BRB No. 09-0764

JOSE L. PUENTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STRACHAN SHIPPING COMPANY	)	DATE ISSUED: 05/25/2010
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimant.

Melanie B. Rother and Cristina K. Lunders (Fulbright & Jaworski, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and Supplemental Decision and Order Awarding Attorney's Fees (2006-LHC-00028) of Administrative Law Judge Lee J. Romero, Jr., 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).

This is the second time this case has been before the Board. Claimant sustained injuries to his knees and left ankle while working for employer on April 16, 1999. He returned to work on June 11, 1999, but suffered an additional period of temporary total disability from July 16, 2000, to June 9, 2001, following surgery to his left ankle. Claimant sought total disability benefits for the period he was unable to work, and temporary partial disability compensation for those periods in which he was employed but unable to work his usual hours as a result of his injury. Claimant also sought medical benefits for the bilateral total knee replacements recommended by several physicians.

In his initial decision, the administrative law judge found claimant entitled to compensation for temporary partial disability in the years 2000, 2001, 2002, and 2005, for medical benefits associated with the proposed knee surgeries, and to a future award of temporary total disability benefits for the periods of disability following such surgery. Employer and claimant both appealed the administrative law judge's decision. The Board vacated the administrative law judge's findings concerning claimant's loss in wage-earning capacity and employer's liability for the proposed replacement surgery on claimant's right knee,[1] and thus, vacated his calculation of claimant's temporary partial disability award, as well as his award of medical benefits relating to claimant's right knee condition.[2] *J.P.* [*Puente*] *v. Strachan Shipping Co.*, BRB Nos. 07-0752/A (Apr. 24, 2008) (unpub.). The case, therefore, was remanded for further consideration of these issues. *Id.*

On remand, the administrative law judge found that claimant's right knee condition is related to his work for employer and thus concluded that employer is liable for medical benefits relating to the treatment of that injury. Additionally, based on his recalculation of claimant's loss in wage-earning capacity, the administrative law judge found claimant entitled to temporary partial disability benefits for the years 2003 and 2005.[3]

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[1] The record reflects that claimant had right total knee replacement surgery on June 19, 2007. EX 170.

[2] The Board also modified the administrative law judge's award to reflect claimant's entitlement to compensation for temporary total disability from July 14 through October 5, 2000.

[3] The administrative law judge also found, based on his recalculation of claimant's post-injury wage-earning capacity, that claimant sustained no loss in wage-earning capacity in the years 2000, 2001, and 2002, and accordingly, he denied benefits for these periods of time.

Subsequently, claimant's counsel filed a fee petition with the administrative law judge seeking a fee totaling $6,007.50, representing 26.7 hours of work at an hourly rate of $225. Employer filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney's Fee, the administrative law judge first reduced the requested hours by three, to reflect duplicative services, and then reduced the remaining hours, based on *Hensley v. Eckerhart*, 461 U.S. 421 (1983), by ten percent in light of claimant's limited success in his pursuit of temporary partial disability benefits. Accordingly, the administrative law judge awarded an attorney's fee, payable by employer, of $4,799.25.

On appeal, employer challenges the administrative law judge's findings that claimant's right knee condition is work-related, that claimant is entitled to temporary partial disability benefits for the years 2003 and 2005, and that claimant's counsel is entitled to an award of an attorney's fee. Claimant responds, urging affirmance of the administrative law judge's decisions.

Employer contends that the administrative law judge erred in finding that claimant's right total knee replacement is related to his April 16, 1999, work injury. Employer maintains that the administrative law judge erred by crediting the reports of Drs. Christensen and Bryan, which state that the work injury contributed to claimant's need for a right total knee replacement, over the contrary reports of Drs. Freeman and Weiner. In particular, employer argues that the administrative law judge inappropriately subjected the reports of Drs. Freeman and Weiner to intense scrutiny and speculation, without sufficiently addressing the defects in the reports provided by Drs. Christensen and Bryan, *i.e.*, employer alleges that Dr. Christensen's opinion is based on claimant's inaccurate medical history and Dr. Bryan's most recent opinion is inconsistent with his earlier findings.

In its prior decision, the Board vacated the administrative law judge's finding that employer did not rebut the Section 20(a) presumption with regard to claimant's right knee condition because the administrative law judge's rationale for discrediting the opinions of Drs. Freeman and Weiner that there was no causal relationship was flawed. On remand, the administrative law judge found that employer rebutted claimant's *prima facie* case of a compensable right knee injury and then considered whether claimant established, based on the record as a whole the record, that his right knee condition is related to his April 16, 1999, work accident. Reviewing the evidence on causation, the administrative law judge found that the opinions of Drs. Weiner and Freeman were entitled to less weight than the opinions of claimant's treating and consulting physicians, Drs. Christensen and Bryan. Contrary to employer's contention, the administrative law judge fully evaluated the medical opinions and examined the logic and underlying bases for the physicians' conclusions.

In this regard, the administrative law judge rationally found that Dr. Weiner did not explain what records he relied on in filling out his April 24, 2006, questionnaire opinion. EX 160. While this document lists "Medical reports to date" as enclosures and thus, states the underlying basis for Dr. Weiner's opinion, none of these enclosures are attached to the actual exhibit. *Id.* Nor does Dr. Weiner provide any explanation in support of his check marked answers.[4] *Id.* Furthermore, the administrative law judge rejected Dr. Weiner's opinion because it lacks any explanation as to why the April 16, 1999, accident played no role in claimant's need for knee replacement surgery even though the knee required treatment after the accident. The administrative law judge found that Dr. Weiner gave vacillating opinions regarding whether claimant's left knee condition was aggravated by the work accident.[5] CX 10; JX 4.

The administrative law judge found that Dr. Freeman's March 9, 2005, report is similarly flawed. In this report, Dr. Freeman opined that the injury probably did not significantly contribute to the need for surgery as claimant had a pre-existing degenerative condition. JX 6, p. 20. The administrative law judge rationally found that Dr. Freeman's opinion, worded in terms of "significant contribution," does not preclude the work accident as a contributor to claimant's underlying right knee condition, and thus, may have contributed to the need for claimant's total right knee replacement.[6]

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[4] The April 24, 2006, check-off questionnaire completed by Dr. Weiner merely contains a response of "no" when asked whether his opinion regarding the cause of claimant's knee conditions had changed, and "yes" when asked whether he agreed with Dr. Freeman's report of March 9, 2005, concluding that claimant's knees would be in the same condition now regardless of the work injury of April 16, 1999. EX 160.

[5] Dr. Weiner stated, on June 10, 1999, and November 11, 1999, that claimant needed total knee replacements but added that "its not really related to [his April 16, 1999 work] injury." JX 4, p. 11. More specifically, in his June 10, 1999, statement Dr. Weiner acknowledged that "I know [claimant's left knee condition] was a pre-existing problem but it was aggravated some by the job injury," although he ultimately concluded that he did not feel that claimant's pending need for total knee replacement surgery "is the responsibility of workman's compensation." JX 4, p. 13.

[6] Moreover, the administrative law judge rationally determined that Dr. Freeman's opinion is based on an incomplete picture of claimant's overall medical condition because claimant's credible testimony indicated that Dr. Freeman's exam was not "hands-on," and because Dr. Freeman did not have the benefit of reviewing Dr. Bryan's post-March 9, 2005, reports, as well as the report proffered by Dr. Christensen.

The administrative law judge rejected employer's contention that Dr. Bryan's most recent opinion that claimant's April 16, 1999, work accident contributed to his right knee condition is inconsistent with his earlier findings. Dr. Bryan noted, on September 3, 2004, that claimant has difficulty with both of his knees related to the work injury. JX 2 at 5. As for claimant's right knee, Dr. Bryan specifically stated that claimant's right knee osteoarthritis became painful due to his favoring his left knee. *Id.* On August 17, 2005, Dr. Bryan's notes reflect that claimant needed total knee replacements for both knees. CX 6. By letter dated February 28, 2006, Dr. Bryan stated that he was "ready to amend any previous comments" regarding claimant's right knee and opined that claimant "had significant bilateral knee osteoarthritis which was well tolerated until his job injury of 4-16-99," such that "the result of that job injury is that is [sic] accelerated the osteoarthritic changes in both [of claimant's] knees." EX 170. Consequently, the reports proffered by Dr. Bryan reflect the progression of his opinion as to the cause for claimant's need for a right knee replacement and as such they are not inconsistent with one another.

On June 7, 2005, Dr. Christensen observed that claimant had an injury on April 16, 1999, which did not require surgical intervention, but that this event "without a doubt accelerated the arthritic process that was involved in his knees." EX 170. Specifically, Dr. Christensen opined, based on his review of the x-ray evidence, that claimant's pre-injury osteoarthritic knee condition was aggravated by the work injury. EX 170; JX 6, p. 3.

It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh it. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Board must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. 33 U.S.C. §921(b)(3); *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns*, 41 F.3d 1555, 29 BRBS 28(CRT). The administrative law judge rationally accorded greater weight to the opinions of Drs. Bryan and Christensen. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Moreover, his analysis is consistent with the aggravation rule. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). As his conclusion, based on the record as a whole, that claimant established that his work for employer aggravated his pre-existing right knee condition and thus, contributed to his need for a total right knee replacement, is supported by substantial evidence and consistent with law, it is affirmed. We therefore affirm the administrative law judge's award of medical benefits relating to

the treatment of claimant's right knee condition. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

Employer next argues that the administrative law judge's finding regarding claimant's loss in wage-earning capacity does not comport with the Board's specific remand instructions and is not in accordance with law. Employer maintains that the administrative law judge failed to establish a singular amount representing claimant's post-injury wage-earning capacity, and thus, that he erred in awarding claimant temporary partial disability benefits for 2003 and 2005, based on his comparison of claimant's "year by year" post-injury wage-earning capacity with claimant's average weekly wage.

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). The party contending that the claimant's actual wages do not represent his wage-earning capacity bears the burden of so proving. *Penrod Drilling Co v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). The administrative law judge must adjust claimant's post-injury earnings to the level paid at the time of injury, in order to neutralize the effects of inflation, *see generally Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990), and then compare those adjusted earnings to claimant's average weekly wage to determine whether claimant has sustained any loss in wage-earning capacity. 33 U.S.C. §908(e).

While employer correctly notes that the administrative law judge must determine an "amount" representing an injured worker's post-injury wage-earning capacity, employer has not pointed to anything in the Act or case law that mandates that a claimant must have but one singular "amount" representing his post-injury wage-earning capacity. In this case, claimant's post-injury wages and weeks of work, as well as his corresponding container and holiday payments, fluctuated each year. As instructed by the Board, *Puente*, slip op. at 5-6, the administrative law judge considered but rejected employer's contention that he should calculate one post-injury wage-earning capacity for claimant based on an aggregate of claimant's post-injury earnings, in favor of an approach comparing each individual post-injury year's earnings with the average weekly wage, because "adjustable annualized increases in wages computed yearly would more accurately reflect claimant's wage-earning capacity." Decision and Order on Remand at 16. The administrative law judge's methodology in calculating claimant's wage-earning capacity permissibly represents the post-injury wages to be paid under normal conditions

to claimant as injured.[7] *See generally See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). We thus reject employer's contention that the administrative law judge's calculation of claimant's wage-earning capacity on a year-to-year basis is erroneous. As it is rational and supported by substantial evidence, under the facts and arguments presented, we affirm the administrative law judge's finding that claimant established a loss in wage-earning capacity, and the consequent award of temporary partial disability benefits for the years 2003 and 2005.[8]

Lastly, employer challenges the administrative law judge's award of an attorney's fee. Specifically, employer argues that the administrative law judge erred by summarily dismissing its objections regarding certain entries in the fee petition which it deemed to be duplicative, unrelated to issues before the administrative law judge, and/or excessive for the tasks described by counsel. Additionally, employer argues that the administrative law judge did not sufficiently reduce counsel's fee to reflect the limited success achieved by claimant on remand.

In his Supplemental Decision and Order, the administrative law judge rejected most of employer's objections regarding fees it alleged were unrelated, unnecessary, unreasonable and/or excessive in light of the limited issues addressed on remand. The administrative law judge found that the objections amounted to a "mere disagreement" as to the validity of the requested time, that they did not establish that the entries were "unreasonable, excessive or unrelated to the issues on remand," and/or that the questioned entries were reasonable and necessary in this case.[9] Supplemental Decision and Order at 3-7. Considering employer's limited success objection, the administrative law judge found, based on a comparison of claimant's success and failure in pursuing his claim for benefits, as well as the factors contained at 20 C.F.R. §702.132(a), that the overall fee request should be reduced by ten percent. Consequently, he awarded claimant's counsel a fee totaling $4,799.25, representing 21.33 hours of legal services at the requested hourly rate of $225.

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[7] We note that the administrative law judge's actual calculation of claimant's wage-earning capacity for each of the years in question is not challenged by employer.

[8] We also affirm, as unchallenged on appeal, the administrative law judge's denial of temporary partial disability benefits for the years 2000, 2001, 2002, and 2004.

[9] The administrative law judge did reduce the time sought by counsel for work performed on March 27, 2009, by two hours, and for work performed on March 30, 2009, by 1 hour, finding that "certain tasks within this block billing are duplicative." Supplement Decision and Order at 5.

As the administrative law judge found, claimant prevailed in establishing entitlement to temporary partial disability benefits for the years 2003 and 2005, and to medical benefits associated with his right knee condition, including expenses related to his total right knee replacement, but was unsuccessful in obtaining temporary partial disability benefits for the years 2000, 2001, 2002, and 2004. Given the overall circumstances in this case, the administrative law judge's decision to make only a ten percent across-the-board reduction in the reasonable and necessary hours requested by claimant's counsel is affirmed, as employer has not established an abuse of discretion in this regard. *See generally Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). Furthermore, the administrative law judge fully considered each of employer's objections, and employer has failed to establish an abuse of the administrative law judge's discretion in determining the number of compensable hours. *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Pozos*, 31 BRBS at 178. The administrative law judge's award of an attorney's fee totaling $4,799.25, payable by employer, is thus affirmed. 33 U.S.C. §928.

Accordingly, the administrative law judge's Decision and Order on Remand and Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

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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JUDITH S. BOGGS
Administrative Appeals Judge