

BRB Nos. 06-0774
and 06-0917

G.M.)
)
 Claimant-Respondent)
 v.)
)
 UNIVERSAL MARITIME SERVICE) DATE ISSUED: 08/28/2007
 COMPANY)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeals of the Decision and Order on Remand, Second Supplemental Decision and Order Award of Attorney's Fee, and Errata of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Clifford R. Mermell (Gillis, Mermell & Pacheco, P.A.), Miami, Florida, for claimant.

Lawrance B. Craig, III and Frank J. Sioli (Valle, Craig, Sioli & Lynott, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand, Second Supplemental Decision and Order Award of Attorney's Fee, and Errata (2003-LHC-1015) of Administrative Law Judge Daniel F. Solomon 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C.

§921(b)(3). 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 is the second time that this case is before the Board.

Claimant injured his left big toe while working for employer on March 22, 2001. Employer voluntarily paid claimant periods of temporary total disability benefits and permanent partial disability benefits for a three percent impairment for the toe injury. Although claimant returned to his usual work for a few weeks after the accident, he has not worked since May 2001. Claimant subsequently filed a claim for benefits under the Act, alleging that in addition to the toe injury, the work accident caused depression and aggravated his pre-existing low back condition, diabetes, and diabetic retinopathy.

In the initial Decision and Order, the administrative law judge awarded claimant an additional 12 weeks of scheduled benefits for his work-related left great toe injury, based on an eight percent impairment rating, but denied benefits for claimant's other alleged work-related injuries. The administrative law judge also awarded claimant's counsel a fee of \$26,643.75, representing 50 percent of the 213.15 hours which he found to be compensable at \$250 per hour, and expenses of \$9,616.88.

On claimant's appeal, the Board reversed the administrative law judge's finding that claimant's depression is not work-related and remanded the case for the administrative law judge to address whether claimant is disabled by that condition. With regard to claimant's assertion of an aggravation of his pre-existing diabetes, the Board vacated the administrative law judge's finding that Dr. Cohen's opinion rebuts the Section 20(a) presumption as the administrative law judge did not discuss the entirety of the doctor's opinion. The Board directed the administrative law judge to address on remand whether Dr. Cohen's opinion, as a whole, is sufficient to rebut the Section 20(a) presumption under the applicable rebuttal standard of the United States Court of Appeals for the Eleventh Circuit. The administrative law judge's findings that claimant's diabetic retinopathy and present low back problems are not related to his work accident were affirmed. With regard to employer's appeal, the Board affirmed the fee awarded to claimant's counsel by the administrative law judge, but stated that the administrative law judge may reconsider his award of an attorney's fee in light of any additional success obtained by claimant on remand. [*G.M.*] v. *Universal Maritime Serv. Corp.*, BRB Nos. 05-0161/A (Oct. 13, 2005) (unpub.).

On remand, the administrative law judge found that Dr. Cohen's opinion was insufficient to establish that claimant's diabetes was not aggravated by his work-injury and that, as claimant is incapable of performing any employment as a result of his work-related psychiatric condition, he is entitled to temporary total disability compensation from March 23, 2001 through April 5, 2001, and from June 5, 2001, through February 26, 2002, and

permanent total disability compensation from June 2, 2002, and continuing.

Subsequent to the administrative law judge's decision on remand, claimant's counsel filed a fee petition with the administrative law judge documenting the totality of the services rendered on claimant's behalf before the administrative law judge. Employer filed objections to this fee petition. In his Second Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an additional fee of \$28,910. The administrative law judge then issued an Errata, stating that the \$28,910 fee was for services after remand and awarding counsel an additional \$21,950, for his initial work before the administrative law judge.

Employer appeals the administrative law judge's decision on remand, challenging the administrative law judge's determinations that it did not rebut the Section 20(a) presumption with regard to the aggravation of claimant's pre-existing diabetes and that claimant is entitled to ongoing total disability benefits. BRB No. 06-0774. Employer subsequently appealed the administrative law judge's award of an additional attorney's fee to claimant's counsel. BRB No. 06-0917.¹ Claimant responds to employer's appeals, urging the Board to reject employer's contentions of error and affirm the administrative law judge's decisions in their entirety.

Employer initially requests reconsideration of the Board's initial decision to vacate the administrative law judge's finding that Dr. Cohen's opinion rebutted the presumed causal connection between claimant's diabetes and his work-injury due to the administrative law judge's failure to discuss the entirety of Dr. Cohen's opinion. Employer also challenges the Board's prior reversal of the administrative law judge's finding that claimant's depression is not work-related, asserting that Dr. Castiello's opinion that claimant's psychiatric condition is unrelated to his employment injury should control on this issue. We reject employer's contentions. These issues were fully addressed by the Board in our previous decision, and our dispositions in this regard constitute the law of the case. *See Lewis v. Sunnen Crane Serv., Inc.*, 34 BRBS 57 (2000); *Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000); *Ricks v. Temporary Employment Services*, 33 BRBS 81 (1999). Employer has offered no basis for the Board to depart from the law of the case doctrine, which holds that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice.²

¹ We hereby consolidate these appeals for purposes of decision.

² Contrary to employer's contention, moreover, the administrative law judge in his initial decision did not discuss the totality of Dr. Cohen's testimony at rebuttal, *see* July 13, 2004, Decision and Order at 62-63, and it was this omission which resulted in the decision of the Board to vacate the administrative law judge's finding and remand the case for further consideration. Also contrary to employer's argument, the administrative law judge did not

See Gladney v. Ingalls Shipbuilding, Inc., 33 BRBS 103 (1999). Accordingly, we deny employer's request that the Board reconsider its prior decision on these issues. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989).

Employer next avers that the administrative law judge erred on remand in determining that the opinion of Dr. Cohen is insufficient to establish rebuttal of the presumption in Section 20(a) of the Act, 33 U.S.C. §920(a), with regard to the alleged aggravation of claimant's diabetes. We reject employer's assertions of error. Once, as in the instant case, Section 20(a) is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's injury was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Where aggravation of a pre-existing condition is at issue, employer must submit substantial evidence that work events did not aggravate the pre-existing condition. *See, e.g., Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Cairns v. Matson Terminals*, 21 BRBS 252 (1988). If employer rebuts the Section 20(a) presumption, it no longer controls, and the issue of causation must be resolved on the whole body of proof, 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).

We affirm the administrative law judge's finding on remand that employer failed to rebut the Section 20(a) presumption with regard to the alleged aggravation of claimant's diabetes, as the administrative law judge rationally found the opinion of Dr. Cohen, upon whom employer relies in support of its contention of error, insufficient to rebut the presumption. The administrative law judge quoted Dr. Cohen's statement on direct examination that there is no medical basis for finding that a foot injury can cause diabetes and that he could not "tie this accident into the causation of [claimant's] diabetes." Decision and Order on Remand at 4, *citing* EX 22 at 23-24. The administrative law judge then found that Dr. Cohen vacillated when questioned regarding whether claimant's work-injury aggravated his pre-existing diabetes. In this regard, the administrative law judge cited Dr. Cohen's statements that claimant's stress, probable loss of income, and pain associated with the work-injury "probably exacerbates somewhat his problems," and that those factors

find Dr. Castiello's opinion to be controlling in his initial decision; rather, in addressing the evidence of record as a whole regarding the issue of the causal connection between claimant's psychiatric condition and his employment, the administrative law judge credited the opinion of Dr. Garcia-Granda because it was better reasoned than that of Dr. Castiello. *Id.* at 68-71. The Board affirmed the administrative law judge's weighing of the evidence, but reversed the denial of benefits because the administrative law judge erred as a matter of law in concluding that Dr. Garcia-Granda's opinion did not establish causation as he attributed claimant's depression to other causes in addition to his work-related injury.

possibly played a role in claimant's need for additional diabetic medication post-injury. Decision and Order on Remand at 3; EX 22 at 24-26, 41. Based on the totality of Dr. Cohen's testimony, the administrative law judge concluded that employer did not meet its burden of showing that claimant's diabetes had not been aggravated by his work-injury and thus failed to rebut the Section 20(a) presumption. As the administrative law judge fully considered Dr. Cohen's testimony and his decision accurately reflects that testimony, we affirm the finding that Dr. Cohen's opinion is insufficient to meet employer's burden of presenting substantial evidence that claimant's pre-existing diabetes was not aggravated by his work-injury. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption, and his consequent finding that claimant's diabetes is a work-related condition. *See Brown*, 893 F.2d 294, 23 BRBS 22 (CRT).

Employer next challenges the administrative law judge's award of ongoing permanent total disability benefits to claimant. Specifically, employer contends that the administrative law judge erred in relying upon the opinion of Dr. Garcia-Granda in addressing the extent of claimant's disability. We disagree. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). If claimant is incapable of resuming his usual employment duties with employer, claimant has established a *prima facie* case of total disability, and the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *Id.*

In the instant case, the administrative law judge credited the opinion of Dr. Garcia-Granda, who opined that claimant is incapable of working due to his psychiatric condition, over the contrary opinion of Dr. Castiello, finding that Dr. Garcia-Granda's opinion was better reasoned. It is well-established that the administrative law judge as the trier-of-fact is entitled to weigh the evidence, and his decision must be affirmed if it is supported by substantial evidence. *O'Keefe*, 380 U.S. 359. As the administrative law judge rationally credited Dr. Garcia-Granda, his finding that claimant established an inability to perform any employment is supported by substantial evidence. It therefore follows that claimant is totally disabled. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Accordingly, we affirm the administrative law judge's conclusion that claimant is totally disabled from June 2, 2002.³

³ We further hold that the administrative law judge did not commit reversible error in not addressing employer's contention that claimant's disability is due to a supervening cause. Claimant's psychiatric condition which has resulted in his total disability has been found to be work-related in part, and employer has failed to set forth evidence that this condition has a

We agree, however, that this case must be remanded for the administrative law judge to address the evidence pertaining to employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). Section 8(f) of the Act shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his permanent total disability is not due solely to the subsequent work injury. *See, e.g., Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2^d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). In the instant case, the administrative law judge did not address employer's arguments and evidence regarding relief pursuant to Section 8(f). *See* EX 4. We therefore remand the case for the administrative law judge to consider this issue.

Employer has also filed an appeal challenging the administrative law judge's supplemental fee award to claimant's counsel. Specifically, employer avers that since it did not controvert any recommendation by the claims examiner regarding claimant's psychiatric, diabetic, or total disability claims, employer cannot be held liable for claimant's counsel's fees relating to those claims pursuant to Section 28(b) of the Act.⁴ Alternatively, employer challenges the number of hours and the hourly rate awarded to claimant's counsel by the administrative law judge on remand. We vacate the administrative law judge's supplemental fee award and remand the case for further findings by the administrative law judge regarding employer's arguments.

Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee only if the claimant succeeds in obtaining greater compensation than

subsequent supervening cause. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 316, 31 BRBS 129(CRT) (5th Cir. 1997). The conditions relied upon by employer to establish a worsening of claimant's psychiatric condition pre-existed claimant's work-injury; thus, at best, claimant's work-injury has combined with these pre-existing conditions to result in claimant's present psychiatric condition.

⁴ In his initial fee award, the administrative law judge awarded claimant's counsel a fee as a result of claimant's success in establishing entitlement to greater permanent partial disability benefits for his left foot condition than had been accepted by employer. In its decision, the Board, while agreeing with employer that it is not liable for claimant's counsel's fee under Section 28(a) of the Act, 33 U.S.C. §928(a), held that employer is liable for counsel's fee under Section 28(b), 33 U.S.C. §928(b), as it rejected the district director's recommendation with regard to this injury. In the present appeal, employer concedes that it is liable to counsel for the services rendered in furtherance of the successful claim for additional disability to claimant's left foot. *See* Employer's br. at 5.

that already paid or tendered by the employer. 33 U.S.C. §928(b). Specifically, Section 28(b) states that:

If the employer or carrier pays or tenders payment of compensation without an award . . . and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse (sic) to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee . . . shall be awarded in addition to the amount of compensation. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b). The Board has recently held that, given the trend in the case law,⁵ it will apply a strict construction approach to fee liability under Section 28(b) in all circuits which have not specifically addressed the statutory language regarding an informal conference and written recommendation from the district director. *See Davis v. Eller & Co.*, BRBS , BRB No. 06-0670 (Jun. 4, 2007). Thus, although the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has not addressed this precise

⁵ The United States Court of Appeals for the Fourth Circuit stated that Section 28(b) “requires *all* of the following: (1) an informal conference, (2) a written recommendation from the [district director] or Board, (3) the employer’s refusal to adopt the written recommendation, and (4) the employee’s procuring of the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation” in order for employer to be held liable for claimant’s attorney’s fee pursuant to Section 28(b). *Virginia Int’l Terminals, Inc. v. Edwards*, 398 F.3d 313, 317, 39 BRBS 14(CRT), (4th Cir. 2003), *cert. denied*, 126 S.Ct. 478 (2005), (emphasis in original). *See also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Staftex Staffing v. Director, OWCP*, 232 F.3d 431, 34 BRBS 105 (5th Cir. 2000). Most recently, the United States Court of Appeals for the Sixth Circuit held that the district director must make a recommendation on the issue favorably decided by the administrative law judge in order to shift fee liability to the employer pursuant to Section 28(b). *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

issue, under *Davis* findings are necessary as to whether the pre-requisites to fee liability have been met in this case.

Employer asserts that it cannot be held liable for claimant's counsel's fee relating to his claim for benefits for his diabetes and psychiatric condition since, while an informal conference was held in this claim, no recommendations were issued regarding these specific conditions and claimant's claim for permanent total disability.⁶ Claimant, in response, states that the issues involving these conditions, as well as his claim for permanent total disability benefits, were presented during the informal conference, that employer specifically rejected each of the claims made by claimant, and that the claims examiner addressed each of the presented issues and made a written recommendation suggesting a disposition of the controversy. In his Second Supplemental Decision and Order following remand, the administrative law judge, while acknowledging that employer denied liability for any additional fee, did not address these contentions regarding Section 28(b). We therefore vacate the administrative law judge's supplemental decision awarding claimant's counsel an additional attorney's fee and remand this case for the administrative law judge to address employer's contentions regarding its liability for a fee greater than that initially awarded by the administrative law judge. *See Davis*, slip op. at 6-7. Employer's alternate contentions regarding the hourly rate of \$275 and compensable hours are rejected, as the administrative law judge considered these arguments, Second Supplemental Decision and Order at 3, 4, and employer has not demonstrated that an abuse of discretion in this regard.

Accordingly, the case is remanded for the administrative law judge to address employer's request for relief pursuant to Section 8(f) of the Act. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed. BRB No. 06-0774. The administrative law judge's Second Supplemental Decision and Order and Errata are vacated, and the case is remanded for further consideration consistent with this opinion. BRB No. 06-0917.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

⁶ As noted previously, the Board held in its prior decision that a recommendation was made on the left foot injury following the informal conference. The Board did not address claimant's other conditions as no benefits or fee had been awarded at that time.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge