BRB Nos. 06-0872
and 07-0412

CARL E. DEVOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY	)	DATE ISSUED: 07/25/2007
	)	
and	)	
	)	
BROADSPIRE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order – Awarding Benefits and the Attorney Fee Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Michael J. Plank (Strokoff & Cowden, P.C.), Harrisburg, Pennsylvania, for claimant.

James M. Mesnard (Seyfarth Shaw, L.L.P.), Washington, D.C., for employer/carrier.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Attorney Fee Order (2005-LHC-1547) of Administrative Law Judge Richard A. Morgan 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked as a bartender for employer at its Community Club in Fort Indiantown Gap, Pennsylvania. His primary duties included dispensing beer and mixed drinks and collecting payments. On January 22, 2000, claimant tripped while carrying two cases of beer, and he hit his head and right shoulder against the wall. He was diagnosed with chronic rotator cuff tendonitis/tear and underwent surgery.[1] Claimant's shoulder was re-injured during physical therapy following surgery. Employer voluntarily paid temporary total disability benefits from January 22, 2000, through August 5, 2004. Emp. Ex. 12. Claimant has not worked since his injury, and he filed a claim for disability benefits.

The administrative law judge found, *inter alia*, that claimant has a work-related permanent total disability because he cannot return to his usual work and employer did not establish the availability of suitable alternate employment. Decision and Order at 19-24. The administrative law judge noted employer's failure to raise Section 8(f), 33 U.S.C. §908(f), before the district director but found that the Section 8(f)(3), 33 U.S.C. §908(f)(3), defense was not timely raised by the Director, Office of Workers' Compensation Programs (the Director); however, he found that employer failed to establish that claimant had a pre-existing permanent partial disability, and therefore denied employer's request for Section 8(f) relief. Decision and Order at 27-30. Employer appeals the administrative law judge's findings on these issues, and claimant and the Director respond, urging the Board to affirm the administrative law judge's

[1]Claimant injured his right shoulder while working for employer in 1997. Following two surgeries, he returned to work in 1999 with restrictions. Emp. Exs. 2, 14-15.

decision. In the alternative, the Director requests that the Board remand the case for the administrative law judge to address the Section 8(f)(3) defense. BRB No. 06-0872.

Subsequent to the administrative law judge's decision, claimant's attorney filed a petition for an attorney's fee in the amount of $23,944.45, representing $21,367.50 in fees at various rates and $2,576.95 in expenses. The administrative law judge addressed employer's objections and awarded a total fee of $21,216.83 payable by employer; he denied the claim for expenses. Supp. Decision and Order at 1-5. Employer challenges the fee award, arguing that it is not liable for any fee to counsel because the requirements of Section 28(b), 33 U.S.C. §928(b), have not been met. Claimant has not responded to this appeal. BRB No. 07-0412.[2]

Disability

Employer initially contends that the administrative law judge's decision does not comport with the Administrative Procedure Act (APA), as he did not address all of the relevant evidence in rendering his decision. Specifically, employer argues that the administrative law judge failed to address claimant's being left-hand dominant and whether the surveillance videotapes support claimant's claim of being in "constant pain." Employer also argues that it established the availability of suitable alternate employment and that the administrative law judge erred in finding otherwise. Claimant responds, urging affirmance.

In order to establish a *prima facie* case of total disability, a claimant must demonstrate an inability to return to his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Based on claimant's testimony regarding his "constant excruciating pain," as well as medical evidence which documented the pain, Cl. Exs. 3-6, 9, 21-24; Emp. Exs. 14-15, the administrative law judge found that claimant cannot return to his usual work. Decision and Order at 19-20. Thus, the administrative law judge found that claimant met the initial burden of showing he is totally disabled. A claimant's credible complaints of pain may, alone, be sufficient to establish his inability to return to his usual work. *Eller & Co. v. Golden*, 620 F.2d 71, 8 BRBS 846 (5th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1149, 21 BRBS 122(CRT) (9th Cir. 1988); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). To the extent that employer's APA argument relates to the finding that claimant cannot return to his usual work, we reject employer's assertion. The administrative law judge, as is within his discretion, *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.

[2]We hereby consolidate employer's appeals for decision. 20 C.F.R. §802.104(a).

1961), credited and relied on claimant's complaints of pain and found that his complaints were supported by medical documentation. The finding that claimant cannot return to his usual work is thus supported by substantial evidence.

If a claimant establishes a *prima facie* case of total disability, then he is considered totally disabled unless and until his employer satisfies its burden of establishing the availability of suitable alternate employment. *See Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on recon.). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine that jobs are realistically available to claimant and suitable for him given his age, education, medical restrictions and other relevant factors. *See, e.g., Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In this case, the administrative law judge found that the jobs identified by employer took into account claimant's physical and anatomical restrictions but were not suitable because of claimant's persistent pain.[3] Claimant testified that he is incapable of working due to his numerous physical problems and most particularly due to the constant pain in his shoulder. The administrative law judge found that medical evidence supports the history of claimant's pain. *See, e.g.*, Cl. Exs. 3-6, 22-23, 25; Emp. Exs. 14-16; Tr. at 35. Although claimant is left-hand dominant, whereas the injury was to his right shoulder, and the videotapes could support a finding that claimant is not in "constant pain,"[4] there is substantial evidence of record supporting the administrative law judge's finding that claimant is totally disabled by his pain. Specifically, the finding is supported

[3]Drs. Maurer and Eagle stated that claimant could work but advised him to avoid at- and above-shoulder work and they restricted him from lifting over 10 pounds with his right hand/arm/shoulder. Emp. Ex. 21 at 5-6; Emp. Ex. 30. Dr. Montisano diagnosed claimant as also having anxiety and panic attacks as a result of this injury, Emp. Ex. 14; however, a psychiatrist who examined claimant on behalf of employer, Dr. Altaker, stated that claimant can work from a psychiatric/psychological perspective. Emp. Ex. 31. With these restrictions, employer identified jobs such as lunch tray assembler, cashier, unarmed security guard, and bartender. After receiving updated physical limitations, the vocational counselor removed the bartender jobs from the list of possibilities. However, the others were approved by the doctors. Ms. Byers, the counselor, testified that jobs have been available since 2004. Emp. Ex. 22, 24-27; Tr. at 116-132. The administrative law judge found that employer satisfied its burden of showing the *availability* of possible work for claimant. Decision and Order at 21.

[4]The administrative law judge summarized the videotapes as showing claimant putting gas and store-bought items in his car, unlocking the car door and putting on his seatbelt, using both his right and left hands depending on the task. Decision and Order at 13; Emp. Exs. 37-38.

by claimant's testimony, which the administrative law judge credited, and the doctors' notes and reports recording claimant's painful reactions to passive and active manipulations of his shoulder and/or complaints of pain. *See, e.g.*, Cl. Exs. 3-6, 22-23, 25; Emp. Exs. 14-16; Tr. at 35. Because the administrative law judge's finding that claimant is totally disabled is supported by substantial evidence, we affirm the award of permanent total disability benefits. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (administrative law judge credited the claimant's complaints of pain in finding claimant totally disabled over doctors whose opinions did not take into pain into account as a factor in returning to work).

Section 8(f)

Employer next contends the administrative law judge erred in denying it Section 8(f) relief because he found that claimant did not have a pre-existing permanent partial disability. It argues that claimant had a previous injury to his right shoulder that resulted in two shoulder surgeries and permanent lifting restrictions. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in the case of permanent total disability, if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). Under Section 8(f), the term "disability" is not a term of art referring to the statutory definitions of "disability" and "injury," 33 U.S.C. §§902(2), 902(10). *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949). Thus, a pre-existing permanent partial disability for purposes of Section 8(f) is not limited to an economic disability but also includes any serious lasting physical condition that would motivate a cautious employer to discharge the employee because of an increased risk of compensation liability. *See Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976).

In this case, the administrative law judge relied on the decision of the United States Court of Appeals for the First Circuit in *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991), to find that claimant did not have a pre-existing permanent partial disability. Decision and Order at 30. In *Legrow*, the claimant sustained three back injuries prior to the one which ultimately disabled him. After each of the three previous injuries, he returned to work and resumed his full range of duties with no limitations. The First Circuit held that the mere fact of prior injuries alone is insufficient to establish a pre-existing permanent partial disability. Because the claimant resumed his regular work, without restrictions, medication or continuing medical

treatment, the First Circuit concluded that the employer had not established a pre-existing permanent partial disability and was not entitled to Section 8(f) relief. *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003).

In this case, the administrative law judge found that claimant returned to his usual bartending duties after his 1997 right shoulder injury. The administrative law judge acknowledged that claimant's physicians permanently restricted claimant from lifting heavy kegs of beer or performing strenuous overhead lifting, but he found that these restrictions did not affect claimant's ability to perform his usual work, as lifting heavy objects was not a part of his regular duties as a bartender. Decision and Order at 30 n.42; Emp. Ex. 15 at 27. He also relied on the box Dr. Woods checked on a June 1999 form indicating that claimant could return to work without any restrictions, Emp. Ex. 15 at 26, as well as claimant who testified that he had "no trouble" working after treatment for the 1997 injury, Tr. at 30. Decision and Order at 30. Consequently, the administrative law judge reasoned that claimant, like Legrow, effectively returned to work without restrictions and thus did not have a pre-existing permanent partial disability. We cannot affirm this conclusion, as the facts in this case differ significantly from those in *Legrow*.

Claimant here was treated by several doctors at Arlington Orthopedics, and they referred him to Arlington Rehab and Sports Medicine. In January 1999, Dr. Green, an orthopedic surgeon who worked with Drs. Holencik and Herbert, stated that claimant's condition had not reached maximum medical improvement; however, he gave claimant "a permanent 15 pound weight lifting restriction." Emp. Ex. 15 at 18. On July 9, 1999, Dr. Herbert stated that claimant's condition had reached maximum medical improvement, and he returned claimant to work with a "mild functional deficit" of his right arm and permanent restrictions to refrain from lifting heavy kegs of beer and strenuous overhead lifting. Emp. Ex. 15 at 27. Dr. Herbert's letter was written one month after Dr. Woods filled out the check-box form on which the administrative law judge relied. Emp. Ex. 15 at 26.

Contrary to the administrative law judge's conclusion, the fact that claimant's restrictions did not prohibit his return to his bartending job is not determinative. As the definition of "disability" in Section 8(f) is not limited to an economic disability, a pre-existing injury need not result in an inability to return to work. Rather, there need only be a serious lasting condition that could motivate an employer to discharge the employee due to the increased risk of compensation liability. *See Atlantic & Gulf Stevedores*, 542 F.2d 602, 4 BRBS 79. In this case, claimant had two prior shoulder surgeries, his shoulder condition had been deemed "chronic" as early as 1998, Emp. Ex. 15 at 15, and he had been given permanent lifting restrictions in 1999, Emp. Ex. 21 at 1-5. These facts distinguish the instant case from *Legrow*, as they demonstrate that claimant did not recover from his prior injuries without any restrictions. The fact that claimant's bartending job was within his restrictions is relevant to establishing a *prima facie* case of

disability under the Act. Thus, denying Section 8(f) relief on this basis would, in effect, restrict a pre-existing permanent partial disability to one causing economic disability while ignoring the evidence of a chronic condition which limited claimant's overall physical capabilities. Thus, as the evidence establishes that claimant's pre-2000 shoulder condition was a serious, lasting condition for which his doctor assigned permanent physical restrictions, employer established that claimant had a pre-existing permanent partial disability to his right shoulder prior to the January 2000 work injury which is sufficient to meet the requirements of Section 8(f). *See, e.g., Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997) (pre-existing permanent partial disability found despite continued work in usual job). Therefore, we reverse the administrative law judge's finding that employer did not satisfy the first element necessary for Section 8(f) relief. We vacate the administrative law judge's denial of Section 8(f) relief, and we remand the case for consideration of whether employer satisfied the remaining elements necessary for an award of Section 8(f) relief. *See Lewis*, 202 F.3d 656, 34 BRBS 55(CRT).

Although we remand this case for further consideration of the remaining Section 8(f) issues on the merits, we reject the Director's argument that the administrative law judge must address the Section 8(f)(3) defense.[5] Section 8(f)(3) states:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore [sic], shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3). Section 702.321(b)(3), 20 C.F.R. §702.321(b)(3) (emphasis added), provides:

> Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application [for Section 8(f) relief] need not be submitted to the district director to preserve the employer's right to later

[5]Where, as here, the Director raises the Section 8(f)(3) defense in his response brief before the Board as an alternative rationale supporting the administrative law judge's denial of Section 8(f) relief, the Board has addressed the issue. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998) (decision on recon.).

> seek relief under section 8(f) of the Act. In all other cases, failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund. *This defense is an affirmative defense which must be raised and pleaded by the Director.*

See Abbey v. Navy Exchange, 30 BRBS 139 (1996). Where Section 8(f)(3) is raised by the Director, employer bears the burden of establishing that it timely presented the issue of Section 8(f) relief. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998) (decision on recon.); *Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989).

In this case, employer did not raise its entitlement to Section 8(f) relief before the district director, and the administrative law judge so found based on the transmittal letter from the district director. Decision and Order at 27. The administrative law judge also found that the Director did not raise and plead the Section 8(f)(3) defense before him, and therefore stated he would not consider whether it applies to this case. Decision and Order at 27-28. The Director, in his response brief, argues that if the Board vacates the denial of Section 8(f) relief he should have the opportunity to argue the applicability of the defense because the purpose of the defense is to prevent the situation where an employer raises the issue when it could go "unnoticed and uncontested." Dir. Brief at 11.

We reject the Director's argument that he was not on notice that Section 8(f) had been raised before the administrative law judge. The Director's only contention in this regard is that employer did not advise "counsel for the Director" that Section 8(f) was at issue. In response, employer notes that on June 17, 2005, after the case was transferred to the administrative law judge but eight months before the hearing, employer filed a pre-hearing statement with the administrative law judge and sent a copy to the district director.[6] This LS-18 pre-hearing statement form specifically identified the nature and extent of claimant's disability and Section 8(f) relief as issues to be addressed at the formal hearing. On January 20, 2006, over one month before the hearing, employer notes that it submitted a "pre-hearing filing" with the administrative law judge, also copied to the district director, which posed employer's entitlement to Section 8(f) relief as an issue. The administrative law judge found that the Director did not participate at the hearing before him on February 26, 2006, Tr. at 5, and, consequently, did not raise and plead the Section 8(f)(3) defense. As the district director is the Director's authorized representative for receiving applications for Section 8(f) relief, 20 C.F.R. §§701.301(6), (7), 702.321, and as it is uncontested that employer sent copies of its pre-hearing statements to the district director documenting that it sought Section 8(f) relief as early as eight months before the formal hearing, the Director was given sufficient notice that Section 8(f) was at issue. The Director's failure to raise and plead the Section 8(f)(3) absolute defense

[6] Employer states that the Director did not have counsel at this juncture.

before the administrative law judge prevents him from raising it at this juncture. *See generally Abbey*, 30 BRBS 139.

Attorney's Fee

Employer argues that the administrative law judge erred in holding it liable for claimant's counsel's attorney's fee award because the requirements of Section 28(b) have not been met. Claimant has not responded to this appeal.

As employer voluntarily paid claimant benefits from the date of injury, employee's liability for the attorney's fee award in this case is controlled by Section 28(b).[7] The United States Court of Appeals for the Third Circuit, wherein this case arises, has not addressed the specific requirements for an employer's liability under Section 28(b). In recent decisions, the appellate courts which addressed the interpretation of Section 28(b) have strictly construed its requirements. Thus, the United States Courts of Appeals for the Fourth, Fifth, and Sixth Circuits have held that in order for an employer to be liable for an attorney's fee under Section 28(b) of the Act, the district director must have held an informal conference and issued a written recommendation, the employer must have rejected that recommendation, and the claimant must have used the services of an attorney to secure greater compensation than the employer voluntarily paid. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477

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[7]Section 28(b), provides in pertinent part:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, 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 based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b).

F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 126 S.Ct. 478 (2005); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). *Cf. Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 882, 11 BRBS 68, 73 (9th Cir. 1979) (claimant entitled where liability controverted and claimant successfully obtains compensation regardless of whether employer specifically rejected an administrative recommendation). The Board recently applied these holdings in a case arising under the jurisdiction of the United States Court of Appeals for the Eleventh Circuit and held that it would require an informal conference in order for Section 28(b) to apply in all circuits that have not yet addressed the issue. *Davis v. Eller & Co.*, __ BRBS __, BRB No. 06-0670 (June 4, 2007); *see Andrepont v. Murphy Exploration & Production Co.*, 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd on recon.*, ___ BRBS ___, BRB No. 06-0393 (July 13, 2007) (Hall, J., concurring).

In determining that counsel is entitled to an attorney's fee, the administrative law judge in this case rejected employer's Section 28(b) argument, stating that he is not bound by the Fourth Circuit's decision in *Edwards*, especially because the "procedural postures" of the two cases are distinct.[8] *See* Attorney Fee Order at 2. For the reasons set forth in *Davis*, we hold that employer is not liable for a fee under Section 28(b) as the prerequisites for employer liability have not been met.

In this case, an informal telephone conference was conducted on January 20, 2005. 20 C.F.R. §702.311. At the conclusion of the conference call, the district director gave the parties additional time to discuss settlement and her memorandum stated that if the parties could not reach agreement within 30 days, they were to notify her and she would issue a written recommendation. Emp. Obj. at Exh. A-B. On March 22, 2005, claimant's counsel notified the district director of the parties' inability to reach an agreement; however, counsel requested a transfer of the claim to the Office of Administrative Law Judges (OALJ) as soon as possible. *Id.* at Exh. C. Pursuant to claimant's request, the district director expeditiously referred the case to the OALJ. *Id.* at Exh. D-F. The district

[8]In *Edwards*, the employer voluntarily paid benefits for only one month, and the claimant sought an additional two days of benefits thereafter. Employer in the instant case voluntarily paid benefits for three years before terminating them, after which claimant sought continuing additional benefits. Contrary to the administrative law judge's conclusion, the facts are not distinguishable in any legally meaningful way.

director, therefore, did not make a written recommendation after the informal conference. Because no written recommendation was made, a requirement for an attorney's fee pursuant to Section 28(b) is absent. *Pittsburgh & Conneaut Dock*, 473 F.3d 253, 40 BRBS 73(CRT) (no recommendation made because the parties were pursuing settlement – lack of recommendation precludes an employer's liability for fee); *Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (absence of all criteria precludes an employer's liability under Section 28(b)); *Davis*, slip op. at 7. Consequently, employer cannot be held liable for an attorney's fee under the Act. *Id.*

Accordingly, the administrative law judge's finding that employer did not establish that claimant had a pre-existing permanent partial disability is reversed, and his denial of Section 8(f) relief is vacated. The case is remanded for consideration of the remaining Section 8(f) issues on the merits. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge's award of an attorney's fee payable by employer is reversed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge