

BRB Nos. 01-0258
and 01-0539

TERRANCE W. O'NEIL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MATSON TERMINALS, INCORPORATED)	DATE ISSUED: <u>Nov. 19, 2001</u>
)	
and)	
)	
SIGNAL MUTUAL INSURANCE COMPANY)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits and the Order Denying Attorney's Fees of Alexander Karst, Administrative Law Judge, United States Department of Labor, and the Order Denying Attorney Fee of Karen Staats, District Director, United States Department of Labor.

Terrance W. O'Neil, Seattle, Washington, *pro se*.

Mary Alice Theiler (Theiler Douglas Drachler & McKee), Seattle, Washington, for claimant.

John P. Hayes (Forsberg & Umlauf, P.S.), Seattle, Washington, for employer/ carrier.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (99-LHC-917) of Administrative Law Judge Alexander Karst, and claimant's attorney appeals the Order Denying Attorney's Fees (99-LHC-917) of Judge Karst and the Order Denying Attorney Fee (14-117778) of District Director Karen Staats, 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).¹ We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, 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 had a long history of shoulder problems, *see* EX 21, prior to the subject injury on October 20, 1994, which occurred when he was knocked backwards into a metal container and slid unconscious to the floor. Claimant returned to his usual job as a vehicle driver working off the bull board² following conservative treatment for his injuries and subsequently underwent several surgeries to repair both of his rotator cuffs.³ Following his second surgery, claimant voluntarily retired on March 22, 1996. EX 11. Employer paid

¹On April 19, 2001, claimant's appeal of the administrative law judge's Decision and Order Denying Benefits, BRB No. 01-0258, and claimant's attorney's appeals of the administrative law judge's Order Denying Attorney's Fees, BRB No. 01-0258S, and the district director's Order Denying Attorney Fee, BRB No. 01-0539, were consolidated for purposes of decision.

²Longshoremen in claimant's local union obtain jobs from five different boards: stevedore, trucker, sling, bull and crane; the bull board is for drivers of all equipment except cranes. HT at 31.

³Surgical repairs were performed on claimant's right and left rotator cuffs on December 7, 1994, March 26, 1996, and July 23, 1996. *See* CXS 7-9.

claimant's medical bills and disability compensation through September 26, 1997. EX 5. Thereafter, claimant sought permanent total disability compensation as a result of his 1994 work accident.⁴

⁴It is undisputed that claimant reached maximum medical improvement on March 22, 1996. Decision and Order at 2.

In his Decision and Order, the administrative law judge determined that claimant failed to establish that he was unable to return to his usual employment duties with employer as a result of his shoulder conditions and, therefore, claimant suffered no compensable disability. Accordingly, the administrative law judge denied the relief sought by claimant.⁵ Thereafter, the administrative law judge and the district director denied claimant's attorney's request for a fee payable by employer.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for ongoing permanent total disability compensation. Employer has not responded to this appeal. Claimant's counsel has appealed the district director's and administrative law judge's denial of her request for an attorney's fee award. Employer responds, urging affirmance of these denials.

We will first address claimant's appeal of the denial of his request for continuing compensation benefits. BRB No. 01-0258. It is claimant's burden to establish the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1986). To establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd sub mem.*, *Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge determined that despite the physical restrictions placed upon claimant, he was fully capable of performing his usual job duties.

In concluding that claimant had not established a *prima facie* case of total disability, the administrative law judge declined to rely upon either the testimony of claimant or claimant's interpretation of the medical opinion of Dr. Matsen, claimant's primary treating physician. Moreover, the administrative law judge found claimant's contention that he was disabled from working despite his wish to return to employment unconvincing in light of his decision to voluntarily retire without trying to return to his usual job and the videotape evidence of record demonstrating claimant's daily activities. *See* Decision and Order at 10. The administrative law judge relied upon the opinions of Drs. Kirby, Matsen and Russo, as supported by the testimony of employer's vocational counselor, Mr. Tomita, that claimant,

⁵As all related medical bills had been paid by employer prior to the hearing before the administrative law judge, claimant sought no further medical care at the formal hearing. *See* Decision and Order at 2.

despite the physical restrictions imposed upon him post-injury, was capable of performing his pre-injury job duties.

Dr. Matsen opined that claimant cannot perform heavy work activities and must avoid pushing, pulling, overhead work or lifting with his right shoulder, or the heavy use of his arms involved in changing tires, throwing tie-downs across loads or putting on tire chains. EX 28; CX 9. In addressing this opinion, the administrative law judge reasoned that, while Dr. Matsen stated that claimant could not return to his former work, that part of Dr. Matsen's opinion was based upon an inaccurate description of claimant's usual employment duties and that Dr. Matsen in reality concluded that claimant could perform his actual job, finding that claimant could drive a vehicle with an automatic transmission. EX 28. Dr. Kirby, an orthopedist, concluded that claimant could resume his usual job activities although he must avoid repeated overhead reaching or lifting. EX 29. Dr. Russo, also an orthopedist, restricted claimant's work to avoid the use of his shoulders in the overhead position; he concluded, however, that claimant could drive a vehicle with power steering and work hydraulic levers. EX 30. Claimant's co-workers testified that the vehicles driven by claimant have power steering, automatic transmissions, and either hydraulic or electrically powered levers and that operation of these vehicles does not require overhead activity or lifting. *See* HT at 113-118. Mr. Tomita, employer's vocational consultant, concluded that none of the restrictions placed on claimant precluded his operating employer's bull board vehicles.⁶

It is well-established that an administrative law judge is not bound to accept the opinion of any particular medical examiner, but rather is entitled to weight the credibility of all witnesses and draw his own inferences from the evidence. *See 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); *Anderson*, 22 BRBS at 22. In the instant case, the administrative law judge rationally compared claimant's physical restrictions with his usual employment requirements as a driver and found that based upon the medical opinions and vocational evidence

⁶The administrative law judge declined to rely upon the contrary opinion of Mr. Shafer, claimant's vocational consultant, who opined that claimant was totally disabled from all work, HT at 271, because he found Mr. Tomita to be more experienced and knowledgeable concerning the specifics of claimant's actual job. *See* Decision and Order at 10.

regarding the normal duties of a driver, claimant was capable of performing the regular duties of a driver. As the administrative law judge's determinations are rational and within his authority as fact finder, we affirm the administrative law judge's conclusion that claimant has failed to meet his burden of proving that he was incapable of performing his former occupational duties as a driver, and his consequent denial of claimant's request for ongoing permanent total disability compensation.

We now address claimant's counsel's appeals of the district director and administrative law judge's decisions denying her a fee paid by employer. BRB Nos. 01-0258S and 01-0539. Subsequent to the issuance of the administrative law judge's decision, claimant's attorney submitted petitions for an attorney's fee to both the administrative law judge and the district director. Before the administrative law judge, claimant's attorney sought a fee of \$46,606.55, representing 155.9 hours of attorney services at \$200 per hour, 99.3 hours of legal assistant services at \$85 per hour, and \$6,986.05 in costs. Before the district director, claimant's counsel sought a fee of \$4,078.23, representing 16.25 hours of attorney services at \$200 per hour, 8.15 hours of paralegal time at \$85 per hour, and costs of \$828.23. Both requests were denied based on the conclusion that claimant had failed to successfully prosecute a claim under the Act.

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; only fees approved under Section 28 may be received by claimant's attorney. Inasmuch as employer initiated the voluntary payment of compensation in this case, the issue of employer's liability for an attorney's fee is governed by Section 28(b) of the Act, 33 U.S.C. §928(b), which generally attaches such liability to employer when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due; in such cases, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that which employer paid or tendered. *See, e.g., Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT)(9th Cir. 1998). When, however, claimant does not obtain greater compensation than that paid or tendered, employer is not liable for claimant's attorney's fee. *See, e.g., Wilkerson v. Ingalls*, 125 F.3d 904, 31 BRBS 150(CRT)(5th Cir. 1997).

Claimant contends that even if he is not entitled to additional compensation presently, employer, despite having paid disability compensation and all medical bills prior to the hearing, contested the issues of causation, nature and extent of disability, and amount of compensation due, if any; additionally, claimant notes that employer also sought reimbursement of all monies previously paid by it. The record reflects, however, that the only issue presented by the parties before the administrative law judge at the time of the hearing was the nature and extent of claimant's disability, if any.⁷ *See* HT at 13. Thereafter, the

⁷Before the administrative law judge, employer also sought relief under Section 8(f),

issue of the nature and extent of claimant's alleged disability was the only one addressed by both parties in their respective post-hearing briefs.

33 U.S.C. §908(f), if further benefits were awarded. Given his disposition of the case, it was not necessary for the administrative law judge to address this issue.

We reject claimant's contentions that employer is liable for his attorney's fee. In the instant case, employer paid claimant all compensation due, and claimant, by virtue of the administrative law judge's decision, did not recover benefits in excess of those which employer voluntarily paid. Thus, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(b). See *Barker v. United States Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT)(1st Cir. 1998). Moreover, the fact that claimant did not lose any benefits and may become entitled to additional benefits at some undetermined time in the future does not provide a basis for present success under Section 28(b). See *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). Claimant's argument for an attorney's fee in this case relies primarily on the contention that he was the prevailing party in the sense that the administrative proceedings did not result in his losing any previously received monies. This argument is without merit, as the Act requires that claimant obtain additional compensation, which he failed to do. See *Barker*, 138 F.3d 431, 32 BRBS 171(CRT); see also *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).⁸ Although claimant has the right to seek modification pursuant to Section 22 of the Act, 33 U.S.C. §922, his entitlement to future benefits is purely speculative. In the event that claimant obtains additional compensation, his attorney may receive a fee for any work necessary to and reasonable for the achievement of that compensation award, including any such work from the present fee requests. As claimant has gained no additional compensation as a result of the proceedings at this time, a result which he concedes, we hold that neither the administrative law judge nor the district director erred in rejecting claimant's counsel's fee requests.

⁸In *National Steel*, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, stated that the purpose of Section 28 of the Act, "is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings in which he or she is represented by counsel." *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Attorney's Fees and the district director's Order Denying Attorney Fee are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge