BRB Nos. 05-0161
and 05-0161A

GARNETT G. MURRAY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE COMPANY	)	DATE ISSUED: 10/13/2005
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order, Errata, and Supplemental Decision and Order Award of Attorney's Fee of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Clifford R. Mermell (Gillis, Mermell & Pacheco, P.A.), Miami, Florida, for claimant.

Lawrance B. Craig, III and Frank J. Sioli (Valle, Craig, Sioli & Lynott, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Errata and employer appeals the Supplemental Decision and Order Award of Attorney's Fee (2003-LHC-1015) of Administrative Law Judge Daniel F. Solomon 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). 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, injured his left big toe at work on March 22, 2001. Employer voluntarily paid claimant periods of temporary total disability benefits and permanent partial disability benefits for a three percent impairment for the toe injury. Tr. at 12. Claimant returned to his usual work for a few weeks after the accident, but has not worked since May 2001. Tr. at 71-72. Claimant alleged that the work accident caused depression and aggravated his pre-existing low back condition, diabetes, and diabetic retinopathy. Claimant sought additional disability benefits for these conditions.

The administrative law judge awarded claimant an additional 12 weeks of scheduled benefits for his work-related left great toe injury, based on an eight percent impairment rating, but denied benefits for claimant's other alleged work-related injuries. The administrative law judge found that claimant established invocation and employer established rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption with respect to the low back, psychiatric, diabetes, and diabetic retinopathy claims, and that upon an evaluation of the evidence as a whole, claimant did not establish the work-relatedness of these conditions.

Subsequent to the administrative law judge's award, claimant's counsel filed an attorney's fee petition, requesting $89,562.50, representing 358.25 hours of attorney services at $250 per hour, and expenses of $9,616.88. Employer objected to the fee petition. After considering employer's objections, the administrative law judge awarded claimant's counsel a fee of $26,643.75, representing 50 percent of 213.15 allowed hours at $250 per hour, and the expenses requested.

On appeal, claimant challenges the administrative law judge's denial of additional disability benefits. Employer responds in support of the administrative law judge's findings to which claimant replies. Employer appeals the administrative law judge's award of an attorney's fee. Claimant responds in support of the fee award, and employer filed a reply brief.

Claimant first contends that the administrative law judge erred in finding that his depression is not work-related, as the administrative law judge credited Dr. Garcia-Granda's

opinion, which claimant alleges, supports a finding that his depression is work-related. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered an injury and that an accident occurred which could have caused the injury or aggravated a pre-existing condition. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's injury was not caused or aggravated by his employment. The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated that the Section 20(a) presumption is not rebutted where employer has not presented evidence ruling out the employment as a possible cause of the injury. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT); *Cf. Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The Board has held that under this standard, it is sufficient if a physician unequivocally states, to a reasonable degree of medical certainty, that the harm is not related to the employment. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If employer rebuts the Section 20(a) presumption, it no longer controls, and the issue of causation must be resolved on the whole body of proof, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The work-related aggravation of a pre-existing condition constitutes an "injury" within the meaning of the Act, and employer is liable for any disability due to the entire resultant condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

In determining whether claimant's depression is work-related, the administrative law judge discussed the opinion of Dr. Garcia-Granda, a Board-certified psychiatrist, that claimant's severe depression is due to his left foot pain, back pain, and inability to work as a longshoreman. Cl. Ex. 5 at 10-12; *see* Decision and Order at 37, 68, 69. The administrative law judge also discussed the contrary opinion of Dr. Castiello, also Board-certified in psychiatry, that claimant's pre-existing severe personality disorder is not work-related. Emp. Ex. 20 at 17, 20-23, 28-29, 56-57; *see* Decision and Order at 41-42, 69, 70. The administrative law judge invoked the Section 20(a) presumption based upon the opinion of Dr. Garcia-Granda, and found rebuttal established based upon Dr. Castiello's opinion. Decision and Order at 68-69. In weighing the evidence, the administrative law judge credited Dr. Garcia-Granda's opinion because it was better reasoned than that of Dr. Castiello. The administrative law judge, however, found that this opinion does not establish that claimant's psychiatric condition is work-related because Dr. Garcia-Granda related claimant's depression to his work-related left foot injury as well as to his back pain and inability to work as a longshoreman due to his diabetic retinopathy which the administrative law judge found were not work-related. Decision and Order at 69-71; *see* discussion, *infra*.

We hold that the administrative law judge erred in finding that Dr. Garcia-Granda's opinion does not establish the work-relatedness of claimant's depression. Dr. Garcia-Granda's opinion states that claimant's depression is due in part to his work-related foot pain. Contrary to the administrative law judge's finding, if claimant's work played a role in his injury, the condition as a whole is work-related.[1] *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999)(court affirms the administrative law judge's finding that claimant's disability is due to his work accident where the administrative law judge credited a doctor's opinion stating that both claimant's prior condition and work accident contributed to his permanent disability); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). Because the administrative law judge credited Dr. Garcia-Granda's opinion and it establishes that claimant's psychiatric condition is work-related in part, we hold that it is work-related as a matter of law. *Id.* Consequently, we reverse the administrative law judge's finding that claimant's depression is not work-related, and remand the case for the administrative law judge to address whether claimant is disabled by this condition. *See Obert*, 23 BRBS 157.

Claimant also contends that the administrative law judge erred in finding that claimant's pre-existing diabetes was not aggravated by the work accident. Specifically, claimant contends the administrative law judge erred in finding that Dr. Cohen's opinion rebuts the Section 20(a) presumption. The administrative law judge invoked the Section 20(a) presumption based upon the opinions of Dr. Pardell and Dr. Cohen, and found rebuttal established based upon Dr. Cohen's opinion that claimant exhibited better control of his diabetes after the work accident. Decision and Order at 62-63. In weighing the evidence, the administrative law judge credited the opinion of Dr. Cohen over that of Dr. Pardell, and concluded that claimant failed to meet his burden of establishing that the work accident aggravated his underlying diabetic condition. *Id.*

[1] The aggravation rule applies "where an employment injury worsens or *combines with* a preexisting impairment . . . ." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, 18 BRBS 45, 49(CRT) (5th Cir. 1986) (*en banc*)(emphasis added).

We cannot affirm the administrative law judge's finding that Dr. Cohen's opinion rebuts the Section 20(a) presumption, as the administrative law judge did not discuss the entirety of that opinion at rebuttal. In weighing the evidence, the administrative law judge stated that, "[W]hile Dr. Cohen's opinion does not rule out the possibility of the accident having aggravated [Mr. Murray's] underlying diabetic condition, it does not affirmatively draw that causal connection." Decision and Order at 65. Based on the administrative law judge's statement that Dr. Cohen did not "rule out the possibility" that claimant's work injury aggravated his diabetes, claimant contends it cannot rebut the Section 20(a) presumption pursuant to *Brown*, 893 F.2d 294, 23 BRBS 22(CRT).

Dr. Cohen, a Board-certified endocrinologist, stated that it is a "tricky question" as to whether claimant's diabetes was aggravated by his work accident. He stated that environment is a big factor in controlling blood sugar levels. With regard to claimant specifically, Dr. Cohen stated, "stress in this man is his inactivity, his probable loss of income, and the pain that he has and it *probably exacerbates somewhat his problems."* Emp. Ex. 22 at 24-26 (emphasis added); *see* Decision and Order at 29-30, 64-65. Additionally, Dr. Cohen stated that it was possible that the pain, surgery, and stress from the work accident played a role in claimant's need for a third medication to control his diabetes. Emp. Ex. 22 at 41; *see* Decision and Order at 31. In light of this evidence, which the administrative law judge did not discuss at rebuttal, we cannot affirm the administrative law judge's finding that Dr. Cohen's opinion rebuts the Section 20(a) presumption merely because he opined that claimant's diabetes was under better control when he saw claimant. An opinion that the work accident "probably" exacerbates a pre-existing condition supports, rather than disproves, a causal connection. *Bridier v. Alabama Dry Dock & Shipping Corp.*, 29 BRBS 84 (1995). Therefore, we vacate the administrative law judge's rebuttal finding based on Dr. Cohen's opinion. On remand, the administrative law judge must address whether Dr. Cohen's opinion, as a whole, is sufficient to rebut the Section 20(a) presumption under the Eleventh Circuit's standard.[2] *See Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT); *see Jones,* 35 BRBS 37; *O'Kelley,* 34 BRBS 39.

Claimant next contends that that administrative law judge erred in relying on Dr. Trattler's opinion to find that claimant's diabetic retinopathy was not aggravated by his work accident. The administrative law judge invoked the Section 20(a) presumption based upon Dr. Hamburger's opinion, and found rebuttal established based upon Dr. Trattler's opinion.[3]

[2] If the administrative law judge finds that claimant's diabetes was aggravated by the work injury, he must address the nature and extent of any disability claimant may have due to the aggravation. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

[3] Dr. Hamburger, a Board-certified ophthalmologist, stated that claimant could have developed diabetic retinopathy in the six months between the date of the work accident in

Decision and Order at 65-67. In evaluating the evidence, the administrative law judge credited Dr. Trattler's opinion over that of Dr. Hamburger because Dr. Hamburger's opinion was based on generalities that did not relate to claimant's specific medical situation, and because Dr. Hamburger was unaware of claimant's blood sugar levels before the accident and stated that he would defer to an endocrinologist regarding what caused claimant's dyscontrol of his diabetes. Decision and Order at 67-68. As the administrative law judge's finding that claimant's diabetic retinopathy was not aggravated by his work accident is rational and supported by substantial evidence, we affirm it. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Claimant further contends that the administrative law judge erred in finding that the work accident did not aggravate his low back problems. The administrative law judge invoked the Section 20(a) presumption based upon the opinions of Drs. Galitz and Kohrman and found rebuttal established based upon Dr. Herskowitz's opinion.[4] Decision and Order at 53-54. Upon weighing the evidence, the administrative law judge credited the opinion of Dr. Herskowitz, finding it to be well-reasoned. He gave little weight to Dr. Galitz's opinion because he had limited expertise regarding back injuries and because his opinion lacked specificity. Likewise, the administrative law judge found Dr. Kohrman's opinion unpersuasive because claimant's description of the work accident does not support the physician's two alternate theories. As the administrative law judge rationally weighed the evidence and his finding that claimant's back problems were not aggravated by the work

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March 2001 and its onset in September 2001. Cl. Ex. 3 at 16-17; *see* Decision and Order at 32, 66. Dr. Trattler, also Board-certified in ophthalmology, related claimant's diabetic retinopathy to untreated diabetic retinopathy changes indicated in 1996 and 2000, and stated that claimant's work accident and subsequent toe surgery did not accelerate it. Emp. Ex. 21 at 10-18, 30-32, 36, 41-42, 48; *see* Decision and Order at 33-36.

[4] Dr. Herskowitz, a Board-certified neurologist, testified that claimant's work accident was not related to his current back complaints and that these were due to a combination of claimant's previous work-related back injuries and age. Tr. at 167. Dr. Galitz, claimant's treating Board-certified foot surgeon, opined that claimant developed an aggravation of his pre-existing low back condition from the work accident and that it was not uncommon for people on crutches as a result of foot problems, as claimant was, to develop back pain. Cl. Ex. 1 at 33-35. Dr. Kohrman, a Board-certified neurologist, believed that claimant could have experienced an acute injury to the low back at the time of the work accident by experiencing a type of startled response (a twisting movement at the time of the accident) or claimant could have developed his syndrome as a result of abnormal lumbar biomechanics (altered gait syndrome) from his orthopedic injury. Cl. Ex. 4 at 39-40.

accident is supported by substantial evidence, we affirm it. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999).

We next address employer's challenges to the administrative law judge's award of an attorney's fee. The administrative law judge noted employer's objection to fee liability and summarily found employer liable because claimant obtained a greater schedule award than employer had paid. Employer argues that it is not liable for the fee under Section 28(a) or (b) of the Act, 33 U.S.C. §928(a), (b). Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee only if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. 33 U.S.C. §928(b). We agree with employer that it is not liable for the fee under Section 28(a) because it did not decline to pay compensation after receiving notice of claimant's claim. Employer was voluntarily paying benefits when it received claimant's claim.[5] *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *see also Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *pet. for cert. pending*, No. 05-61; *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000).

However, we hold that employer is liable for the fee under Section 28(b) based on the facts of this case. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor, OWCP*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (2001). In this case, an informal conference was held and the district director issued a memorandum after the conference which addressed the impairment rating to claimant's left foot. Specifically, the district director stated he would recommend a percentage impairment to claimant's left foot upon receipt of Dr. Galitz's opinion. Dr. Galitz subsequently found that claimant has an eight percent impairment. Employer previously had paid benefits for only a three percent impairment. Employer declined to pay benefits for this increased rating, and, subsequently, the administrative law judge awarded claimant benefits for the eight percent impairment. Ex. B at 2 to Emp. P/R and Br.; Emp. Ex. 28 at 174, 355-357, 361-362. On these facts, we reject employer's contention that the conditions of Section 28(b) are not

[5] Employer voluntarily paid claimant temporary total disability benefits from March 23, 2001, through April 5, 2001, June 5, 2001, through February 26, 2002, and a three percent scheduled permanent partial disability award from February 27, 2002, through April 8, 2002. Tr. at 12. Claimant filed his claim on November 19, 2001. Emp. Ex. 28 at 381; Ex. A to Emp. P/R and Br.

satisfied, and we affirm the finding that employer is liable for claimant's attorney's fee.[6] *James J. Flanagan Stevedores*, 219 F.3d 426, 34 BRBS 35(CRT).

Employer also argues that the administrative law judge erred in not applying an analysis pursuant to the holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, the Supreme Court generally held that a fee award under a fee-shifting statute, such as Section 28 of the Act, should be for an amount that is reasonable given the results obtained. *Hensley*, 461 U.S at 434-437. In the instant case, the administrative law judge reduced the otherwise allowable hours by 50 percent. Thus, he took into account claimant's limited success. Because, however, claimant may obtain greater benefits on remand due to the Board's reversal of the administrative law judge's finding that claimant's psychiatric condition is not work-related, and the remand for reconsideration of whether claimant's pre-existing diabetes was aggravated by his work accident, the administrative law judge may reconsider his award of an attorney's fee in light of any additional success on remand. *Hensley*, 461 U.S. 424.

Employer correctly argues that it did object to an award of costs before the administrative law judge; however, its only argument was that the costs should be reduced in accordance with the principles of *Hensley*. The Board has held that, pursuant to Section 28(d) of the Act, 33 U.S.C. §928(d), an award of expenses is predicated on a finding that they are reasonable and necessary. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). As the administrative law judge found that counsel's requested costs were necessary and reasonable, Supp. Decision and Order at 5, we hold that the administrative law judge acted within his discretion in awarding these costs and we decline to disturb this award.

[6] We agree with employer that it is not liable for any services performed prior to January 30, 2003, when the case was referred to the Office of Administrative Law Judges (OALJ), since the administrative law judge has no authority to award a fee for services not rendered before him. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1(2001)(*en banc*); ALJ 1. On remand, the administrative law judge should modify the fee award to disallow services performed prior to the claim's referral to the OALJ.

Accordingly, the administrative law judge's finding that claimant's psychological injury is not work-related is reversed. The administrative law judge's finding that claimant's pre-existing diabetes was not aggravated by his work accident is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge should address any disability issues related to claimant's psychiatric condition, and to claimant's diabetes if it is found to be work-related. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge should disallow an attorney's fee for work performed prior to January 30, 2003; in all other respects, the administrative law judge's Supplemental Decision and Order Award of Attorney's Fee is affirmed. The administrative law judge may reconsider the fee award in light of any success claimant achieves on remand.

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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REGINA C. McGRANERY
Administrative Appeals Judge