BRB No. 08-0297

W.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CIVILIAN PERSONNEL OFFICE	)	DATE ISSUED: 09/18/2008
	)	
and	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Part, Denying Benefits in Part, and Remanding the Claim to the District Director, OWCP to Calculate Overpayments and Direct Further Proceedings of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

John J. Osterhage, Warsaw, Kentucky, for claimant.

Gregory D. Cox (Office of Legal Counsel, Air Force Services Agency), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits in Part, Denying Benefits in Part, and Remanding the Claim to the District Director, OWCP to Calculate Overpayments and Direct Further Proceedings (2006-LHC-00293) of Administrative Law Judge Alice M. Craft 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 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, while working in food service for employer on Wright Patterson Air Force Base,[1] injured her right knee due to a slip and fall incident that occurred on May 12, 2000. Following a period during which claimant was off work and underwent treatment to her right knee, claimant returned to her usual work for employer through 2001, 2002, and into 2003. Increased pain and discomfort in 2003 prompted claimant to undergo several arthroscopic procedures on her right knee, culminating in a total right knee replacement on July 1, 2004. Meanwhile, when she was at home on September 18, 2003, recovering from one of the arthroscopic procedures, claimant fell and broke her right wrist. Claimant underwent surgery for her right wrist on November 16, 2004, and again on May 17, 2005. She returned to her usual job as a food service worker on March 1, 2005.

Employer voluntarily paid periods of temporary total disability benefits from May 15 to June 4, 2000, from June 30 to July 16, 2000, and from August 15, 2000, to January 29, 2001. Employer terminated its payment of benefits retroactive to January 15, 2001, on the basis that claimant had been "released to and did return to work" as of that date. Claimant subsequently sought permanent total disability benefits based on an alleged recurrence of her work-related right knee injury in March 2003 and on the right wrist injury sustained in September 2003, which she alleged was also due to the natural progression of the work-related knee injury sustained on May 12, 2000.

In her decision, the administrative law judge found that claimant is entitled to the Section 20(a) presumption with regard to her initial right knee injury and that employer rebutted the presumption. 33 U.S.C. §920(a). After weighing the evidence as a whole, the administrative law judge concluded that claimant's May 12, 2000, fall caused a strain in her right knee which had entirely healed by January 2001. Additionally, the administrative law judge found that the May 12, 2000, work incident did not in any way accelerate or aggravate the advance of claimant's osteoarthritis such that it was not a factor in the recurrence of her knee problems in 2003 or her subsequent right wrist fracture. Accordingly, the administrative law judge found claimant entitled to disability and medical benefits "for her time off work" in 2000 and 2001, but denied disability and medical benefits for claimant's subsequent right knee condition and right wrist injury.

[1] Claimant was working in Wings Kitchen, a division of the Officer's Club at Wright Patterson Air Force Base, at the time of the incident.

On appeal, claimant challenges the administrative law judge's finding that the 2003 worsening of her right knee and the right wrist injury are not work-related injuries. Claimant specifically argues that the administrative law judge erred in crediting the opinion of Dr. Randolph over that of her treating orthopedic surgeon, Dr. Saunders, to find that the 2003 worsening of claimant's right knee condition and the right wrist injury were unrelated to her initial May 12, 2000, work injury. Employer responds, urging affirmance.

After consideration of the administrative law judge's decision, the arguments raised on appeal, and the evidence of record, we affirm the administrative law judge's Decision and Order as it is supported by substantial evidence and contains no reversible error. Where claimant has established invocation of the Section 20(a) presumption, and employer has established rebuttal thereof,[2] the administrative law judge must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1995); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In finding that claimant did not establish that the recurrence of her right knee problems in 2003 or right wrist fracture were caused or aggravated by the work-related fall sustained on May 12, 2000, the administrative law judge rationally credited the opinion of Dr. Randolph over the contrary opinion of Dr. Saunders. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge found that Dr. Randolph's opinion that claimant's right knee condition is due to her degenerative arthritis and tobacco abuse,[3] rather than to her May 12, 2000, fall at work, is more consistent with evidence that claimant's complaints of knee pain pre-existed the May 12, 2000, work incident, than Dr. Saunders's contrary opinions.[4] In addition, the

[2] Claimant does not contest the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption based on Dr. Randolph's opinion. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

[3] Dr. Randolph noted that tobacco abuse accelerates degeneration.

[4] The administrative law judge found that Dr. Saunders's opinion regarding the post-2003 condition of claimant's right knee became more tentative and equivocal once he reviewed the treatment notes of other doctors. Dr. Saunders initially testified that he reached his conclusion on causation, in large part, based on the absence of any knee complaints prior to the May 12, 2000, fall at work. Claimant's Exhibit (CX) 1, Dep. at

administrative law judge found no evidence that the May 12, 2000, fall resulted in a knee "injury so bad that she had fractured the cartilage or torn the meniscus itself," which was the crux of claimant's 2003 knee complaints. Decision and Order at 16. As it is rational and supported by substantial evidence, we affirm the administrative law judge's determination, based on the record as a whole, that claimant's 2003 right knee condition and right wrist injury are not causally related to her 2000 work injury. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.2d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Consequently, the administrative law judge's denial of benefits relating to these conditions is affirmed. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

We also reject claimant's assertion that she is entitled to an attorney's fee payable by employer in this case. Any attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928. *See also* 20 C.F.R. §§702.132, 702.134. The administrative law judge found that claimant did not obtain any compensation beyond that which employer had voluntarily paid. As employer voluntarily paid benefits following claimant's injury, it is not liable for a fee under Section 28(a), nor can employer be held liable under Section 28(b), as claimant failed to obtain any additional compensation. *See generally Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Devor v. Dept. of the Army*, 41 BRBS 77 (2007); *Davis v. Eller & Co.*, 41 BRBS 58 (2007). Consequently, we affirm the administrative law judge's denial of an attorney's fee payable by employer under Section 28 of the Act. *Id.*

19, 25. Subsequently, Dr. Saunders acknowledged that the evidence of knee complaints in 1999 and 2000 indicates that claimant's right knee condition could be "degenerative," and that there is no evidence that claimant sustained, as a result of the May 12, 2000, work incident, the sort of direct blow to the knee usually required to create the grade 3 chondromalacia which he diagnosed in 2003. CX 1, Dep. at 57.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Part, Denying Benefits in Part, and Remanding the Claim to the District Director, OWCP to Calculate Overpayments and Direct Further Proceedings is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge