BRB Nos. 98-1468,
00-640 and 00-640A

ERIC K. TUBBS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: March 6, 2001
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Decision and Order on Section 22 Modification, and the Supplemental Decision and Order – Awarding Attorney's Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Eric K. Tubbs, Greenville, Mississippi, *pro se*.

Donald P. Moore (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, without representation, appeals the Decision and Order Awarding Benefits and the Decision and Order on Section 22 Modification, and employer appeals the Supplemental Decision and Order – Awarding Attorney's Fees (1997-LHC-1969) of Administrative Law Judge James W. Kerr, Jr., 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 an appeal by a *pro se* claimant, we will review the administrative law judge's findings of fact and conclusions of law to determine if they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant fractured his pelvis on July 9, 1992, when he was attempting to put a forklift in a safe position. Emp. Ex. 10 at 1; Tr. at 33-35. Employer voluntarily paid temporary total disability benefits from July 11 through December 7, 1992, as well as all related medical benefits. ALJ Ex. 1; Emp. Ex. 4. Claimant filed a claim for additional benefits for injuries involving his back, stomach and a psychological condition. Employer disputed the claim for additional benefits. The administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption relating his pelvic, stomach, back, and psychological conditions to the work injury. He found, however, that employer rebutted the presumption for all conditions except the pelvic condition for which it had already paid benefits. Decision and Order at 27-29. Based on the evidence as a whole, the administrative law judge concluded that claimant's back, stomach, and psychological troubles are not related to the 1992 work injury, and he denied compensation for these conditions. *Id.* at 30-34. He also denied medical benefits for the treatment of those conditions. *Id.* at 36-38. The administrative law judge denied claimant permanent partial disability benefits for the pelvic condition because claimant did not establish a loss of wage-earning capacity. *Id.* at 38-41. Based on the work-related pelvic injury, the administrative law judge awarded only the temporary total disability benefits between July and December 1992 and the related medical benefits which employer had already paid. The administrative law judge also permitted claimant's counsel to file a petition for an attorney's fee.

Claimant, *pro se*, appealed the administrative law judge's decision, but prior to any action by the Board, he filed a motion for modification of that decision. Consequently, in an Order dated July 14, 1999, the Board dismissed the appeal and remanded the case to the administrative law judge for modification proceedings pursuant to Section 22 of the Act, 33 U.S.C. §922. BRB No. 98-1468. Subsequently, the administrative law judge denied claimant's motion for modification. Claimant appeals the denial of modification, BRB No. 00-640, and by Order dated April 20, 2000, the Board reinstated claimant's previous appeal, BRB No. 98-1468, and consolidated the two appeals for purposes of decision. Employer responds, urging affirmance. In a supplemental decision, the administrative law judge awarded claimant's counsel a fee totaling $10,658.91 for services rendered before him. Employer appeals the fee award. BRB No. 00-640A.

Claimant first challenges the administrative law judge's determination that his back, stomach and psychological conditions are not related to the 1992 work injury. In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which is invoked only after he establishes a *prima facie* case.

Port Cooper/T. Smith Stevedoring Co. v. Hunter, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986). Once the presumption is invoked, an employer may rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his condition. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof, with the claimant bearing the burden of persuasion. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *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).

The administrative law judge in this case determined that claimant invoked the Section 20(a) presumption for all his medical conditions. The burden thus shifted to employer to rebut the presumption for each condition. With regard to claimant's back condition, the administrative law judge properly found substantial evidence of record which rebutted the presumption and established that claimant's back problems are not related to his 1992 work injury. Emp. Exs. 11, 13, 16. Specifically, Dr. Wiggins stated that, if claimant had injured his back in 1992, any injury he sustained would have resolved within three months and any current back problems are not related to the work incident. Emp. Ex. 13. This conclusion is supported further by Dr. Winters's opinion and the lack of objective evidence substantiating an injury to claimant's low back. Emp. Exs. 11, 16. Similarly, the administrative law judge correctly found that employer rebutted the presumption and severed the connection between claimant's psychological condition and his 1992 work injury. Dr. Maggio, a psychiatrist who evaluated claimant in December 1997, determined that claimant has an unspecified personality disorder with features such as hysteria, avoidance and dependency, but he stated that this condition is not related to the 1992 injury. Emp. Ex. 8. Moreover, the administrative law judge noted that claimant did not seek psychological assistance until five years after the injury, and during those five years a multitude of stressful events occurred. Decision and Order at 33. As the record contains evidence sufficient to rebut the Section 20(a) presumption, and as this same evidence was credited by the administrative law judge on the record as a whole, establishing no causal relationship, we affirm the administrative law judge's determination that claimant's back and psychological conditions are not related to his 1992 work injury, and that he is not entitled to compensation for them. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington University*, 30 BRBS 233 (1997); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). As these conditions are not work-related, claimant also is not entitled to medical benefits for the treatment thereof. 33 U.S.C. §907; *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director,*

OWCP, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Therefore, we affirm the administrative law judge's denial of disability and medical benefits for claimant's back and psychological conditions.

The administrative law judge also found claimant entitled to the benefit of the Section 20(a) presumption for his stomach condition. The administrative law judge determined that claimant's medical records show a history of ulcers dating back to 1980, Emp. Ex. 9, and, thus, he concluded that claimant's ulcers were not caused directly by his work injury. Decision and Order at 28. We affirm this finding. *Coffey*, 34 BRBS 85. As the ulcers pre-dated the work injury, however, the question of whether claimant's work injury aggravated the ulcers arises. Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Kubin v. Pro-Football, Inc.* 29 BRBS 117 (1995). A work-related aggravation of a pre-existing injury is considered a new injury. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). Thus, application of Section 20(a) presumes that the work injury aggravated the pre-existing condition, and employer must produce evidence addressing aggravation in order to rebut it. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). The administrative law judge here did not determine whether employer rebutted the presumption with regard to any aggravation of claimant's ulcer condition. Further, the administrative law judge improperly placed the burden of showing aggravation on claimant. Decision and Order at 30-31. Consequently, we must vacate his denial of benefits related to the ulcer condition and remand the case for further consideration. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998). On remand, the administrative law judge must determine whether employer produced substantial evidence to rebut the presumption that claimant's ulcers were aggravated by the work injury, and, if so, the administrative law judge must consider the evidence as a whole to determine whether claimant sustained a work-related aggravation of his ulcer condition. *Id.* If claimant's work injury aggravated his ulcers, the administrative law judge should consider claimant's entitlement to disability and medical benefits for this condition.

We next address whether the administrative law judge properly denied claimant permanent partial disability benefits. Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), provides for an award of permanent partial disability benefits based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h), 33 U.S.C. §908(h), provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. If these earnings do not represent the claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which

reasonably represents the claimant's wage-earning capacity. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). In this case, the administrative law judge found that claimant returned to light duty work in December 1992 and then to his usual work in January 1993 at his pre-injury wages. Claimant worked for three and one-half years in this capacity, earning raises and working regular, overtime and double time hours. Emp. Ex. 19. He ceased work only when Dr. Darby, an unauthorized physician, diagnosed chronic back pain and chronic muscoskeletal strain. Claimant was placed on a non-industrial leave of absence, and then he was terminated pursuant to the union contract when he failed to return to work within one year. Decision and Order at 41-43. Because claimant returned to his usual work for several years after his injury at his pre-injury earning level and did not demonstrate his work injury prevented his continual performance of this work, the administrative law judge rationally found that claimant did not establish a loss of wage-earning capacity due to his injury. Therefore, we affirm the administrative law judge's denial of permanent partial disability benefits. *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995).

Claimant next challenges the administrative law judge's denial of his motion for modification. He asserted before the administrative law judge that his favorable disability finding before the Social Security Administration (SSA) constitutes reason to modify the award of benefits under the Act. Section 22 of the Act permits the modification of a final award if the proponent of the modification can establish either a change in a claimant's condition or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The administrative law judge found that claimant established neither a change in condition nor a mistake in a determination of fact. Decision on Modif. at 3. Accordingly, he denied the motion. *Id.* at 3-4.

We affirm the administrative law judge's decision. Claimant's submission of the SSA decision established only that another adjudicatory body found the totality of his medical conditions to be disabling. It does not establish a change in claimant's condition since the issuance of the administrative law judge's decision or a mistake in the determination of a fact, as the SSA decision does not show that the disabling conditions are related to his 1992 work injury. *See generally Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, No. 99-1954 (4th Cir. Dec. 8, 2000); *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983). Moreover, as the extent of a claimant's disability is a mixed question of fact and law, and as the SSA decision was based on both industrial and non-industrial factors, the SSA standard for awarding benefits differs from that under the Act. *Jones v. Midwest Machinery Movers*, 15 BRBS 70 (1982); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). Accordingly, it was appropriate for the administrative law judge to reject claimant's assertion that the SSA decision warranted modification of his award under the Act.

Employer appeals the administrative law judge's award of an attorney's fee. Specifically, it argues that claimant's counsel is not entitled to a fee, as he did not obtain any additional benefits for claimant beyond those voluntarily paid, or, alternatively, that the fee should be greatly reduced. Claimant's counsel filed a fee petition for $15,850 plus $1,331.13 in expenses, and employer filed objections. The administrative law judge considered the objections and then awarded a total fee in the amount of $10,658.91. This figure included specific reductions based on employer's objections and also included a 30 percent overall reduction due to claimant's limited success.

The administrative law judge did not award claimant benefits beyond those previously paid by employer. Nevertheless, he awarded claimant's counsel a fee because employer controverted the claim and because it had a financial interest in the outcome. Supp. Decision and Order at 3. Under Section 28(b), 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In this case, employer voluntarily paid all benefits related to the injury prior to the administrative law judge's determination. Under those circumstances, claimant did not succeed in prosecuting his claim and it was error for the administrative law judge to award counsel a fee. *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997). However, in light of our decision to vacate the administrative law judge's denial of benefits related to claimant's ulcer condition and to remand the case for further consideration of claimant's entitlement to benefits, claimant may ultimately succeed in obtaining additional benefits. Therefore, we vacate the fee award, and we remand the case for further consideration of the fee petition and objections thereto in light of any additional award on remand.

Accordingly, the administrative law judge's denial of disability and medical benefits for claimant's ulcer condition and his fee award are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge