BRB No. 06-0514

BRUCE L. ROBINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 02/16/2007
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Gibbons, Kittrell, Olsen, Walker & Hill, P.C.), Mobile, Alabama, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Richard A. Seid (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees (2004-LHC-849) of Administrative Law Judge C. Richard Avery 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked at employer's facility as a shipfitter, welder, carpenter, and burner from 1979 until he injured his left foot in April 2002. Emp. Ex. 6; Tr. at 23-26. His treating orthopedist, Dr. Fontana, diagnosed claimant as having fractured the second metatarsal of his left foot, and he treated claimant with medication, a walker-boot, and therapy. Cl. Ex. 6. Because of other problems with his feet, Dr. Fontana referred claimant to Dr. Elmore, a neurologist. On August 1, 2002, Dr. Elmore diagnosed claimant as having a progressive hereditary disorder called Charcot Marie Tooth disease (CMT) which can cause muscular weakness and atrophy, as well as deformities of the hands and feet. Dr. Elmore stated that claimant was totally disabled from sedentary work and manual labor as a result of this condition. Decision and Order at 3; Cl. Ex. 7. Dr. Fontana stated, and the parties agreed, that claimant's work-related condition reached maximum medical improvement on January 21, 2003. Cl. Ex. 6; Jt. Ex. 1. At that time, employer voluntarily paid claimant permanent partial disability benefits under Section 8(c)(4), 33 U.S.C. §908(c)(4), for a two percent impairment to the left foot. Claimant filed a claim for permanent total disability benefits, contending his work-related fracture combined with his pre-existing CMT to prevent him from returning to work.

In his initial decision, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption; however, he found that employer rebutted the presumption, and on the record as a whole, he found that claimant's work-related fracture did not cause, aggravate or contribute to the progression of claimant's CMT which prevents him from returning to his usual job. Decision and Order at 5-6. Thus, he denied benefits.

Claimant appealed the administrative law judge's decision to the Board. In its decision, the Board vacated the administrative law judge's finding that employer rebutted the Section 20(a) presumption and remanded for reconsideration of this issue. *Robinson v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-0195 (Nov. 7, 2005) (unpub.). The Board held that the administrative law judge must reconsider the medical evidence in view of whether claimant's work injury combined with the pre-existing CMT to cause his disability. *Robinson*, slip op. at 5. Specifically, the Board held that the administrative

law judge must address whether claimant's work-related injury resulted in any physical restrictions, and, if so, whether they "combined with" the pre-existing disability in an additive way to result in an inability to return to work.

In his decision on remand, the administrative law judge found that claimant has permanent work restrictions related to the work injury, and that employer failed to rebut the Section 20(a) presumption linking these restrictions, in combination with the pre-existing CMT, to claimant's ultimate disability. The administrative law judge found that claimant is unable to return to his usual employment, and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant compensation for permanent total disability from January 21, 2003. Finally, the administrative law judge denied employer's request for Section 8(f) relief. 33 U.S.C. §908(f). The administrative law judge found that claimant's CMT was not manifest to employer prior to his work injury. Employer's motion for reconsideration was summarily denied.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of $11,750, representing 58.75 hours of attorney time at $200 per hour and costs of $100.28. In his Supplemental Order Awarding Attorney's Fees, the administrative law judge addressed employer's objections to the fee petition, and awarded claimant's counsel a fee of $8,300, representing 41.5 hours of attorney time at $200 per hour, and costs of $100.28.

On appeal, employer challenges the administrative law judge's finding that claimant's work injury combined with his CMT to result in claimant's disability, that claimant is unable to return to his usual employment, and that employer failed to establish the availability of suitable alternate employment. Employer also challenges the administrative law judge's denial of Section 8(f) relief. Finally, employer appeals the attorney's fee award. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

We first address employer's contention that the administrative law judge erred by finding that claimant's work injury combined with his CMT to cause claimant's disability. On remand, the administrative law judge credited Dr. Fontana's July 24, 2003, opinion, following a functional capacities evaluation, that claimant's restrictions against walking on unprotected heights and climbing are due to his work injury, and Dr. Fontana's subsequent opinion that claimant's ultimate disability is due to the combination of the foot injury and his pre-existing CMT. Decision and Order at 3; *see* Cl. Ex. 6 at 19-21, 82. Under the aggravation rule, if a work-related injury "worsens or *combines with* a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resultant condition is

compensable." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, 18 BRBS 45, 49(CRT) (5th Cir. 1986)(*en banc*) (emphasis added). The employment injury need not interact with the underlying condition to produce a worsening of the underlying impairment. It is sufficient under the aggravation rule if the pre-existing condition and the work injury combine in only an additive way. Under such circumstances, the overall impairment is compensable. *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 839, 24 BRBS 137, 141(CRT) (9th Cir. 1991). In this case, the credited opinion of Dr. Fontana, claimant's treating physician, constitutes substantial evidence supporting the administrative law judge's conclusion that claimant's disability is due to the combination of claimant's work-related foot injury and his pre-existing CMT.[1] Employer's contentions on appeal essentially urge the Board to reweigh the evidence, a role outside of the Board's scope of review. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Consequently, in view of the credited opinion of Dr. Fontana, we affirm the administrative law judge's conclusion that claimant has a work-related impairment affecting his ability to work.

Employer next argues that the administrative law judge erred by finding that claimant is unable to return to his usual employment, and that employer did not establish the availability of suitable alternate employment. In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002). Employer argues that the January 2003 opinion of Dr. Fontana establishes that claimant's work injury does not prevent him from returning to work. On remand, however, the administrative law judge credited the July 24, 2003, opinion of Dr. Fontana that claimant has permanent restrictions related to the work injury that prevent him from walking on unprotected heights and climbing. Claimant testified that his job duties included climbing. Tr. at 27. Inasmuch as the administrative law judge's finding that claimant cannot return to his usual employment is supported by substantial evidence, it is affirmed. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Employer also argues that it established the availability of suitable alternate employment within the restrictions Dr. Fontana placed due to claimant's work injury. Employer, however, must establish the availability of suitable alternate employment in light of the totality of claimant's work restrictions, *i.e.*, claimant's restrictions from both the work injury and his pre-existing CMT. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001). In this regard, we note that employer

[1] As he weighed the evidence, any error in the administrative law judge's statement that the Section 20(a) presumption was not rebutted is harmless. *See generally Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

concedes that claimant is permanently and totally disabled. *See* Petition for Review and brief at 13; Cl. Ex. 6 at 78; Emp. Exs. 8, 9. Moreover, the administrative law judge found that employer did not identify any jobs allegedly suitable for claimant considering all his medical restrictions. Accordingly we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. Consequently, we affirm the administrative law judge's award of compensation for permanent total disability. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Employer's only contention on appeal regarding the fee award of the administrative law judge is that it should be vacated in the event the Board vacates the administrative law judge's award of benefits. Inasmuch as we have affirmed the award of benefits, we likewise affirm the fee award. 33 U.S.C. §928.

We next address the administrative law judge's denial of Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent total disability is not solely due to the subsequent work-related injury. *See Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *see also Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

Employer challenges the administrative law judge's finding that employer did not satisfy the manifest element. Specifically, employer contends that claimant's CMT was objectively apparent at work to anyone who saw him. The Director responds that the administrative law judge's finding that claimant's CMT was not manifest to employer must be affirmed as it is supported by substantial evidence. It is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if, prior to the subsequent injury, employer had actual knowledge of the pre-existing disability or there were medical records in existence from which the condition was objectively determinable. *Equitable Equipment Co. v. Hardy*, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); *Callnan v. Morale, Welfare & Recreation Dep't of the Navy*, 32 BRBS 246 (1998).

In this case, the administrative law judge found there were no medical records in evidence from which employer could have determined that claimant had a pre-existing permanent partial disability.[2] Decision and Order at 4. The administrative law judge

[2] This finding is not challenged on appeal.

found that claimant's CMT was first diagnosed after the work injury when Dr. Fontana noticed irregularities in claimant's hands and feet, and he referred claimant to Dr. Elmore, a neurologist, for evaluation. Dr. Elmore diagnosed claimant's CMT on August 1, 2002.[3] Emp. Ex. 8. The administrative law judge found that claimant worked successfully and manifested no disability prior to his foot injury in April 2002. The administrative law judge found claimant's testimony that everyone in the shipyard knew his hands were "different" is not sufficient to establish that claimant's CMT was manifest to employer. *See* Tr. at 36. The administrative law judge therefore denied employer's request for Section 8(f) relief.

In order for a pre-existing condition to be manifest, employer need not know the severity or precise nature of the condition, so long as there is sufficient information that might motivate a cautious employer to consider terminating the employee because of the risk of compensation liability. *American Mutual Ins. Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970); *Dillingham Corp. v. Massey*, 505 F.2d 1126 (9th Cir. 1974); *see also Allred*, 118 F.3d 387, 31 BRBS 91(CRT). In this case, the evidence establishes claimant was able to work for employer in multiple job classifications from 1979 until his foot injury in April 2002. Claimant testified that he passed an initial physical when he began working for employer, and that his job duties included climbing and walking long distances. Tr. at 23, 27-28. Employer provided no testimony from supervisors or co-workers, or any other evidence to show that anyone considered claimant to have a disabling condition or had observed him experiencing difficulty on the job. Based on this record, we hold the administrative law judge acted within his discretion as fact finder to conclude that claimant's testimony to the effect it was common knowledge at work that his hands and feet are abnormal is not sufficient evidence to establish a manifest disability, pursuant to Section 8(f). *See Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11(CRT) (5th Cir. 1989); *Maurice P. Foley Co., Inc. v. Balderson*, 569 F.2d 132 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978); *see also C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994) (scar on back is not sufficient evidence to show that employer had constructive knowledge of claimant's pre-existing back condition). Accordingly, we affirm the administrative law judge's denial of Section 8(f) relief.

We next address claimant's counsel's request for an attorney's fee for work performed before the Board in his prior appeals in this case, BRB Nos. 05-0195, 05-0592. On December 7, 2005, counsel for claimant submitted an attorney's fee petition to the Board seeking a fee totaling $8,950 for 44.75 hours of work at a rate of $200 per hour. In

[3] A post-hoc diagnosis of a pre-existing condition is insufficient to meet the manifest requirement for Section 8(f) relief. *Transbay Container Terminal v. U.S. Dep't of Labor, Benefits Review Board*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *see also Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

an order dated February 14, 2006, the Board declined to award a fee at that time as claimant had not yet obtained any benefits. *Robinson v. Northrop Grumman Ship Systems, Inc.*, BRB No. 05-0592 (Feb. 14, 2006) (unpub.). The Board directed claimant to refile his fee petition after the administrative law judge issued a decision on remand that reflected a successful prosecution of claimant's claim. 20 C.F.R. §802.203(c). Counsel re-filed his attorney's fee petition on February 23, 2006, subsequent to the issuance of the administrative law judge's decision on remand. Employer filed objections to the fee request.

Claimant's counsel is entitled to an attorney's fee payable by employer for successfully prosecuting his claim. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). After considering counsel's fee petition, we disallow entries for work that was not related to the appeals before the Board, totaling 11 hours.[4] The fee petition lists telephone calls to claimant and correspondence with doctors and claims adjusters related to claimant's ongoing medical treatment, and counsel should seek reimbursement for these services from the district director, who oversees the medical care of claimants. *See generally* 33 U.S.C. §907; 20 C.F.R. §702.407. The items designated as telephone calls and correspondence with the district director's office similarly are not related to the appeals before the Board. *See Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (*en banc*) (Brown and McGranery, JJ., dissenting), *aff'g on recon.*, 27 BRBS 80 (1993) (McGranery, J., dissenting) (decision on remand), *aff'd on other grounds sub nom., Todd Shipyards v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

Employer argues that the Board should reduce six of the remaining one-quarter hour entries to one-eighth of an hour, pursuant to the criteria set forth in the decisions of the United States Courts of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v.*

[4] These entries are not related to work before the Board: December 7, 2004; December 8, 2004; January 10, 2005; January 19, 2005; January 31, 2005; February 13, 2005; February 18, 2005; February 21, 2005; March 4, 2005; March 7, 2005; March 14, 2005; March 18, 2005; May 3, 2005; May 11, 2005; May 31, 2005; August 4, 2005; August 5, 2005; August 9, 2005; October 11, 2004; and, October 12, 2005. Additionally, we disallow as work not related to claimant's appeal to the Board: one- half hour on November 29, 2004, and February 15, 2005; and one-quarter hour on January 19, 2005, and May 3, 2005. Moreover, as we disallow the entries on December 7 and 8, 2004, January 19, 2005, May 11, 2005, February 13, 2005, August 4, 2005, and October 12, 2005, we need not address employer's specific objections to these entries. We disallow the work related to claimant's motion for reconsideration to the administrative law judge: February 28, 2005; March 3, 2005; and one-quarter hour on February 15, 2005.

Director, OWCP [Fairley], No. 89-4459 (5th Cir. July 25, 1990) (unpub.) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpub.). *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). In *Fairley*, the Fifth Circuit, in whose jurisdiction this case arises, stated that, generally, attorneys should charge no more than one-quarter of an hour for preparation of a one-page letter, and one-eighth of an hour for review of a one-page letter. We agree with employer that the six one-quarter hour entries to review a one-page letter on January 18, 2005, April 25, 2005, May 6, 2005, June 4 and 12, 2005, and July 14, 2005, must be reduced to one-eighth of an hour. However, we reject employer's contention that counsel should not be allowed a quarter-hour for each of his telephone calls to claimant. *Fairley* did not address telephone calls, and the regulations specifically permit quarter-hour minimum billing. *See* 20 C.F.R. §802.203(d)(3). In sum, we disallow 11.75 hours of the 44.75 hours requested.

Employer also objects to the hourly rate claimed of $200. We reject employer's contention that this rate is excessive as we consider $200 per hour reasonable and customary for the geographic area in which this case arises. *See* 20 C.F.R. §802.203(d)(4). Counsel is therefore awarded a fee of $6,600, representing 33 hours at $200 per hour for work performed before the Board in the prior appeals, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand, Decision on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees are affirmed. Claimant's counsel is awarded a fee of $6,600 for work performed before the Board in the BRB Nos. 05-0195, 05-0592, payable directly to counsel by employer.

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