BRB Nos. 91-1047
and 93-0897

CARL E. WEBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JACKSONVILLE SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of Aaron Silverman, Administrative Law Judge, United States Department of Labor and the Compensation Order-Award of Attorney's Fees of N. Sandra Ramsey, District Director, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Paul M. Doolittle (Sharp & Doolittle, P.A.), and John C. Taylor, Jr. and Cindy L. Anderson (Taylor, Day & Rio), Jacksonville, Florida, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-1623, 89-LHC-1638) of Administrative Law Judge Aaron Silverman and the Compensation Order-Award of Attorney's Fees (Case Nos. 6-93255 and 6-93152) of District Director N. Sandra Ramsey awarding benefits 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).[1] We must affirm the findings of fact and conclusions of law of the

[1]We hereby consolidate for purposes of decision claimant's appeal of the administrative law judge's Decision and Order, BRB No. 91-1047, with claimant's appeal of the district director's

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 worked for employer as a pipefitter when he sustained a back injury on May 4, 1985, and a separate left knee injury on December 20, 1985. Claimant was released for light duty by his treating physician as of December 1986. Claimant sought permanent total disability benefits and medical expenses resulting from a heart attack in April 1989, which was allegedly due to stress over finances resulting from claimant's loss of income.

The administrative law judge found that claimant reached maximum medical improvement from the back and knee injuries on December 5, 1986. He found that claimant suffered a 15 percent loss of use of his left leg which translates to a 6 percent whole man impairment and that claimant's back condition resulted in a 20 percent whole man impairment, for a total of a 26 percent whole man impairment. The administrative law judge also found that claimant was released for work in December 1986 with restrictions and that based on claimant's age, education, experience and the medical consensus, employer established abundant evidence of suitable alternate employment paying in a range of $4 to $7 per hour with most of the openings at $4 to $4.50 per hour. Thus, the administrative law judge awarded claimant permanent partial disability pursuant to the schedule at Section 8(c)(2), (19), 33 U.S.C. §908(c)(2), (19), for his knee injury and for his back injury under Section 8(c)(21), 33 U.S.C. §908(c)(21).

The administrative law judge found, however, that the award for the knee injury has to be factored out of the award for claimant's back condition under Section 8(c)(21) in order to avoid a double recovery to claimant. In order to factor out the loss of wage-earning capacity attributable to claimant's knee injury, the administrative law judge reduced the Section 8(c)(21) award by 23 percent while it and the scheduled award for claimant's knee injury are running concurrently for 43.20 weeks. Decision and Order at 4.

The administrative law judge also found employer is not liable for a penalty under Section 14(e), 33 U.S.C. §914(e), for failure to timely pay benefits for the scheduled injury, inasmuch as employer was continuing to pay claimant temporary total disability benefits, and because the schedule award could not overlap or run concurrently with payments for total disability. Lastly, the administrative law judge found that claimant's heart attack was not work-related, and that employer was entitled to relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

Claimant's counsel subsequently filed a fee application for services performed before the district director in which he requested $2,100 representing 14 hours of services at $175 per hour. In a Compensation Order-Award of Attorney's Fees dated April 9, 1992, the district director awarded claimant's counsel a fee of $1400, representing 14 hours of legal services at $100 per hour, to be paid by employer.

On appeal, claimant contends that the administrative law judge erred in finding that

---

Compensation Order-Award of Attorney's Fees, BRB No. 93-897. 20 C.F.R. §802.104.

claimant's heart attack was not causally related to his work injury and in finding that suitable alternate employment was established. Claimant also contends that the administrative law judge erred in finding that an award for permanent partial disability under Section 8(c)(21) and under the schedule cannot run concurrently. BRB No. 91-1047. In addition, claimant appeals the district director's fee award, contending that the district director erred in reducing the hourly rate requested from $150 to $100 without further explanation. BRB No. 93-897. Employer responds, urging affirmance of the administrative law judge's Decision and Order and the district director's Compensation Order-Award of Attorney's Fees.

Initially, claimant contends that the administrative law judge erred in finding that claimant's heart attack in April 1989 was not work-related, based on Dr. Nauman's opinion that the work-related injuries were a ten percent cause of the heart attack. The Section 20(a) presumption, 33 U.S.C. §920(a), applies to the issue of whether an injury is causally related to employment. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub. nom. Insurance Co. of North America v. Director, OWCP*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). The failure to properly apply the Section 20(a) presumption is harmless error if the evidence relied upon establishes the lack of causal connection between claimant's employment and the injury and therefore would be sufficient to rebut the presumption. *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981).

In the present case, the administrative law judge's entire discussion regarding the cause of claimant's heart attack is that "any benefits to the claimant from the Section 20(a) presumption would be clearly rebutted by the weight of the only probative medical evidence from Dr. Steven S. Nauman which fails to support the contention." Decision and Order at 5. Dr. Nauman is the only physician of record who states an opinion regarding the cause of claimant's heart attack in April 1989. In a letter dated September 22, 1989, Dr. Nauman opined that he did not feel that the injuries at the shipyard played any substantial role in claimant's subsequent heart attack. However, in a letter dated October 16, 1989, Dr. Nauman stated that he would assign the stress related to claimant's work injuries a weight of approximately ten percent compared to the other factors. Cl. Ex. 15.

Subsequently, during deposition, Dr. Nauman testified that his opinion in the first letter was more reliable than the second, inasmuch as he had a clearer idea of the time lapse between the work-related injuries in 1985 and the heart attack in September 1989. Moreover, Dr. Nauman also stated that there was no relationship between the stress involved and the myocardial infarction in 1989 and that the stress related to the previous injuries does not constitute the type of stress which would contribute to coronary disease. Dr. Nauman Dep. at 7-9. Therefore, as Dr. Nauman's last opinion rules out a connection between claimant's employment and his heart attack, it is sufficient to establish rebuttal of the Section 20(a) presumption. *Graham*, 13 BRBS at 339. Thus, we affirm the administrative law judge's finding that the evidence does not establish that claimant's heart attack in April 1989 was work-related. *See generally Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1989).

Claimant also contends that the administrative law judge erred in awarding permanent partial

disability benefits inasmuch as the evidence is insufficient to establish the availability of suitable alternate employment. In addition, claimant contends that a showing of suitable alternate employment cannot be applied retroactively to the date of maximum medical improvement.

Once the administrative law judge finds that claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical areas where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he was in a position to compete realistically if he diligently tried. *See Turner*, 661 F.2d at 1042-43, 14 BRBS at 164-165; *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, No. 90-1491 (D.C. Cir. May 7, 1991).

In the present case, the administrative law judge found that based on claimant's age, education, experience and the medical consensus, employer provided evidence of suitable alternate employment paying in a range from $4 to $7 an hour with most of the openings at $4 to $4.50 per hour. Without specifying which job(s) he found suitable, the administrative law judge summarily concluded that $4.50 per hour is a reasonable representation of the claimant's residual wage-earning capacity.[2]

The record in the instant case contains numerous specific positions that have been identified, as well as the availability of such work in claimant's local community, and the applicable wages, hiring practices, and the physical requirements of such positions. These positions were reviewed by claimant's treating physician for his back and knee injuries, Dr. Lucie, and the cardiologist, Dr. Nauman; a large number of the positions were approved by both physicians as within claimant's limitations. In violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A)(APA),[3] the administrative law judge failed to provide any rationale for his finding that suitable alternate employment was established and failed to identify the evidence he was accepting or rejecting. Without specific findings regarding suitable and available employment, we are unable to properly apply our standard of review. Accordingly, we vacate the administrative law judge's finding that suitable alternate employment was established and remand the case for the administrative law judge to reconsider the suitability and the availability of the alternate work identified by employer consistent with law and the requirements of the APA.[4] *See generally Bryant v. Carolina Shipping*

[2]The administrative law judge instructed the district director to determine how much a job currently paying $4.50 an hour paid at the time of claimant's injury. Decision and Order at 3.

[3]The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), mandates that the administrative law judge's decision include a statement of "findings and conclusions and the reason or basis therefor, on all material issues of fact, law, or discretion presented in the record."

[4]However, we reject claimant's contention that in order to establish suitable alternate employment employer must convey to claimant information about currently available jobs. *Hogan v. Schiavone*

Co., 25 BRBS 294 (1992); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

We also agree with claimant that in determining the commencement date for the award of permanent partial disability compensation, the administrative law judge erred in applying his finding of suitable alternate employment retroactively to the date of maximum medical improvement. An injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Accordingly, on remand if the administrative law judge finds that employer has met its burden of establishing suitable alternate employment and that claimant thus is only permanently partially disabled, the commencement date for the award of permanent partial disability compensation should be the date that employer first establishes the availability of suitable alternate employment. *See Stevens*, 909 F.2d at 1259-1260, 23 BRBS at 94 (CRT); *Rinaldi*, 25 BRBS at 131. Finally, on remand it is the administrative law judge's responsibility to determine claimant's post-injury wage-earning capacity based on wage levels of suitable jobs at the time of injury. *See, e.g., Richardson v. General Dynamics Corp.*, 23 BRBS 326 (1990).

Terminal, Inc., 23 BRBS 290 (1990). Moreover, we note that as claimant's heart attack occurred after the work injuries and is not related to claimant's employment, the administrative law judge need not consider restrictions resulting from this event in determining if suitable alternate employment is established.

Claimant also contends on appeal that the administrative law judge erred in finding that the permanent partial disability awards for a scheduled injury and for loss in wage-earning capacity under Section 8(c)(21) cannot run concurrently. Where claimant suffers two distinct injuries, a scheduled injury and a non-scheduled injury, arising either from a single accident or multiple accidents, he may be entitled to receive compensation under both the schedule at Section 8(c)(1)-(20) and Section 8(c)(21). *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 234-235 (1985). However, since the scheduled injury is being compensated separately, any loss in wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. *Id.*

As claimant correctly contends, he is entitled to two separate awards for his injuries, and they may run concurrently; thus, we affirm the administrative law judge's finding that claimant is entitled to concurrent awards for both his back and knee injuries. *Id.* However, in order to avoid double recovery, we hold that the administrative law judge properly factored out the disability from the knee injury from the Section 8(c)(21) award. The administrative law judge rationally considered the amount of disability attributable to claimant's knee injury (6 percent) and reduced the amount of the Section 8(c)(21) award by the ratio of claimant's knee injury to the total impairment (6 percent/26 percent), or 23 percent, while it and the scheduled award are running concurrently for 43.20 weeks. *Id.* As the administrative law judge's finding in this regard is rational and in accordance with law it is affirmed.

Lastly, we decline to address claimant's contention that he is due a Section 14(e) penalty associated with the scheduled permanent partial disability award as it is inadequately briefed. *See West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125 (1988). Moreover, the administrative law judge correctly denied the penalty upon finding that claimant, at all times, was receiving compensation for temporary total disability. *See generally Olson v. Healy Tibbits Construction Co.*, 22 BRBS 221 (1989)(Brown,, J., dissenting on other grounds).

In his appeal of the district director's fee order, claimant contends that the district director erred in reducing the hourly rate from $175 to $100 without further explanation, and notes that the administrative law judge awarded an hourly rate of $125. The district director found that:

> Considering the quality of the representation, the work performed, the complexity of the case, the benefits awarded and the risk of loss, I find that a rate of $100.00 per hour is reasonable and appropriate.

Compensation Order-Award of Attorney's Fees.

The amount of an attorney's fee award 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). An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of the benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989).

As the district director specifically noted the complexity of the case in reducing the hourly rate from $175 to $100, claimant's assertion that the district director did not properly consider the complexity of the case is rejected. Moreover, although a lower hourly rate may not be awarded solely because work is non-litigation work, *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), the district director is not restricted to the hourly rate awarded by the administrative law judge, if other factors warrant a lower hourly rate. *See* 20 C.F.R. §702.132; *see also Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds). Furthermore, we reject claimant's contention that the hourly rate awarded should be increased due to the delay in payment of the attorney's fee award. Augmentation of the hourly rate to reflect delay in payment is not necessary because factors such as risk of loss and delay of payment occur generally in Longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel. *See Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988). Generally, the hourly rate requested should be based on the rate in effect at the time the services were rendered. *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987). *Cf. Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991)(Board affirms a discretionary determination of the administrative law judge that unusually protracted litigation warranted use of rate higher than the historical rate). Thus, inasmuch as claimant has not established that the district director abused her discretion in awarding an hourly rate of $100, we affirm the hourly rate awarded. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Accordingly, the administrative law judge's award of permanent partial disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed. The district director's Compensation Order-Award of Attorney's Fees is affirmed.[5]

SO ORDERED.

NANCY S. DOLDER, Acting
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]Counsel's request for an attorney's fee for work performed before the Board in BRB No. 91-1047 will be considered upon the filing of fee petition within 60 days of the issuance of the administrative law judge's Decision and Order on Remand. 20 C.F.R. §802.203(c). Counsel is not entitled to a fee in BRB No. 93-897 as he was unsuccessful on appeal.