BRB Nos. 01-0776
and 01-0776A

JUAN ALMANZAR	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BRADY MARINE REPAIR COMPANY, INCORPORATED	)	DATE ISSUED: June 21, 2002
	)	
and	)	
	)	
ACE USA	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
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 Supplemental Decision and Order Granting Attorney's Fees of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

Whitney R. Given (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Mark A. Reinhalter, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States

Department of Labor.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order-Awarding Benefits (1999-LHC-2277, 2001-LHC-0432) of Administrative Law Judge Joseph E. Kane 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). In addition, employer appeals the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees. 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 determination 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 worked as a welder for employer. On May 14, 1991, claimant was struck by a truck while welding at employer's Trumball Street facility, which was located near Port Elizabeth, New Jersey.[1] Claimant was hospitalized and treated for injuries to his face, forearm and left eye area, as well as multiple traumas to his chest, abdomen and back. Cl. Ex. 2. After claimant's treating physicians could not find an organic explanation for his continued complaints of pain, he was referred to a psychiatrist, Dr. Moreno, for evaluation. Dr. Moreno diagnosed claimant as suffering from an adjustment disorder with mixed emotional features. Claimant has not returned to work since the day of the work-related accident, and he filed a claim alleging an injury to his head, a fractured jaw, loss of two teeth, loss of vision in his left eye, and permanent injuries to his back and shoulder, as well as neurological and neuropsychiatric complaints. In addition, claimant filed a claim on December 7, 1994, alleging that he suffers from an occupational pulmonary condition caused by his exposure to dust, fumes, asbestos, and other deleterious substances while working for employer.

[1]After the accident, employer moved its ship repair facility to a different location due to construction on the New Jersey turnpike. H. Tr. at 85.

In his Decision and Order, the administrative law judge found that claimant was injured on a covered situs pursuant to Section 3(a), 33 U.S.C. §903(a), and that employer conceded that claimant was performing maritime employment at the time of the accident. Therefore, the administrative law judge found that the evidence established that the injuries claimant sustained in the work-related accident were covered under the Act. The administrative law judge also found that the evidence established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant suffers from a work-related pulmonary condition. However, the administrative law judge found that employer submitted evidence that rebutted the presumption, and after weighing the evidence as a whole, concluded that the evidence is insufficient to establish that claimant suffers from pulmonary disease arising out of his employment.

After reviewing the evidence relevant to the nature and extent of claimant's disability resulting from his orthopedic injuries, the administrative law judge found that claimant sustained cervical and lumbar sprains due to the 1991 accident which aggravated and accelerated claimant's pre-existing osteoarthritic condition and resulted in a torn right rotator cuff and restricted back, neck and shoulder movement, and that he has reached maximum medical improvement. The administrative law judge concluded that claimant is not "totally disabled" from performing his usual employment due to his orthopedic injuries, but as claimant can no longer work, his permanent partial disability compensation is to be based on a residual wage-earning capacity of $0. The administrative law judge also found that claimant has established that he continues to suffer from depression caused by the injuries he sustained on May 14, 1991, and that the depression contributes to claimant's inability to work.

In addition, the administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), because he found that claimant did not suffer from a pre-existing permanent partial orthopedic or psychiatric disability prior to the accident. Finally, in a Supplemental Decision and Order Granting Attorney's Fees, the administrative law judge awarded claimant's counsel an attorney's fee in the amount of $27,075, representing 90.25 hour of legal services at the hourly rate of $300, plus expenses of $4,481.78, for a total of $30,706.78.

On appeal, employer initially contends that the administrative law judge erred in finding that claimant's 1991 accident occurred on a covered situs. In addition, employer contends that the administrative law judge erred in finding that claimant established that he suffers from disabling orthopedic and psychiatric disabilities, and in denying relief pursuant to Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's decision to deny relief pursuant to Section 8(f), contending that the administrative law judge used the wrong legal standard to determine whether claimant had a pre-existing permanent partial disability.

Employer also appeals the administrative law judge's fee award, contending that the fee award should be vacated if the award of benefits for orthopedic and psychiatric injuries is vacated. Claimant responds, urging affirmance of the administrative law judge's finding that claimant's accident occurred on a covered situs. In addition, on cross-appeal, claimant contends that the administrative law judge erred in finding that claimant was not totally disabled due to his orthopedic and psychiatric injuries. Claimant also asserts that the administrative law judge erred in finding that claimant does not have a work-related pulmonary disability.

PULMONARY CONDITION

Initially, we will address claimant's contentions regarding his pulmonary condition, because claimant alleges that he was exposed to deleterious substances, at least in part, while working aboard ships as well as at employer's Trumball Street facility, and thus situs is not at issue with regard to the alleged work-related pulmonary condition. Claimant contends that the administrative law judge erred in relying on the opinion of Dr. Friedman in finding that claimant failed to establish the existence of a work-related pulmonary condition. Section 20(a), 33 U.S.C. §920(a), provides claimant with a presumption that his injury is causally related to his employment, if claimant establishes that he has a physical harm, and that an accident or working conditions occurred that could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In the present case, Dr. Eisenstein opined that claimant suffers from chronic obstructive pulmonary disease, which was caused, at least in part, by claimant's exposure to noxious fumes and dust, such as welding fumes, dirt, oil mist, solvents, exhaust fumes, coolants and other irritating chemicals, during his employment as a welder. Claimant testified that he worked in closed rooms on ships and was exposed to smoke and fumes. H. Tr. at 35-36. The administrative law judge found that Dr. Eisenstein's opinion and claimant's testimony are sufficient to establish invocation of the Section 20(a) presumption that claimant's exposure to irritants in the course of his employment could have caused his respiratory injury.

Once claimant establishes invocation of the presumption, employer may rebut the Section 20(a) presumption by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to the injury. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The record in the instant case contains the report and testimony of Dr. Friedman, who opined generally that claimant does not suffer from a primary lung disease (*i.e.*, claimant's respiratory problems are due to non-

lung conditions), and more specifically that he does not have chronic obstructive pulmonary disease. He opined that claimant's pulmonary condition, as evidenced by the restrictive impairment measured in the pulmonary function studies, is a result of his diabetes and dialysis, rather than occupational exposure, due to the lack of evidence of interstitial fibrosis on his chest x-rays and the fact that claimant's pulmonary problems did not arise while he was working. We affirm the administrative law judge's finding that Dr. Friedman's opinion is sufficient to establish rebuttal of the Section 20(a) presumption as it is supported by substantial evidence. *See generally Bath Iron Works Corp. v. Director, OWCP,* 137 F.2d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

When employer produces substantial evidence that claimant's injury is not work-related, the Section 20(a) presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, with claimant bearing the burden of proving that his disability is work-related. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). After reviewing the evidence as a whole, the administrative law judge concluded that Dr. Eisenstein's opinion is insufficient to establish that claimant suffers from a pulmonary condition arising out of his employment. Decision and Order at 35-37. The administrative law judge accorded determinative weight to Dr. Friedman's opinion and found that Dr. Friedman attacked each of the bases for Dr. Eisenstein's diagnosis of chronic obstructive pulmonary disease in a well-reasoned and well-documented manner. In addition, he accorded greater weight to Dr. Friedman's opinion as to the absence of an obstructive impairment and the presence of a restrictive impairment because he found that Dr. Friedman thoroughly explained how the pulmonary function test evidence supported his conclusion and Dr. Friedman's diagnosis was supported with a pulse oximetry test. Therefore, the administrative law judge found that as Dr. Friedman's opinion casts doubt on Dr. Eisenstein's diagnoses, claimant did not establish that he suffers from chronic obstructive pulmonary disease arising out of his employment.

We affirm the administrative law judge's finding that the evidence is insufficient to establish a work-related pulmonary condition. Claimant contends on appeal that Dr. Friedman cannot explain what caused the restrictive impairment on the pulmonary function studies and that there is no evidence of pulmonary edema at the time the tests were given. However, Dr. Friedman testified that while he was not certain as to the reason for the restrictive impairment, he was certain that pulmonary fibrosis was not the cause and thus, that it was not work-related. Moreover, he opined that claimant does not have lung disease, and that his respiratory condition is related to other health problems. Emp. Ex. 16 at 19-20. He stated that the presence of wheezing, as found by Dr. Eisenstein but not Dr. Friedman, increased bronchovascular markings, and an abnormal pulmonary function test could be signs of chronic obstructive pulmonary disease, Emp. Ex. 16 at 36, but they are not in this case, Emp. Ex. 16 at 40, and the pulmonary function studies indicate a restrictive lung

condition, rather than obstructive impairment, Emp. Ex. 16 at 38. The weight to be accorded to evidence of record is for the administrative law judge as the trier-of-fact. *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). The administrative law judge thoroughly weighed the conflicting medical opinions, and claimant has raised no reversible error on appeal. Therefore, we affirm the administrative law judge's finding that claimant has not established the he suffers from a work-related pulmonary condition as it is rational and supported by substantial evidence.

SITUS

Employer contends that the administrative law judge erred in finding that claimant's work-related accident occurred on a covered situs. *See* Decision and Order at 29. Section 3(a) provides that compensation shall be payable "if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. §903(a). In analyzing whether claimant's injury occurred on an "adjoining area" under Section 3(a), the administrative law judge cited *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). In *Herron*, the United States Court of Appeals for the Ninth Circuit stated that in order to further the goal of uniform coverage, the phrase "adjoining area" in Section 3(a) should be read to describe a functional relationship between the site and navigable water that does not in all cases depend on physical contiguity with navigable waters. Factors to be considered in determining whether a site is an adjoining area under Section 3(a) include: the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances. *See Herron*, 568 F.2d at 141, 7 BRBS at 411; *see also Nelson v. American Dredging Co.*, 143 F.3d 780, 32 BRBS 115(CRT) (3d Cir. 1998); *Arjona v. Interport Maintenance Co.*, 31 BRBS 86 (1997)(*Arjona I*).

In the present case, the administrative law judge applied the *Herron* factors, and on appeal, employer agrees that this test is applicable. Employer argues, however, that the administrative law judge's result is erroneous, asserting that the instant case is more similar to *Arjona v. Interport Maintenance Co.*, 34 BRBS 15 (2000)(*Arjona II*), *Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992), and *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988), in which the Board affirmed administrative law judges' decisions that facilities located at varying distances from a port were not covered under Section 3(a). Employer contends that, as in these cases, the only factor supporting a finding of coverage is that the short driving distance

to the port provided an economic benefit to employer and that this sole consideration is insufficient for a finding of coverage under *Herron*.

We reject employer's contention, as the administrative law judge fully analyzed the evidence and found coverage based upon a weighing of the relevant factors. Initially, he found that although the evidence does not indicate that the facility was particularly suited for maritime uses, it does establish that the Trumball Street facility's proximity to the port gave employer an economic advantage over businesses located farther from the port. Specifically, the administrative law judge found it relevant that 75 percent of employer's work involved the repair of ship components for ships at Port Elizabeth and that employer's repair shop was integral to that work. The administrative law judge found that employees traveled to and from the port to repair vessels at the dock and to transport parts back to the Trumball Street facility for repair. H.Tr. at 89. Thus, the administrative law judge rejected employer's contention that the proximity of the facility to the ports was not a factor in its selection,[2] and found this factor favored a finding of a covered situs. In addition, the administrative law judge found that the maritime nature of the properties located in the surrounding area, and particularly those in the area between the facility and the port, weighed in favor of coverage. Specifically, the administrative law judge found the maritime businesses included, but were not limited to, trucking companies that transported containers to and from the port. The administrative law judge thus concluded that a weighing of all relevant facts and circumstances in this case led to the conclusion that claimant's injury occurred in an adjoining area customarily used for ship repair.

[2]The administrative law judge considered whether the site was as close to the waterway as possible, given all of the circumstances, but found that neither party was able to establish the motivation of the prior owner, now deceased, in choosing the site. Thus, he could not determine whether its selection was as close as was feasible to the port.

We cannot say that the administrative law judge erred in reaching this decision. In each of the cases cited by employer, the administrative law judge found the factors weighed against coverage, specifically that the surrounding area was primarily used for non-maritime purposes and that the site was not as close as feasible to the waterway but was selected based on economic factors, such as favorable lease terms.[3] In contrast, in the present case, the administrative law judge weighed the evidence, finding that the site was used for a maritime purpose, located in a waterfront area with similar maritime businesses and bore a functional relationship to the port. Employer essentially asks that the Board reweigh the evidence which we are not empowered to do. 33 U.S.C. §921(b)(3). An area is an adjoining area within the meaning of Section 3(a) of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity.[4] *Texports Stevedore Co.*

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[3]In *Lasofsky*, the evidence demonstrated that the site was selected based on a favorable lease, and employer's witness testified that no effort was made to locate as close to the waterfront as feasible because the cost of transporting containers was the same whether they were transported 100 yards or two miles. In *Gonzalez*, employer had specifically declined to lease a closer location. In *Arjona*, the site was selected based on the low per-acre cost of the rent. This evidence demonstrates the lack of a relationship between the site and the waterfront, and such evidence is absent in the present case.

[4]Claimant testified that the distance to the port was 1 3/4 miles and employer's representative stated that the distance by road was 4 1/2 miles, but one mile by air. The map submitted by employer, Emp. Ex. 17, shows that the site is in the waterfront area bordering Newark Bay, which Port Elizabeth adjoins. It appears that the gate to the port may be a greater distance from the site. In any event, there is a clear functional and geographic nexus with Newark Bay and the port, regardless of the distance to the entrance to the port.

v. Winchester, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980)(*en banc*), *cert. denied,* 452 U.S. 905 (1981); *Herron,* 568 F.2d 137, 7 BRBS 409. As the administrative law judge in the instant case rationally applied the *Herron* factors, and as the site has a functional and geographic nexus with navigable waters, we affirm the administrative law judge's finding that claimant's injury occurred on a covered situs as it is supported by substantial evidence.

ORTHOPEDIC DISABILITY

We next address the parties' contentions regarding the injuries sustained in the accident on May 14, 1991. Initially, employer contends that the administrative law judge erred in finding that claimant suffers from a disabling orthopedic condition. Specifically, employer contends that the administrative law judge erred in relying on the opinion of Dr. Steinway rather than the conflicting opinion of Dr. Nehmer. On cross-appeal, claimant contends that the administrative law judge erred in finding that he is not totally disabled due to his orthopedic condition.

Total disability is defined as a complete incapacity to earn pre-injury wages in the same work as that performed at the time of injury or in any other employment. *See Eastern S.S. Lines, Inc. v. Monahan,* 110 F.2d 840 (1st Cir. 1940); 33 U.S.C. §902(10). Thus, "disability" is an economic as well as a medical concept. *Quick v. Martin,* 397 F.2d 644 (D.C. Cir. 1968). In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *American Stevedores, Inc. v. Salzano,* 538 F.2d 933 (2d Cir. 1976). It is irrelevant that a physician terms such an impairment "partial," *Employers Liability Assurance Corp. v. Hughes*, 188 F.Supp. 623 (S.D.N.Y. 1959), as disability is not measured by claimant's physical or mental condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975). Claimant's credible complaints of pain alone may be enough to meet the employee's burden. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). In order to determine whether claimant has established a *prima facie* case of total disability, the administrative law judge must compare the employee's medical restrictions with the specific requirements of his usual employment.[5] *Carroll v. Hanover Bridge Marina,*

[5]If the employee meets his burden, the burden shifts to employer establish the existence of realistically available job opportunities within the geographical area where the employee resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If employer meets its burden, then the employee's disability is at most partial. *See* 33 U.S.C. §908(c).

17 BRBS 176 (1985).

In the present case, the administrative law judge did not review the evidence of claimant's condition and restrictions, if any, to determine whether claimant's ability to perform his normal duties of a welder was affected by his work-related injuries. *See Delay*, 31 BRBS 197; *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988)(administrative law judge must compare claimant's physical limitations with the requirements of his usual work in order to determine whether a claimant is disabled). Rather, the administrative law judge found that Dr. Nehmer characterized claimant's disability due to his orthopedic condition as partial, and thus, the administrative law judge declined to award total disability benefits. The administrative law judge found that there are three physicians of record that discuss the nature and extent of claimant's orthopedic disability. Dr. Martinez opined that claimant reached maximum medical improvement from an orthopedic standpoint on November 6, 1995, and that claimant was capable of working as a welder from an orthopedic standpoint. Emp. Ex. 1. The record also contains the reports and deposition of Dr. Steinway, who opined that claimant is totally disabled from working as a welder due to his work-related orthopedic condition. Cl. Exs. 14, 22. In addition, the record contains the report and deposition of Dr. Nehmer, who opined that claimant was fully recovered from his orthopedic injuries and that he required no further treatment. Emp. Ex. 2.

After reviewing the medical evidence, the administrative law judge found that Dr. Nehmer's opinion was entitled to less weight than that of Dr. Steinway. He found that Dr. Nehmer examined claimant only once and that his assessment of claimant's health at this examination did not match claimant's physical state. In addition, the administrative law judge found that Dr. Nehmer did not document or explain his findings as well as Dr. Steinway, and that he could not credit Dr. Nehmer's deposition testimony regarding physical findings at the examination which were not documented as the physician testified that he did not have an independent recollection of claimant's exam. Thus, the administrative law judge accorded the opinion of Dr. Steinway with determinative weight. He found that Dr. Steinway had examined claimant three times in four years and concluded that Dr. Steinway has a better basis to determine the accuracy of claimant's effort. Moreover, the administrative law judge found that Dr. Steinway explained how claimant's work-related injury interacted with his pre-existing osteoarthritis in developing his current orthopedic condition, and that Dr. Steinway's opinion is supported by the x-ray evidence showing degenerative arthritic changes. Thus, we reject employer's contention that the administrative law judge erred in finding, based on Dr. Steinway's opinion, that claimant continues to suffers from an orthopedic condition as the administrative law judge thoroughly reviewed the relevant evidence, his decision to credit Dr. Steinway's opinion is rational, and his conclusion is supported by substantial evidence. *See Calbeck,* 306 F.2d 693; *John W. McGrath Corp.*, 289 F.2d 403.

With regard to the extent of claimant's disability, however, the administrative law judge found that Dr. Steinway initially opined that claimant's orthopedic condition was only partially disabling, but without a rational basis later changed his opinion to state that claimant was totally disabled due to his orthopedic condition. Thus, the administrative law judge concluded that claimant failed to establish that the orthopedic injuries he suffered as a result of the work-related accident rendered him totally disabled from performing his usual duties as a welder.[6] However, as stated earlier, it is not dispositive that a physician characterizes an impairment as "partial." Rather, the administrative law judge must compare claimant's orthopedic restrictions with his job requirements. Moreover, contrary to the administrative law judge's finding, Dr. Steinway stated in his first report that claimant was unable to return to work as a welder because of his "medical problems, psychiatric problems, residual discomfort in the mandible and the orthopedic dysfunction noted...," Cl. Ex. 14, and did not state that claimant was only partially disabled due to any one of the factors. He explained in his deposition that claimant was unable to return to his former duties as a welder, Cl. Ex. 22, and stated that it was his understanding that being a welder requires the ability "to reach above and grab things," "to quickly look from side to side," "to repetitively bend, ...to work on his knees, to kneel, to squat, to twist his torso from left to right." Cl. Ex. 22 at 50-51. Dr. Steinway also testified that claimant could perform alternate work if he "wouldn't have any heavy lifting, he would be able to get up from a bench type situation ten minutes every hour to walk around and stretch, [and] wouldn't have to use his right upper extremity repetitively in an overhead manner." Cl. Ex. 22 at 51-52. Thus, we vacate the administrative law judge's finding that claimant is not totally disabled, and remand the case for further findings.[7] *Curit*, 22 BRBS at 103; *see also Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring). As the administrative law judge credited Dr. Steinway's report, on remand the administrative law judge must reconsider whether his report is sufficient to establish that claimant is unable to perform his usual duties as a welder under the proper standard.[8]

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[6]The administrative law judge found that claimant was not totally disabled but awarded him permanent partial disability benefits based on a residual wage-earning capacity of $0, which, in fact, indicates that the administrative law judge found that claimant is totally disabled.

[8]As employer presented no evidence of suitable alternate employment, if the administrative law judge finds on remand that claimant is unable to return to his former duties due to his work-related injuries alone, claimant will be entitled to an award of permanent total disability compensation as a matter of law. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

[7]However, contrary to claimant's contention, it is not relevant that the administrative law judge did not consider the fact that claimant was found to be totally disabled by the

PSYCHIATRIC CONDITION

Employer also contends that the administrative law judge erred in finding that claimant suffers from a permanent psychiatric disability. Decision and Order at 46. Claimant contends on cross-appeal that the administrative law judge erred in finding that he was not totally disabled due to his psychiatric condition. The record contains the reports of six physicians who address claimant's alleged psychiatric condition. Dr. Castillo diagnosed a prolonged depressive disorder, but did not relate the condition to the 1991 accident and did not offer an opinion as to the nature and extent of any disability claimant may have. Cl. Ex. 12. Dr. Mendelson opined that claimant's persistent headaches could be a result of depression or anxiety about returning to work, but noted that secondary gain may be a factor and concluded that claimant could return to work. Emp. Ex. 7. Claimant was examined by Dr. Moreno who diagnosed an adjustment disorder and opined that claimant was in need of psychiatric treatment in the form of psychotherapy and psychopharmacotherapy in the form of antidepressants. Cl. Ex. 8. Dr. Moreno later reported symptom magnification and an inability to reconcile claimant's complaints with his own observations, and concluded that claimant exaggerated his symptoms for secondary gain. *Id*. Dr. Filipone evaluated claimant's condition on August 8, 1993 and concluded that claimant was "faking" his psychiatric problems and cognitive defects. Emp. Ex. 8. Dr. Ferretti examined claimant and diagnosed an "adjustment reaction" with features of anxiety, depression and phobia. He concluded that it was unreasonable for claimant to return to work as a welder given his subjective complaints and that claimant's work-related injuries are a substantial cause of his depression. Cl. Ex. 11. Finally, the record contains the report of Dr. Head, who opined that claimant is a malingerer and concluded that claimant sustained no permanent psychiatric condition or disability related to the May 14, 1991 accident. Emp. Ex. 5. Dr. Head opined that there was no reason to impose psychiatric restrictions on claimant's ability to work. *Id*.

The administrative law judge recited this medical evidence, and concluded that claimant suffers from permanently disabling depression caused by the injuries he sustained on May 14, 1991. The administrative law judge first found that the diagnosis of depression is supported by the opinions of Drs. Ferretti, Moreno and Castillo. Decision and Order at 48. The administrative law judge also found that claimant suffers from a psychiatric disability, based on Dr. Ferretti's opinion to that effect. Decision and Order at 49. The administrative law judge further relied on Dr. Ferretti's opinion, as of the time he last examined claimant on

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Social Security Administration, as that finding was made in another forum on a different record. *Jones v. Midwest Machinery Movers*, 15 BRBS 70 (1982).

October 17, 2000, to find that claimant's psychiatric condition was permanent in nature. *Id.*

We must remand this case for further findings regarding claimant's alleged psychiatric injury, as the administrative law judge has not provided a rational basis for his conclusion that claimant has a work-related, disabling, psychiatric impairment. Contrary to the administrative law judge's finding that the opinions of Drs. Ferretti, Moreno and Castillo support the finding that claimant has depression, Dr. Moreno did not make a definitive diagnosis of depression and reported symptom magnification for purposes of secondary gain. Emp. Ex. 3. In addition, Dr. Ferretti initially opined that the issue of secondary gain needed to be addressed, Emp. Ex. 4, but, without explanation, the administrative law judge relied on Dr. Ferretti's later opinion, which concluded that claimant suffered from disabling chronic depression and did not raise the issue of secondary gain. Cl. Ex. 11. Moreover, although Dr. Ferretti stated that claimant has a permanent psychiatric condition, he also stated that this was due to non-work-related conditions. *Id.*

We cannot affirm, moreover, the administrative law judge's rationale for crediting the opinions of Drs. Ferretti, Moreno and Castillo. The administrative law judge stated only that two of these physicians were claimant's treating physicians. These would be Drs. Moreno and Castillo, as the administrative law judge specifically found that Dr. Ferretti was not a treating physician. Decision and Order at 47. As the administrative law judge relied most heavily on Dr. Ferretti's opinion, and he is not a treating physician, the administrative law judge has not provided a valid basis for crediting Dr. Ferretti's opinion over contrary opinions. As discussed above, the opinion of Dr. Moreno, who last examined claimant in November 1993, is not necessarily supportive of the administrative law judge's finding that claimant is disabled by work-related depression. Furthermore, the administrative law judge's application of the "treating physicians" is inconsistent in that the administrative law judge did not accord weight to the opinion of Dr. Mendelson on this basis. Dr. Mendelson, a neurologist and psychiatrist who treated claimant until 1992, opined that there was no reason claimant could not return to work and that secondary gain may be a factor in claimant's continued physical complaints. Emp. Ex. 7.

Given the conflicting evidence in this record and the fact that the administrative law judge did not provide valid reasons for relying on the opinions he credited, it is difficult to conclude whether the administrative law judge "reasonably failed to credit" significant probative evidence. *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997). Because the administrative law judge must in the first instance resolve the conflicts in the evidence and explain what evidence he credited and why, consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557, *see Gremillion*, 31 BRBS at 168, and because the Board cannot render more specific findings to supplement the administrative law judge's findings, *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982), we vacate the administrative law judge's findings with respect to

claimant's psychiatric condition. On remand, the administrative law judge must determine whether claimant has a work-related psychiatric injury, applying the Section 20(a) presumption to this issue. *See generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). The administrative law judge also must determine whether claimant is capable of performing his usual duties as a welder notwithstanding the limitations, if any, imposed by any psychiatric condition, consistent with law, as discussed, *supra*. Finally, the administrative law judge must provide a rational basis for determining which medical experts he credits on the issues concerning claimant's alleged psychiatric injury.

SECTION 8(f)

Lastly, employer contends that the administrative law judge erred in finding that it is not entitled to relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). The Director responds, urging the Board to vacate the denial of Section 8(f) relief and to remand the case to the administrative law judge for further findings consistent with the APA. Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks where an employee suffers from a manifest, pre-existing, permanent partial disability. 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). In the case of total disability, employer also must establish that claimant's disability is not due solely to the subsequent injury. *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000). In the case of partial disability, employer must establish that claimant's disability is not due solely to the subsequent injury, and that it is materially and substantially greater due to the contribution of the pre-existing disability than if would be due to the work injury alone. *See Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT)(5th Cir. 1997). A medical condition need not be economically disabling in order to constitute a pre-existing permanent partial disability within the meaning of Section 8(f). *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976). In order to constitute a pre-existing permanent partial disability for Section 8(f) purposes, claimant must have a serious, lasting physical condition which pre-existed the work injury. *See, e.g.*, *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992).

In the present case, the administrative law judge found that "because [employer] has not established that [claimant] suffered from a pre-existing permanent partial orthopedic or psychiatric disability prior to the May 14, 1991 accident, I find [employer] is not entitled to Section 8(f) relief." Decision and Order at 50. However, there is no requirement that

claimant's pre-existing permanent partial disability be of the same type as the disability for which he is awarded benefits under the Act.[9] *See Lewis*, 202 F.3d 656, 34 BRBS 55(CRT); *Director, OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978)(Section 8(f) relief granted where claimant suffered from "pre-existing physical infirmities of heart disease and diabetes mellitus"). Moreover, employer submitted evidence of a prior injury to claimant's back and buttocks which resulted in a settlement of a claim for compensation under the New Jersey Division of Workers' Compensation, and the administrative law judge did not discuss this evidence. Emp. Ex. 9. As the administrative law judge did not apply the correct legal standard regarding the pre-existing permanent partial disability element of Section 8(f), we vacate the administrative law judge's finding that employer is not entitled to Section 8(f) relief, and remand the case for further consideration of this issue and to render findings consistent with law. *Gremillion*, 31 BRBS 163.

ATTORNEY'S FEE

In a supplemental appeal, employer urges the Board to vacate the administrative law judge's award of an attorney's fee if the Board agrees that claimant is not entitled to benefits under the Act. Employer has made no other objection to the amount of the fee award. Because we have partially vacated the decision on the merits and remanded the case for further consideration of claimant's entitlement to benefits, claimant's degree of success is not yet ascertainable. On remand, the administrative law judge may reconsider the amount of the fee award commensurate with the benefits awarded on remand. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). If claimant again succeeds in obtaining an award of total disability benefits, then claimant is entitled to the attorney's fee as awarded by the administrative law judge, as employer has not challenged the award on any other ground.

Accordingly, the administrative law judge's finding that claimant does not suffer from a work-related pulmonary condition is affirmed. In addition, the administrative law judge's findings that claimant's work-related accident occurred on a situs covered under the Act and

[8]*Cf. Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.2d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989)(in the case of a retiree compensated under Section 8(c)(23), pre-existing disabilities must be of the type that contribute to the compensable disability).

that claimant suffers from a work-related orthopedic condition are affirmed. However, the administrative law judge's finding regarding the extent of claimant's disability due to his orthopedic condition is vacated, and the case is remanded for further consideration. Moreover, the administrative law judge's findings that claimant suffers from a psychiatric condition and that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f) are vacated and the administrative law judge

is instructed to reconsider these issues on remand. If the administrative law judge determines on remand that claimant is entitled to less than that awarded in the original Decision and Order, the administrative law judge may reconsider the amount of the award of an attorney's fee.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge