BRB No. 05-0966

RONALD M. WILSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS	)	DATE ISSUED: 08/25/2006
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Attorney Fee Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Attorney Fee Order (2004-LHC-2730) of Administrative Law Judge Richard E. Huddleston 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).

Claimant, a freight handler, injured his back and right hip on August 3, 2001. He underwent hip surgery in October 2002 and was released to work with sedentary restrictions on December 13, 2002. EX 16. Claimant attempted several jobs within his restrictions but has not worked since April 10, 2003, except for a temporary part-time

position with Car Care Creations from December 11, 2003, to January 22, 2004.[1] Claimant sought temporary total disability benefits for the period from July 10, 2002, to August 14, 2002, temporary partial disability benefits for the period from January 28, 2003 to April 9, 2003, and temporary total disability from that date and continuing.

In his Decision and Order, the administrative law judge found that employer did not establish the availability of suitable alternate employment in 2002 and that, therefore, claimant is entitled to temporary total disability benefits for the period from July 10, 2002, through August 14, 2002. 33 U.S.C. §908(b). For the period between January 28, 2003, through April 9, 2003, the administrative law judge awarded claimant temporary partial disability benefits based on his actual wages at Ranstad. 33 U.S.C. §908(e), (h). For the period commencing April 10, 2003, the administrative law judge found that employer established the availability of suitable alternate employment paying wages higher than claimant's average weekly wage at the time of injury and that claimant failed to demonstrate diligence in seeking alternate employment. Thus, the administrative law judge denied claimant an ongoing award of benefits. Claimant appeals the administrative law judge's finding that he did not diligently seek alternate employment, and employer responds, urging affirmance.

Claimant's counsel subsequently submitted a petition to the administrative law judge seeking an attorney's fee in the amount of $6,463.75, plus expenses of $98.00. Pursuant to *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2003), *cert. denied*, 126 S.Ct. 478 (2005), the administrative law judge held that employer is not liable for the payment of any attorney's fees or costs pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). The administrative law judge ordered counsel to serve claimant with the fee petition and he gave claimant time to respond to it. *See* 33 U.S.C. §928(c). Claimant appeals the administrative law judge's denial of an employer-paid attorney's fee, and employer responds that the administrative law judge's finding is in accordance with law.

Claimant first contends that the administrative law judge erred in finding that he did not seek alternate work in a diligent manner, and therefore erred in denying benefits commencing April 10, 2003. Once, as here, claimant establishes his inability to perform his usual work as a result of his injury, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997);

[1] Claimant was employed by Outsource Resources in July 2002, by Ranstad for three to four months prior to April 9, 2003, and by Car Care Creations from December 11, 2003, through January 22, 2004. From July 1 through October 4, 2004, claimant testified he did not seek employment due to family matters. HT at 53-55.

Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Claimant can rebut the employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

The administrative law judge found that employer established the availability of suitable alternate employment through the labor market survey conducted by Melissa Echevarria, a vocational consultant, which identified multiple entry-level positions approved as within claimant's physical restrictions by his treating physician, Dr. Jiranek.[2] EX 16. In support of his contention that he diligently sought employment but was unable to obtain it, claimant submitted his job search file detailing his efforts from late 2003 until early 2005. EX 2. This exhibit contains copies of job applications, verifications of job contacts, and contacts made with the employers listed in employer's labor market survey. Claimant testified he was not granted any interviews or offered any job. HT at 31-34.

The administrative law judge found that claimant's efforts were less than diligent for several reasons. First, he determined that claimant routinely applied for jobs for which he was not qualified, such as administrative positions in medical and legal offices. Second, he found that most of his contacts were made via "cold calls" and not to employers who advertised actual, available positions. Third, the administrative law judge found it likely that claimant exaggerated his weaknesses, *i.e.*, the use of crutches when none were required, and de-emphasized or failed to mention his strong points, *i.e.*, two years of college and some computer skills. CX 2. The administrative law judge found that claimant further limited his employability by refusing to work weekends or mornings, *id.*, and that he failed to follow up on his applications with any prospective employers. Decision and Order at 20-21.

The administrative law judge's finding that claimant's evidence of his efforts to secure alternative employment is insufficient to establish that he diligently sought appropriate work is rational and supported by substantial evidence. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see also DM & IR Railway Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998). The administrative law judge discussed the particular jobs relied upon by claimant and considered both the nature and sufficiency of

[2] Positions identified as suitable alternate employment and approved by Dr. Jiranek include those as customer service representative, order taker, and call center attendant. EX 8.

claimant's efforts, *see* Decision and Order at 21-22, and he rationally found that claimant was not genuinely seeking alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). The administrative law judge is entitled to weigh the evidence and to draw rational inferences therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). His decision to reject claimant's testimony concerning his job search is rational. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, the administrative law judge's finding that claimant did not undertake a diligent post-injury job search is affirmed. *Berezin*, 34 BRBS 163. Therefore, as the administrative law judge found that claimant's post-injury wage-earning capacity is higher than his average weekly wage, we affirm the denial of benefits as of April 10, 2003.

Next, we address claimant's appeal of the administrative law judge's Attorney Fee Order in which he found that employer is not liable for claimant's attorney's fees and costs pursuant to Section 28(b) of the Act. The procedural facts in this case are not disputed. Claimant was injured on August 3, 2001. Employer voluntarily paid temporary total and partial disability benefits for various periods.[3] The last payment was made on January 20, 2003. EX 11. On July 15, 2003, an informal conference was convened to address claimant's claim of entitlement to additional temporary total and partial disability benefits. Claimant also requested payment of a bill from an emergency room visit. The claims examiner stated in the memorandum of informal conference that no additional disability benefits were due because claimant did not submit medical documentation of disability. She stated that employer's liability for the medical bill would be addressed upon receipt of clarification from the doctor who treated claimant.

Employer "accepted" this recommendation to pay nothing further. Claimant, however, sought a formal hearing on his entitlement to additional benefits. The administrative law judge awarded claimant additional benefits, although claimant was not wholly successful in pursuing his claim. In his Order, the administrative law judge found that, pursuant to *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2003), *cert. denied*, 126 S.Ct. 478 (2005), employer is not responsible for claimant's attorney's fee because employer did not reject the district director's recommendation. Claimant contends that the administrative law judge's reliance on

[3] Although it cannot be determined from the record before us whether these payments were timely in relation to employer's receipt of the notice of claimant's claim, no party contends that fee liability in this case can be predicated on Section 28(a), 33 U.S.C. §928(a).

Edwards in this case is misplaced, as it did not address the facts presented here and the finding that employer is not liable for a fee is contrary to the purpose of Section 28(b), which is to shift fee liability to employer when claimant obtains greater compensation than employer paid or tendered.

Section 28(b) states:

> If the employer or carrier pays or tenders payment of compensation without an award . . . and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse (sic) to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee . . . shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b). In *Edwards*, claimant requested an informal conference on his entitlement to additional disability benefits for three days, but the district director refused to schedule the conference, instead writing a letter to claimant stating that he needed to supply additional medical evidence. Claimant did not do so, and he requested a formal hearing. After referral to an administrative law judge, employer agreed to pay compensation for the three additional days; therefore, the claim was never litigated before the administrative law judge. The Fourth Circuit held that employer is not liable for claimant's attorney's fee pursuant to Section 28(b) of the Act.[4] Interpreting the language of Section 28(b), the court stated that it "requires *all* of the following: (1) an informal conference, (2) a written recommendation from the deputy commissioner[5] or Board,[6] (3)

[4] The court also held that employer could not be held liable for claimant's attorney's fee pursuant to Section 28(a). *Edwards*, 398 F.3d at 317-318, 39 BRBS at 3-4(CRT).

[5] The title "district director" has replaced the term "deputy commissioner" used in the statute, 20 C.F.R. §702.105, and will be used in this decision in referring to this official.

the employer's refusal to adopt the written recommendation, and (4) the employee's procuring of the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation." *Edwards*, 398 F.3d at 317, 39 BRBS at 4(CRT) (emphasis in original)(footnotes added). The Fourth Circuit held that employer was not liable as none of the preconditions was fulfilled because the district director never held an informal conference or issued a written recommendation. *Id.; see also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (the lack of an informal conference "poses an absolute bar to an award of attorney's fees under §28(b);" court finds fee liability under Section 28(a)); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, --- F.3d ----, 2006 WL 2135498 (6th Cir. Aug. 2, 2006) (informal conference held, but district director wrote that he was not making recommendation because parties were considering settlement; court holds that district director must make recommendation on the issue favorably decided by administrative law judge in order to shift fee liability).[7]

In the present case, the administrative law judge found that only the third requirement listed by the court in *Edwards* was not satisfied, but concluded that under that decision, in the absence of employer's refusal of the district director's recommendation, employer cannot be liable for claimant's attorney's fee under Section 28(b). In seeking reversal of this decision, claimant contends that *Edwards* is factually distinguishable from the facts in this case. Specifically, claimant notes that an informal conference was held and a written recommendation was issued; thus, claimant asserts that, as the two factors at issue in *Edwards* were satisfied here, the language relied upon

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[6] It is unclear why the statute includes the Board in its references to setting informal conferences and issuing recommendations. The Board does not hold informal conferences or make written recommendations.

[7] The Sixth Circuit's decision perhaps goes further than other cases in requiring that specific successful issues be addressed in a recommendation. *Compare James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Staftex Staffing v. Director, OWCP [Loredo]*, 232 F.3d 431, 34 BRBS 105 (5th Cir. 2000). The Act's regulations allow new issues to be raised for the first time before the administrative law judge, 20 C.F.R. §702.336, and it is not clear whether employer could be liable if claimant succeeded on an issue, over employer's controversion, raised for the first time before the administrative law judge or whether the case would need to be remanded to the district director for the sole purpose of obtaining a recommendation. A requirement that the recommendation address each issue does not account for discovery as the case progresses and evolves before the administrative law judge, and a strict focus on the language of the recommendation engrafts formality onto an informal level of proceedings. *See* 20 C.F.R. §§702.316-319.

by the administrative law judge is not controlling as it was not necessary to the holding in the case. Moreover, this case was actually litigated before the administrative law judge with employer contesting entitlement, as opposed to *Edwards* wherein employer paid the benefits claimed after referral but before a hearing was held. Claimant contends that under these circumstances, fee liability should not turn on whether a favorable recommendation was received from the district director but on claimant's success in obtaining a greater award than employer paid or tendered by virtue of the proceedings before the administrative law judge.

Although claimant's contentions have some merit, we are constrained by the decision in *Edwards* to affirm the administrative law judge's finding that employer is not liable for claimant's attorney's fee pursuant to Section 28(b). As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, *Edwards* is controlling precedent. In *Edwards*, the court set forth four prerequisites for shifting fee liability to employer. In this case, the third requirement was not satisfied: employer did not refuse to adopt the district director's recommendation. While claimant is correct that these facts were not present in *Edwards*, and thus this language was not necessary to its holding, we must apply the decision as written.[8] Unless and until the Fourth Circuit holds that fee liability may be shifted to employer where the district director does not recommend additional benefits, but claimant successfully pursues his claim and obtains greater compensation from the administrative law judge, we cannot so hold.[9] Therefore,

[8] As claimant asserts, the mandatory language "shall" appears with reference to the informal conference and written recommendation: if a controversy develops "the deputy commissioner or Board *shall* set the matter for an informal conference and following such conference the deputy commissioner or Board *shall* recommend in writing a disposition of the controversy." 33 U.S.C. §928(b) (emphasis added). Claimant notes it then provides that following the recommendation, the employer "shall" pay or tender the amount it believes is due (in this case, $0), and that when claimant thereafter uses the services of an attorney to obtain greater benefits than tendered, employer is liable for the fee. These requirements were satisfied.

[9] In *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000), an informal conference was held and a recommendation was issued. However, the court stated that the "substance" of the recommendation was not in the record. Employer asserted that the recommendation was to reinstate temporary total disability benefits and that it complied with this recommendation. Employer therefore argued that there was no "rejection" as required by Section 28(b). The court stated that as the recommendation was not in evidence, it could not verify employer's contentions, and that, moreover, it was clear that after the conference, issues existed regarding temporary partial disability benefits and average weekly wage which were adjudicated in claimant's favor. The court held that "under these particular circumstances, we find that

we reject claimant's contention of error and affirm the finding that employer is not liable for claimant's attorney's fee.

The stricter interpretation recently given to Section 28(b) by some courts of appeals follows years of case precedent in which the primary factor in assessing fee liability pursuant to Section 28(b) was claimant's success in obtaining greater compensation than employer paid or tendered. For example, in *National Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), the Ninth Circuit held that a written recommendation was not required in order to shift fee liability to employer. Alternatively, the court stated that it is clear from the facts in that case that one of the parties would have rejected any recommendation, as the district director referred the case for a formal hearing upon conclusion of the informal conference. As claimant gained greater compensation, employer was held liable for claimant's attorney's fee. In *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981), the Fifth Circuit stressed the employer's liability for an attorney's fee for work performed at all levels once claimant succeeded in obtaining greater benefits as the result of appellate review. These existing interpretations of the Act's attorney's fee provisions were not changed in 1984 when the Act was amended. *See generally Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1194 (4th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992) (Congress is presumed to know the interpretations of a statute when it amends it).

The purpose of the fee-shifting provisions contained in the Act's 1972 Amendments was to assess attorney's fees against employer "in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals." House Rept. No. 92-1441, *reprinted in* 1972 U.S.C.C.A.N. 4698, 4706; *accord* Sen. Rept. No. 92-1125; *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976). In discussing the applicability of amended Section 28 to pending claims, the Second Circuit stated "that [the amended sections] provide for the first time what is clearly a congressional preference that attorneys' fees not diminish the recovery of a claimant regardless of how close a case might be which is litigated but finally lost by a

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employer has failed to demonstrate that the ALJ erred in finding the conditions of §928(b) satisfied." *Id.*, 219 F.3d at 435, 34 BRBS at 41-42(CRT). In a footnote, the court stated that while an initial reading of Section 28(b) supports the proposition that *employer* must reject a written recommendation, it was expressing no opinion on this subject or on the Ninth Circuit's opinion in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) (holding otherwise, pursuant to *National Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979)), given the lack of evidence to support employer's contention regarding what was the recommendation. *Gallagher*, 219 F.3d at 435 n. 18, 34 BRBS at 42 n. 18(CRT).

carrier." *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291, 1297 n.14 (2d Cir. 1974). In generally discussing Section 28(b), the Fifth Circuit stated that, "Subsection (b) relates to the situation where the employer and claimant agree that some compensation is due but disagree as to what amount. If the claimant is eventually granted a greater amount than the employer acknowledged as owing, a reasonable attorney's fee for the claimant's counsel may be awarded against the employer." *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 813, 5 BRBS 317, 318 (5th Cir. 1977).

Claimant, in this case, cogently argues that the result herein will have a chilling effect on advocacy for claimants. If the district director's recommendation is a denial of further benefits which employer accepts, claimant can either do nothing and cut his losses, or have the case referred to an administrative law judge and if he succeeds in obtaining greater benefits than employer paid or tendered, have his benefits reduced by the amount of his attorney's fee. This is the result the statutory provision is designed to prevent. *Overseas African Constr. Corp.*, 500 F.2d at 1297 n.14. Moreover, as claimant notes, a focus on the district director's recommendation puts that official in the position of making final determinations as far as fee liability is concerned.[10] Nonetheless, given the language used by the court in the circuit in which this case arises, we must affirm the administrative law judge's denial of an employer-paid attorney's fee. *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT).

Accordingly, the administrative law judge's Decision and Order and Attorney Fee Order are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

[10] Adjudicatory functions under the Act were transferred to the hearing officers, or administrative law judges, in 1972. 33 U.S.C. §919(d). The district director's functions were thus limited to those related to conducting investigations and seeking an informal resolution of claims. Under this interpretation of Section 28(b), the district director's favorable recommendation becomes critical. Even if a recommended denial is incorrect, it controls regardless of the merits of the claim. For example, in this case, the recommended denial rested on the lack of medical evidence of disability. However, it is well-settled that an award may be based on claimant's credible testimony. *See Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980).

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge