BRB No. 90-1180

TIMOTHY GODDARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CALIFORNIA STEVEDORE AND BALLAST COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Michael Cohen (Dorsey Redland, Inc.), San Francisco, California, for claimant.

Albert Sennett (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Reconsideration (89-LHC-3071) of Administrative Law Judge Thomas Schneider awarding benefits 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).

Claimant was injured on January 10, 1989 when he slipped and fell from a fork lift and struck his back on several metal steps going down from the vehicle. Claimant has not returned to work and sought permanent total disability benefits under the Act.

The administrative law judge found the evidence sufficient to establish that claimant could not return to work as a result of the accident on January 10, 1989, and that employer did not present evidence of suitable alternate employment. See Decision and Order at 2. Therefore, the administrative law judge found claimant entitled to total disability benefits under the Act.[1] The administrative law judge granted employer relief from continuing disability payments under Section 8(f) of the Act, 33 U.S.C. §908(f), and awarded claimant's attorney a fee in the amount of $14,195.64 for services and costs. See Decision and Order at 5-6. The administrative law judge summarily denied employer's Motion for Reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that claimant could not perform his usual and customary work, and, thus, that claimant suffers from an ongoing disability. In addition, employer contends that the administrative law judge erred in finding that any disability claimant may suffer was caused by the January 10, 1989 injury. Lastly, employer contends that there was insufficient time to respond to claimant's counsel's fee petition and thus the award of an attorney's fee should be vacated. Claimant responds, urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence.

Initially, employer contends that there is no evidence establishing that claimant was permanently precluded from performing the work of a fork lift driver. Employer maintains that the physicians the administrative law judge relied on only preclude heavy strenuous work, and that this does not preclude driving a fork lift. Employer also contends that these physicians did not have sufficient knowledge of claimant's job duties to render an opinion as to claimant's ability to perform his job. To establish a prima facie case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding total disability. See Boone v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 1 (1988). In order to determine whether claimant has shown total disability, the administrative law judge must compare the medical restrictions with the specific physical requirements of his usual employment. See Carroll v. Hanover Bridge Marina, 17 BRBS 176 (1985).

[1]The administrative law judge awarded temporary total disability benefits from January 10, 1989 to July 14, 1989 and permanent total disability from July 15, 1989, the date of maximum medical improvement, and continuing.

In the present case, the administrative law judge credited claimant's testimony that much of his usual duties consists of driving over rough surfaces and that driving requires a lot of sitting and twisting to look in all directions. See Tr. at 189-191. The limitations Dr. Wagner placed on claimant's activities include no repetitive lifting, bending, pushing or pulling; no prolonged sitting without the opportunity to stand and stretch every 20-30 minutes; and no driving or riding fork lifts, motorcycles or other vibratory vehicles. See Cl. Ex. E. Dr. Silverman, claimant's treating chiropractor, concluded in a report dated April 17, 1989 that claimant was not at pre-injury status and that it would be dangerous for claimant to perform his job as a longshoreman. See Cl. Ex. A. Dr. Silverman testified at the hearing that she based this opinion on a comparison of claimant's work activities as described by claimant on initial treatment forms and during multiple exams and claimant's physical condition. See H. Tr. at 115, 118.

Employer contends that the administrative law judge erred in according less weight to the opinions of Drs. Kelley and Barber.[2] The administrative law judge found that Dr. Kelley's opinion focused primarily on the effect of the work injury rather than whether the work injury aggravated claimant's pre-existing disc degeneration. In addition, the administrative law judge found that although Dr. Kelley believes that the pain claimant is likely to suffer with longshoring work would be tolerable, the administrative law judge credited claimant's testimony that it is not. Credibility determinations by the administrative law judge must be given great weight and employer has raised no reversible error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations. See Todd Pacific Shipyards Corp. v. Director, OWCP, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990); Cordero v. Triple A Machine Shop, 580 F.2d 1131, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979). Moreover, the administrative law judge rationally concluded that as claimant is restricted from operating vibratory machinery and performing heavy work, he is disabled from doing his usual and customary work as a fork lift driver. As the administrative law judge considered the restrictions placed on claimant's activities by the physicians he credited and compared them to the work requirements as described by claimant, we affirm the administrative law judge's finding that the evidence is

[2]Dr. Barber concluded that claimant suffers from no permanent disability and that claimant can return to work. However, the administrative law judge accorded the opinion of Dr. Barber little weight because he did not consider the recent MRI or CT scan and spent very little time on the examinations. See Decision and Order at 2.

sufficient to establish a prima facie case of total disability. See Boone, 21 BRBS at 3; Carroll, 17 BRBS at 178.

We also reject employer's contention that the administrative law judge erred in finding that the January 10, 1989 injury caused any permanent disability over and above the back problems that pre-existed the work injury. Where an employment injury aggravates, accelerates, or combines with a pre-existing impairment, the entire resulting disability is compensable. See generally Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), aff'g in pert. part Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344 (1989).

In the present case, the administrative law judge noted that Dr. Kelley concluded that the 1985 CT scan and the 1989 MRI show the same pathology and attributed nothing in either report to trauma. Moreover, Dr. Kelley stated that claimant had no disability due to the work injury. See H. Tr. at 148. The administrative law judge, however, reviewed the evidence as a whole and found that the mechanics of the work injury indicate that claimant had a significant trauma and that claimant was able to work before the injury and has not been able to work since. In addition, after reviewing claimant's testimony and the symptoms reported to physicians both before and following the injury, the administrative law judge found that claimant suffered new symptoms following the injury of January 1989. Dr. Wagner, moreover, opined that the work injury aggravated the conditions shown on the earlier CT scan.[3] See H. Tr. at 25-28. Thus, the administrative law judge concluded that the injury on January 10, 1989 caused some worsening of claimant's condition and contributed to his present degree of disability.[4] We affirm the administrative law judge's finding that claimant's disability is caused, at least in part, by the injury on January 10, 1989 as it is supported by substantial evidence. See generally Obert v. John T. Clark & Son of Maryland, 23 BRBS 157 (1989).

[3]Dr. Silverman also stated that claimant's current symptomotology is the result of the work injury and a prior industrial accident in which he herniated a disc. See Cl. Ex. A.

[4]Although the administrative law judge did not apply the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), we hold that any error is harmless, inasmuch as there is substantial evidence to support the administrative law judge's conclusion that claimant's disability is caused by the work injury based on the record evidence as a whole. See Oliver v. Murry's Steaks, 21 BRBS 348 (1988).

Finally, we reject employer's contention that it had insufficient time to respond to claimant's counsel's fee petition before the Decision and Order was issued. The administrative law judge notified the parties at the hearing that claimant's attorney should submit the attorney's fee petition at the same time as the post-hearing brief, and employer would have ten days to respond to the petition. In the Decision and Order, the administrative law judge noted that no objections from employer had been received and he awarded claimant's attorney a fee for services and costs in the amount of $14,195.64.[5] In order to be considered on review, an issue must first be raised below. See generally Clophus v. Amoco Production Co., 21 BRBS 261 (1988); Moore v. Paycor, Inc., 11 BRBS 483 (1979). In the present case, employer did not respond to the fee petition in the time allotted by the administrative law judge. Furthermore, it neither requested an extension of time nor objected to the time given. Therefore, as the objections to the fee petition were not raised before the administrative law judge in a timely manner, we decline to address them on appeal.

Accordingly, the Decision and Order and Order Denying Reconsideration of the administrative law judge awarding benefits are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]We note that employer included objections to claimant's attorney's fee petition in its brief in support of its Motion for Reconsideration, which the administrative law judge summarily denied, as is within his discretion.