BRB No. 03-0429

LOIS J. COHEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRAGMA CORPORATION	)	DATE ISSUED: MAR 19, 2004
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Benefits and the Supplemental Decision and Order Awarding Attorney Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

John C. Lynch (Macleay, Lynch, Gregg & Lynch, P.C.), Washington, D.C., for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Granting Modification and Benefits and the Supplemental Decision and Order Awarding Attorney Fees (2002-LHC-0368) of Administrative Law Judge Pamela Lakes Wood 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 Defense Base Act, 42 U.S.C. ' 1651 *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).

Claimant worked as an attorney for employer in Almaty, Kazakhstan, from November 1997 through May 1998. She claims she developed pulmonary fibrosis as a result of her employment as well as multiple complications from treatment therefor. In her original claim, she contended she was exposed to environmental pollutants in Almaty. She developed what was originally diagnosed as "usual interstitial pneumonitis" (UIP) with fibrotic processes.[1] This was interchangeably referred to as idiopathic pulmonary fibrosis. Her treating physician, Dr. Wagner,[2] could not pinpoint the cause of her condition, but he agreed it developed while claimant was overseas exposed to harmful environmental pollutants. The administrative law judge initially found that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption via the testimony of its expert, Dr. Friedman, who stated that claimant's condition was the result of a virus she contracted and was not the result of her employment exposures. The administrative law judge then credited this opinion over that of Dr. Wagner and denied claimant's claim. Decision and Order at 28, 31-32. Claimant appealed the decision, but before the Board could address the appeal, claimant moved for modification pursuant to 33 U.S.C. §922, and the Board dismissed the appeal. *Cohen v. Pragma Corp.*, BRB No. 01-739 (Sept. 25, 2001).

The administrative law judge conducted a hearing on claimant's motion for modification on July 22, 2002. At issue was claimant's contention that her condition is not idiopathic but was the direct result of exposure to pollutants, specifically cadmium, while she lived and worked in Almaty. She submitted articles reporting the poor air quality, the atmospheric inversion, and the presence of cadmium and other pollutants. The administrative law judge considered the new evidence claimant submitted as well as the evidence from the original hearing and found that claimant established a *prima facie* case invoking the Section 20(a) presumption. She also found that employer's evidence no longer sufficed to rebut the presumption, but even if it did, claimant established by a preponderance of the evidence that her conditions are the result of her employment in Almaty, Kazakhstan. Decision and Order on Modif. at 42-45. The administrative law

[1]According to Dr. Wagner, the American Thoracic Society changed the definition of UIP in 2000. Although UIP was a correct diagnosis for claimant in 1998, it is now reserved for people with lung conditions of unexplained etiology in progressive decline. As claimant's condition is not in progressive decline, the diagnosis would now be inappropriate. Dr. Wagner stated that, as of 2000, claimant's diagnosis would be "organizing pneumonia with residual pulmonary fibrosis." Cl. Ex. J at 59-60, 107.

[2]Dr. Wagner is Board certified in internal medicine with subspecialty certifications in pulmonary medicine and critical care medicine. Tr.2 at 62.

judge, therefore, modified the prior denial and awarded claimant both disability and medical benefits. Employer appeals the award, asserting that the administrative law judge should not have reopened the case pursuant to Section 22 and that the evidence does not support the administrative law judge's findings on the merits. Claimant responds, urging affirmance.

Subsequently, claimant's counsel filed a petition for an attorney's fee for work performed during the course of both the original claim and the modification proceedings. Counsel requested a total fee of $240,299.51, plus expenses. Employer filed objections. The administrative law judge reduced the fee in light of some of employer's objections; however, she awarded a fee in the amount of $160,140, plus $14,779.51 in costs. Supp. Decision and Order at 7. Employer appeals the fee award, and claimant responds, urging affirmance.

In light of the issues presented, it is necessary to recount the facts in some detail. Claimant testified that when she was working in Almaty, Kazakhstan, she began having shortness of breath upon exertion and had to reduce her level of exercise. She also testified that a friend commented on her yellowing skin color, and she stated that she began having diarrhea that ceased with antibiotics but resumed once treatment was completed. Tr.1 at 50-52. As a result of her unexplained, recurrent diarrheal condition, she returned to the United States for treatment on May 31, 1998. Six days later, she suffered extreme shortness of breath and went to the emergency room. Prior to her discharge on June 18, 1998, claimant became extremely ill, was put on a ventilator, and underwent a transbronchial lavage and an open lung biopsy. Cl. Ex. G1B at 700-702; Tr.1 at 54-58.

Results from the lavage and biopsy revealed active interstitial pneumonitis with fibrotic processes in mature, immature, and active stages. Cl. Ex. J at 14, 99-100; Tr.2 at 73-75. Based on the presence of the fibrous materials, claimant was put on Prednisone therapy. The dose was originally extremely high, and it was reduced over the course of the next nine months until it was discontinued. Cl. Ex. J at 19-22, 115-116; Tr.1 at 59. Although the steroid treatment halted claimant's active lung inflammation, a number of complications arose related to the Prednisone therapy.[3] Claimant was able to return to work as an attorney, traveling to Latvia in February 1999, Tbilisi, Georgia in June 1999,

[3]Claimant contended that the following conditions are related to the steroid treatment: loss of bone density of the right and left femoral joints, herpes zoster (shingles) in claimant's left arm causing ulnar nerve impingement, coronary artery disease, "moon face" and "buffalo hump" (wherein fatty tissue converges in one spot), and severe dental problems. Claimant has undergone one or more surgeries for each of the above conditions. Cl. Ex. G1A at 201, 340-342; Cl. Ex. G2D at 784B, 786-788, 811; Cl. Exs. G3G-G3H; Cl. Ex. J at 24, 33-34, 37-49. *See* discussion, *infra*.

and Bosnia in early 2000; however, due to her continuing conditions and surgeries, she worked only sporadically after June 2001. Tr.1 at 68, 76-77; Tr.2 at 42-43.

Following the administrative law judge's first decision, wherein she stated that one of the reasons she denied benefits was because claimant could not "identify a causative agent[,]" Decision and Order at 29, claimant and her attorneys undertook the task of searching for such an agent. Upon reading an article by the Green Women Ecological News Agency of Kazakhstan, Cl. Ex. L1, and other similar articles, Cl. Exs. L2-L31, claimant came to believe that cadmium was the cause of her disease. Claimant and her attorneys conducted more research, re-connected with Dr. Wagner, obtained his opinion on this theory, and filed a motion for modification pursuant to Section 22.

The Motion for Modification

Employer first contends the administrative law judge erred in reopening the denial of benefits pursuant to Section 22. Employer argues that claimant's theory on modification, cadmium-related illness, is different from her original theory of recovery, environmental pollutants-related illness, and is based on materials that cannot be considered "new evidence" as they were published and available before the first hearing. Employer asserts that claimant merely changed her theory of causation to fill in the gaps noted in the administrative law judge's first decision and, consequently, claimant was improperly permitted to re-litigate her claim. We reject employer's argument.

Section 22 of the Act displaces doctrines of finality such as *res judicata* and the law of the case doctrine, *see Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993), and permits the modification of a final award or denial if the party seeking to alter the award or denial can establish either a change in conditions or a mistake in the determination of a fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The administrative law judge has great discretion to correct *any* mistakes of fact, *see Banks*, 390 U.S. 459, and may consider wholly new evidence, cumulative evidence, or may further reflect on evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). If the moving party asserts a change in condition, the award or denial may be modified if there is a change in either an employee's wage-earning capacity or a change in her physical condition. *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT).

Claimant moved for modification on the basis of a mistake in fact regarding the issues of causation and rebuttal. Thus, the administrative law judge has great discretion in reviewing the evidence regardless of whether it is "wholly new," cumulative or old evidence. *O'Keeffe*, 404 U.S. 254. While acknowledging this holding, employer argues

that claimant's motion for modification here was based on new evidence, namely the articles depicting Almaty as being extremely polluted with cadmium and other harmful particles. Employer asserts that as this evidence was available prior to the time of the first hearing, it cannot be considered "wholly new" evidence and should not be permitted to be the basis for granting a motion for modification. Employer asserts that "wholly new" evidence under the Act should be defined as:

> evidence which was not readily available or could not with due diligence have been discovered within ten days of the Administrative Law Judge's ruling in the first trial, *i.e.*, the time period during which the Administrative Law Judge has jurisdiction to rule upon a Motion for Reconsideration.

Emp. brief at 5. Its basis for asserting this definition rests on Federal Rules of Civil Procedure (FRCP) Rule 60(b) wherein a party may seek relief from judgment. Rule 60(b)(2) permits relief from judgment if there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]" A motion for such relief must be made not more than one year after the judgment. Rule 59(b), Fed. R. Civ. P. 59(b), provides that a party may move for a new trial "no later than 10 days after entry of the judgment." Employer also relies on the decisions in *Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001), and *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), as support for its proposition.

Contrary to employer's argument, the United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, has held that Section 22 of the Act does not require the moving party to establish that the evidence offered in support of modification was not available before the first hearing. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *see also Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002). That is, the breadth of the standard gives the administrative law judge great leeway in reviewing new or cumulative evidence, or further reflecting upon evidence initially submitted, and requiring a party to proffer newly-discovered evidence improperly restricts a well-established ground for granting modification. *Jensen*, 346 F.3d at 277, 37 BRBS at 101-102(CRT); *see also O'Keeffe*, 404 U.S. 254 (Supreme Court rejected efforts to limit modification to instances where new evidence is produced); *Banks*, 390 U.S. 459 (Supreme Court permitted modification although supporting evidence could have been discovered earlier). In *Old Ben Coal*, the United States Court of Appeals for the Seventh Circuit discussed *O'Keeffe*, *Banks* and other cases involving Section 22 and concluded that the interest in accuracy overrides the interest in finality, so a "modification request cannot be denied out of hand based solely on . . . the basis that the evidence may have been available at an earlier stage in the proceeding." *Old Ben Coal*, 292 F.3d at 546, 36 BRBS at 44(CRT). Accordingly, we reject employer's argument that modification must be based on "wholly new"

evidence. As Section 22 is to be broadly construed and as the administrative law judge is not bound by technical or formal rules of procedure, *see* 33 U.S.C. §923(a), we reject employer's contention that reference to the FRCP is appropriate.

Additionally, employer's reliance on *Hutchins* and *Woodberry* is misplaced. In *Hutchins*, the motion for modification was based on a continuing condition, which was the responsibility of a later carrier; thus, the evidence submitted could only have been obtained after the first hearing. *Hutchins*, 244 F.3d 222, 35 BRBS 35(CRT). In *Woodberry*, the employer moved for modification so as to raise Section 8(f), 33 U.S.C. §908(f), and modify the award of benefits. The court rejected the employer's argument that it should be permitted to raise the Section 8(f) defense on modification because of a change in the law regarding the definition of "disability" as used in Section 8(f). It held that a change in law does not equate to a change in the claimant's condition; therefore, modification is not permitted on this basis. *Woodberry*, 673 F.2d 23, 14 BRBS 636. The decision in *Woodberry*, as employer asserts, is based on the principle of finality and holds that a party may not re-litigate the claim to incorporate an omitted strategy. As the Seventh Circuit stated in *Old Ben Coal*, however, *Woodberry* involved an affirmative defense that was not previously raised; moreover, the court concluded that case law such as *Woodberry* that "emphasizes finality interests cannot easily be squared with the language of the statute, the holdings of the Supreme Court, or the holdings of other circuits that have emphasized the preference for accuracy over finality in §22 adjudications." *Old Ben Coal*, 292 F.3d at 545, 36 BRBS at 43(CRT). Therefore, we reject employer's assertion that the interest of finality is of utmost concern and should serve to prohibit the administrative law judge from re-opening this claim. Accordingly, we hold that the administrative law judge properly re-opened claimant's case pursuant to Section 22 and considered the new and old evidence offered in support of modification.

Section 20(a)

Pulmonary Fibrosis

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that she sustained a harm or pain and that conditions existed or an accident occurred at her place of employment which could have caused the harm or pain. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Marinelli*, 248 F.3d

54, 35 BRBS 41(CRT); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *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).

In this case, employer contends claimant did not establish a *prima facie* case because she failed to show she was exposed to harmful levels of cadmium, which was the basis for her motion for modification. Thus, employer asserts claimant's claim on modification must fail. Contrary to employer's assertion, although it was the focus of the motion for modification, cadmium exposure need not be the basis for the administrative law judge's decision. Rather, once an administrative law judge decides to reconsider the entire claim pursuant to Section 22, she is free to revisit issues already decided. *O'Keeffe*, 404 U.S. 254; *Hutchins*, 244 F.3d at 227, 35 BRBS at 37-38(CRT). Here, upon further consideration and a better understanding of the case, the administrative law judge determined that claimant's condition was caused by her exposure to environmental pollutants in Almaty. The administrative law judge agreed with employer that claimant's evidence "falls short of establishing that she was exposed to potentially harmful levels of cadmium." Decision and Order on Modif. at 42. Nevertheless, the administrative law judge found that claimant's evidence on modification "also has a bearing upon the original theory espoused[.]" As *O'Keeffe* allows the administrative law judge to "rethink" the entire case pursuant to Section 22, we reject employer's contention that the administrative law judge erred in considering issues not specifically raised in claimant's motion for modification.

The administrative law judge determined, as she did in her initial decision, that claimant established a *prima facie* case relating her pulmonary fibrosis to the exposure to pollutants in Almaty, Kazakhstan. Decision and Order on Modif. at 42. In light of the evidence, the administrative law judge found that the "zone of danger" test assisted in invoking the Section 20(a) presumption, regardless of whether the cause was viral, environmental or something else.[4] She applied Section 20(a) and found that claimant's exposure to some agent while she was in Kazakhstan is responsible for her condition. Decision and Order on Modif. at 45. The administrative law judge then found that employer's rebuttal evidence was weaker than she previously found and that Dr.

[4]The doctrine aids in establishing the "course of employment"/working conditions element of a *prima facie* case in Defense Base Act cases. *See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085 (9th Cir. 2004), *aff'g Ilaszczat v. Kalama Services, Inc.*, 36 BRBS 78 (2002).

Friedman's opinion does not constitute substantial evidence rebutting the Section 20(a) presumption. Specifically, the administrative law judge found that Dr. Friedman "backed off" from the positions that bronchitis is a necessary pre-requisite in the development of environmentally-related pulmonary fibrosis and that claimant's disease developed rapidly upon her return to the United States because the active inflammation shows it was not an "older" disease process. Decision and Order on Modif. at 42-43. While Dr. Friedman maintained his belief that environmental pollutants in general and cadmium in particular were unlikely factors in claimant's lung disease because of the brevity of her exposure, the administrative law judge stated that Dr. Friedman's opinion did not sever the connection to that exposure as the possible etiological cause, as he admitted a lack of knowledge regarding her exposure and clinical findings. *Id.* at 43. The administrative law judge therefore doubted that employer's evidence constituted the necessary "substantial countervailing evidence" needed for rebuttal, but she stated that, even if Dr. Friedman's opinion constituted sufficient rebuttal evidence, then the preponderance of the evidence supports claimant's claim that environmental pollutants encountered in Kazakhstan caused her pulmonary condition. *Id.* at 43-45. Moreover, the administrative law judge determined that even if the cause of claimant's lung condition is unclear, both doctors agreed, based on the stages of fibrosis found in claimant's lungs and the timing that evidence implies, that claimant's condition "arose out of her sojourn in Almaty." *Id.*

The administrative law judge's findings are supported by substantial evidence and are rational. Dr. Friedman maintained that claimant's condition was viral in nature, or perhaps related to the medication she had taken, with her long history of smoking being a contributory factor. Emp. Ex. E2 at 22, 40, 69. While the results of claimant's open lung biopsy specifically ruled out the presence of viral inclusions, Cl. Ex. J at 65; Tr.2 at 81, 83, Dr. Friedman believed claimant could have contracted a virus in Almaty. Emp. Ex. E2 at 23-24, 65-67, 71-72. The administrative law judge stated that, in her prior decision, she found Dr. Friedman's theory that claimant contracted a virus more plausible than claimant's theory of environmental pollutants; however, she determined there had been no evidence to establish the latency period of the virus. In her decision on modification, the administrative law judge stated that even if Dr. Friedman's viral theory is correct, his more recent deposition establishes that claimant most likely contracted the virus in Almaty. Decision and Order on Modif. at 44. Thus, she found that Dr. Friedman's opinion is not sufficient to sever the causal relationship. *Id.* Further, the administrative law judge noted that, whatever the causative agent, Dr. Wagner stated that when claimant was removed from the hazardous environment and treated with steroids her active disease resolved. Even when claimant resumed smoking, her active disease did not resume. *Id.* at 44-45; Cl. Ex. J at 84-85, 180. Based on the evidence of record, the administrative law judge rationally found that employer did not rebut the Section 20(a) presumption.

However, even if Dr. Friedman's opinion constitutes substantial rebuttal evidence, the administrative law judge credited the testimony of Dr. Wagner and claimant that her pulmonary condition arose during the course of her employment in Almaty as a result of her exposure to environmental pollutants. *See Marinelli*, 248 F.3d at 65-66, 35 BRBS at 49(CRT); Cl. Ex. J at 95; Emp. Ex. E2 at 22; Tr.2 at 87-88, 91, 93-107. Specifically, the administrative law judge found that, although the evidence upon which Dr. Wagner relied was insufficient to establish that cadmium was the cause of claimant's lung ailments, his testimony was persuasive in establishing that environmental pollutants were the most likely cause of claimant's condition and, at the same time, in ruling out other etiological factors such as viruses and bacteria. Decision and Order on Modif. at 46. The administrative law judge also gave great weight to Dr. Wagner's opinion that while claimant's smoking habit may have been a contributory factor, it was not a causative agent because her condition did not worsen once she resumed smoking. *Id.* Additionally, she relied on Dr. Wagner's interpretation of the biopsy information, which placed the insult to claimant's lungs as having occurred within the three or four months prior to the biopsy at the time claimant was in Almaty suffering from shortness of breath. Similarly, she acknowledged that when claimant was removed from the environment, her condition resolved, in contrast to most cases of pulmonary fibrosis which progress. *Id.* Even discounting the cadmium-related articles upon which Dr. Wagner relied to support his theory that cadmium was the causative agent, the administrative law judge found Dr. Wagner's opinion to be more persuasive than Dr. Friedman's because his credentials are superior, he was claimant's treating physician at the crucial period in 1998, and he testified before her and gave her a better understanding of the situation. *Id.* at 47.

It is within the administrative law judge's discretionary powers to determine how to credit and weigh the evidence of record, including the opinions of medical experts. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge's decision to give greater weight to Dr. Wagner's opinion is rational and is supported by substantial evidence of record. Cl. Ex. J at 13, 17-18; Tr.2 at 115, 119. Therefore, we affirm the administrative law judge's determination that claimant's pulmonary fibrosis was caused by her employment in Almaty, Kazakhstan.

The Right & Left Hip Conditions

Employer contends the administrative law judge erred in concluding that claimant's need for hip replacement surgeries was caused or exacerbated by the

Prednisone treatment.[5] It argues that the plan for right hip surgery pre-dated claimant's employment in Almaty and steroid treatment and was based upon her advanced stage of arthritis in the hip, and it argues that the need for left hip replacement surgery was due solely to arthritic changes and became necessary long after claimant stopped taking Prednisone. Dr. Wagner testified that Prednisone is known to decalcify bones. He stated that the most significant deterioration would occur within the first three months of treatment and would be permanent, but that there are long-term effects, as the body does not return to pre-Prednisone status. Cl. Ex. J at 18, 25-26. He believed that claimant's high doses of Prednisone exacerbated the condition of her right femoral joint, expediting the need for the replacement surgery. He stated that, although the hip was arthritic, he believes the shortening of the femoral head was due to bone density loss caused by Prednisone. Cl. Ex. J at 20, 24-26, 121-126, 128-132, 135-137. Dr. Wagner confirmed that, prior to the steroid treatment, claimant's left hip was normal, and he believed she would not have had to undergo surgery on the left hip had she not been treated with Prednisone. Cl. Ex. J at 33-34, 42- 44, 133-138.

Dr. Friedman opined that claimant's pre-existing arthritis was the sole reason she needed right hip replacement surgery and, prior to her stay in Almaty, claimant had plans to undergo this surgery. Cl. Ex. K at 22-23, 80-81. He noted the lack of a vascular pattern on the femoral head that he stated would have been present if Prednisone were the culprit. *Id.* at 24-25. However, he had been presuming a much lower dose of Prednisone, and he admitted that claimant did not have left hip problems until after the treatment, so he could not discount a connection. *Id.* at 55, 71, 75, 81. Dr. Graeter, claimant's treating orthopedist, noted that surgery revealed there had been a flattening of the femoral head. Cl. Ex. G2D at 784B-785A, 791, 805-815.

The administrative law judge credited the opinion of Dr. Wagner over that of Dr. Friedman due to his status as treating physician and his familiarity with claimant's treatment and results. She gave less weight to Dr. Friedman's opinion because of his lack of knowledge as to the Prednisone doses claimant took as well as his failure to address whether bone loss due to Prednisone could have resulted in hastening the need for either surgery. She found that the right hip condition was aggravated by the steroid treatment and the left hip condition was caused by it, making both conditions compensable. Decision and Order on Modif. at 51.

[5]Employer conceded at the first hearing that claimant's "moon face" and "buffalo hump" conditions, requiring corrective plastic surgery, and her severe dental problems, also requiring numerous surgeries and treatments, were related to the Prednisone treatment. Tr.1 at 29-30. As the administrative law judge found that claimant did not establish a relationship between her coronary artery disease, requiring a carbon stent implant, and her Prednisone therapy, the administrative law judge concluded that the heart condition was not compensable. Decision and Order on Modif. at 52.

If a claimant suffers from complications arising from treatment for a work-related injury, any disability related to or treatment necessitated by the complications is also work-related. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Moreover, if the treatment exacerbates a pre-existing condition, employer is liable under the aggravation rule. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). As claimant's Prednisone treatment was related to her work injury, any disabling complications arising from the Prednisone treatment are also work-related. The administrative law judge's finding that claimant's hip injuries are related to the Prednisone treatment and are compensable is supported by Dr. Wagner's opinion. Although Dr. Friedman's opinion is contrary, the administrative law judge has the authority to credit and weigh the medical evidence. Her decision to give greater weight to Dr. Wagner's opinion is rational and does not constitute an abuse of discretion. *Lennon*, 20 F.3d 658, 28 BRBS 22(CRT); *Calbeck*, 306 F.2d 693; *Donovan*, 300 F.2d 741; *Hughes*, 289 F.2d 403; *Perini Corp.*, 306 F.Supp. 1321. Consequently, we affirm the awards of temporary total disability benefits for the periods of disability and medical benefits related to the hip conditions.

The Ulnar Nerve Condition

Employer contends the administrative law judge erred in relating claimant's ulnar nerve entrapment to the Prednisone treatment. As the administrative law judge found, both Drs. Wagner and Friedman agreed that herpes zoster (shingles) is a complication of Prednisone use. Cl. Ex. J at 34; Cl. Ex. K at 28. Dr. Wagner believed the ulnar nerve neuropathy was related to the shingles. Cl. Ex. J at 37-38, 154-159. Dr. Friedman believed it was related to a past trauma. Cl. Ex. K at 28, 66-71. Dr. Edelson treated claimant's shingles and ulnar neuropathy but did not define the cause of either. Cl. Ex. G3F. The administrative law judge determined that Dr. Wagner's position was the more persuasive due to his superior knowledge of claimant's particular condition and his belief that "more likely than not" the neuropathy, requiring surgery, was due to the Prednisone-induced shingles. Decision and Order on Modif. at 52. As with the hip conditions, it is within the administrative law judge's discretionary powers to weigh the medical evidence, and Dr. Wagner's opinion supports the administrative law judge's decision that the disabling neuropathy arising from the Prednisone treatment is work-related. *Everett*, 23 BRBS 316; *Mattera*, 20 BRBS 43; *Weber*, 19 BRBS 146. We therefore affirm the administrative law judge's determination that claimant's ulnar nerve condition is compensable.

The Fee Award

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). Following the success on the motion for modification, claimant's counsel filed a petition for an attorney's fee in the amount of $240,299.51. Employer filed objections, seeking a significant disallowance of hours requested, arguing that the request contains: excessive hours, duplicative hours, services not performed before the administrative law judge, hours spent on the unsuccessful first hearing, excessive hourly rates, and charges for claimant's time. Additionally, employer sought an overall reduction of the fee because claimant obtained only partial success. The administrative law judge agreed that no fee could be awarded for services performed before other agencies, and she disallowed 254.4 hours, or $44,400. Supp. Decision and Order at 3-4. She also disallowed 26.8 hours of clerical time, or $1,340, as overhead, 76.1 hours of work claimant performed on behalf of herself, $15,220, and 22.1 hours spent on a related district court claim, $4,420. *Id.* at 5-6. She rejected employer's assertions that services performed in preparation of the first and second hearings should be denied or reduced by two-thirds, that the hourly rates of the associate attorneys should be reduced, and that the overall fee should be reduced by 10 to 12 percent because claimant was only partially successful. *Id.* at 4-6. In total, the administrative law judge disallowed $65,380 of the requested amount. She determined that, although the fee is large in comparison to the benefits awarded,[6] there may be future medical benefits related to claimant's work-related conditions, the case was complex, counsel displayed a high degree of skill, and counsel managed to get the administrative law judge to change her mind. *Id.* at 6-7. Accordingly, the administrative law judge awarded a fee in the amount of $160,140, plus expenses totaling $14,779.51. *Id.* at 7.

Employer first contends the administrative law judge should have denied time for all services related to the initial proceedings of this case because claimant did not succeed in obtaining benefits at that time. Contrary to employer's assertion, the administrative law judge correctly determined that the "ultimate success" is the deciding factor and that counsel is entitled to a fee for work performed leading to that success, including work that may have previously led to an unsuccessful result. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 8 (2001) (*en banc*); *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993) (*en banc*). Therefore, we reject this argument.

[6]Claimant was awarded medical benefits in the amount of $153,918.56, plus temporary total disability benefits at the maximum compensation rate for the periods between June 6, 1998, and February 1, 1999, March 3 and March 21, 2000, and October 27, 2000, and June 1, 2001.

Employer next contends the administrative law judge erred in failing to disallow excessive and duplicative time recorded by counsel during the two proceedings before the administrative law judge. The administrative law judge rejected these objections, stating that the case involved a large number of complex issues, it was handled well by claimant's counsel, the ultimate award was significant, and she was unwilling to arbitrarily reduce it by two-thirds. Supp. Decision and Order at 4, 6. With regard to the assignment of more than one attorney to the case, the administrative law judge stated: "I do not agree that the assignment of two attorneys to work together on a complex issue is necessarily duplicative. In fact, it may even be advisable in certain instances." *Id.* at 4. Employer argues that, while delegation of duties is acceptable, duplicative service is not. For example, employer states that 459 hours of service were amassed during the initial proceedings. Of that time, counsel requested a fee for over 135 hours for preparation of and attendance at two two-hour depositions and one half-day hearing (58.7 hours for Attorney Numrych and 48.3 hours for Attorney Lynch) and for over 175 hours for the briefing stage (74.2 hours for Attorney Numrych and 66.3 hours for Attorney Lynch).

After reviewing the fee petition, we agree with employer that there might be some duplicative or excessive entries. For instance, on April 12-13, 2000, Attorney Numrych billed 3.4 hours for preparing a request for admissions and other discovery documents and meeting with Attorney Lynch about same; Attorney Lynch billed 2.5 hours for preparing the same discovery documents. On April 19, 2000, Attorney Numrych twice charged .30 hour for preparing a medical release for one of claimant's overseas doctors. There also appear to be numerous instances where the same information is communicated to the same people by different methods: telephone calls, faxes, and letters. While the medical issues here are complex, some entries regarding "preparing for" various claim-related activities could be considered excessive. *See, e.g.*, entries for October 19, 2000 – October 25, 2000. We also note that three attorneys and one paralegal prepared the brief, and that both Attorney Numrych (6 hours) and Attorney Lynch (8 hours) requested a fee for their time at the first hearing on October 27, 2000.

The Board has previously affirmed fee awards wherein the administrative law judges determined that delegation of duties in complex cases may be advisable. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 43 (2000); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). However, the Board has held that duplicate and excessive work is not compensable. *See Parks*, 32 BRBS at 98 (counsel who attended but did not participate at hearing not entitled to fee); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986) (excessive work disallowed). In this case, counsel has charged for work performed by several attorneys during the course of claimant's case, and some of the charges could be considered duplicative or excessive. For these reasons, we vacate the fee award and remand the case for the administrative law judge to reconsider the specific entries to determine whether counsel has billed for services that are duplicative or excessive.

Although we agree it was reasonable for the administrative law judge to reject employer's request for an arbitrary two-thirds reduction, its argument that there are excessive and/or duplicative charges has merit and should be addressed more thoroughly.

Employer also contends the administrative law judge erred in failing to reduce the hourly rate for Mr. Lynch's associates. The administrative law judge stated that she would not arbitrarily reduce the rate because $200 per hour is reasonable in the Washington, D.C. area, and employer submitted no specific proof to show that less experienced attorneys should be paid at a lower rate. Supp. Decision and Order at 5. The Act provides that any fee shall take into account the quality of the representation and each person's normal billing rate. 20 C.F.R. §702.132(a). In this case, the attorneys' billing rate was identified on the fee petition as $200 per hour. The administrative law judge determined this was reasonable in light of the quality of representation claimant received, and employer has not shown an abuse of discretion in awarding a fee based on a $200 hourly rate. *See O'Kelley*, 34 BRBS 39.

Finally, employer contends the administrative law judge erred in failing to reduce the overall fee award by a factor of 10 to 12 percent due to claimant's failure to succeed on her claim for benefits for her coronary artery disease. The administrative law judge found that claimant ultimately prevailed on the bulk of her claim, that the heart disease issue overlapped issues involved with the other conditions, and the amount of time spent on that particular issue was minimal in comparison. As she concluded claimant received an excellent result, the administrative law judge declined to reduce the award further. Supp. Decision and Order at 6.

Although claimant did not prevail on her claim for benefits for the coronary artery condition, the administrative law judge rationally found that the work therein was necessary and it involved a "common core of facts" related to showing that claimant's medical conditions were Prednisone-related. Based on this "common core of facts" for addressing a causal relationship, claimant succeeded in establishing employer's liability and in obtaining future medical benefits. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see generally George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). The administrative law judge rationally rejected employer's argument on this matter after giving it thorough consideration, *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993) (Brown, J., dissenting), and her fee award comports with *Hensley*.[7]

[7]We reject employer's argument that the fee should be reduced due to claimant's lack of success on the disfigurement and "bad faith" claims. The administrative law judge did not discuss a disfigurement claim pursuant to Section 8(c)(20) of the Act, 33 U.S.C. §908(c)(20), in either decision. Although disfigurement is listed as a complication of the Prednisone treatment in claimant's pre-hearing statement at 4, for the

Accordingly, the administrative law judge's Decision and Order Granting Modification and Benefits is affirmed. The Supplemental Decision and Order Awarding Attorney Fees is vacated, and the case is remanded to the administrative law judge for further consideration of the fee petition and objections thereto consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge

motion for modification proceedings, employer previously accepted liability for claimant's facial condition, and it paid for the successful plastic surgery. Cl. Exs. I1-I7. As it does not appear claimant pursued a Section 8(c)(20) disfigurement claim, no fee reduction is warranted. For similar reasons, we reject employer's assertion that the fee should be reduced because claimant was unsuccessful on her claims for damages.