BRB Nos. 89-2134
and 89-2134A

LOGIUS DAVIS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and the Supplemental Decision and Order Awarding Attorney Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Steven M. Vaughan (Mandell & Wright), Houston, Texas, for claimant.

Charles F. Herd, Jr. (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-2468) of Administrative Law Judge James W. Kerr, 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 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 shown by the challenging party to be arbitrary, capricious, an abuse

of discretion or not in accordance with the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On June 25, 1985, claimant injured his back while working for employer as a longshoreman. Although he returned to work on February 15, 1986, he subsequently missed work due to back pain for intermittent periods through January 11, 1988. Employer voluntarily paid claimant temporary total disability benefits based on an average weekly wage of $606.47 from June 25, 1985 to February 4, 1986, from August 6, 1986 to August 26, 1986, and from February 23, 1987 to March 29, 1987. 33 U.S.C. §908(b). Claimant sought additional compensation, arguing that employer's voluntary payments of compensation were based on an incorrect average weekly wage and that he also was entitled to permanent partial disability benefits commencing February 15, 1986.

The administrative law judge determined that claimant was entitled to temporary total disability compensation during the periods in which voluntary temporary total disability payments had been made, with the exception of the period between September 12, 1985 and February 4, 1986, based on an average weekly wage of $661.77, which was higher than that voluntarily paid. The administrative law judge denied claimant permanent partial disability compensation, finding that he failed to establish a *prima facie* case of disability in that he was able to perform the same work post-injury which he had been able to perform prior to the 1985 work injury. The administrative law judge also awarded claimant future medical expenses. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded claimant an attorney's fee in the amount of $7,496.25 to be paid by employer.

On appeal, claimant contends that the administrative law judge erred in denying temporary total disability benefits from September 12, 1985 to February 4, 1986, and permanent partial disability compensation after February 1986. BRB No. 89-2134. Employer responds, urging affirmance of the administrative law judge's Decision and Order. Employer appeals the Supplemental Decision and Order, contending that the administrative law judge erred in holding it liable for an attorney's fee or, in the alternative, awarded an excessive fee. BRB No. 89-2134A. Claimant responds, urging affirmance of the fee award.

On appeal, in challenging the administrative law judge's finding that he was not temporarily totally disabled from September 12, 1985 through February 4, 1986, claimant contends that the administrative law judge erroneously relied on Dr. Moore's testimony in finding that claimant could return to his usual work in September 1985 because Dr. Moore did not release claimant to return to work in his September and October 1985 reports.[1] Claimant also notes that neither Dr. Street in his

[1]Claimant also contends that the administrative law judge erred in denying compensation during this period in light of the parties' stipulation. The parties, however, only stipulated that temporary total disability was paid during various periods, not that employer was liable during the periods paid. Although claimant asserts that the employer had no intention of putting this previously paid compensation at issue, employer's pre-hearing statement indicated that the nature and extent of disability, if any, was a contested issue.

October 1985 report nor Dr. Barnes in his January 1986 report returned claimant to work. Claimant also contends that certain medical evidence indicates his physical condition worsened.[2] Claimant contends that in denying him temporary total disability compensation during this period, the administrative law judge summarily dismissed, ignored, or failed to mention the evidence of a worsening condition in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1992). The administrative law judge denied claimant temporary total disability benefits from September 12, 1985 to February 4, 1986 relying on Dr. Moore's hearing testimony that claimant reached maximum medical improvement on September 12, 1985 and, on that date, claimant could return to work and had no increased permanent impairment or physical restrictions over those imposed on claimant for a work-related back injury claimant suffered in 1980.[3] The administrative law judge considered Dr. Street's October 11, 1985 opinion wherein he opined claimant could return to work pending the results of a CT scan if negative for disc herniation.[4] Further, the administrative law judge discussed Dr. Barnes' January 1986 opinion that there was no reason claimant could not return to his pre-1985 occupation.

Inasmuch as Dr. Moore's testimony that claimant had recovered from his injury on September 12, 1985 and required no additional work restrictions, corroborated in part by Dr. Barnes' January 1986 opinion, provides substantial evidence to support the administrative law judge's denial of temporary total disability during the period from September 12, 1985 until February 4, 1986, we affirm the administrative law judge's finding. *See Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Contrary to claimant's contentions, Dr. Moore's testimony is not inconsistent with his September and October 1985 reports, as they indicate only that claimant felt that he was unable to return to work and that there were no objective findings to support claimant's complaints. Claimant's contention that the administrative law judge's analysis of this issue fails to comport with the APA also is rejected. As the administrative law judge considered and weighed the relevant evidence and adequately detailed the rationale behind his decision, he complied with the requirements of the APA. *See generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Claimant's reference to evidence in the record which allegedly could support a finding contrary to the administrative law judge's is not determinative where, as here, the administrative law judge's finding regarding disability is rational and supported by substantial evidence. *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

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[2]This evidence consists of Dr. Barnes' notation that there was atrophy in claimant's left calf and a January 1986 CT scan showing degenerative changes at L5-S1.

[3]Those restrictions were no prolonged bending, stooping or lifting over 50 pounds.

[4]When a CT scan was performed, it showed degenerative changes and no disc herniation.

Claimant next contends that the administrative law judge erred in denying permanent partial disability benefits after February 1986 because every doctor, other than Dr. Moore, found objective evidence, as well as subjective complaints, that claimant was suffering from a physical impairment. Claimant also contends that the administrative law judge erred by not crediting his testimony concerning his ability to work and in failing to explain why he credited Dr. Moore's opinion over the opinions of Dr. Street, Dr. Barnes, and particularly, claimant's treating physician, Dr. Wright. In finding that claimant did not sustain any additional compensable permanent disability, the administrative law judge rejected claimant's testimony that he could perform certain types of jobs before but not after the 1985 injury in favor of Dr. Moore's testimony and records which show that claimant could not perform this rigorous work prior to his June 1985 accident as a result of his 1980 injury. The administrative law judge credited Dr. Moore's hearing testimony over that of claimant because he found that claimant was a poor historian.

We reject claimant's contentions, as it is within the administrative law judge's discretion to credit Dr. Moore's testimony and records over claimant's testimony in finding that claimant is not permanently partially disabled as a result of the 1985 injury. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). Dr. Moore's November 8, 1982 report states that claimant should avoid bending, stooping and lifting and that claimant told the doctor he cannot lift any sacks. Dr. Moore testified that claimant should not have been lifting sacks in 1983, and that after he reached maximum medical improvement from the 1985 injury, his restrictions were the same as before the latter injury. *See* n.3, *supra*. Contrary to claimant's contention, we hold that the administrative law judge's failure to indicate why he credited Dr. Moore's testimony over that of Dr. Wright is harmless error because both doctors agreed that claimant could perform work which did not involve lifting sacks and other activities involving a lot of bending or stooping. Moreover, also contrary to claimant's contention that the administrative law judge erred in failing to consider pre-1985 gang sheets indicating that claimant did in fact perform heavy work in holds of ships, because the administrative law judge rationally found that claimant's restrictions had not increased since the 1980 injury, the administrative law judge's failure to consider the pre-1985 gang sheets is harmless. Accordingly, as Dr. Moore's opinion regarding claimant's restrictions provides substantial evidence supporting the administrative law judge's finding that claimant is not permanently partially disabled due to the 1985 injury, this finding is affirmed.[5] *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

In its appeal, employer challenges the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. On June 23, 1989, claimant filed an attorney's fee petition with the administrative law judge for services rendered from June 1, 1988 to May 1, 1989 for 6.75 hours of work for C.B. Eakin at an hourly rate of $55, and 71.25 hours of work at an hourly rate of $200 for Steven Vaughan, plus $744.30 in costs for a total fee of $15,365.55. Employer filed objections

[5]Thus, as claimant is not entitled to permanent partial disability benefits, we need not address claimant's contention that the administrative law judge failed to consider all the factors relevant to a determination of post-injury wage-earning capacity. *See Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); 33 U.S.C. §908(h).

regarding both its liability for and the amount of the fee claimed.

In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge stated that considering the quality of representation, the work performed, the complexity of the case and the benefits awarded, Stephen Vaughan is entitled to an hourly rate of $100 for 71.25 hours and C.B. Eakin is entitled to an hourly rate of $55 for 6.75 hours. The administrative law judge therefore awarded claimant an attorney's fee of $7,496.25 to be paid by employer.

On appeal, employer contends, as it did below, that the administrative law judge erred in holding it liable for claimant's attorney's fee because, by virtue of the administrative law judge's decision, claimant received approximately $5,800 less than employer had voluntarily paid him.[6] Employer contends that even though the award of benefits was based on a higher average weekly wage than that voluntarily paid, this did not result in claimant's obtaining additional compensation sufficient to support an award of attorney's fees under 33 U.S.C. §928(b). Employer also maintains that the fact that it agreed to withdraw its controversion and provide additional future medical benefits does not constitute an additional benefit sufficient to support an award of an attorney's fees as this issue was never litigated and the administrative law judge made no findings that any medical care was currently due.[7] Employer also contends that even if its withdrawal of its controversion is perceived as a benefit to claimant, that benefit must be weighed against the other benefits received, and asserts that the amount of medical expenses claimant is likely to incur is nominal compared to the net overpayment of approximately $5,700. Finally, employer maintains that in the event that an attorney's fee is due it should be limited to the time spent on the medical care claim alone.

Claimant responds that employer's withdrawal of its controversion did provide additional compensation sufficient to support the fee award as did his establishing entitlement to compensation based on a higher average weekly wage. Claimant further asserts that even if he did not prevail with regard to the aggregate compensation gained, he is still entitled to a fee for the work necessarily done on all issues as the administrative law judge may not sever successful and unsuccessful issues, and the chance of success on all issues raised was reasonable. Employer replies, reiterating several arguments made in its initial brief, and in addition argues that claimant is not entitled to a fee for issues on which he lost.

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[6]Employer states that its temporary total disability payments for the periods from June 25, 1985 to February 4, 1986, from August 6, 1986 to August 26, 1986, and from February 23 to March 29, 1987 totalled $16,172.40, and that the total amount of benefits awarded by the administrative law judge was $10,429.91, or $5,805.94 less than employer had voluntarily paid.

[7]Employer also argues that no attorney's fee is due in this case as claimant failed to follow the well-established procedure of requesting an informal conference so that a written recommendation could be made. Although Section 28(b) states that the deputy commissioner shall make a written recommendation, the failure of the deputy commissioner to do so will not preclude an assessment of an attorney's fee against the employer. *National Steel & Shipbuilding Co. v. U. S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).

Under Section 28(b) of the Act, 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 if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). The Board has held that an award of future medical expenses constitutes additional compensation sufficient to support a fee award payable by employer under Section 28(b), *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987); *Morgan v. General Dynamics Corp.*, 16 BRBS 336, 339 (1984), and that the matter was not litigated here does not negate claimant's success as employer only withdrew its controversion to this issue at the hearing.[8] Moreover, the overpayment of disability compensation may not be offset against employer's liability for medical benefits. *See Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 15, 1991). Thus, we reject employer's contention that it is not liable for an attorney's fee.

We agree, however, that the case must be remanded to the administrative law judge for reconsideration of the attorney's fee award in light of claimant's limited success before him. *See Ingalls Shipbuilding, Inc. v. Director, OWCP, [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). Because we affirm the administrative law judge's denial of benefits for temporary total disability from September 12, 1985 through February 4, 1986, and for permanent partial disability, employer's overpayment of disability benefits to claimant resulted in claimant's obtaining no additional disability benefits despite the increased average weekly wage. Claimant thus succeeded in obtaining only medical expenses. In *Baker*, 991 F.2d at 163, 27 BRBS at 14 (CRT), two hearing loss cases in which the claimants had no measurable impairment, the United States Court of Appeals for the Fifth Circuit remanded one of the consolidated cases for a determination concerning the necessity of future medical treatment and for the entry of an award of an attorney's fee tailored to claimant's limited success. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988); *Ahmed v. Washington Metropolitan Area Transit Authority*,, 27 BRBS 241 (1993); *Bullock v. Ingalls Shipbuilding, Inc.*, BRBS , BRB Nos. 90-194/A (July 16, 1993)(*en banc*)(Brown and McGranery, JJ., dissenting). Moreover, the regulation governing awards of attorneys' fees states, *inter alia*, that the amount of benefits is a factor to be considered in entering a fee award. 20 C.F.R. §702.132. We therefore vacate the Supplemental Decision and Order Awarding Attorney Fees, and remand the case for the administrative law judge to consider counsel's fee petition in light of claimant's limited success and the aforementioned cases.

[8]This case is distinguishable from *Ingalls Shipbuilding, Inc. v. Director, OWCP, [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). In *Baker*, the court recognized that a claimant may be entitled to medical benefits even though he has no ratable impairment. Nonetheless, upon the employer's challenge to the award of medical benefits and the resultant attorney's fee, the court reversed the award of benefits and the award of an attorney's fee where the claimant failed to present evidence of the need for future medical treatment. In the instant case, claimant is impaired and employer has not challenged its liability for future medical care. Thus, the award of such care supports employer's liability for an attorney's fee.

Accordingly, the administrative law judge's Decision and Order - Granting Benefits is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration in a manner consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge