BRB Nos. 92-2536
and 93-0745

ANDREW ZANKICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONTAINER STEVEDORING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Thomas Schneider, Administrative Law Judge, United States Department of Labor and the Compensation Order Award of Attorney Fees of Linda Myer, Acting District Director, United States Department of Labor.

Diane L. Middleton (Law Offices of Diane L. Middleton), San Pedro, California, for claimant.

Enrique M. Vassallo and James P. Aleccia (Mullen & Filippi), Long Beach, California, for employer/carrier.

Marianne Demetral Smith (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop and Samuel J. Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-1405) of Administrative Law Judge Thomas Schneider and the Compensation Order Award of Attorney Fees (Case No. 18-42803) of Acting District Director Linda Myer 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).

On October 25, 1989, claimant, a ship boss, injured his right knee during the course of his employment with employer when he struck his right knee on the rung of a ladder that he was climbing aboard a ship. The administrative law judge awarded claimant temporary total, permanent total, and permanent partial disability benefits pursuant to Section 8(a)-(c), 33 U.S.C. §908(a)-(c), as well as medical benefits pursuant to Section 7, 33 U.S.C. §907. The administrative law judge denied employer relief pursuant to Section 8(f), 33 U.S.C. §908(f), finding that none of the required elements was met. The administrative law judge also awarded an attorney's fee to claimant's counsel. The acting district director awarded an attorney's fee to claimant's counsel as well.

On appeal, employer challenges the administrative law judge's finding that claimant's injury to his right knee, left knee, low back and right shoulder arose out of an industrial injury, the administrative law judge's denial of Section 8(f) relief, as well as the administrative law judge's award of an attorney's fee. BRB No. 93-0745. Employer also appeals the fee award of the acting district director.[1] BRB No. 92-2536. Claimant responds in support of the administrative law judge's award of benefits and the fee awards of both the administrative law judge and the acting district director.[2] The Director, Office of Workers' Compensation Programs (the Director), has filed briefs in support of the administrative law judge's denial of Section 8(f) relief.

Employer initially challenges the administrative law judge's findings that claimant's injuries to his right knee, right shoulder, low back, and left knee are work-related. In establishing that claimant's injuries arose out of his employment, claimant is aided by the presumption under Section

[1]The Board consolidated employer's appeal of the administrative law judge's Decision and Order (BRB No. 93-0745) and employer's appeal of the acting district director's fee award (BRB No. 92-2536) in an Order dated August 6, 1993.

[2]Claimant's counsel filed a Motion to Dismiss employer's appeals because claimant died on October 29, 1995, from causes unrelated to the instant claim and employer terminated benefits upon claimant's death. Despite claimant's death, employer has a right to the disposition of these appeals. We, therefore, deny the Motion to Dismiss as employer properly notes that it contests the attorney's fees awarded in this case and may be entitled to relief pursuant to Section 8(f) for past benefits paid. 20 C.F.R. §802.402(b).

20(a), 33 U.S.C. §920(a), that his injuries are causally related to his employment. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). Once the Section 20(a) presumption is invoked, the burden shifts to employer to establish that claimant's injuries are not work-related. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). Although the administrative law judge in this case did not analyze the evidence in terms of the Section 20(a) presumption, any error is harmless as the administrative law judge's findings that claimant's injuries to his right knee, right shoulder, low back, and left knee are work-related is supported by substantial evidence. *Bass*, 28 BRBS at 11.

In concluding that claimant's injury to his right knee was work-related, the administrative law judge discussed and weighed the relevant opinions of Drs. Jackson, Latteri, and London. Decision and Order at 2-4. The administrative law judge acted within his discretion in crediting Dr. Jackson's opinion that claimant's October 25, 1989 injury to his right knee caused his right medial meniscus tear since Dr. Jackson is claimant's treating physician, he performed claimant's right knee surgery, and his credentials as a knee expert are outstanding. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); Decision and Order at 4.

The administrative law judge also determined that claimant's right shoulder condition, low back pain and left knee injury are work-related after concluding that the use of crutches from the right knee injury aggravated a shoulder condition and caused claimant's low back pain and left knee injury. Decision and Order at 4-6. The administrative law judge's findings are based on Dr. Latteri's opinion that claimant's complaints concerning his right shoulder, low back, and left knee were aggravated or caused by the use of crutches for the right knee injury and Dr. Jackson's testimony that generally the use of crutches could lead to the kind of altered gait that causes low back pain. Cl. Exs. 7 at 22-23, 8 at 38. Although employer correctly notes that Dr. Latteri did not know when, how often and how claimant experienced symptoms in his right shoulder, Dr. Latteri did know that claimant started experiencing symptoms during the postoperative period for his right knee and used crutches for many months. Dr. Latteri, therefore, could render an opinion that the increased strain on the shoulder was caused by the crutches. Cl. Ex. 8 at 60; Emp's Br. at 13-14. Despite employer's assertion that claimant's golfing activities caused the right shoulder injury, substantial evidence supports the administrative law judge's finding that the use of crutches caused the right shoulder injury. Consequently, we affirm the administrative law judge's findings that claimant's injuries to his right knee, right shoulder, low back, and left knee are work-related. *Goldsmith*, 838 F.2d at 1079, 21 BRBS at 27 (CRT); *Cordero*, 580 F.2d at 1331, 8 BRBS at 744; *Uglesich*, 24 BRBS at 180; Decision and Order at 4-6.

Employer next challenges the administrative law judge's denial of relief pursuant to Section 8(f), 33 U.S.C. §908(f). Section 8(f) shifts liability to pay compensation for permanent total or

partial disability from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) the permanent disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993).

Employer contends that the administrative law judge erred in denying Section 8(f) relief by finding that claimant did not have a pre-existing permanent partial disability. Employer asserts that claimant's right medial meniscus tear in 1970 was the type of injury that would have motivated a cautious employer to discharge claimant because of a greatly increased risk of compensation liability. In concluding that claimant did not have a pre-existing permanent partial disability, the administrative law judge found that there was no showing that claimant had any disability after the 1970 right medial meniscus tear and that claimant worked more or less continuously without knee complaints until the October 25, 1989, injury. Decision and Order at 6.

We affirm the administrative law judge's finding that claimant did not have a pre-existing permanent partial disability within the meaning of Section 8(f), as there is nothing in the record to indicate that claimant suffered from an impairment or missed work because of the 1970 right medial meniscus tear or that employer faced a greatly increased risk of compensation liability by hiring and retaining claimant as an employee.[3] *See Todd Shipyards Corp. v. Director, OWCP [Cortez]*, 793 F.2d 1012, 19 BRBS 1 (CRT)(9th Cir. 1986); *see also Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *cf. Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991). The instant case is similar to *Cortez* and *Campbell Industries* wherein the court upheld an administrative law judge's finding of no pre-existing permanent partial disability where, as here, the claimant worked without problems after the initial injury and there are no medical records of continued treatment. *See Cortez*, 793 F.2d at 1012, 19 BRBS at 1 (CRT)(claimant resumed his regular job including overtime without any restrictions or decrease in pay and his medical records showed no objective or subjective evidence of permanent disability); *see also Campbell Industries*, 678 F.2d at 836, 14 BRBS at 974 (claimant returned to work with no restrictions and without additional medical problems or medical care). In contrast, the instant case can be distinguished from *Lockheed Shipbuilding* in that in *Lockheed Shipbuilding*, the claimant did not return to work after his earlier injuries without additional medical problems but instead continued to have back problems as documented by the medical evidence of record. *Lockheed Shipbuilding*, 951 F.2d at 1143, 25 BRBS at 85 (CRT). We, therefore, affirm the administrative law judge's findings that the evidence of record is insufficient to satisfy the pre-existing permanent partial disability element of Section 8(f) relief. Consequently, we affirm the administrative law judge's denial of Section 8(f) relief as it is rational and supported by substantial evidence.[4]

[3]The medical evidence establishes that a right medial meniscus tear was diagnosed in 1970. Emp. Ex. 7.

[4]Based on our affirmance of the administrative law judge's finding that claimant did not suffer

Employer lastly challenges the awards of attorney's fees by both the administrative law judge and the acting district director. 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). In her fee petition before the administrative law judge, claimant's counsel sought an attorney's fee of $16,734.23, representing 7.25 hours of paralegal services at $100 per hour, 73.25 hours of attorney services at $150 per hour, and $5,021.73 in expenses for claimant's deposition and expert witnesses' fees. The administrative law judge awarded this fee in its entirety. Despite employer's objections to the requested hourly rate of the paralegal, the administrative law judge acted within his discretion in awarding the paralegal a $100 hourly rate based on the paralegal's unusual credentials, which the administrative law judge found superior to that of many lawyers practicing in the longshore area. *See Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). The administrative law judge also acted within his discretion in awarding claimant's expert witness fees, over the objections of employer, as employer had agreed to pay the expert witness fee of Ms. Van Den Bosch, claimant's vocational rehabilitation expert, Claimant's Response to Defendant's Objection Re Rehabilitation Expert at 1, and as the administrative law judge found that the fees for the deposition of Dr. Latteri, claimant's expert, were reasonable and necessary. *See Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); Decision and Order at 7.

In her fee petition before the acting district director, claimant's counsel sought an attorney's fee of $6,800, representing 14 hours of paralegal services at $100 per hour and 36 hours of attorney services at $150 per hour. The acting district director reduced the requested hourly rate of the paralegal to $75 and then awarded counsel a fee of $6,450. Despite employer's objection to the requested hourly rate of the paralegal, the acting district

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from a pre-existing permanent partial disability, we need not address the administrative law judge's findings regarding the two remaining requirements of Section 8(f) relief.

director acted within her discretion in awarding the paralegal an hourly rate of $75. *See Mijangos*, 19 BRBS at 15; Compensation Order Award of Attorney Fees at 1.

Accordingly, the administrative law judge's Decision and Order is affirmed. The acting district director's Compensation Order Award of Attorney Fees is also affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge