BRB Nos. 02-799
and 02-799A

GARY NITSCHKE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
COASTAL TANK CLEANING	)	DATE ISSUED: 08/12/2003
	)	
and	)	
	)	
AMERICAN INTERNATIONAL ADJUSTMENT COMPANY	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary Nitschke, Pacific, Washington, *pro se*, for claimant-petitioner.

David B. Condon (Welch & Condon), Tacoma, Washington, for claimant/ cross-respondent.

Raymond H. Warns, Jr., and Robert J. Burke, Jr., (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order, and employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (2001-LHC-2330) 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). In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). 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).

Claimant alleged that he was physically and psychologically injured at work on January 25, 1990, after falling 20 feet into a tank of the *U.S.S. Nimitz.* The administrative law judge found that claimant injured both knees but no other parts of his body in the fall at work and that claimant's psychological disorders are not work-related. The administrative law judge found that claimant's knee injuries reached maximum medical improvement on May 15, 1991, and that claimant's treatment by Dr. O'Neill was unauthorized and thus that employer is not responsible for the payment of Dr. O'Neill's medical bills. The administrative law judge ordered employer to pay claimant temporary total disability benefits from January 25, 1990, through May 22, 1991, and permanent partial disability benefits for a five percent impairment to each leg, 33 U.S.C. §908(c)(2), as stipulated by the parties. *See* Decision and Order at 2.

Subsequently, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge, requesting a total fee of $21,279, representing 87.2 hours of work at an hourly rate of $200 and 17.45 hours of work at an hourly rate of $220, plus $2,478 in costs. Employer objected to the amount of the fee in relation to claimant's success before the administrative law judge. Over employer's objections, the administrative law judge awarded claimant's counsel the entire fee requested, plus an additional $1,320 which claimant's counsel sought for replying to employer's objections.

Claimant, who is without counsel, appeals the administrative law judge's decision. Employer responds in support of the decision, but appeals the administrative law judge's fee award. Claimant's former counsel responds in support of the fee award.

We first address claimant's appeal of the administrative law judge's finding that he injured only his knees in the fall at work. Claimant also alleged that he injured his back, hips, thighs, feet, ankles, shoulder, neck, and wrist in the fall. In addition, claimant alleged that his pre-existing psychological condition was aggravated by the work injury. With regard to claimant's physical injuries, the administrative law judge stated only:

> [Claimant] has complained of problems in numerous parts of his body due to the fall in 1990. The record clearly indicates that his knees were injured at that time. [Claimant] reported back and neck complaints to Drs. Mandt and O'Neill and informed Dr. Levine that he also had problems with his thighs and feet. Examinations in 1991 did not reveal objective orthopedic findings relating to areas other than the knees.

Decision and Order at 16-17. With regard to claimant's psychological condition, the administrative law judge stated only, "[Claimant] has psychological disorders that have affected him throughout his life. These can not be attributed to the injury or considered to have been aggravated by events in January 1990." Decision and Order at 17.

We cannot affirm the administrative law judge's finding that claimant injured only his knees in the work accident, as the administrative law judge did not discuss and weigh all the medical evidence to determine if claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a). Section 20(a) provides claimant with a presumption that the harm he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that a work accident occurred which could have caused the harm or aggravated a pre-existing condition. *See Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant bears the burden of establishing each element of his *prima facie* case without the benefit of the Section 20(a) presumption. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's injury was not caused or aggravated by his employment. *Duhagon*

v. Metropolitan Stevedore Co., 31 BRBS 98 (1997) *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established with claimant bearing the burden of persuasion. *See 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). Employer is liable for claimant's entire disability if it is due at least in part to the work-related aggravation of a pre-existing condition. *See, e.g., Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

The administrative law judge's summary conclusion that all of claimant's alleged injuries, except his knees, are not work-related is not based on an application of Section 20(a) or on a discussion and weighing of the voluminous and conflicting medical evidence of record. As there is evidence of record to support claimant's contention that he injured other body parts in the fall at work, we vacate the administrative law judge's decision, and remand this case for further consideration. On remand, the administrative law judge must discuss and weigh the relevant evidence and make findings consistent with Section 20(a) as to whether claimant suffers from any other work-related injuries. *See Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998). If the administrative law judge finds that claimant has any additional work-related conditions, he must discuss whether claimant is disabled by them in terms of the medical and vocational evidence of record.[1]

We next address the administrative law judge's finding that claimant reached maximum medical improvement on May 15, 1991, with respect to his knees. Decision and Order at 15. On May 15, 1991, Dr. Mandt, claimant's orthopedic surgeon who performed surgery on claimant's knees, reported that claimant's condition was relatively stable and that no further treatment was indicated. Cl. Ex. 6 at 28. Dr. Levine, who performed an independent medical examination on August 1, 1991, agreed that claimant was fixed and stable with respect to his knees. Emp. Ex. 14.207. Dr. O'Neill agreed with Dr. Levine's assessment in October 1991. Cl. Ex. 8 at 41, 42. Thus, as the administrative law judge's finding that claimant's knee injuries became permanent on May 15, 1991, is supported by substantial evidence, it is affirmed. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

[1]If claimant is awarded additional permanent disability benefits, the administrative law judge must consider employer's claim for Section 8(f) relief. 33 U.S.C. §908(f).

We also affirm the administrative law judge's finding that Dr. O'Neill's treatment was not authorized and thus that employer is not liable for the cost of this treatment. First, the administrative law judge rationally found that claimant was not referred by Dr. Mandt, an orthopedic surgeon, to Dr. O'Neill, a physiatrist, but by claimant's former attorneys. *See* Cl. Ex. 8 at 33, 43, 74; Cl. Ex. 19 at 299, 337. Moreover, the record does not establish that claimant requested from employer or the district director consent to a change in physician from Dr. Mandt to Dr. O'Neill. Thus, the administrative law judge's finding that employer is not liable for the medical bills of Dr. O'Neill is supported by substantial evidence and is affirmed. 33 U.S.C. §907(b), (d); *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.2d 440, 35 BRBS 17(CRT)(5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406.

Next, we address employer's appeal of the administrative law judge's fee award. Employer contends that the administrative law judge failed to properly apply the holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), by awarding a fee without regard to the issues on which claimant was successful or unsuccessful. The fee awarded by the administrative law judge amounts to over $25,000. According to employer, it was ordered to pay approximately $30,000, exclusive of interest, in additional compensation as a result of the administrative law judge's decision which awarded claimant benefits at a higher average weekly wage than that voluntarily paid by employer.

In *Hensley*, 461 U.S. 424, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434. The *Hensley* analysis is applicable to fee-shifting statutes such as the Act. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based

on related legal theories, the Supreme Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

In this case, the administrative law judge awarded the entire fee requested, as he felt "compelled" by the Board's decision in *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993) (Brown, J., dissenting), to measure claimant's success only against the amount of benefits voluntarily paid by employer, and the administrative law judge determined that claimant was "fairly successful" in obtaining additional benefits from employer. Supp. Decision and Order at 5. Moreover, the administrative law judge awarded the fees based on the factors identified in 20 C.F.R. §702.132, requiring the administrative law judge to award a fee "reasonably commensurate with the necessary work done," taking into account the quality of the legal representation, the complexity of the legal issues involved, and the amount of benefits awarded.

We cannot affirm the administrative law judge's fee award, as his analysis does not comport with *Hensley*. The administrative law judge is first required to determine if claimant was successful on issues that are unrelated to the issues on which he was unsuccessful. If the claims are severable, the administrative law judge should award only a partial attorney's fee. *See Horrigan*, 848 F.2d at 325, 21 BRBS at 81(CRT). If, however, the claims are interrelated or based on a "common core of facts," then the administrative law judge should focus on the overall success and award a fee that is reasonable in relation to the results obtained. *Id.* The Board's decision in *Rogers*, 28 BRBS 29, is not to the contrary. In *Rogers*, the claimant filed a claim for hearing loss benefits, and the employer paid no benefits voluntarily. Although the amount of the award was small, the claimant was fully successful in pursuing all his claims; there were no unsuccessful claims to sever from successful claims. Thus, the Board held that the administrative law judge appropriately applied only a "second-step" *Hensley* analysis, and awarded a fee appropriate to the amount of benefits obtained. *Rogers*, 28 BRBS at 92-93. Thus, although it is appropriate to measure claimant's overall success against employer's voluntary payments, *see* 33 U.S.C. §928(b), the administrative law judge first must determine if the successful and unsuccessful claims are severable. We therefore vacate the administrative law judge's fee

award and remand this case for reconsideration pursuant to *Hensley*, as well as the criteria at 20 C.F.R. §702.132, and in light of any additional benefits claimant may obtain on remand.[2]

Accordingly, the administrative law judge's Decision and Order is vacated with respect to the administrative law judge's findings that all of claimant's alleged psychological and physical injuries, except his knees, are not work-related, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge's Supplemental Decision and Order is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[2]Claimant's counsel's request for an attorney's fee is denied for two reasons. First, counsel did not file an itemized fee petition. 20 C.F.R. §802.203. Second, and more importantly, counsel has not yet successfully defended his fee award. Counsel may file a fee petition if, after remand, he is successful in retaining his fee award. *See generally Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001).