DARIUS J. SNYDER	)	BRB Nos. 93-619 and 93-619A
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE, YOKOSUKA, JAPAN	)	
	)	
and	)	
	)	
GATES McDONALD	)	
	)	
Employer/Carrier- Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	
	)	
DARIUS J. SNYDER	)	BRB No. 93-1634
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE, YOKOSUKA, JAPAN	)	
	)	
and	)	DATE ISSUED:_____
	)	
GATES McDONALD	)	
	)	
Employer/Carrier- Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Order Denying Reconsideration of Thomas Schneider, Administrative Law Judge, and the Memo Order Approving Attorney Fees of Don M. Sodergren, District Director, United States Department of Labor.

Warren G. Shimeall (Welty, Shimeall & Kasari), Tokyo, Japan, for claimant.

Robert E. Babcock (Littler, Mendelson, Fastiff & Tichy), Portland, Oregon, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits and the Order Denying Reconsideration (86-LHC-489) of Administrative Law Judge Thomas Schneider, and employer appeals the Memo Order Approving Attorney Fees (OWCP No. 15-20634) of District Director Don M. Sodergren, 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act).[1] 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On February 24, 1978, claimant, an assistant club manager at employer's Seafarer's Club on the U.S. Navy Base in Yokosuka, Japan, lifted a 70-pound box, slipped on ice and fell, injuring his lower back. Tr. at 14. Dr. Levine performed an L5-S1 hemilaminectomy on claimant's back in early March 1978. Tr. at 17-18; Cl. Ex. 1 at 2; Emp. Ex. 5 at 107-108.

After a recuperative absence from work, claimant returned to his pre-injury position with employer on November 6, 1978.

[1]We consolidate for purposes of decision claimant's appeal and employer's cross-appeal of the administrative law judge's Decision and Order Awarding Benefits and the Order Denying Reconsideration, BRB Nos. 93-619 and 93-619A, and employer's appeal of the district director's Memo Order Approving Attorney Fees, BRB No. 93-1634. *See* 20 C.F.R. §802.104.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

On January 16, 1979, claimant was released from his duties at the Seafarer's Club and reassigned to lesser duties at the Club Alliance. Emp. Exs. 2 at 72, 14 at 213-214. Effective May 19, 1979, claimant's position as supervisor at the Club Alliance was deemed unnecessary, and claimant was terminated.[2] Emp. Ex. 2 at 70. From May 1980 until his release in October 1980, claimant worked as an automotive mechanical instructor in the Auto Hobby Shop; thereafter, he held several other positions on an intermittent basis.[3] Cl. Ex. 1 at 12, 28.

In the summer of 1989, claimant developed ulcers on his feet and legs due to complications from diabetes.[4] Despite treatment, the infection persisted and turned gangrenous, resulting in the amputation of his right foot in early 1990. Tr. at 32-36; Cl. Ex. 1 at 42. Since then, claimant has been confined to a wheelchair and has been totally disabled. Claimant filed a claim under the Act for his disability, and employer stipulated to claimant's permanent total disability since 1989 but disputed any work-related cause.

In his Decision and Order, the administrative law judge found that claimant is presently permanently totally disabled; however, after summarizing the evidence, he determined that claimant's diabetic condition and complications, and the resultant amputation, were not aggravated or caused by the 1978 work injury. Decision and Order at 5. The administrative law judge also found that claimant suffered a disability caused by the 1978 work injury which prohibited him from returning to his regular job. Next, the administrative law judge analyzed claimant's post-injury wage-earning capacity and, pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), determined that claimant's wages as an automotive instructor resulted in a post-injury wage-earning capacity of $175 per week. From this figure, the administrative law judge determined that claimant is entitled to permanent partial disability compensation, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), at the rate of $39.87 per week[5] from March 14, 1979 and continuing.[6] Decision and

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[2]Claimant appealed the termination, but a hearing officer found the reduction-in-force to be "procedurally correct." Emp. Exs. 2, 13-14.

[3]Claimant was subsequently employed as a car salesman, a tow truck operator, and a commercial spokesman/actor. Tr. at 68, 72; Cl. Ex. 1 at 12, 28.

[4]Doctors diagnosed diabetes in approximately 1973. Claimant treated his disease with diet and oral medication; however, as it was left largely uncontrolled, he developed complications such as retinopathy, cellulitis, and neuropathy, *e.g.* absent ankle jerks and decreased deep pain sensation in feet. Emp. Exs. 9 at 173, 10 at 185, 12 at 197. Claimant also suffers from hypertension and obesity. Emp. Exs. 5, 9-12.

[5]Claimant's average weekly wage of $234.80, minus his wage-earning capacity of $175, equals $59.80; two-thirds of $59.80 equals $39.87. 33 U.S.C. §908(c)(21).

[6]The administrative law judge relied on Dr. Kneapler's estimate that claimant's condition became permanent and stable one year after his surgery and considered March 14, 1979 to be the date of

Order at 5, 8. Further, the administrative law judge denied claimant's request for Section 10(f), 33 U.S.C. §910(f), adjustments and a Section 14(e), 33 U.S.C. §914(e), penalty, and employer's request for Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation. Decision and Order at 8-9. The administrative law judge also denied employer's subsequent motion for reconsideration of the Section 8(f) issue.

On appeal, claimant contends the administrative law judge erred in determining the extent of his disability and in not applying Sections 10(f) and 14(e) to his claim. Employer responds, urging affirmance. In its cross-appeal, employer challenges the administrative law judge's findings regarding claimant's disability and the inapplicability of Section 8(f). Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has responded to employer's cross-appeal. BRB Nos. 93-619, 93-619A. Employer has also filed an appeal of the attorney's fee awarded to claimant's counsel by the district director and a motion to remand the case to the administrative law judge for an evidentiary hearing on that fee award. Claimant has not responded to the appeal or motion. BRB No. 93-1634.

Extent of Disability

Claimant initially contends the administrative law judge erred in concluding that he is permanently partially, rather than permanently totally, disabled as a result of his 1978 work-injury. Specifically, claimant argues that he established a *prima facie* case of total disability by showing he cannot return to his usual work, and that employer failed to show the availability of suitable alternate employment that he could perform given his condition and work restrictions. In its cross-appeal, employer contends that claimant is neither totally nor partially disabled due to his work-related injury; alternatively, employer contends that claimant's subsequent work constituted suitable alternate employment, thus making claimant's disability no more than partial.

Claimant has the burden of establishing the nature and extent of his disability. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment due to his work-related disability. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). A claimant's credible complaints of pain alone may be enough to meet his burden of establishing disability. *See Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981). In this case, following claimant's surgery and recovery, Dr. Levine released claimant to return to work on November 6, 1978 with a 20 percent permanent loss of function and restrictions from lifting. Cl. Ex. 1 at 2. Claimant testified he had difficulty performing his regular job post-injury due to back pain. Tr. at 30. In discussing claimant's return to work post-injury, the administrative law judge credited this testimony, stating:

[I]t is clear that claimant suffered an injury at work in February 1978 and that the subsequent surgery did not leave claimant very much improved. Claimant could not

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maximum medical improvement. Decision and Order at 5; Emp. Ex. 12 at 203.

> permanently have returned to his previous job as club supervisor, because it required heavy lifting and heavy carrying.

Decision and Order at 5. Because claimant was restricted post-injury from lifting, and his job involved such an activity, we accept this statement by the administrative law judge as an implicit finding that claimant established a *prima facie* case of total disability, and we affirm that determination, as it is supported by substantial evidence. *See Chong*, 22 BRBS at 245.

Once claimant establishes his *prima facie* case of total disability, the burden shifts to employer to establish the availability of suitable alternate employment which claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the instant case, the administrative law judge discussed claimant's six-month post-injury performance of his pre-injury managerial duties, his subsequent work as an automotive mechanical instructor in 1980, and as a salesman and a tow truck operator intermittently for several years thereafter, and the medical evidence of record. He then concluded that the evidence of claimant's subsequent post-injury employment "supports, perhaps compels, a finding of partial rather than total disability."[7] Decision and Order at 7. Although the administrative law judge determined that claimant's brief employment with two clubs does not "fairly and reasonably reflect his capacity to continue in his job indefinitely[,]" he thereafter found, based on the stability of claimant's physical status after March 14, 1979, that claimant's wages as an automotive mechanical instructor fairly and reasonably represent his post-injury wage-earning capacity. Decision and Order at 5-8. The administrative law judge subsequently calculated claimant's post-injury wage-earning capacity, and his consequent award of permanent partial disability compensation, based on

the wages claimant earned post-injury during his employment as an automotive mechanical instructor.

If it is shown that claimant can perform alternate employment, he is only partially disabled. *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Based on the administrative law judge's discussion of the evidence of record, and his use of claimant's post-injury employment as an automotive mechanical instructor to award claimant permanent partial disability compensation, we conclude that the administrative law judge found claimant's post-injury position as an automotive mechanical instructor to be suitable alternate employment. *See generally Sproull v. Stevedoring Services of America*, 25 BRBS 100, 109 (1991) (Brown, J., concurring and dissenting) (where the Board affirmed an administrative law judge's implicit finding that claimant's post-injury wages represented his wage-earning capacity). Therefore, as employer has presented

[7]Claimant acknowledges his post-injury employment, but contends employer has not shown *suitable* alternate employment, and even if it did, claimant argues he has diligently sought work, "without success, except for the intermittent and part-time work already described." Cl's Brief at 22. Contrary to claimant's argument, part-time work a claimant can perform may constitute suitable alternate employment. *Royce v. Elrich Construction Co.*, 17 BRBS 157, 159 (1985).

evidence of suitable alternate employment, we affirm the administrative law judge's finding that claimant's 1978 work-related back injury resulted in a permanent partial disability.[8] *Turner*, 661 F.2d at 1031, 14 BRBS at 156.

In its cross-appeal, employer challenges the administrative law judge's calculation of claimant's post-injury wage-earning capacity. Pursuant to Section 8(c)(21), an award for permanent partial disability is based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h); *see Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

Initially, we reject employer's contention that claimant's termination following his post-injury return to work does not affect a finding of suitable alternate employment and that his earnings from the post-injury club manager positions fairly and reasonably represent his wage-earning capacity. The administrative law judge could properly find that claimant's work at the two clubs did not reasonably represent his wage-earning capacity. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3698 (April 19, 1994). Where an employer provides a claimant with light duty work at its facility but then lays the claimant off for economic reasons, moreover, employer has made the alternate employment unavailable and the claimant is totally disabled unless the employer provides evidence of other suitable alternate jobs. *See Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985). Additionally, we reject employer's argument that the administrative law judge erred in calculating a wage-earning capacity of $175 per week. In the case *sub judice*, claimant testified he earned approximately $4.08 per hour, totalling approximately $4,071.23, during a five-month period as an automotive mechanical instructor. Cl. Ex. 1 at 12. The administrative law judge determined these figures represent wages of $163.20 and $185.06 per week, respectively. Decision and Order at 7. Thereafter, the administrative law judge averaged these two figures to determine that claimant's post-injury wage-earning capacity is $175 per week. Employer has presented no evidence in support of its contention that the $185.06 per week figure is "more credible;" thus, as the administrative law judge's calculation is rational, we affirm the administrative law judge's determination that claimant's post-injury wage-earning capacity is $175 per week. *See Penrod Drilling*, 905 F.2d at 88-89, 23 BRBS at 111 (CRT).

Section 14(e)

Claimant next contends the administrative law judge erred in denying a Section 14(e)

[8]As we affirm the administrative law judge's finding of permanent partial disability, we also affirm his denial of Section 10(f) adjustments, as they apply only to periods of permanent total disability. 33 U.S.C. §910(f) (1988); *Scott v. Lockheed Shipbuilding & Construction Co.*, 18 BRBS 246 (1986).

penalty. The administrative law judge stated:

> Claimant seeks a 10% penalty under §914(d) [sic]. He is not entitled to this because the notice of controversion was filed in May 1980, and any penalty due before then was paid in November 1985.

Decision and Order at 9. Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely controversion under Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director after a showing that, owing to conditions beyond its control, the employer could not pay such installment within the prescribed period. Where an employer timely pays compensation but later suspends payments, the employer will be liable for additional compensation under Section 14(e) unless it files a notice of controversion within 14 days after a controversy between the parties arises. 33 U.S.C. §914(d); *Ramos v. Universal Dredging Corp.*, 15 BRBS 140 (1982); *Devillier*, 10 BRBS at 662.

In this case, employer's notice of final payment dated November 4, 1985 indicates that it paid claimant temporary total disability benefits from March 1 through November 5, 1978 at a rate of $156.54 per week, as well as a 10 percent penalty and six percent interest on those benefits.[9] Er's Closing Brief at Ex. B; *see also* Tr. at 27. Claimant returned to work on November 6, 1978 and continued until May 19, 1979. Employer thereafter filed a notice of controversion on May 16, 1980. *Id.* Although the administrative law judge acknowledged employer's payment of penalty amounts due prior to May 1980, this payment covered only the period from March to November 1978. Although the administrative law judge awarded benefits from March 14, 1979 and continuing, he did not make findings necessary for determining whether a penalty is due on those overdue payments. *See Ramos*, 15 BRBS at 145-146; *Devillier*, 10 BRBS at 662. We therefore vacate the administrative law judge's denial of a Section 14(e) assessment and remand the case to the administrative law judge for further consideration of this issue.

Section 8(f)

Employer in its cross-appeal next contends the administrative law judge erred in denying relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In its application for Section 8(f) relief, employer cited obesity, hypertension, and pyuria as pre-existing permanent partial disabilities which were manifest to employer and contributed to claimant's present disability. Emp. Ex. 3 at 94-95. The administrative law judge determined that claimant's obesity and hypertension were manifest, and that claimant's obesity, but not his hypertension, contributed to his present condition; however, he determined that obesity alone could not constitute a pre-existing permanent partial disability. Decision and Order at 8-9. In support of its contention of error, employer argues that claimant had

[9]Employer paid these penalty and interest amounts on the district director's recommendation following the informal conference.

pre-existing obesity, hypertension, and myocardial ischemia,[10] and that those conditions fulfill the pre-existing permanent partial disability requirement necessary for Section 8(f) relief.

Section 8(f) shifts the 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. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

Initially, we affirm the administrative law judge's finding that obesity, by itself, cannot constitute a pre-existing permanent partial disability, although we note that physically disabling symptoms attributable to obesity may be sufficient to establish a pre-existing permanent partial disability. *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989); *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985); *Brogden v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 259 (1984). In the instant case, Dr. Campbell diagnosed claimant's mild hypertension, obesity, and pyuria in 1976 as medical findings which "would limit [claimant's] performance;" nonetheless, Dr. Campbell concluded, by checking the correlating box, that claimant had "no limiting conditions for this job." 1992 Submission of Evid. - U.S.C.S.C. Cert. of Med. Exam. (April 4, 1976). The administrative law judge thus rationally determined that claimant's obesity did not prevent him from performing his job as a club manager. *See Brogden*, 16 BRBS at 260-261. Employer also attempts to establish myocardial ischemia as a physically disabling symptom of claimant's obesity. Despite employer's assertion, however, claimant's pre-1978 medical reports do not indicate a diagnosis of myocardial ischemia, and employer did not raise this condition as a pre-existing permanent partial disability earlier. *See* Emp. Exs. 3, 5; 1992 Submission of Evid. Thus, as the record does not contain evidence of a pre-existing disability, we affirm the administrative law judge's denial of Section 8(f) relief. *Brogden*, 16 BRBS at 260-261.

Attorney's Fee

Lastly, employer has filed an appeal of the attorney's fee awarded to claimant's counsel by the district director, as well as a motion to remand the case for an evidentiary hearing on the fee award. Claimant's counsel submitted a petition for an attorney's fee to the administrative law judge for the following amounts:[11] $57,280.05, representing 203.2 hours at $282 per hour for services

[10]A deficiency of blood supply to the heart muscles due to obstruction or constriction of the coronary arteries. *Dorland's Illustrated Medical Dictionary* (26th ed. 1981).

[11]All amounts have been converted from yen to dollars using the administrative law judge's stated conversion rate of January 29, 1993 of $.008054. *See* Supp. Decision and Order at 1-2.

performed by Mr. Shimeall between April 20, 1979 and December 1, 1992; $51,303.98, representing 254.8 hours at $201 per hour for services performed by Mr. Hammond between September 1, 1985 and February 17, 1987; and $1,445.44, representing expenses (international phone calls) incurred between August 15, 1982 and March 12, 1987. Thus, claimant's counsel requested a total fee of $110,029.47. Employer responded, arguing that a fee is unenforceable until all appeals are final, and that this fee was indeterminable because it was calculated in yen. The administrative law judge rejected employer's second contention, reduced certain hours, and awarded a total fee of $92,764, plus $1,445.44 in costs. *See* Supp. Decision and Order.

Employer sought reconsideration of the hourly rates awarded by the administrative law judge. Although the administrative law judge rejected employer's motion since it did not previously object to the hourly rates requested by claimant's counsel, the administrative law judge vacated his award because it included a fee for services performed before the district director. *See* Order on Reconsideration (February 26, 1993). The administrative law judge then recalculated the fee and awarded claimant's counsel a fee of $39,993.60, plus $1,445.44 in costs, for services rendered after January 15, 1986. *Id.* at 2. This award was not appealed.

Thereafter, claimant submitted a fee petition to the district director, requesting a fee for 113.3 hours of Mr. Shimeall's time, and 151.7 hours of Mr. Hammond's time, for work performed between April 20, 1979 and January 15, 1986, at the above-noted hourly rates, for a total fee of $62,482.94. Employer filed objections with the district director, challenging the hourly rates and the time requested, and requesting additional time for discovery on items set forth in the petition. The district director, without acknowledging or addressing employer's objections, referred to the administrative law judge's Order on Reconsideration and summarily awarded claimant's counsel a total fee of $56,127. *See* Memo Order.

Under the Act, approved fees must be reasonably commensurate with the necessary work done. 33 U.S.C. §928; 20 C.F.R. §702.132. Based on its contention that the fee requested and awarded in this case is "enormous," and on its unacknowledged request for discovery, employer now moves to remand the case to the administrative law judge for a hearing on the district director's fee award. In cases involving fees for work performed before the district director, the Board has held that an evidentiary hearing is necessary only when an employer raises a *bona fide* factual issue in challenging the fee. *Carroll v. Hullinghorst Industries, Inc.*, 12 BRBS 401, 404 n.4 (1980), *aff'd* 650 F.2d 760, 14 BRBS 373 (5th Cir. 1981); *McCloud v. George Hyman Construction Co.*, 11 BRBS 194 (1979). We need not address this issue, however, based upon our determination that the instant fee award
must be remanded to the district director for further consideration.

In this case, the district director awarded 113.5 hours for Mr. Shimeall's time, which he stated includes one hour for services performed on December 1, 1992, and 120 hours for Mr. Hammond's time, for the period between April 20, 1979 and January 15, 1986, at rates of $282 and $201 per hour respectively. In rendering this award, the district director did not address employer's objections, nor did he explain how he computed Mr. Shimeall's time or why he reduced Mr.

Hammond's time from 151.7 hours to 120 hours. Failure to provide a sufficient explanation to support the reduction of the attorney's fee renders the district director's decision arbitrary. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). As the district director neither addressed employer's objections nor explained his rationale for the award, it is impossible for the Board to perform its review function. Therefore, we vacate the district director's fee award and remand this case to him for further consideration.[12]

[12]Employer's motion to remand is thus granted in part; the case is remanded for reconsideration of the fee, but remand is to the district director not the administrative law judge.

Accordingly, the administrative law judge's denial of a Section 14(e) assessment is vacated, and the case 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 Awarding Benefits and the Order Denying Reconsideration are affirmed. BRB Nos. 93-619 and 93-619A. The district director's Memo Order Approving Attorney Fees is vacated, and the case is remanded to the district director for further consideration in accordance with this opinion. BRB No. 93-1634.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge