BRB Nos. 89-425
89-425A

GUY V. McMILLAN Claimant-Petitioner Cross-Respondent v. INGALLS SHIPBUILDING, INCORPORATED and AETNA CASUALTY AND SURETY COMPANY Employer/Carrier-Respondents Cross-Petitioners	)	DATE ISSUED: _ DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

George W. Murphy (Parlin & Murphy), Ocean Springs, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and employer appeals the Supplemental Decision and Order-Awarding Attorney's Fees (87-LHC-2037) of Administrative Law Judge C. Richard Avery awarding benefits and an attorney's fee 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).

Claimant sustained an injury to his right wrist on October 28, 1983, in the course of his employment as a chipper for employer when the chiseler claimant was using to clean snipes twisted and caught his hand. On November 1, 1983, claimant was treated for complaints of pain and swelling in his right wrist and hand by Dr. Harold Hawkins, a board-certified orthopedic surgeon. Dr. Hawkins performed a closed reduction and pinning of claimant's wrist on November 2, 1992 and applied a cast for ligamentous injuries of the right wrist. When post-surgical x-rays revealed that the ligaments had not healed properly and the bones had misaligned, Dr. Hawkins performed a ligamentous reconstruction on March 5, 1984.

Employer voluntarily paid benefits for temporary total disability from November 1, 1983 to August 30, 1984; from September 5, 1984 to September 9, 1984; and from September 17, 1984 to October 19, 1984, at the rate of $253.01 per week. Employer also paid claimant benefits for a 32 percent permanent impairment to the right arm pursuant to Section 8(c)(1), 33 U.S.C. §908(c)(1). The parties stipulated that claimant reached maximum medical improvement on September 14, 1984. The administrative law judge found that employer established the availability of suitable alternate employment, and that claimant sustained a 25 percent permanent impairment to the right hand and is therefore entitled to benefits pursuant to the schedule set forth in Sections 8(c)(3), (19) of the Act, 33 U.S.C. §908(c)(3), (19). In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of $1,293.75, plus expenses, to be paid by employer.

On appeal, claimant contends that the administrative law judge erred in concluding that employer established the availability of suitable alternate employment. Next, claimant contends that the administrative law judge committed reversible error in not considering that the Social Security Administration found claimant to be totally disabled using more stringent guidelines. Finally, claimant argues that the administrative law judge incorrectly credited employer's overpayment of disability compensation against claimant's entitlement to future medical benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. In its appeal, employer contends that the administrative law judge erred in holding employer liable for claimant's attorney's fee as claimant received no additional compensation by pursuing his claim. Employer argues in the alternative that if employer is responsible for any portion of claimant's attorney's fee, it should be far less than the amount the administrative law judge awarded. Claimant does not respond to this appeal.

Initially, we reject claimant's contention that the administrative law judge erred in finding that employer

established the availability of suitable alternate employment. Once claimant, as in the instant case, proves that he is unable to return to his usual work, he has established a prima facie case of total disability. See P&M Crane Co. v. Hayes, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56, 59 (1985). The burden therefore shifts to employer to demonstrate the existence of realistically available job opportunities within the geographical area where claimant resides, which he is capable of performing given his age, education, work experience and physical restrictions, and which he could secure if he diligently tried. See New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1040, 14 BRBS 156, 164-165 (5th Cir. 1981); Wilson v. Dravo Corp., 22 BRBS 463 (1989).

Based on the evidence of record, the administrative law judge concluded that employer established the availability of suitable alternate employment. In so determining, the administrative law judge rationally credited the opinion of employer's expert, Mr. Day, who testified that within the category of jobs which claimant was reasonably capable of performing there were jobs available in the community for which claimant was able to compete[1] and which he could realistically and likely secure, particularly within the security industry.[2] The administrative law judge, within his discretion to make credibility determinations, rationally rejected the conflicting opinion of Mr. Christiansen, claimant's expert in rehabilitation, finding that Mr. Day's knowledge of claimant's medical condition was more extensive and accurate than Mr. Christiansen's, who relied on claimant in obtaining most of his medical background.[3] See generally Calbeck v. Strachan Shipping

[1]The administrative law judge noted that claimant's refusal to accept any job paying less than $8.00 per hour imposed an artificial income barrier. Similarly, the administrative law judge noted further that an inference can be drawn that claimant is not highly motivated to seek further employment based on his testimony that he received $133.00 per month disability for an ulcer condition, that he received monthly disability benefits of $1,004.00 from Social Security, that he had tried only on two occasions to obtain lighter work from employer since being released by Dr. Hawkins in September 1984, and that he had not filled out applications anywhere else.

[2]The jobs identified by Mr. Day were: (1) a security guard at Singing River Mall, which paid $3.35 per hour; (2) a station guard at Gulfport Authority for $4.50 per hour; (3) a security guard at Edgewater Mall at $4.00 per hour; and (4) a security guard at the McDermott Industrial site at $4.00 per hour on a part-time basis, with the possibility of full-time employment.

[3]The administrative law judge also found from Mr. Christiansen's testimony that he had changed his conclusion in the

Co., 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963). Regarding the basis for Mr. Day's opinion, the administrative law judge noted that Mr. Day was provided with records by Dr. Hawkins, claimant's treating physician and that Mr. Day had reviewed the testing performed by Mr. Tingle, the rehabilitation specialist to whom claimant was referred by the Department of Labor. Moreover, the administrative law judge credited the opinion of Dr. Hawkins that claimant could return to any type of employment except for heavy labor requiring the use of his right wrist. The administrative law judge further credited Dr. Hawkins' opinion that claimant should be able to work as a service station attendant or a security guard or perform light stock work. Substantial evidence therefore supports the administrative law judge's finding that employer has established the availability of suitable alternate employment, and that claimant thus is only partially disabled. See generally McCollough v. Marathon Letourneau Co., 22 BRBS 359 (1989).

Next, contrary to claimant's contention, the administrative law judge did not err in finding that claimant was partially disabled even though the Social Security Administration found claimant totally disabled. The Board has held that a finding by the Social Security Administration, while relevant, is not binding on the administrative law judge. See Jones v. Midwest Machinery Movers, 15 BRBS 70 (1982) (Ramsey, C.J., dissenting on other grounds); Hunigman v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 141 (1978).

Claimant correctly argues, however, that the administrative law judge erred in crediting employer's overpayment of compensation against claimant's future medical benefits. Section 14(j) of the Act, 33 U.S.C. §914(j), provides that: "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." Compensation is defined pursuant to Section 2(12) of the Act, 33 U.S.C. §902(12), as "the money allowance payable to an employee...as provided for in this chapter." The Board has held that since medical expenses are not paid in installments and are not within the definition of compensation under Section 2(12), Section 14(j) does not afford employer the right to reduce its liability for medical benefits under the administrative law judge's award by the amount of its

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June 30, 1987 report which was submitted into evidence, stating that based on claimant's education, testing, skills, and health, he did not feel that claimant was employable or that retraining was possible. The administrative law judge found that the May 20, 1987 report, also prepared by Mr. Christiansen, was identical except for the conclusion that claimant could perform minimum wage jobs.

voluntary disability payments. Aurelio v. Louisiana Stevedores, Inc., 22 BRBS 418 (1989), aff'd mem., No. 90-4135 (5th Cir. March 5, 1991). We therefore reverse the administrative law judge's determination that employer is entitled to credit its overpayment of disability benefits against claimant's future medical expenses.

In its appeal, employer contends that the administrative law judge erred in holding it liable for claimant's attorney's fee as claimant received no additional compensation as a result of pursuing his claim. We agree that the administrative law judge's finding that "the permanent nature of the award would have to be viewed as a measure of success on the part of claimant" cannot support the award of an attorney's fee. Employer made full and final payment for a 32 percent permanent partial impairment of the arm on September 12, 1986, in addition to its voluntary temporary total disability payments, almost a full year before the claim was referred to the Office of Administrative Law Judges. After a hearing on the merits, the administrative law judge awarded claimant benefits for a 25 percent permanent partial disability to the hand. Thus, as employer voluntarily paid claimant for a greater permanent impairment than that awarded by the administrative law judge, employer is not liable for an attorney's fee on this basis. Armor v. Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119 (1986); 33 U.S.C. §928(b). We therefore vacate the administrative law judge's finding that employer is liable for claimant's attorney's fee.

We note, however, that the administrative law judge awarded claimant future medical benefits which could support the award of an attorney's fee payable by employer. See generally Geisler v. Continental Grain Co., 20 BRBS 35 (1987). The parties stipulated that all medical benefits had been paid up to the date of the hearing, but it is not clear whether the issue of claimant's entitlement to future medical benefits was a contested issue on which claimant prevailed. Thus, we remand the case for the administrative law judge to consider whether employer may be liable for claimant's attorney's fee on this basis. If he determines that employer is not liable for the fee, he should consider whether claimant is liable for the fee in light of 33 U.S.C. §928(c) and 20 C.F.R. §702.132(a).

Accordingly, the administrative law judge's crediting of employer's overpayment of compensation against claimant's future medical benefits is reversed. The Decision and Order of the administrative law judge awarding permanent partial disability

benefits is affirmed in all other respects. The Supplemental Decision and Order-Awarding Attorney's Fees is vacated, and the case is remanded for consideration of the attorney's fee award consistent with this decision.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge