BRB No. 93-1288

RALPH CHATWIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Order - Attorney Fees and Costs of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Scott E. Stafne, Seattle, Washington, for claimant.

Thomas G. Hall (Thomas G. Hall & Associates), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Order - Attorney Fees and Costs (91-LHC-1184) of Administrative Law Judge Steven E. Halpern 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 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).

On April 25, 1990, claimant was assigned work tasks in both an empty fuel tank and a machinery space; subsequently, claimant was found disoriented, suffering from fatigue, short-term

memory loss, nausea and incoordination, and complaining of pain in his side. Claimant was diagnosed as suffering from multiple sclerosis (MS), acute toxic encephalopathy, broken ribs, and symptoms of unknown etiology, including panic attacks, somatic disorder, post-traumatic stress syndrome, chronic pain syndrome, and long-term neurological damage. Claimant has not returned to work.

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption based upon his diagnosed conditions and his exposure to toxins of unknown proportions in the fuel tank and machinery space and that employer failed to rebut this presumption. The administrative law judge next found that even if employer had established rebuttal of the presumption, his weighing of all the medical evidence of record resulted in a finding that claimant established a causal relationship between his working conditions and his physical problems. Further, the administrative law judge determined that claimant was unable to return to his usual job and that employer failed to establish the availability of suitable alternate employment. Accordingly, he awarded claimant permanent total disability compensation. Subsequent to his decision, claimant's attorney submitted a fee petition for services performed before the Office of Administrative Law Judges and employer filed objections to this fee request. In a subsequent Order, the administrative law judge addressed the objections raised by employer and awarded claimant's attorney a fee.

Employer now appeals, arguing that the administrative law judge erred in finding that claimant established his *prima facie* case for invocation of the Section 20(a) presumption, that employer failed to establish rebuttal of the Section 20(a) presumption, and that claimant established the existence of a causal relationship based on the record as a whole. Employer additionally challenges the administrative law judge's determination that it failed to establish the availability of suitable alternate employment. Finally, employer appeals the administrative law judge's award of the attorney's fee. Claimant responds, urging affirmance of the administrative law judge's decisions. Claimant also has submitted a fee petition for services rendered before the Board.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption; specifically, employer asserts that the administrative law judge erred in finding that claimant established the existence of working conditions which could have caused his MS. We disagree. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Volpe v. Northeast Marine Terminals*, 14 BRBS 17 (1981), *rev'd on other grounds*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). In establishing his *prima facie* case, claimant is not required to introduce affirmative medical evidence proving that the working conditions in fact caused the harm; rather, claimant must only show the existence of working conditions which could conceivably cause the harm alleged. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989).

In the instant case, it is uncontroverted that claimant suffers from MS, as well as several other syndromes. Moreover, it is undisputed that claimant was exposed to fumes on April 25, 1990,

while working for employer in a fuel tank and working space. Thus, as it is undisputed that claimant sustained some degree of exposure to fumes which could have caused his current physical conditions, we hold that the administrative law judge did not err in finding that claimant established the working conditions element of his *prima facie* case.[1] Accordingly, we affirm the administrative law judge's invocation of the Section 20(a) presumption. *See Sinclair*, 23 BRBS at 148.

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, aggravated, or rendered symptomatic by his employment. *See Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). 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 Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the instant case, employer alleges that the testimony of Drs. Sparks and Alvord are sufficient to rebut the Section 20(a) presumption. We need not address this specific contention because, assuming, *arguendo*, that the testimony of these physicians is sufficient to rebut the Section 20(a) presumption, the administrative law judge's finding that causation is established based on the record as a whole is rational and supported by substantial evidence. It is within the administrative law judge's discretion to credit the opinions of Drs. Daniel, Smith, and Longstreth, that exposure to fumes can precipitate, make manifest, or render apparent MS, over the contrary opinions of Drs. Sparks and Alvord. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). We therefore affirm the administrative law judge's finding that a causal relationship between claimant's employment and his physical condition has been established based on the conclusions of Drs. Daniel, Smith, and Longstreth.

Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290 (1994). Employer contends that the administrative law judge erred in failing to credit the testimony of its rehabilitation expert and in failing to find that it established the availability of suitable alternate employment. We disagree. The administrative law judge concluded that employer failed to establish the availability of suitable alternate employment based upon the medical opinions of record that claimant was precluded from returning to his usual work and from work requiring hand and eye coordination. Moreover, the administrative law judge did rely upon employer's expert to the extent that she testified that if claimant had accurately reported his symptoms, then he was unemployable. Tr. at 1736. The administrative law judge found that claimant was a credible witness who accurately reported his

[1]Drs. Jui, Call, Schneir, Daniel, Longstreth and Stockbridge each opined that one or more of claimant's medical problems could be due to the toxic exposure at work.

symptoms. *See* Decision and Order at 104-105. Accordingly, the administrative law judge found that claimant was unemployable.

It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence, and we affirm the administrative law judge's decision to credit the testimony of the claimant and employer's vocational expert, as supported by the medical opinions of record, as that determination is neither inherently incredible nor patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1981), *cert. denied*, 440 U.S. 911 (1979). Thus, as we affirm the administrative law judge's finding that claimant cannot perform any employment, it follows that employer has not established the availability of suitable alternate employment. *See Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1982), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Accordingly, we affirm the administrative law judge's conclusion that claimant is totally disabled.

Employer next appeals the amount of the attorney's fee awarded by the administrative law judge. 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 requested a fee of $66,628.50, representing 264.9 hours of services for lead counsel at $150 per hour, 184.8 hours of services for co-counsel at $125 per hour subsequent to his becoming a member of the bar and 46.6 hours of services at $75 per hour prior to his bar membership, and 7.4 hours of paralegal services at $40 per hour, plus costs of $14,370.97. In his order awarding attorney fees, the administrative law judge addressed the specific objections raised by employer, reduced the hourly rate requested by claimant's co-counsel from $125 to $100 per hour, reduced the number of hours requested by 68, disallowed $684 of the expenses sought, and thereafter awarded claimant's counsel a fee of approximately $57,800, plus expenses of $13,686.97. On appeal, employer argues that the administrative law judge should have further reduced the hourly rate, the number of hours awarded, and the deposition costs.

In considering counsel's fee petition, the administrative law judge set forth each objection made by employer and reduced the number of hours requested by 68 and the expenses sought by $684. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard and we decline to reduce further or disallow the hours and expenses 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).

Lastly, we reject employer's assertion that the awarded hourly rate of $100 is excessive. The administrative law judge determined that the hourly rate of $125 sought by claimant's co-counsel was excessive and awarded him an hourly rate of $100, finding that rate to be fair and reasonable in the region where this case originated and under the circumstances of this case. As employer's

assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose for an individual with co-counsel's experience is insufficient to meet its burden of proving that this rate is excessive, we affirm the rate awarded by the administrative law judge. *See Maddon*, 23 BRBS at 55; *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Claimant's counsel has filed a fee petition for work performed before the Board, requesting a fee of $7,380, representing 49.2 hours of services rendered at an hourly rate of $150. Because claimant has successfully defended this appeal, his counsel is entitled to a fee reasonably commensurate with the work performed before the Board. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom., Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989); 33 U.S.C. §928; 20 C.F.R. §802.203. After reviewing counsel's fee petition, we find the amount requested to be reasonable in this case. Moreover, we note that employer has filed no objections to counsel's fee petition. Therefore, we award counsel an attorney's fee of $7,380, representing 49.2 hours at $150 per hour, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, we affirm the administrative law judge's Decision and Order - Awarding Benefits and the administrative law judge's Order - Awarding Attorney Fees and Costs. Additionally, we award claimant's counsel an attorney's fee of $7,380 for work performed before the Board.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge