RENE J. DARTEZ	)	BRB Nos. 13-0078
	)	and 13-0078A
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND OPERATING COMPANY,	)	
INCORPORATED	)	DATE ISSUED: 09/27/2013
	)	
and	)	
	)	
LOUISIANA WORKERS'	)	
COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
RENE J. DARTEZ	)	BRB No. 13-0229
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND OPERATING COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	
LOUISIANA WORKERS'	)	
COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order Granting Attorney's Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John H. Hughes (Allen & Gooch), Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and claimant appeals the Decision and Order Granting Attorney's Fees (2011-LHC-01306) of Administrative Law Judge Clement J. Kennington 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *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. 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 law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Marcum v. Director, OWCP*, 12 BRBS 355 (1980).

Claimant allegedly sustained an injury to his left shoulder on October 26, 2008, while climbing a ladder in the course of his work for employer as a lead operator at East Cameron 261, a platform located on the Outer Continental Shelf. Claimant stated that he informed a co-worker of the accident, filled out an accident report, and sought treatment with Dr. Faulk, his general physician. Claimant testified that he was capable of performing his usual work, with modifications, until early March 2009. Claimant stated that his left shoulder pain increased in March 2009 after he played a round of golf, prompting him to seek additional treatment from Dr. Faulk. An MRI dated March 10, 2009, revealed a full-width rotator cuff tear of the left shoulder.[1] Dr. Schutte performed shoulder surgery on March 25, 2009. Dr. Schutte released claimant to return to work on July 16, 2009, with a restriction against repetitive lifting of no more than 50 pounds, and he recommended physical therapy. Claimant, however, did not return to work for

[1]Claimant had a previous partial tear of the rotator cuff of his left shoulder in 2005. He was treated at that time by Dr. Cobb, who administered injections of DepoMedrol and Marcaine.

employer as he believed he was not capable of performing his usual job with that restriction. Employer terminated claimant in late 2009. He has not obtained any other employment. Claimant filed a claim seeking permanent total disability and medical benefits related to his work injury, which employer controverted.

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that employer did not establish rebuttal thereof, and thus, he concluded that claimant's left shoulder condition is work-related. The administrative law judge found that claimant's left shoulder condition reached maximum medical improvement on July 16, 2009, the day claimant was released to return to work. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from the date of his surgery, March 26, 2009, until July 16, 2009. 33 U.S.C. §908(b). The administrative law judge denied claimant's request for reimbursement of out-of-pocket medical expenses but awarded claimant future medical benefits related to his October 26, 2008 injury.

Claimant's counsel subsequently requested an attorney's fee totaling $22,149.56, representing 48.1 hours of attorney work at an hourly rate of $350, 17 hours of paralegal work at an hourly rate of $100, plus expenses of $3,614.56. Employer filed objections to the fee petition. In his Decision and Order Granting Attorney's Fees, the administrative law judge, after making reductions in the requested hourly rates and hours for both attorney and paralegal work, as well as in the requested expenses, awarded counsel a fee totaling $11,120.06, payable by employer.

On appeal, claimant challenges the administrative law judge's findings that he is not entitled to permanent total disability benefits and to reimbursement of out-of-pocket medical expenses. BRB No. 13-0078. In its cross-appeal, employer challenges the administrative law judge's finding that claimant's shoulder injury is work-related. BRB No. 13-0078A. Claimant has also appealed the administrative law judge's award of an attorney's fee. BRB No. 13-0229.[2]

Causation

We first address employer's cross-appeal. Employer contends the administrative law judge erred in finding that claimant's rotator cuff injury is related to his employment. Employer avers that claimant is not entitled to the benefit of the Section 20(a) presumption because: claimant obtained no contemporaneous medical treatment for the left shoulder injury he allegedly sustained on October 26, 2008; he successfully performed his usual work, including substantial amounts of overtime, until March 2009

[2]In response to the Board's Order to Show Cause dated June 21, 2013, the parties informed the Board that they had filed consolidated briefs addressing all the appeals.

without any complaints of shoulder pain; and he sought treatment for his left shoulder on March 9, 2009, only after experiencing increased pain following a round of golf.

In order to establish a prima facie case, a claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or working conditions existed that could have caused the harm. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). If these two elements are established, the Section 20(a) presumption applies to relate the claimant's injury to his employment. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Under the aggravation rule, if a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986)(*en banc*).

The administrative law judge found that claimant credibly testified about the work incident of October 26, 2008, i.e., the feeling of sudden pain in his left shoulder while climbing the ladder, and that this is supported by his contemporaneous filing of an accident report with employer.[3] The administrative law judge noted that while there is contrary testimony regarding the alleged incident and claimant's allegations of pain, such testimony is "inconclusive" and that claimant's recollection of the accident is "the most thorough and accurate."[4] Decision and Order at 11. Moreover, Drs. Faulk and Schutte stated that claimant's work accident aggravated his pre-existing shoulder condition.

The Board is not permitted to reweigh the evidence but may ascertain only whether substantial evidence supports the administrative law judge's decision. *See, e.g., Pool Co. v. Cooper*, 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). It is well-established that the administrative law judge has the authority to address questions of witness credibility and is entitled to draw his own inferences from the evidence; that other inferences could

[3]The administrative law judge found that claimant's filing of the accident report was confirmed by employer's safety manager, Lance LeBlanc, and account manager, Tom Doyle. EX 9 at 8-9; EX 10 at 11-12.

[4]The administrative law judge noted that claimant's co-worker, Wade Hebert, testified that he could not recall whether claimant reported an injury while climbing a ladder on or about October 26, 2008, whether he had assisted claimant in completing the accident report or whether claimant had ever complained about shoulder problems while at work after that date. EX 11. Mr. Hebert, however, admitted that claimant may have mentioned having some physical problems. *Id.*

have been drawn does not establish error in the administrative law judge's conclusion. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995). As substantial evidence supports the administrative law judge's finding that claimant established both a harm, a torn rotator cuff in his left shoulder,[5] and the occurrence of an incident at work on October 26, 2008, which could have caused that harm or aggravated a pre-existing condition, the administrative law judge properly invoked the Section 20(a) presumption. Therefore, we affirm this finding. *H.B. Zachary Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Employer next argues that Dr. Schutte's testimony, that it is most likely that claimant's playing golf in March 2009 was the precipitating event for the rotator cuff surgery, is sufficient to rebut the Section 20(a) presumption. Once the claimant establishes a prima facie case, as here, Section 20(a) of the Act applies to relate his injury to his employment, and the burden shifts to the employer to rebut the presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The employer's burden is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). When aggravation of a pre-existing condition is claimed, the employer must produce substantial evidence that work events neither directly caused the injury nor aggravated a pre-existing condition to result in injury. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The administrative law judge found that employer did not present substantial evidence to rebut the Section 20(a) presumption. The administrative law judge found that claimant suffered from a previous shoulder injury and that the medical evidence suggests that claimant aggravated that injury in the incident at work. In this regard, Dr. Faulk opined that the October 2008 work incident aggravated claimant's pre-existing left shoulder symptoms prompting the need for the MRI in March 2009 and the surgical procedure. CX 2 at 14. Dr. Schutte opined that claimant at least aggravated a previous

[5]Contrary to employer's contention, the results of the MRIs from 2005 and 2009 are not "identical," as the former showed a full-thickness partial-width tear while the latter showed that the condition had progressed to a full-width tear. EX 4; CX 2.

shoulder problem during the work incident on October 26, 2008.[6] CX 1 at 10, 14, 15, 26. The administrative law judge thus rationally found that employer did not produce substantial evidence that the October 26, 2008, work incident neither directly caused claimant's full rotator cuff tear nor aggravated his pre-existing partial tear to the point that surgical intervention was required. Decision and Order at 12. We, therefore, affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption and the consequent finding that claimant's left shoulder injury is work-related.[7] *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Bunol*, 211 F.3d 294, 34 BRBS 29(CRT).

Extent of Disability

In his appeal, claimant contends the administrative law judge erred in finding that he is not entitled to permanent total disability benefits as of July 16, 2009. Claimant contends he cannot return to his usual work based on the opinion of Dr. Schutte that claimant has a limitation against repetitively lifting more than 50 pounds overhead and that a functional capacity evaluation (FCE) would be beneficial to determine claimant's ability to use a rope swing. Claimant avers he cannot perform his usual work within those restrictions, and that employer did not introduce any evidence that it would accommodate the restrictions imposed by Dr. Schutte or present any other evidence regarding the availability of suitable alternate employment. Claimant further asserts that the administrative law judge's finding that "claimant made the decision not to return to work and, by his own admission, chose to retire," is inapposite to whether he is able to return to work.

The administrative law judge found that claimant was temporarily totally disabled from the date of surgery, March 26, 2009, until July 16, 2009, the date Dr. Schutte released claimant to return to work. Specifically, the administrative law judge stated that

[6]Dr. Schutte stated that while he was not certain whether the work incident or claimant's subsequent golf game triggered the pain that motivated claimant to agree to the surgery, both were contributing factors. CX 1 at 15.

[7]The administrative law judge erred in his recitation of the rebuttal standard by stating that employer "must establish" that claimant's injury was not caused or aggravated by his work in order to rebut the Section 20(a) presumption. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). This error is harmless, however, because the administrative law judge found the evidence supportive of a causal relationship between the accident and the harm. Thus, the administrative law judge properly found that employer did not produce substantial evidence that claimant's injury is not work-related. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

Dr. Schutte opined that there is no reason to believe that claimant would have any trouble performing his regular, pre-injury job as of July 16, 2009. The administrative law judge found that claimant was capable of performing his prior duties with the restriction of not lifting 50 pounds repetitively overhead. Decision and Order at 14. The administrative law judge also found that Dr. Schutte did not believe that a functional capacity evaluation was necessary in order for claimant to return to his prior position. Moreover, the administrative law judge found significant claimant's testimony that, once released to work, he had intended to return to work until he was informed that he would be receiving Social Security disability benefits and that he then made the decision not to return to work and, by his own admission, chose to retire. The administrative law judge thus concluded that claimant was no longer disabled upon reaching maximum medical improvement and his release to return to work on July 16, 2009. *Id.*

In order to establish a prima facie case of total disability, claimant bears the burden of establishing that he is unable to perform his usual work due to the injury. *See, e.g., New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1981). In order to determine whether a claimant can return to his usual work, the administrative law judge must compare the claimant's medical restrictions with the physical requirements of the usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). We affirm the administrative law judge's denial of additional disability benefits after July 16, 2009, as he rationally found that claimant did not meet his burden of establishing continuing disability due to the work injury.

Dr. Schutte addressed claimant's work status in his report dated July 16, 2009. He opined that "[a]t this point I have given [claimant] a release to return back to work and his only restriction would be lifting more than 50 pounds repetitively up overhead." CX 3.[8] Although claimant testified he did not believe he could perform his work with this restriction, HT at 32-33, on appeal claimant does not reference any evidence of record that his usual work actually required repetitive overhead lifting of more than 50 pounds. With respect to claimant's ability to use a rope swing, Dr. Schutte stated, "I don't see why he wouldn't be able to swing from a rope; but depending on the size of the patient, and how much force has to be exerted, it might be something that might be better tested [with an FCE] to give us more information."[9] CX 1 at 13. However, claimant testified that he did "not usually" use a rope swing at work "except for when the hurricane came and damaged the platforms." HT at 14. Moreover, as the administrative law judge properly stated, no physician actually ordered an FCE prior to releasing claimant to return

[8]There also is evidence that Dr. Schutte released claimant to return to work without any restrictions. *See* CX 3 at 37-39.

[9]Dr. Schutte also stated that it would be reasonable for claimant to undergo an FCE as "it would be nice to know that he can safely transfer without impairing his safety or hurting himself or someone else." CX 1 at 26-27.

to work. Thus, we reject claimant's contention that the medical evidence indicates his continuing inability to return to his usual work.

With respect to the relevance of claimant's retirement, case precedent establishes that if a claimant's work injury results in his inability to perform his usual work, he is entitled to benefits unless employer establishes the availability of suitable alternate employment, irrespective of claimant's retirement. *See Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997). On the other hand, if a claimant voluntarily leaves the workforce for reasons unrelated to his traumatic injury, the administrative law judge may find that the claimant did not sustain a loss of earning capacity due to the injury. *See Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001). In this case, claimant testified that he did not go back to work because he was awarded Social Security disability benefits in August 2009, apparently because of his shoulder injury. HT at 32, 49, 58.[10] The administrative law judge found that claimant chose to retire from employment at this time, as claimant did not attempt to return to work for employer and declined to pursue a job lead in North Dakota. *Id.* at 49, 58-59. Given the absence of evidence in the record that claimant was unable to return to his usual work, we cannot say that the administrative law judge erred in finding that claimant voluntarily left the work force. The administrative law judge is entitled to weigh the evidence and to draw inferences therefrom, and to assess the credibility of witnesses. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). As the administrative law judge's findings and inference are rational, and as claimant has not established reversible error in the administrative law judge's decision, we affirm the finding that claimant did not establish his inability to return to his usual work after July 16, 2009. *Hoffman*, 35 BRBS at 149-150. Thus, we affirm the denial of additional benefits.

Medical Expenses

Claimant also contends the administrative law judge erred by denying him reimbursement for out-of-pocket expenses incurred for medical care for his work-related left shoulder injury. Claimant asserts that he timely reported the accident/injury to employer, and that employer was aware prior to claimant's surgery that he was undergoing medical treatment for his work-related left shoulder condition; thus, claimant contends employer is liable for any medical benefits relating to that treatment.

The administrative law judge found that the medical records and testimony of claimant's treating physician, Dr. Schutte, support a finding that claimant established a

[10]There is no evidence of record other than claimant's testimony concerning the Social Security proceedings. Claimant testified he was awarded disability benefits because he would need retraining in order to become employable and that he was too close to retirement age to be retrained. HT at 32.

prima facie case for compensable medical treatment. 33 U.S.C. §907(a). The administrative law judge found, however, that claimant did not request authorization for medical care prior to obtaining medical treatment. He thus concluded that claimant is entitled to any future medical benefits related to his October 28, 2008 injury but not to reimbursement for his past out-of-pocket expenses.

Section 7(d) provides requirements which must be met in order for employer to be held liable for medical treatment. The statute states:

> (d) Request of treatment or services prerequisite to recovery of expenses; ...
>
> (1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless—
>
> (A) the employer shall have refused or neglected *a request* to furnish such services and the employee has complied with subsections (b) and (c) and the applicable regulations; . . . .

33 U.S.C. §907(d)(1) (emphasis added). Thus, under Section 7(d), an employee must request authorization for treatment before employer may be held liable for it. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). If employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary for treatment of the work injury, employer is liable for the treatment. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); 33 U.S.C. §907(c)(2). Employer's mere knowledge of treatment for claimant's injury does not create an obligation to pay for that care in the absence of a request for treatment. *See Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989).

Claimant testified that he did not request authorization from employer for any medical treatment for his left shoulder condition.[11] HT at 50-51. Employer's representatives, Mr. Doyle and Mr. LeBlanc, likewise testified that claimant did not request authorization. EX 9, Dep. at 17; EX 10, Dep. at 15-16, 19. Accordingly, as substantial evidence supports the administrative law judge's finding that claimant did not seek authorization for treatment from employer or the district director at any time prior to his left shoulder surgery, we affirm the administrative law judge's denial of reimbursement for claimant's out-of-pocket expenses relating to that procedure. 33

[11]Claimant also stated that when he went to Dr. Faulk in March 2009 for treatment of his left shoulder symptoms, the nurse asked him whether he was seeking workers' compensation, to which claimant replied, "No, I'm filing it on my insurance." HT at 27.

U.S.C. §907(d); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

Attorney's Fee Award

Claimant contends the administrative law judge erred in awarding claimant's counsel an attorney's fee based on $275 per hour and in reducing counsel's overall fee request by 40 percent based on claimant's limited success in obtaining benefits.

Addressing the requested hourly rates, the administrative law judge found that the issues and facts presented in this case do not support an award based on the requested hourly rates of $350 for attorney work and $100 for paralegal work. He thus concluded that a reasonable rate in this case is $275 per hour for attorney work and $75 per hour for paralegal work. The administrative law judge and Board decisions cited by claimant as supportive of his requested rate of $350 do not establish an abuse of discretion in the administrative law judge's determination that $275 represents a reasonable hourly rate in this case. *See generally Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994). Accordingly, we affirm the awarded rates.

Claimant also contends that the administrative law judge's 40 percent reduction of the requested attorney's fees does not account for his success in establishing he sustained a work-related injury for which he was found entitled to temporary total disability benefits and future medical benefits. Claimant maintains that a 15 percent reduction is more appropriate given all of the facts in this case.

The administrative law judge found that while claimant established his entitlement to an award of temporary total disability benefits for approximately four months and future medical benefits, claimant was unsuccessful in establishing his entitlement to an ongoing award of permanent total disability benefits and reimbursement of his out-of-pocket medical expenses. Considering the limited success claimant achieved in the pursuit of his claim, the administrative law judge found that an overall reduction of counsel's claimed fees of 40 percent, after the exclusion of certain specific entries,[12] is appropriate. Claimant has not established error in the administrative law judge's finding that his success was limited in view of the litigation as a whole or that the reduced fee award is based on an abuse of the administrative law judge's discretion. Thus, the fee award is affirmed. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *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).

[12]The administrative law judge's denial of certain specific entries is affirmed as unchallenged on appeal.

Accordingly, the administrative law judge's Decision and Order and Decision and Order Granting Attorney's Fees are affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge