BRB No. 92-718

JIMMY RAY NATIONS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LIBERTY SERVICES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits, Order Denying Motion for Reconsideration of Benefits, and Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

C. Joseph Murray (Murray Law Firm), New Orleans, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey, Stafford, Cellini & Lang), New Orleans, Louisiana, for employer and CIGNA Insurance Company.

Robert E. Peyton and Daniel A. Rees (Christovich & Kearney), New Orleans, Louisiana, for employer and Liberty Mutual Insurance Company.

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

PER CURIAM:

CIGNA Insurance Companies (CIGNA) appeals the Decision and Order - Awarding Benefits, Order Denying Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney Fees (90-LHC-489, 90-LHC-490) of Administrative Law Judge Quentin P. McColgin 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 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 injured his back on February 16, 1988, while working for employer as a pumper gauger helper. Claimant returned to work on March 26, 1988, allegedly reinjured his back on May 2, 1988, while moving oil drums, and has not worked since May 3, 1988. Liberty Mutual Insurance Company was on the risk on February 16, 1988, and CIGNA was on the risk on May 2, 1988.

The administrative law judge found that claimant is unable to work due to myofascial pain syndrome and a psychological condition, severe depression, based on the medical opinions of Dr. Hensarling and Dr. Vise which he credited over the opinions of Dr. Zelman, Dr. Steiner, and Dr. Roniger that claimant has no disabling physical or mental condition. The administrative law judge also found that claimant has not yet reached maximum medical improvement based on Dr. Hensarling's opinion. The administrative law judge found that claimant suffered an injury at work on May 2, 1988, and that claimant's myofascial pain syndrome and severe depression resulted from this incident based on Dr. Caden's opinion that claimant had completely recovered from the February 1988 injury prior to his return to work in March 1988. The administrative law judge therefore found that the May 2, 1988, injury constituted a new injury or an aggravation of the February 1988 injury. Since CIGNA was on the risk on May 2, 1988, the administrative law judge found that CIGNA is the responsible carrier. The administrative law judge therefore ordered CIGNA to pay temporary total disability benefits to claimant commencing May 3, 1988, and continuing. CIGNA filed a motion for reconsideration which the administrative law judge denied.

On appeal, CIGNA contends that the administrative law judge erred in finding that claimant has myofascial pain syndrome and suffers from depression, and erred in finding that claimant is disabled from these conditions. Further, CIGNA contends that even if claimant is disabled, he is only partially so, as it has established the availability of suitable alternate employment. Moreover, assuming claimant is disabled, CIGNA contends that claimant's disability resulted from the natural progression of the February 1988 injury, and that therefore Liberty Mutual is the responsible carrier. Claimant and Liberty Mutual respond to this appeal, urging affirmance of the administrative law judge's decision.

Initially, CIGNA contends that in finding that claimant has myofascial pain syndrome and a psychological condition and is disabled thereby, the administrative law judge erred in relying on the opinions of Drs. Hensarling and Vise instead of on the opinions of Drs. Caden, Steiner and Zelman. CIGNA cites Drs. Caden's testimony that myofascial pain syndrome is a diagnosis that cannot be substantiated, Dr. Steiner's testimony that myofascial pain syndrome is a general label for subjective complaints, and Dr. Zelman's testimony that Drs. Hensarling's and Vise's diagnosis is inaccurate, in part, because both doctors relied on a thermogram which Drs. Zelman and Caden stated was not useful. CIGNA further contends that even if claimant suffers from myofascial pain syndrome or a psychological condition, claimant is not disabled from these conditions.

We reject CIGNA's contentions. In the instant case, the administrative law judge rationally credited the opinions of Drs. Hensarling and Vise, that claimant has myofascial pain syndrome, over the opinions of Drs. Zelman, Caden and Steiner, that claimant does not have myofascial pain syndrome. The administrative law judge considered CIGNA's contentions at length below, and chose to reject them, finding Dr. Hensarling's opinion was more credible and well-reasoned than the contrary doctors' opinions of record. Specifically, the administrative law judge found that Dr. Hensarling was claimant's treating physician, his examination of claimant was more extensive than the other doctors' examinations, and Dr. Hensarling based his diagnosis on clinical findings, thermogram results obtained by Dr. Vise, and claimant's history. The administrative law judge found that, contrary to CIGNA's contention, Dr. Hensarling's partial reliance on the thermogram results did not detract from the reasonableness of his opinion because Dr. Hensarling deposed that his clinical findings were the principal basis of his diagnosis, CIGNA has not shown that use of a thermogram is contrary to prevailing medical practice, and Dr. Hensarling thought use of the thermogram results were helpful. The administrative law judge's reasons for accepting Dr. Hensarling's opinion are rational and in accordance with law. *See generally I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989). We therefore affirm the administrative law judge's finding that claimant suffers from myofascial pain syndrome.

Similarly, we affirm the administrative law judge's finding that claimant suffers from severe depression resulting from his chronic pain, and that claimant has not yet reached maximum medical improvement and is unable to work. The administrative law judge rationally found that the opinions of Dr. Hilsman, a psychiatrist, and Drs. Beissel and Thomas, psychologists, that claimant suffers from a severe psychological condition, corroborates Dr. Hensarling's opinion in this regard. We therefore affirm the administrative law judge's finding that claimant is temporarily totally disabled due to myofascial pain syndrome and a severe psychological condition.[1] *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

[1]Because we affirm the administrative law judge's finding that claimant is unable to work, we need not address employer's contentions regarding the availability of suitable alternate employment. *See Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

CIGNA next contends that if claimant is disabled, the administrative law judge erred in finding that his disability is related to the May 2, 1988, injury. CIGNA contends that claimant's disability resulted from the natural progression of the February 1988 injury and that therefore Liberty Mutual is the responsible carrier. In allocating liability between successive employers and carriers in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, claimant sustains an aggravation of the original injury, the employer at the time of the aggravation is liable for the entire disability resulting therefrom. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

In the instant case, the administrative law judge found, based on Dr. Caden's opinion, that claimant completely recovered from the February 1988 injury when Dr. Caden released claimant to return to work without restriction in March 1988. Dr. Caden stated that at that time claimant told him he was not having any trouble with his back.[2] The administrative law judge found that Dr. Caden was in the best position to determine claimant's condition in March 1988 because he was the only doctor that had treated claimant prior to the alleged May 1988 accident. Further, contrary to CIGNA's contention, the administrative law judge found that the testimony of claimant, his brother, and claimant's supervisor, Kenwood Hartman, establish that claimant injured himself moving oil drums on May 2, 1988. *See* Tr. at 84, 159, 169; Emp. Ex. 2.

[2]In the Order Denying Motion for Reconsideration, the administrative law judge found that claimant's principal complaints from the first accident were pain in the low back and pain radiating to his upper back, and that after the May 2, 1988, incident, claimant additionally suffered shoulder problems. Further, the administrative law judge noted that claimant returned to work within a few weeks after the February 1988 accident with no functional disability, and claimant was unable to work at all after the May 2, 1988 injury.

The administrative law judge also found that since claimant had completely recovered from his February 1988 injury in March 1988, the chronic pain that is the basis of his depression must have resulted from the May 1988 injury and, therefore, claimant's depression as well as his physical condition is related to the May 2, 1988, accident. The administrative law judge considered the opinions of Drs. Vise, Hilsman and Thomas that claimant's physical or psychological condition was related to the February 16, 1988, incident, but found that their opinions are not probative since they did not know of the May 2, 1988, incident. Further, contrary to CIGNA's contention, Dr. Vise's opinion that regardless of any secondary trauma, the February 1988 fall was a major precipitating cause of claimant's condition does not disprove that the May 2, 1988, incident contributed to claimant's condition. *See generally Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 24 BRBS 22 (CRT) (11th Cir. 1990). The administrative law judge therefore rationally concluded that since claimant's physical and mental disability causally related to the May 2, 1988 incident, *see generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990), and CIGNA was on risk on May 2, 1988, CIGNA is the responsible carrier. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). We therefore affirm the administrative law judge's findings that claimant's myofascial pain syndrome and severe psychological condition are causally related to the May 2, 1988, incident, and that CIGNA is the responsible carrier.

On July 31, 1991, claimant's attorney submitted to the administrative law judge an attorney's fee petition for $12,658.75 representing 111 hours at an hourly rate of $125, and $4,564.61 in costs. CIGNA submitted objections. In a Supplemental Decision and Order Awarding Attorney Fees, after considering CIGNA's objections, the administrative law judge awarded the requested fee. On appeal, CIGNA contends the administrative law judge erred in failing to find that the 4.75 hours charged in file review and the $1,000 fee for Dr. Vise's deposition were not excessive. As the administrative law judge specifically considered these objections below and found that the amounts in question were reasonable, we affirm the administrative law judge's findings as employer has not established that the administrative law judge abused his discretion. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits, Order Denying Motion For Reconsideration, and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge