employment and the disability, permanent partial disability, maximum medical improvement, and average weekly wage. Claimant clearly succeeded in establishing the timeliness of her claim and in showing that her continuing condition was not caused by an intervening injury, thereby establishing her entitlement to medical benefits. From Judge Mills' decision, it is not clear whether the date of maximum medical improvement was truly disputed, as he cited and credited only one doctor's report discussing such date and neither party argued the matter on brief. With regard to average weekly wage, employer originally paid claimant temporary total disability benefits for approximately eleven weeks in 1993, Cl. Ex. 4, based on an average weekly wage of $733.23, but it later claimed an overpayment, arguing that benefits should have been based on an average weekly wage of $201.32. Judge Mills awarded benefits based on an average weekly wage of $473.50. The Board modified it to $597.54, and this final figure was affirmed by the court of appeals. Although claimant was not found to be entitled to additional temporary total disability benefits, Judge Mills, and subsequently the Board, awarded claimant benefits based on an average weekly wage higher than employer last asserted. Moreover, Judge Mills' award of permanent partial disability benefits for a seven

[1]If, as employer asserts, the parties have reached agreement on claimant's request for an MRI, the administrative law judge may resolve the case based on their agreement. The record before us contains no evidence permitting us to resolve the case on this basis, although if the issue is indeed moot, an appropriate motion could have rendered this opinion unnecessary.

percent impairment would properly be paid at this higher rate. Given claimant's success on a number of the issues disputed, it is unclear what Judge Mills meant by claimant's "overwhelming degree of limited success" which was the basis for his 50 percent reduction of the fee. *See* Supp. Decision and Order at 1. Further, as Judge Mills issued the fee award prior to the Board's decision in this case, which increased the average weekly wage, we must vacate the fee award, as well as the order denying reconsideration of the fee award, and remand this case to the administrative law judge for reconsideration of the fee award in view of claimant's success, explaining the reasons for any reduction made. *See Baker*, 991 F.2d at 163, 27 BRBS at 14(CRT); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

Accordingly, the administrative law judges' Decision and Order, Supplemental Decision and Order Awarding Attorney Fees, and Order Denying Motion for Reconsideration are vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[2]Although claimant sought benefits for a 20 percent impairment but succeeded only in obtaining benefits for a seven percent impairment, employer had not voluntarily paid any permanent partial disability benefits. Thus, claimant was successful on this issue.

[3]As no other aspect of the fee award has been challenged, Judge Mills' findings regarding hourly rates and specific objections are not affected by our decision.