BRB Nos. 96-1058
and 96-1058A

RAYMOND HARMON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
SEA-LAND SERVICE, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Supplemental Decision and Order Denying Application for Attorney Fees and Costs, and the Order Denying Employer's Motion for Reconsideration and Motion for Extension of Time of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

W. Robins Brice and Marcus R. Tucker (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and employer cross-appeals the Supplemental Decision and Order Denying Application for Attorney Fees and Costs and the Order Denying Employer's Motion for Reconsideration and Motion for Extension of Time (95-LHC-1919) of Administrative Law Judge Samuel J. Smith 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). The Board held oral argument in this case in Houston, Texas, on March 5, 1997.

As of December 1991 claimant had worked for employer for 30 years, most recently as a crane operator. During the course of his employment on February 5, 1992, claimant slipped and fell while walking on a vessel. He injured his back, but continued to work until February 21, 1992, when the pain became unbearable and he had to be taken to the emergency room. He was first examined by Dr. Finkel, his treating physician, on February 27, 1992. Dr. Finkel initially diagnosed a strained back, but later determined there was an annulus tear at L4-5. On November 2, 1992, claimant underwent a decompression laminectomy, and hardware was inserted to help his spine. Perpetual pain and stiffness resulted in a second surgery to remove the hardware and reinforce the fusion on February 2, 1994. Dr. Wilde, an independent examiner, determined that claimant's condition reached maximum medical improvement on August 24, 1994.

While claimant was undergoing treatment for his back condition, he filed a claim for social security disability benefits, and he began receiving those benefits on August 1, 1992. He filed a claim for benefits under the Act on August 25, 1992. On June 23, 1993, claimant applied for longevity retirement from his employment, and on July 1, 1993, his retirement became effective.

The administrative law judge determined that claimant is entitled to temporary total disability benefits from February 21, 1992, through June 30, 1993. In terminating benefits on this date, the administrative law judge considered claimant's retirement plans in calculating his future loss of wage-earning capacity. He determined that the evidence regarding claimant's motivation for retiring is in equipoise and stated he could not determine whether claimant's retirement was voluntary or "involuntary," that is, due to the work injury. Thus, he found that claimant failed to carry his burden of establishing he retired due to his work injury by a preponderance of the evidence, he concluded that claimant was not disabled after June 30, 1993, and he denied disability benefits after that date.[1] Decision and Order at 12-17. "For the sole purpose of avoiding unnecessary delay[,]" in the event his retirement findings are overturned, the administrative law judge alternatively held that claimant was temporarily totally disabled until August 23, 1994, when his condition reached maximum medical improvement. From August 24, 1994, until March 5, 1995, when employer established the availability of suitable alternate employment, claimant would be entitled to permanent total disability benefits and, thereafter, he would be entitled to permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), based on a residual wage-earning capacity of $150 per week. Decision and

[1]The administrative law judge held employer liable for reasonable medical benefits resulting from the February 5, 1992, injury, and, pursuant to an agreement between the parties, for a one-year health club membership, renewable if deemed necessary by claimant's physician. He also granted employer a credit for benefits previously paid. Decision and Order at 21-22.

Order at 19-21. Claimant appeals the administrative law judge's decision denying benefits as of the date of his retirement, and employer responds, urging affirmance.[2] BRB No. 96-1058.

The administrative law judge then granted claimant's counsel 30 days to apply for an attorney's fee. Decision and Order at 17. Counsel filed a fee petition for 52.75 hours of services at an hourly rate of $250, plus 15.5 hours of legal assistant services at a rate of $90 per hour, plus $2,004.16 in costs. The administrative law judge denied counsel a fee and expenses because he failed to obtain additional benefits for claimant. Supp. Decision and Order at 2. In the event his findings regarding claimant's retirement and disability thereafter were overturned on appeal and his alternate findings were enforced, he issued alternate fee findings, noting that employer had not filed objections "within the deadline." *Id.* The administrative law judge stated that, if claimant is awarded benefits on appeal, then claimant's counsel is entitled to a fee of $10,550, representing 52.75 hours at a rate of $200 per hour, plus $1,162.50, representing 15.5 hours at a rate of $75 per hour, plus $2,004.16 in costs, for a total award of $13,716.66.

Employer moved for reconsideration of the administrative law judge's alternate fee findings, seeking to have the administrative law judge consider its objections to the fee petition.[3] The administrative law judge denied the motion for reconsideration based on the Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18. Specifically, 29 C.F.R. §18.6(a), (b) allows a party 10 days in which to respond to a motion or an application for an order, and 29 C.F.R. §18.4(c) allows a party an additional five days if the motion was served by mail. The administrative law judge stated that he granted employer 10 days in which to respond, plus five days for service of the petition by mail and five days for filing the objections by mail, for a total of 20 days, making the response due on May 20, 1996. Order Denying Recon. at 2. Because the administrative law judge found that employer's objections were not received until May 28 and employer had no valid justification for the delay, he denied employer's

[2]The administrative law judge's alternate findings have not been challenged on appeal.

[3]Claimant's counsel filed an application for a fee with the administrative law judge on May 3, 1996. The administrative law judge issued his Supplemental Decision and Order on May 23, 1996, and he received employer's objections to the fee petition dated May 23, 1996, on May 28, 1996.

motion. Employer cross-appeals the administrative law judge's alternate fee findings. Claimant has not responded to the cross-appeal. BRB No. 96-1058A.

Claimant contends the administrative law judge erred in determining that his retirement was voluntary and that it affected his disability status. Claimant argues it is uncontroverted he cannot return to his usual longshore work, and he disputes the "circumstantial evidence" relied upon by the administrative law judge. Consequently, claimant asks the Board to reverse the administrative law judge's finding that his retirement is voluntary and to order entry of the alternate findings. Employer responds, urging affirmance. Employer avers the administrative law judge did not explicitly find that claimant's retirement was voluntary, but merely stated that the evidence is in equipoise; therefore, claimant failed to persuade the administrative law judge otherwise, as is required by the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

The administrative law judge determined that claimant is a credible witness, except with regard to his motive for retiring. In this respect, the administrative law judge questioned, but did not discredit, claimant's testimony. Instead, he relied on four factors to conclude that the evidence regarding claimant's motive for retiring is in equipoise. First, the administrative law judge found there is no evidence to support claimant's testimony that Dr. Finkel told him he would not be able to return to work prior to his retirement. Next, the administrative law judge stated that if claimant really wanted to return to work, he would have waited until his condition reached maximum medical improvement before he made the decision to retire. Third, the administrative law judge considered claimant's decision not to seek work indicative of his decision to completely withdraw from the workforce, and finally, he believed claimant's failure to answer questions on the retirement application concerning disability indicated a desire to retire solely because of his age. From these factors, the administrative law judge drew the conclusion that a voluntary retirement was equally as plausible as a retirement forced by claimant's work injury. In addition, the definitions of

"disability,"[4] and "loss of wage-earning capacity"[5] led the administrative law judge to conclude that claimant was no longer disabled under the Act once he retired from the workforce. Decision and Order at 11-14. The administrative law judge reasoned that the Act requires consideration of forward-looking factors to determine a claimant's loss of wage-earning capacity. *See, e.g., Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). The administrative law judge also considered the Board's decision in *Klubnikin v. Crescent Wharf & Warehouse*, 16 BRBS 182, 187 (1984), wherein the Board stated that a claimant's age and retirement plans are not relevant to his average weekly wage but would be relevant to his post-injury

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[4]Section 2(10), 33 U.S.C. §902(10), states:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined [by the American Medical Association *Guides to the Evaluation of Permanent Impairment* in the case of a voluntary retiree].

[5]Section 8(h), 33 U.S.C. §908(h) (1988) (emphasis added), states:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the [administrative law judge] may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case *which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.*

wage-earning capacity, as authority for his position. For the reasons that follow, we reverse the administrative law judge's denial of post-retirement compensation, and we hold that his alternate findings shall be enforced.

In a traumatic injury case, a claimant need only establish the existence of a harm and of an incident at work which could have caused that harm to fulfill his burden of establishing a *prima facie* case of causation. 33 U.S.C. §920(a); *U.S. Industries v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982)*; Darnell v. Bell Helicopter International, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT) (8th Cir. 1984). The claimant also has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, he must show that he can no longer perform his usual work because of his work-related injury. To limit the extent of a claimant's disability, an employer must then present evidence of alternate employment the claimant can perform given his physical condition and other factors. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addition to the above burden of proof, the administrative law judge placed an additional burden on claimant by requiring him to prove by a preponderance of the evidence that he was forced to retire solely because of his work-related disability.

Under the Act as amended in 1984, "retirement" is defined as the voluntary withdrawal of an individual from the work force with no realistic expectation of return. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Johnson v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 160 (1989); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); 20 C.F.R. §702.601(c). The determination of whether retirement is voluntary or involuntary is based on whether a work-related condition forced the claimant to leave the workforce. If his departure is due to considerations other than the work injury, his retirement is voluntary. *Id.*; *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986). If a claimant voluntarily retires from his employment, and then is impaired by an occupational disease, his recovery of disability compensation is limited to an award for permanent partial disability based on the extent of his impairment as measured by the AMA *Guides to the Evaluation of Permanent Impairment.* If a claimant's retirement is involuntary, the post-retirement provisions of Sections 2(10), 8(c)(23), and 10(d)(1), (2) do not apply, and the claimant is entitled to an award based on his loss of wage-earning capacity. 33 U.S.C. §§902(10), 908(c)(23), 10(d)(1), (2) (1988); *Morin*, 28 BRBS at 208; *Smith*, 22 BRBS at 49; *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987); *MacDonald*, 18 BRBS at 184.

Although the administrative law judge considered claimant's retirement a factor in determining whether he sustained a continuing disability, the question of whether a claimant voluntarily or involuntarily retired from his employment previously has only come into question in occupational disease cases. *See, e.g., Morin*, 28 BRBS at 205; *Smith*, 22 BRBS at 46; *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1987). In pre-1984 Amendment cases, retired employees who became aware of an occupational disease post-retirement were not entitled to disability benefits. *Aduddell v. Owens-Corning Fiberglas*, 16

BRBS 131 (1984). *Aduddell* was specifically overruled by the 1984 Amendments, and the Act was broadened to encompass voluntary retirees who later become aware of the existence of an occupational disease. *See MacDonald*, 18 BRBS at 184. Consequently, these voluntary retirees could obtain disability benefits for a work-related impairment that was latent at the time of their retirement. The employers in such cases, therefore, are potentially liable for both longevity retirement benefits and workers' compensation benefits.[6]

[6]The entitlement of an employee to the former benefits, of course, is dependent upon variables outside the scope of the Act. We merely note that if the criteria are met by an employee, his employer could be held liable for both types of benefits.

In the case at bar, there is no question but that claimant sustained a traumatic injury at work prior to his retirement. Therefore, this is not an occupational disease case, and the issues of claimant's retirement type and its affect on his disability status should not have arisen. The sole relevant inquiry in this case with regard to claimant's burden of proof on disability is whether claimant's work injury precludes his return to his usual work. The parties agreed at the hearing that claimant's condition reached maximum medical improvement as of August 24, 1994, and that he cannot return to his usual work.[7] Tr. at 7-8; *see also* Emp. Ex. 3. The record contains medical evidence supporting these stipulations. Cl. Ex. 5; Emp. Ex. 3. Thus, he has satisfied his burdens under the Act in accordance with *Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43 (CRT); *see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996), and is entitled to disability benefits. Although employer argues it should not have to pay workers' compensation "on top of" retirement benefits, its assertion is not compelling, as any given employer may already possess this double liability in post-retirement occupational disease cases. *See* n.6, *supra*. Claimant's entitlement to disability benefits is not equivalent to his entitlement to longevity retirement benefits: he became entitled to his pension when he met the age and years worked criteria established by employer, but his entitlement to disability benefits vested when he was injured and established a work-related disability which impaired his earning abilities.[8] *See generally Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992).

As there is no provision in the Act requiring a claimant who sustained a traumatic injury at work to establish that his retirement from his employment was instigated solely by

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[7]Claimant states he opted to apply for age retirement, and he argues this should not be considered evidence of a "voluntary" retirement which, in turn, should not be considered evidence of the resolution of his disability status. Although claimant did not wait until his condition reached maximum medical improvement before he retired, when maximum medical improvement was reached, the doctors ultimately concluded claimant could not return to his usual work.

[8]Although the Board's decision in *Klubnikin*, 16 BRBS at 187, states that a claimant's retirement plans would be relevant to a determination of his future wage-earning capacity, it does not explain how such information would be factored into the determination.

his disability when the credited evidence establishes he is unable to return to his usual work due to the work injury, we hold that claimant has satisfied the burdens imposed by the Act and does not bear the additional burden of showing that he retired involuntarily. Therefore, we reverse the administrative law judge's denial of post-retirement benefits, and we award benefits pursuant to his alternate findings, which have not been challenged on appeal. Accordingly, claimant is entitled to temporary total disability benefits from February 21, 1992, to August 23, 1994, permanent total disability benefits from August 24, 1994, until March 5, 1995, and permanent partial disability benefits thereafter in accordance with the administrative law judge's findings and conclusions on pages 18 through 21 of his Decision and Order.

Because we have implemented the administrative law judge's alternate disability findings, we must address employer's cross-appeal of the alternate fee award. Employer contends the administrative law judge denied it due process by issuing a fee award before receiving and considering its objections to the fee petition and by failing to allow it a reasonable time in which to respond to claimant's fee petition. The administrative law judge allowed claimant 30 days to submit his fee petition; however, he did not set a time limit for employer's response. *See* Decision and Order at 17-18. Employer states it presumed it was also allotted 30 days in which to respond. In his Order denying employer's motion for reconsideration, the administrative law judge explained why employer had 20 days in which to respond to the fee petition. Order Denying Recon. at 2.

Due process requires that the fee request be served on the employer and that the employer be given a reasonable time to respond. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Ortega v. Bethlehem Steel Corp.*, 7 BRBS 639 (1978); *Green v. Atlantic Container Lines Ltd.*, 2 BRBS 385 (1975). The Act and the regulations do not specify a time period for filing either a fee petition or objections thereto. 33 U.S.C. §928; 20 C.F.R. §702.132. The regulations at 29 C.F.R. Part 18 apply to proceedings before the administrative law judge unless they are inconsistent with "a rule of special application as provided by statute, executive order, or regulation." 29 C.F.R. §18.1(a). The regulations at 29 C.F.R. §§18.4(c), 18.6(a), (b), as discussed by the administrative law judge, support his finding that employer did not file a timely reply to claimant's motion for an attorney's fee. As employer has not established that the administrative law judge abused his discretion, we affirm the administrative law judge's alternate fee award in his Supplemental Decision and Order.

Accordingly, the administrative law judge's initial findings in his Decision and Order are reversed, the alternate findings therein are affirmed, and benefits are awarded based on the administrative law judge's alternate findings. The Supplemental Decision and Order and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief

Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge