BRB Nos. 93-0623
and 93-0623A

CHARLES ROBINSON, Deceased LENA MARIE DENSON, Administrator Claimant-Petitioner Cross-Respondent v. LAWRENCE-ALLISON & ASSOCIATES and TRAVELERS INSURANCE COMPANY Employer/Carrier- Respondents Cross-Petitioners	)	DATE ISSUED: DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

James P. Meyer (Martzell & Bickford), New Orleans, Louisiana, for claimant.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and employer appeals the Supplemental Decision and Order (92-LHC-495) of Administrative Law Judge James W. Kerr, Jr., 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. *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 will not be set aside unless shown to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v.*

Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

On May 5, 1972, while working as an inspector for employer, claimant fell while climbing stairs to board a helicopter and broke his left ankle. Claimant's treating physician, Dr. Conn, stated that claimant had a comminuted fracture, left os calcis. Claimant received temporary total disability benefits from May 6, 1972 through June 28, 1976, for a total of $15,150, and scheduled permanent partial disability benefits from June 28, 1976 through March 7, 1978, for a total of $6,160. Claimant reached maximum medical improvement on June 28, 1976, but continued to have trouble with his left ankle and right foot. Claimant never returned to work after the accident and his health continued to deteriorate. Claimant died on July 12, 1985, due to hepatic failure, which was unrelated to his work injuries.

In the Decision and Order awarding benefits, the administrative law judge found claimant entitled to temporary total disability benefits beginning May 5, 1972, permanent partial disability benefits for a 30 percent impairment of the left leg starting June 28, 1976 for 86.4 weeks, and for a 15 percent impairment of the right foot starting June 28, 1976, for 30.75 weeks, all based on an average weekly wage of $204. 33 U.S.C. §908(a), (c)(2), (4).

Claimant appeals, contending that the administrative law judge erred in finding that claimant was not entitled to permanent total disability benefits from March 7, 1978 through the date of death, July 12, 1985. Employer responds, urging affirmance of the award.

In the Supplemental Decision and Order awarding attorney fees, the administrative law judge awarded claimant's counsel a fee of $8,702.66 for 82.75 hours of service at $100 per hour and $427.66 in expenses, payable by employer. Employer appeals, contending that employer is not responsible for claimant's attorney's fees as the permanent total disability claim was unsuccessful and as the additional amount claimant recovered is less than the settlement offer of $3,500 made by employer. Claimant responds, urging affirmance of the fee award. Claimant also requests a fee of $450 for 4.50 hours of service at $100 per hour for work performed before the Board in defense of the fee award.

Claimant contends that the administrative law judge erred in finding that claimant was not permanently and totally disabled and in finding that suitable alternate employment was established. It is undisputed that claimant was unable to perform his usual work. The burden therefore shifted to employer to establish the availability of suitable alternate employment. The United States Court of Appeals for the Fifth Circuit has held that the criteria for establishing suitable alternate employment are: (1) whether considering the employee's age, background, experience and mental and physical capacities, he is capable of performing particular jobs; and (2) whether there are jobs reasonably available in the community within this category of jobs for which claimant is able to compete, and which he could realistically and likely secure. *P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

The administrative law judge found that claimant was physically capable of performing the suitable alternate employment opportunities identified by employer, as claimant's mental

incapacitation arose after and was unrelated to the work accident.[1] Claimant's contention that the administrative law judge erred by failing to consider his psychological condition when determining that employer established suitable alternate employment lacks merits as the uncontested medical evidence indicates that claimant's psychological problems were associated with high ammonia levels and liver problems, were not work-related, and began years after claimant's work accident.[2] Thus, the administrative law judge properly found claimant's psychological problems need not be considered in determining the appropriateness of suitable alternate employment. *See generally Turner*, 661 F.2d at 1041-1043, 14 BRBS at 165.

Claimant next contends that the administrative law judge erred in admitting employer's labor market survey into evidence as claimant was not permitted to cross-examine its author, Joe Walker. Claimant also contends that the survey lacks a proper foundation because Mr. Walker did not meet with claimant and did not list the mental and physical requirements of the jobs identified. Although Mr. Walker did not appear at the formal hearing and was not subject cross-examination, the administrative law judge allowed claimant to submit the rehabilitation report of his expert witness into evidence to counter Mr. Walker's report. The administrative law judge has great discretion in the admission of evidence and is not bound by the formal rules of evidence. 33 U.S.C. §923(a); 20 C.F.R. §702.339; *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 n. 1 (1985); *Brown v. Washington Metropolitan Area Transit Authority*, 16 BRBS 80, 82 (1984), *aff'd*, No. 84-1046 (D.C. Cir. 1984). Claimant in the instant case has not established that the administrative law judge abused his discretion in allowing Mr. Walker's report into evidence. Moreover, contrary to claimant's contention, Mr. Walker's survey took into account claimant's physical restrictions related to his May 1972 accident based on information from Dr. Conn's medical reports and it provided requirements for the jobs listed.[3] *See* Emp. Exh. 35. Furthermore, vocational testing is not required before a labor market survey can be done, there is no requirement that the person performing the survey personally evaluate the worker, and Mr. Walker properly considered claimant's background, work experience and physical limitations, when recommending appropriate jobs. *See Hogan v. Schiavone Terminal Inc.*, 23 BRBS 290 (1990). As claimant has raised no reversible error on the part of the administrative law judge, we affirm the administrative law judge's finding that suitable alternate employment was established. Claimant is therefore limited to a scheduled award. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Dove v. Southwest Marine of San Francisco*, 18 BRBS 139 (1986).

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[1]Of the positions identified, the administrative law judge found that the positions of tool room clerk, motor inspector and collector were within the physical restrictions imposed by Dr. Conn.

[2]Dr. Robertson found claimant could not perform work due to his deteriorating mental and physical condition caused by cirrhosis of the liver and dementia secondary to abnormally high blood ammonia levels. Cl. Exh. 14. Dr. Berthelot found claimant employable physically, but found claimant unemployable from a psychological standpoint. Cl. Exh. 33.

[3]Dr. Conn found claimant had a 30 percent disability of the left leg, an almost 50 percent disability of the left ankle, a 15 percent disability of the right foot and he concluded that claimant could not do any work requiring climbing of ladders, standing, and walking all day.

In its appeal of the fee award, employer contends that claimant's claim for permanent total disability benefits was unsuccessful, and that the permanent partial disability award for claimant's right foot was issued *sua sponte* by the administrative law judge. Employer also states that claimant's recovery was less than it paid and tendered prior to the hearing. Employer therefore contends that it cannot be held liable for claimant's attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), and the holding in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992).

Section 28(b) provides that if employer pays or tenders benefits to claimant and claimant thereafter succeeds in obtaining greater compensation than that paid or tendered, employer is liable for claimant's attorney's fee. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In *Brooks*, the D.C. Circuit held that the holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), applies to attorney's fee awards under the Act.[4] In *Brooks*, the claimant was unsuccessful in his claim for total disability benefits, but received a scheduled permanent partial disability award issued by the administrative law judge *sua sponte*. The court held that the unsuccessful claim for total disability was unrelated to and severable from the successful claim for partial disability, as the successful claim was raised by the administrative law judge himself. The court thus held that under *Hensley*, claimant's counsel was not entitled to a fee for work performed on the claim for total disability, and it remanded the case for consideration of a fee for work performed solely on the permanent partial disability claim, which the court stated, could be negligible. *Brooks*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *see also Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 25 (1993).

Employer, in this case, paid temporary total disability benefits from May 6, 1972 to June 28, 1976, at the pre-1972 Amendment maximum amount of $70 per week, for a total of $15,120, and permanent partial disability benefits at $70 per week for a 30 percent left leg impairment, for a total of $6,160. Thus, employer paid claimant a total of $21,280, and also offered an additional settlement of $3,500. Pursuant to the administrative law judge's award claimant received temporary total disability benefits at two-thirds of his $204 average weekly wage, which is $136, due to the operation of the November 1972 Amendments to Section 6, 33 U.S.C. §906 (1982) (amended 1984), and he also received scheduled permanent partial disability benefits for a 30 percent left leg impairment at two-thirds of $204. The administrative law judge *sua sponte* awarded claimant benefits for a 15 percent right foot impairment, at two-thirds of $204, for a total of an additional $4,182. Although claimant received greater benefits that employer voluntarily paid or tendered under Section 28(b),[5] it is not clear that the amount of the fee awarded is justified in light of the

[4]The two-step *Hensley* analysis is: (1) did the claimant fail to prevail on claims that were unrelated to the claims on which he succeeded?; and (2) did the claimant achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

[5]Claimant also succeeded in establishing that he was not a member of a crew excluded from coverage under the Longshore Act, and in establishing that the claim was not time-barred.

limited degree of claimant's success and whether the success was due to counsel's efforts. Thus, as the instant case is similar to *Brooks*, we vacate the administrative law judge's award of an attorney's fee, and we remand the case to the administrative law judge to reconsider the amount of the fee in light of *Hensley* and *Brooks*.[6]

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. The Supplemental Decision and Order awarding attorney's fees is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[6]Claimant's fee application requesting $450 for 4.5 hours at $100 per hour for work performed before the Board in response to the cross-appeal is thus denied as premature because the case is being remanded for reconsideration of this issue.