BRB No. 03-0144

EARLY WREN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LETOURNEAU, INCORPORATED	)	DATE ISSUED: 09/30/2003
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Johnnie McDaniels, Jackson, Mississippi, for claimant.

W. Thomas McCraney III (McCraney, Nosef, Montagnet & Sandford, PLLC), Jackson, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, the Decision on Employer/Carrier's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees (01-LHC-3097) of Administrative Law Judge C. Richard Avery 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 findings of fact and conclusions of law of the administrative law judge which 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 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).

Claimant, while working for employer on September 9, 1999, as a structural welder, sustained a back injury. Claimant's family physician, Dr. Giffin, diagnosed back spasms and a lumbar sprain, prescribed pain medication and physical therapy, and referred claimant to a neurosurgeon, Dr. Smith. In October 1999, Dr. Smith diagnosed a small disc bulge at L4-5, which he felt belied claimant's significant complaints of back pain. In addition, Dr. Smith referred claimant to a work hardening program and for a functional capacity evaluation (FCE). He further concluded that claimant was not a candidate for surgery, that claimant reached maximum medical improvement with regard to his back injury as of April 24, 2000, and that claimant was able to return to work at a medium level as of June 7, 2000, a position which he reiterated in his report dated July 24, 2000.

Meanwhile, claimant returned to work with employer on two separate occasions. In September 1999, he worked in a light duty position until June 20, 2000, when, following Dr. Smith's recommendation, employer attempted to transition claimant to medium work doing overhead welding. Claimant stated that he stopped this work because it caused him intense back pain. He then returned to work on July 27, 2000, in a different modified position as a flat welder which employer's Human Resource Director, Mr. Fant, stated was within claimant's restrictions. After thirty minutes of work, claimant determined that he could not continue because of his back pain. Employer subsequently authorized a labor market survey which identified a number of jobs as of April 8, 2002, that claimant should be able to perform given his post-injury condition. Claimant, however, believed that he could not do any of these jobs because of his continued back pain.

In his decision, the administrative law judge initially determined that claimant cannot perform his usual work as a structural welder. He then found that claimant could not perform the post-injury modified positions with employer, but that employer otherwise established the availability of suitable alternate employment via the labor market survey dated April 8, 2002. Accordingly, the administrative law judge awarded claimant permanent total disability benefits from August 1, 2000, through April 8, 2002, followed by an award of permanent partial disability benefits. The administrative law judge also awarded medical benefits related to claimant's work-related back injury. The administrative law judge summarily denied employer's motion for reconsideration.

Claimant's counsel subsequently filed a petition for an attorney's fee totaling $23,610, representing 143.65 hours of attorney work at an hourly rate of $150, and 27.50 hours of paralegal work at an hourly rate of $75, plus $929.51 in expenses. In his supplemental decision, the administrative law judge awarded an attorney's fee of $14,685, representing

97.9 hours at $150 per hour, plus expenses totaling $437.60.

On appeal, employer challenges the administrative law judge's finding that claimant is not capable of performing the position as a flat welder that employer provided claimant at its facility. Employer also challenges the administrative law judge's award of an attorney's fee.

Employer contends that the administrative law judge erred in finding that the flat welding position in its fabrication shop, made available to claimant as of July 24, 2000, does not constitute suitable alternate employment. Employer asserts that the administrative law judge erroneously relied on claimant's inconsistent and unsubstantiated statements regarding his inability to perform this work, that he failed to consider other relevant evidence of record, most notably the opinions of Drs. Giffin and Smith, and that he did not undertake a comparison between claimant's restrictions and the requirements of the flat welding position.

Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *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). A job in the employer=s facility within the claimant=s restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001). The choice between reasonable inferences as to claimant's job capabilities is left to the administrative law judge and may not be disturbed if it supported by substantial evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

In his decision, the administrative law judge determined that claimant was incapable of performing the welding job based on claimant's testimony that it is too strenuous on his back. Decision and Order at 11; Hearing Transcript (HT) at 57-59. The administrative law judge found that the fact that claimant has back pain is not challenged by any physician, and that Dr. Smith noted in his deposition that claimant's physical limitations had increased somewhat since he last saw claimant in July 2000.[1] Moreover, the administrative law judge

[1]In contrast to employer's position, neither Dr. Giffen nor Dr. Smith explicitly approved the job description for the modified welding position at employer's facility. While Dr. Giffen stated that the modified welding position is a medium duty position, EX 8, Dep. at 51, he did not address claimant's actual ability to perform that work. EX 8, Dep. at 31-32, 33-34, 36-37, 46, and 51. In turn, Dr. Smith, at most, gave conditional approval of the modified flat welding position because he opined that claimant could perform this work so

relied on claimant's unsuccessful attempt to return to work in this modified position. Specifically, claimant stated that the flat welding position required him to weld in a kneeling position which significantly aggravated his back pain, and in turn, made it so he "couldn't get the weld like it was supposed to be." HT at 57-59. Consequently, the administrative law judge determined that "to expect claimant to drag lead lines, move material and get in various positions, whether working at heights or on level surfaces, does not seem a reasonable expectation for a man with chronic back pain." Decision and Order at 12. As the administrative law judge's decision to credit claimant's testimony that he was unable to perform the modified flat welding position due to back pain is within his discretionary authority, and this testimony provides substantial evidence to support his determination that the job was not suitable for claimant, the finding must be affirmed. *See Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT) (court held that the administrative law judge rationally relied on the claimant's credible complaints of pain, in spite of expert testimony to the contrary, to find that he is unable to perform any post-injury work); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). As he credited substantial evidence, the fact that the administrative law judge did not explicitly discuss contrary evidence in the record does not require remand in this case. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). Consequently, as employer did not establish the availability of suitable alternate employment until April 8, 2002, the administrative law judge's award of permanent total disability benefits from August 1, 2000, until April 8, 2002, is affirmed. *See generally Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991).

With regard to the fee award, employer asserts, as it did in its objections before the administrative law judge, that the hourly rates are excessive, and that certain entries are objectionable. Employer has not shown on appeal that the awarded hourly rates are unreasonable or excessive. *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff=d on recon. en banc*, 32 BRBS 251 (1998). Similarly, we affirm the administrative law judge's rejection of employer's objections that the time spent on legal research and review of documents, as well as time claimed for meeting with claimant are all excessive, since he concluded, within his discretion, that those hours were not unreasonable and since employer has not provided any support for its objections. Moreover, we reject employer's contention that the administrative law judge erred in awarding counsel time spent preparing the fee petition, as it is well-settled that this time is compensable. *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). The administrative law judge's award of an attorney's fee of $14,685, representing 97.9 hours at $150 per hour, plus expenses totaling $437.60, is

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long as he "could change positions when needed." EX 29, Dep. at 19.

therefore affirmed.

Accordingly, the administrative law judge's Decision and Order, Supplemental Decision, and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge