

WILLARD PARKER)
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 Claimant-Petitioner)
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 v.)
)
 MOON ENGINEERING,)
 INCORPORATED)
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 and)
)
 VIRGINIA PROPERTY AND) DATE ISSUED: 09/23/2005
 CASUALTY GUARANTY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand Assigning Responsibility for Payment and the Attorney Fee Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Lisa L. Thatch (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Assigning Responsibility for Payment and the Attorney Fee Order (00-LHC-1743) of Administrative Law Judge Richard K. Malamphy 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). 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). 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).

This case is before the Board for the second time. To recapitulate, claimant, a boilermaker, sustained a torn lateral meniscus on November 29, 1981, when he fell and twisted his left knee in the course of his employment with Moon Engineering, Inc. (Moon). On April 26, 1982, claimant underwent an open, partial lateral meniscectomy of his left knee. Moon voluntarily paid claimant temporary total disability benefits for various periods and medical benefits, and thereafter paid compensation for a ten percent permanent partial disability to claimant’s left lower extremity. 33 U.S.C. §§908(b), (c)(2), 907. Following recovery from his surgery, claimant returned to his regular duty as a boilermaker with Moon, which he performed until he was laid off in 1990. In 1992, claimant began working as a boilermaker for Metro Machine Corporation (Metro). On May 6, 1994, while in the course of his employment with Metro, claimant slipped and twisted his left knee. After obtaining medical treatment, claimant returned to work for Metro, but he continued to experience problems with his left knee. Severe arthritis and a tear in the portion of claimant’s lateral meniscus cartilage that was remaining after his previous knee surgery were found during arthroscopic surgery performed by Dr. Cohn on February 27, 1995, and, thereafter, an arthroscopic partial lateral meniscectomy was performed. After making an unsuccessful attempt to return to his regular employment duties with Metro, claimant was assigned work restrictions by Dr. Cohn. Claimant worked within these restrictions inside Metro’s boiler shop until 1998 when his employment was terminated because of work restrictions resulting from a 1993 arm injury. During the period in which claimant worked in Metro’s boiler shop, he continued to experience left knee problems and, in 1997, both Drs. Cohn and Wagner recommended that claimant undergo a total left knee replacement.

In 1999, claimant and Metro entered into a settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), for both claimant’s 1993 arm injury and his 1994 left knee injury. Under the terms of this agreement, claimant received \$100,000 for both disability and the medical expenses resulting from these injuries. Thereafter, claimant sought medical benefits under Section 7 of the Act, 33 U.S.C. §907, averring that his need for a total left knee replacement is causally related to the November 29, 1981, injury that he sustained while working for Moon and that, therefore, Moon is responsible for providing claimant with that surgery.

In his initial Decision and Order, the administrative law judge determined that claimant’s need for a total left knee replacement resulted from the natural progression of his 1981 knee injury, and not from an aggravation by his subsequent work-related injury. The administrative law judge thus found Moon to be the responsible employer and ordered Moon to provide appropriate medical care for claimant’s left knee condition.

Moon appealed the administrative law judge's responsible employer determination, which the Board vacated. *Parker v. Moon Engineering, Inc.*, BRB No. 03-0448 (Mar. 17, 2004) (unpublished). The Board held it was unclear from the administrative law judge's decision that he adequately considered the principle that where a subsequent work-related injury permanently affects or accelerates the effects of a prior condition, the subsequent employer is responsible. *Id.*, slip op. at 4. The Board further held that the administrative law judge did not address the opinions of Drs. Cohn and Seitz that claimant's 1994 injury with Metro accelerated his need for a total knee replacement, which conflicted with the administrative law judge's conclusion that the timing of the required surgery was unaffected by claimant's 1994 injury. The Board remanded the case for the administrative law judge to discuss all of the medical evidence relevant to determining the responsible employer for claimant's proposed knee replacement surgery and to evaluate the evidence in light of the applicable legal standards.

In his decision on remand, the administrative law judge found that, while the 1981 injury at Moon is the primary cause of claimant's left knee impairment, the 1994 injury at Metro accelerated the degeneration of claimant's knee condition and his need for knee replacement surgery. Accordingly, the administrative law judge concluded that Moon is not responsible for medical expenses related to claimant's left knee condition. In his Attorney Fee Order, the administrative law judge denied claimant's counsel a fee since the claim for medical benefits was denied.

On appeal, claimant contends that the administrative law judge's evaluation of the evidence in his initial decision was in accordance with law, and that the Board should reconsider its contrary holding. Claimant also argues that the administrative law judge erred by failing to consider on remand the statement by Dr. Seitz that claimant's May 1994 work injury was not a significant factor in his degenerative joint disease. Claimant further challenges the denial of an attorney fee. Moon responds, urging affirmance of the administrative law judge's responsible employer determination on remand.¹

We reject claimant's contention that the administrative law judge's evaluation of the evidence in his initial decision was thorough. In its prior Decision and Order, the Board held the administrative law judge's summary finding was insufficient to establish that his responsible employer determination was based on a full evaluation of the evidence and in accordance with law. *See Parker*, slip op. at 6. As the Board's holding on this issue is the law of the case, the Board will not address claimant's contention in

¹ On July 5, 2004, Moon filed a motion to dismiss claimant's appeal in light of claimant's death on May 29, 2005. On July 29, 2005, the Board issued an order to show cause why this appeal should not be dismissed. *See* 20 C.F.R. §802.402(b). Claimant's counsel responded that claimant underwent knee replacement surgery on April 22, 2004, and that liability for that surgery remains at issue notwithstanding claimant's death. In view of this assertion, we deny employer's motion to dismiss.

this appeal. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998).

We also reject claimant's contention that the administrative law judge did not give proper consideration to or discuss Dr. Seitz's opinion that claimant's May 1994 injury was not a significant factor in his degenerative joint disease. CX 4. In his decision on remand, the administrative law judge twice noted Dr. Seitz's opinion that the May 1994 injury was not a significant factor in his degenerative joint disease and that claimant's symptoms at the time of his examination in June 1997 were "primarily related" to the 1981 work injury. Decision and Order at 6-7; *see* EX 7 at 7-8. However, in concluding that Moon is not the responsible employer, the administrative law judge credited the opinion of claimant's treating physician, Dr. Cohn, and another portion of Dr. Seitz's opinion. Dr. Cohn testified in his deposition that the May 1994 injury caused claimant's degenerative arthritis to "progress at a faster rate." EX 6 at 13. Dr. Seitz testified by deposition that the May 1994 injury "probably necessitated the knee replacement being done earlier than it would otherwise have been done." EX 7 at 15. The administrative law judge also credited claimant's medical history that, except for three occasions in 1990, he had not sought treatment for his left knee from 1984 to 1994, whereas claimant received treatment for his left knee on four occasions following the May 1994 injury. Tr. at 18; EXs 3, 7 at 15. Finally, the administrative law judge credited claimant's employment history establishing that he was able to work as a boilermaker for years after the 1982 left knee surgery, but was unable to continue working as a boilermaker after the May 1994 injury. Tr. at 12-14, 18-20.

In adjudicating a claim, it is well established that an administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and is not bound to accept the opinion or theory of any particular medical examiner. *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 (2^d Cir. 1961). Moreover, the administrative law judge may accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969); *see also Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). In this case, the administrative law judge rationally credited the opinion of Dr. Cohn, as supported by that of Dr. Seitz, that the May 1994 injury necessitated the performance of claimant's knee replacement surgery earlier than it otherwise would have been, and claimant's medical and employment history, to find that the 1994 work injury with Metro accelerated the progression of claimant's degenerative joint disease and the need for knee replacement surgery. *See Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 125 S.Ct. 309 (2004); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3^d Cir. 2002). We therefore affirm the administrative law judge's determination on remand that Moon is not the employer responsible for claimant's knee replacement surgery, as it is rational, supported by substantial evidence, and in accordance with law.

See generally Admiralty Coatings Corp. v. Emery, 228 F.3d 513, 517, 34 BRBS 91, 94(CRT) (4th Cir. 2000). Inasmuch as we affirm the administrative law judge's finding that Moon is not the responsible employer, we also affirm the administrative law judge's denial of an attorney's fee to claimant's counsel.² *See generally Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004).

Accordingly, the administrative law judge's Decision and Order on Remand Assigning Responsibility for Payment and the Attorney Fee Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

² Claimant's counsel asserts that, notwithstanding claimant's death, he is entitled to compensation under the Act for any increased permanent impairment resulting from the knee replacement surgery. *See* 33 U.S.C. §908(d). He requests that the Board remand the claim for the administrative law judge to address this issue. Inasmuch as our affirmance of the administrative law judge's responsible employer determination is dispositive of Moon's liability for medical benefits and compensation after May 6, 1994, we deny this request.