BRB No. 97-1522

LONNIE HOUSER, SR.	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	
	)	
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 Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of Marilyn C. Felkner, District Director, United States Department of Labor.

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey Stafford), New Orleans, Louisiana, for self-insured employer.

Janet R. Dunlop, Counsel for Longshore (Martin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees (96-LHC-0515) of Administrative Law Judge James W. Kerr, Jr., and the Compensation Order Award of Attorney's Fees (Case No. 07-0136028) of District Director Marilyn C. Felkner 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 if they 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).

Claimant, a longshoreman, was hired on February 24, 1995, by employer to discharge steel from a ship. Claimant testified that during the course of his employment on that day he began to experience neck pain but continued to work the remainder of that day and the next, because he thought the pain might subside. Claimant admitted that he did not report the incident to employer until March 10, 1995. Meanwhile, on February 26, 1995, claimant initially sought treatment for his neck pain from Dr. Gueringer, who diagnosed acute cervical pain secondary to disc disease with radiculopathy, prescribed medicine and a cervical pillow, and referred claimant to Dr. Epps. Following his examination of claimant, Dr. Epps diagnosed a pre-existing physical condition, cervical spondylosis with myelopathy, which he opined was aggravated by the February 24, 1995, work incident. Dr. Epps subsequently stated that claimant reached maximum medical improvement on April 7, 1995, and limited claimant to sedentary work based on his cervical spine condition. Claimant also was examined by Dr. Nutik who diagnosed a soft tissue strain of the neck, superimposed on notable pre-existing degenerative changes about the cervical spine, and opined that claimant's neck complaints are primarily related to his underlying cervical spine disease. A fourth physician, Dr. Phillips, observed signs of a C6 nerve impingement from a disc hernia, agreed with Dr. Epps's assessment that claimant should be limited to sedentary work, and opined that the injury sustained as a result of the February 24, 1995, work incident is one of the reasons for his issuance of work restrictions.

In his Decision and Order, the administrative law judge initially determined that claimant sustained a work-related aggravation of a pre-existing cervical spine injury as claimant established a *prima facie* case for invocation of the Section 20(a), 33

U.S.C. §920(a), presumption and employer could not establish rebuttal thereof. The administrative law judge then determined that claimant is entitled to temporary total disability benefits from February 25, 1995, until the date of maximum medical improvement which he determined to be April 7, 1995, and that thereafter claimant is entitled to permanent partial disability benefits based on a stipulated weekly wage-earning capacity of $300. The administrative law judge additionally awarded claimant all reasonable medical expenses related to his injury pursuant to Section 7(a), 33 U.S.C. §907(a), with the exception of the medical treatment of Dr. Phillips, as he found that claimant failed to comply with the requirements for a change in physician under Section 7(b), 33 U.S.C. §907(b). Lastly, the administrative law judge denied employer's request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Claimant's counsel then submitted fee petitions to both the administrative law judge and district director. Specifically, counsel sought before the administrative law judge an attorney's fee totaling $14,575.00, representing 89.25 hours of work at an hourly rate of $150, and 9.5 hours of work at an hourly rate of $125, plus costs in the amount of $491.40. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge, after consideration of employer's objections, awarded an attorney's fee of $11,531.25, representing 92.25 hours of service at the hourly rate of $125, plus the requested costs. In the fee petition submitted to the district director, counsel requested a fee of $2,568.75, representing 17.125 hours at the hourly rate of $150. In her Compensation Order Award of Attorney's Fees, the district director, after finding that employer had not filed any objections to the fee petition, awarded an attorney's fee of $2,140.62, representing 17.125 hours at a reduced hourly rate of $125.

On appeal, employer challenges the administrative law judge's determinations that claimant sustained a work-related aggravation of his pre-existing cervical spine condition, and that it is not entitled to Section 8(f) relief, as well as his award of an attorney's fee. Employer also appeals the district director's award of an attorney's fee. Claimant responds, urging affirmance of the decisions issued by the administrative law judge and district director. The Director, Office of Workers' Compensation Programs, responds only with regard to the Section 8(f) issue, urging affirmance of the administrative law judge's denial of said relief.

Employer first argues that the administrative law judge erred in determining that claimant sustained his burden of establishing a *prima facie* claim for compensation. Employer maintains that claimant did not sustain the alleged injury due to discrepancies in the testimony and medical evidence of record.

It is well-established that claimant bears the burden of proving the existence of an injury or harm, and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his *prima facie* case. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

The administrative law judge determined that the evidence of record establishes that claimant suffered an injury, an aggravation of a pre-existing condition of his cervical spine, and that working conditions existed which could have caused, aggravated or accelerated that condition. In finding that claimant's working conditions could have caused his harm, the administrative law judge explicitly relied on claimant's testimony that his neck began to hurt while working on February 24, 1995, which he found was confirmed by testimony from a co-worker, Mr. Jupiter, that claimant had told him of his neck injury sometime during that day, and the medical opinions of Drs. Epps, Nutik and Phillips which all revealed an injury to claimant's neck following the alleged date of injury. In addition, the administrative law judge found relevant claimant's testimony that he has not experienced any neck symptoms since a 1982 automobile accident and the medical opinion of his family physician, Dr. Braud, that claimant was asymptomatic with regard to his neck for at least ten years prior to February 24, 1995. The administrative law judge then determined, based on claimant's description of his work for employer on February 24, 1995, as requiring him to look straight up and reach with his arms, which he found corroborated by two workers, Mr. Chaney and Mr. Jupiter, that the requisite working conditions existed to establish claimant's entitlement to the Section 20(a) presumption.

Moreover, the administrative law judge explicitly considered and rejected employer's contentions that claimant's evidence is not credible. In essence, the administrative law judge determined that the apparent inconsistencies alluded to by employer were most likely due to the fact that claimant was not sure what caused the neck pain because nothing traumatic, such as a fall, had occurred. As the administrative law judge has acted within his discretion in evaluating the evidence, and his credibility determinations are rational, we affirm his finding that claimant is entitled to invocation of the Section 20(a) presumption. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998); *Bolden*, 30 BRBS at 71; *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120, 126 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994).

Employer next argues that, contrary to the administrative law judge's determination, the medical opinion of Dr. Nutik, stating that claimant's neck pain was caused primarily by his pre-existing cervical spondylosis, rather than any incident at work, is sufficient to rebut the Section 20(a) presumption.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175 (1996); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Cairns v. Matson Terminals,* 21 BRBS 252 (1988). 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 Devine v. Atlantic Container Lines, G.I.E.,* 23 BRBS 279 (1990).

In addressing rebuttal, the administrative law judge noted that Dr. Nutik initially admitted that it was difficult to decide whether the disc herniation observed on the MRI was caused by the work incident in question or related to the pre-existing degenerative changes, but subsequently stated that consideration of additional facts provided by employer's insurance adjuster, regarding claimant's work and failure to immediately report his work-related injury to the hospital and employer, if true, would lead him to conclude that claimant's neck complaints and MRI findings are *primarily* related to the underlying degenerative disease about the cervical spine. However, while Dr. Nutik stated that claimant had a pre-existing condition which caused his present condition, he did not specifically render an opinion ruling out claimant's employment as a cause of that condition or stating that the work incident did not aggravate claimant's condition. We thus affirm the administrative law judge's finding that employer did not present specific and comprehensive evidence severing the connection between claimant's neck injury and his employment, and his consequent conclusion that the Section 20(a) presumption is not rebutted. *Quinones*, 32 BRBS at 8; *Cairns*, 21 BRBS at 252. Accordingly, the administrative law judge's award of benefits is affirmed.

Employer alternatively argues that the administrative law judge erroneously denied its request for Section 8(f) relief, asserting that claimant's underlying cervical spondylosis and hypertension are sufficient to warrant entitlement to Special Fund

relief.

In a claim for permanent partial disability benefits, Section 8(f) of the Act limits employer's liability to 104 weeks if employer establishes that claimant suffers from a manifest pre-existing permanent partial disability, and shows, by medical evidence or otherwise, that claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury alone did not cause claimant's permanent partial disability. 33 U.S.C. §908(f)(1); *see generally Louis Dreyfus Corp. v. Director, OWCP,* 125 F.3d 884, 31 BRBS 141 (CRT)(5th Cir. 1997); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995); *see also Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

In the instant case, the administrative law judge denied Section 8(f) relief, finding that employer failed to establish that claimant's cervical spondylosis and hypertension were manifest pre-existing permanent partial disabilities within the meaning of Section 8(f).[1] Specifically, the administrative law judge, relying on the medical opinion and testimony of claimant's treating physician, Dr. Braud,[2] determined that there is no evidence to show that a cautious employer would be influenced in either hiring or firing claimant because of his cervical spondylosis and/or hypertension. *Devine*, 23 BRBS at 287. Additionally, the record establishes that claimant worked for many years without any physical problems related to either his cervical spine condition or hypertension. *See generally Director, OWCP v. Campbell Industries*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982). Thus, as mere evidence of previous injuries does not establish the existence of a permanent disability unless the condition produces a serious lasting physical problem, *CNA Insurance Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991);

[1]Contrary to employer's contention, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has recognized the "manifest" requirement for establishing Section 8(f) entitlement. *See Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91 (CRT) (5th Cir. 1997).

[2]Dr. Braud responded "no," when asked as to whether claimant's degenerative changes were such that a cautious employer would not hire or discharge claimant due to an increased risk of accident, and further indicated that claimant's findings are seen in individuals of his age and are relatively insignificant. Hearing Transcript at 32, 35. In addition, Dr. Braud stated that claimant's pre-existing hypertension was controlled by medication and diet. *Id*. at 36.

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), we hold that the administrative law judge rationally determined that employer did not establish the pre-existing permanent partial disability element of Section 8(f) entitlement.[3] *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Employer next asserts that the administrative law judge's award of an attorney's fee for certain hours is excessive and thus, requests that the Board reduce the fee award. In considering the fee petition, the administrative law judge specifically considered employer's objections in reducing, as excessive, the hourly rate from $150 to $125, and the time spent in performing services by 5.5 hours. The administrative law judge further determined that the remainder of the time spent was reasonable and consequently awarded a fee totaling $11,531.25, plus requested costs of $491.40. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus we decline to reduce or disallow the hours approved by the administrative law judge, *see Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981), and consequently affirm his Supplemental Decision and Order Awarding Attorney's Fees.

Finally, employer argues that the district director erroneously determined it failed to timely object to the fee request submitted by claimant's counsel. Employer maintains that contrary to the district director's finding, it sent, by letter dated July 30, 1997, an original and three copies of its Opposition to Attorney's Fees. Employer thus requests that the Board remand for reconsideration of the fee petition in light of employer's objections. Alternatively, employer contends, on the merits of the fee award, that the district director erred by awarding counsel time spent for "unspecified" conferences with claimant as these entries lack specificity.

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[3]Moreover, we reject employer's contention that the "cautious employer" test is violative of the Americans with Disabilities Act (ADA), as there is no indication that Congress intended to preclude an existing handicap from forming a basis for Section 8(f) relief based solely on the cause of the handicap. *See* 42 U.S.C. §12101; *see generally Greene v. J.O. Hartman Meats,* 21 BRBS 214 (1988).

In her Compensation Order Award of Attorney's Fees, the district director explicitly stated that "employer was notified of the fee request on July 25, 1997, and advised to respond within 30 days if there were any objections to the requested fee." Compensation Order Award of Attorney's Fees at 1. In addition, the district director found that as of the date of her Compensation Order, September 5, 1997, "no response has been filed."[4] *Id.* Despite the absence of employer's objections, the district director reviewed the entirety of claimant's petition, reducing the hourly rate as excessive from $150 to $125, and finding reasonable and necessary the total number of hours of requested services. On appeal, employer has not established an abuse of discretion in this regard. *See Maddon*, 23 BRBS at 55. We therefore affirm the district director's award of attorney's fees as reasonable. *Id.*

[4]Employer did not attach to its brief a copy of any objections demonstrating error in the district director's statement.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees are affirmed. In addition, the district director's Compensation Order Award of Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge