BRB Nos. 03-0780, 03-0780A,
and 04-0748

GUS MARSHALL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
	)	
v.	)	
	)	
FLORIDA STEVEDORING, INCORPORATED	)	DATE ISSUED:Aug. 18, 2004
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents-Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, the Order Denying Claimant's Motion for Reconsideration, the Supplemental Decision and Order Granting Attorney Fee, and the Order Denying Employer/Carrier's Motion for Reconsideration of Supplemental Decision and Order Granting Attorney Fee of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein (Silverstein and Silverstein), Miami, Florida, for claimant.

Laurence F. Valle (Valle & Craig, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration, and employer appeals the Supplemental Decision and Order Granting Attorney Fee and the Order Denying Employer/Carrier's Motion for Reconsideration of Supplemental Decision and Order Granting Attorney Fee (2000-LHC-2437) of Administrative Law Judge Alice M. Craft 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 19, 1999, claimant, while detaching containers from a vessel during the course of his employment with employer, slipped and fell approximately sixteen feet. X-rays taken following this incident revealed multiple fractures in claimant's right foot, and Dr. Lawson performed surgery on the foot on November 28, 1999. Thereafter, Dr. Guerra recommended an MRI of claimant's back, which led to a diagnosis of multiple herniated discs in the lumbar spine. On December 7, 2000, claimant was evaluated by Dr. Magid, a psychiatrist, following various complaints. Claimant subsequently sought disability and medical benefits under the Act for alleged foot, back and psychological conditions which he contended were related to his November 1999 work injury.

In her Decision and Order, the administrative law judge found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), with regard to both claimant's back and psychological conditions, but that employer rebutted the presumption.[1] The administrative law judge then concluded that, based on the record as a whole, claimant failed to establish that his back or psychological conditions arose out of his employment with employer; the administrative law judge therefore denied reimbursement for past and future medical treatment for those conditions. The administrative law judge next found that, as employer presented no evidence of suitable alternate employment,[2] claimant was totally disabled, and she awarded claimant temporary total disability compensation from November 20, 1999 to January 31, 2001, and permanent total disability compensation thereafter. 33 U.S.C.

[1] The parties stipulated that claimant sustained a 39 percent permanent impairment to his right foot, or a 27 percent permanent impairment of the right lower extremity, as a result of his November 1999 work injury. JX 1.

[2] The administrative law judge excluded employer's evidence on this issue from the record. *See* discussion, *infra.*

§908(a), (b). Next, the administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), and determined that claimant is to receive weekly benefits in the amount of $113.56, pursuant to Section 6(b)(2) of the Act, 33 U.S.C. §906(b)(2). Claimant's motion for reconsideration was summarily denied by the administrative law judge.

On appeal, claimant challenges the administrative law judge's determination that employer rebutted the Section 20(a) presumption with respect to claimant's back condition; alternatively, claimant asserts that the administrative law judge erred in concluding that he failed to establish causation based on the record as a whole with regard to claimant's back as well as psychological conditions. Claimant also challenges the administrative law judge's calculation of his average weekly wage. Employer responds, urging affirmance of the administrative law judge's findings on these issues. BRB No. 03-0780. In its cross-appeal, employer contends that the administrative law judge erred in excluding from the record all of its evidence relating to the availability of suitable alternate employment. Claimant responds in support of the administrative law judge's decision to exclude employer's evidence. BRB No. 03-0780A. Lastly, employer appeals the administrative law judge's fee award to claimant's counsel. BRB No. 04-0748.

Causation

Where, as in the instant case, claimant is entitled to invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT)(11th Cir. 1990); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *O'Kelley*, 34 BRBS at 39. If the administrative law judge finds that the Section 20(a) presumption is rebutted, she must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Claimant initially avers that employer failed to rebut the Section 20(a) presumption linking his back complaints to his work injury. In finding rebuttal, the administrative law judge relied upon the opinion of Dr. Scuderi, an orthopedic surgeon who examined claimant on May 21, 2001. *See* EX 31. Dr. Scuderi stated that upon examination claimant had a full range of motion and no spasm or tenderness in the lumbar spine, that claimant exhibited no evidence of nerve root irritation, that claimant's

MRI was consistent with multi-level degenerative disc disease, Tr. at 220, 239, and that claimant's herniated discs were pre-existing, long-standing problems that were not related to his work injury.[3] Tr. at 220. Dr. Scuderi observed that the records from the emergency room where claimant went after the accident reflect that he was having a lot of foot pain but not back pain; he stated that claimant may have had some transient lumbar pain which usually resolves in approximately three months, but that he did not exhibit pain by the time of Dr. Scuderi's May 21, 2001 examination, and certainly was at maximum medical improvement by that time. *Id.* at 223-224. Dr. Scuderi stated that on the day he examined claimant there was no evidence whatsoever to suggest that any of claimant's herniated discs were symptomatic. Tr. at 241. Lastly, Dr. Scuderi stated that claimant sustained no permanent impairment of his lumbar spine as a result of his work incident, that there is no significant trauma, and that he would impose no restrictions based on that accident. *Id.* at 223-224, 244. As Dr. Scuderi's credited testimony establishes, to a reasonable degree of medical certainty, that claimant's back condition is not the result of his work injury, but rather is attributable to a pre-existing degenerative back condition, we affirm the administrative law judge's finding that employer rebutted the presumption as it applies to claimant's physical back complaints. *See, e.g., Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *O'Kelley*, 34 BRBS at 41-42.

Claimant next challenges the administrative law judge's finding that he did not establish causation based on the record as a whole. In support of his contention, claimant avers that the administrative law judge erred by not giving determinative weight to Dr. Guerra's testimony based upon his status as a treating physician.[4] The administrative law judge found that Dr. Guerra's opinion was equivocal and conclusory because he did not offer a specific explanation of how claimant's alleged symptoms were related to his work injury. Decision and Order at 18. In contrast, in relying upon the opinion of Dr. Scuderi, the administrative law judge concluded that as a fellowship-trained spinal surgeon, Dr. Scuderi is best qualified of the doctors who evaluated claimant's back. Tr. at 207. The administrative law judge found that Dr. Scuderi provided a detailed and well-reasoned explanation for his opinion that claimant exhibits no permanent impairment, and that claimant's back condition was not related to his work injury.

Contrary to claimant's contention, an administrative law judge is not required to find determinative the opinion of claimant's medical expert simply because the expert is

[3] Dr. Scuderi explained that claimant's lumbar pain is most likely due to a mildly altered gait as a result of claimant's foot injury, and that such pain was transient and usually works itself out over about three months. Tr. at 222, 237.

[4] However, Dr. Guerra deposed that he had examined claimant only twice. CX 41; EX 6 at 31.

claimant's treating physician. Rather, the administrative law judge, as factfinder, must independently analyze and discuss the medical evidence before her. *See, e.g., Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D.Md. 1999); *see generally Black & Decker Disability Plan v. Nord,* U.S. , 123 S.Ct. 1965 (2003). In so doing, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences from the evidence.[5] *See John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). As the administrative law judge thus acted within her discretion in crediting Dr. Scuderi's opinion over that of Dr. Guerra, claimant did not meet his burden of persuasion in this case. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT). We therefore affirm the administrative law judge's determination, based on the record as a whole, that claimant's back condition is not causally related to his employment with employer. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

We next address claimant's contention that the administrative law judge erred in finding that claimant did not establish a causal link between his psychological complaints and his employment with employer, based on the record as a whole.[6] The administrative law judge found that Dr. Magid, a psychiatrist, diagnosed claimant with a depressive disorder, "NOS," CX 20; however, the administrative law judge credited the contrary opinion of another psychiatrist, Dr. Jarrett, who did not diagnose any mental disorder.[7]

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[5] Claimant alleges bias on Dr. Scuderi's part. Claimant's allegations of bias include that Dr. Scuderi stated that his practice is dedicated to workers' compensation cases; Dr. Scuderi's proffered opinion of doctors who perform "shotgun" MRIs; and his demonstrated interest in rendering an opinion rather than treating claimant's back problems. We reject claimant's contention. Dr. Scuderi stated at the outset of his May 21, 2001, report that he was asked to perform a medical evaluation of claimant, that claimant understood that no doctor/patient treating relationship existed at the time of the interview, and that a report would be sent to the requesting client (employer) following the medical evaluation. EX 31. The fact that a doctor is retained by an employer to perform a medical evaluation does not render the evaluation suspect, and questions involving credibility of witnesses, including medical experts, are for the administrative law judge to resolve.

[6] Claimant does not challenge the administrative law judge's finding that the opinion of Dr. Jarrett is sufficient to rebut Section 20(a).

[7] Dr. Jarrett deposed that claimant did not fulfill the criteria for post-traumatic stress disorder, or exhibit any evidence of a major or minor depressive disorder, or have a depressive affect to interfere with any physical disability. EXs 32, 34. In his opinion

The administrative law judge found Dr. Jarrett's opinion was supported by that of Dr. Guerra, an orthopedist, who saw no reason to refer claimant for psychiatric treatment; the administrative law judge observed that none of the other physicians who examined claimant remarked that claimant appeared depressed. Decision and Order at 18. As the administrative law judge discussed the relevant medical evidence contained in the record and substantial evidence supports her conclusion, we affirm the administrative law judge's determination that claimant failed to establish a compensable psychiatric impairment. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Coffey*, 34 BRBS 85.

Average Weekly Wage

Claimant next challenges the administrative law judge's calculation of his average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), of the Act. It is well-established that the object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury, s*ee James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT)(5th Cir. 1996); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT)(5th Cir. 1991)*; Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982), and that the administrative law judge has broad discretion in determining a claimant's annual earning capacity under Section 10(c). *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT)(5th Cir. 2000). Accordingly, the Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Fox v. West State Inc.*, 31 BRBS 118 (1997).

Claimant on appeal argues that the administrative law judge erred in not crediting claimant's testimony regarding his work history and thus in calculating his average weekly wage. We disagree. In the instant case, the administrative law judge examined and relied upon claimant's tax returns, W-2 statements, and union records for the period of 1994 through 1999, and determined that claimant earned $25,390 during this period. The administrative law judge then concluded that claimant's annual earning capacity at the time of his injury was $5,905, a figure which she subsequently divided by 52 in order to calculate claimant's average weekly wage at the time of his injury. *See* 33 U.S.C. §910(d). As the sum of this calculation, $113.56, resulted in a weekly compensation

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claimant's disabilities lay outside the field of psychiatry and his conditions were not attributable to a mental disorder.

figure below the statutory minimum, the administrative law judge awarded claimant a weekly benefit pursuant to Section 6(b) of the Act, 33 U.S.C. §906(b). We hold that the result reached by the administrative law judge is reasonable, is supported by substantial evidence, and best reflects claimant's earning capacity with employer at the time of his injury. *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). We therefore affirm the administrative law judge's determination of claimant's average weekly wage.

Exclusion of Evidence

In its cross-appeal, employer contends that the administrative law judge abused her discretion in excluding from the record evidence regarding the availability of suitable alternate employment.[8] In her undated Notice of Hearing and Prehearing Order, the administrative law judge instructed the parties to exchange expert reports by April 20, 2001, and exhibits by July 9, 2001. Employer subsequently filed a Motion for Extension of Time for the exchange of exhibits; the administrative law judge granted this motion and extended the time for the exchange of exhibits by one week.[9] *See* Tr. at 191. Employer thereafter submitted to claimant two labor market surveys prepared by Raquelin Fals, a rehabilitation case manager, dated July 6, 2001, and July 9, 2001, respectively. Claimant's counsel received the July 6, 2001 labor market survey on July 9, 2001, and the July 9 report on July 13, 2001. On July 10, 2001, claimant filed a Motion to Strike Job Leads Provided by Innovative Resource Group and Exclude Testimony of Raquelin Fals, asserting that as he did not receive employer's reports until July 10, 2001, and, accordingly, he had not been afforded reasonable time to conduct a good faith work search by the time of the formal hearing set for July 24, 2001. At the formal hearing, the administrative law judge initially allowed the disputed labor market surveys to be submitted into the record, and she allowed Ms. Fals to testify for the purpose of offer of proof. *See* Tr. at 197. However, during Ms. Fals's testimony, the administrative law judge decided to exclude all of employer's proffered evidence regarding the issue of suitable alternate employment beginning with that of July 6, 2001. The administrative law judge allowed in the May 18, 2001, vocational and testing report prepared by Ms. Fals upon meeting claimant. *See* Tr. at 192; EX 29. The administrative law judge based this evidentiary ruling on her concern that employer's late submission of expert evidence

[8] Where, as in this case, claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

[9] On the motion itself, is a handwritten note, presumably written by the administrative law judge: "Granted 7/5/01 AMC [Alice M. Craft]."

was unfairly prejudicial to claimant's preparation of his case, including cross-examination of Ms. Fals, and that the prejudice could not be cured by holding the record open. Decision and Order at 10 n.5.

We affirm the administrative law judge's exclusion of evidence concerning the availability of suitable alternate employment, as employer has not shown that the administrative law judge abused her discretion in this regard. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *French v. California Stevedore & Ballast*, 27 BRBS 1 (1993). Section 702.338, 20 C.F.R. §702.338, provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. Section 23(a) of the Act, 33 U.S.C. §923(a), and Section 702.339 of the regulations, 20 C.F.R. §702.339, provide that administrative law judges are not bound by common law or statutory rules of evidence. The Board has interpreted these provisions as affording administrative law judges considerable discretion in rendering determinations pertaining to the admissibility of evidence. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991), *aff'd*, 996 F.2d 1226 (9th Cir. 1993)(table); *Wayland v. Moore Dry Dock*, 22 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). Because the admission of evidence is discretionary, the Board may overturn such a determination only if it is arbitrary, capricious, or an abuse of discretion. *See, e.g., Patterson v. Omniplex World Services*, 36 BRBS 149 (2002); *Burley*, 35 BRBS 185; *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

In its Motion for Extension of Time to July 16, 2001, employer specifically referenced Paragraph 3 of the administrative law judge's Pre-Hearing Order which addressed the deadline requirements for the submission of exhibits. *See* Notice of Hearing and Prehearing Order, Par.3. Employer did not refer to Paragraph 1B, which contains the requirement that the parties exchange reports from expert witnesses expected to testify at the hearing. *Id.*, Par.1. Moreover, on appeal, employer also does not challenge the exclusion of its evidence on the ground that Ms. Fals's testimony and the labor market surveys are exhibits rather than expert witness reports.

Based upon employer's response to the specific orders of the administrative law judge, specifically its non-compliance with the deadline for exchanging expert reports as ordered by the administrative law judge, we hold that the administrative law judge committed no abuse of discretion in sanctioning employer by excluding the evidence which it had untimely served on claimant; the administrative law judge's exclusion of employer's evidence is in accordance with 29 C.F.R. §18.6(d)(2)(iii), as this regulation allows for such exclusion for failure to comply with any order of the administrative law judge. *See* 29 C.F.R. §18.6(d)(2)(iii). Thus, employer's contention of error is rejected.

Attorney's Fee Award

Employer has additionally appealed the administrative law judge's award of an attorney's fee to claimant's counsel, arguing that the administrative law judge erred in not considering employer's objections to claimant's fee petition. BRB No. 04-0748. 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). In her Supplemental Decision and Order Granting Attorney Fee, the administrative law judge awarded claimant's counsel an attorney's fee of $38,175.75, representing 169.67 hours of work at an hourly rate of $225, the full amount requested by counsel.

In her Decision and Order Awarding Benefits dated June 10, 2003, the administrative law judge allowed claimant's counsel 30 days in which to submit his fee petition, and she allowed employer ten days following service of the application within which to file its objections. *See* Decision and Order at 22. On July 18, 2003, claimant filed a motion for extension of time to file his fee petition with the administrative law judge. Before the administrative law judge acted on this motion, however, claimant's counsel filed its fee petition on July 25, 2003. Employer received this fee application on or about July 28, 2003. Emp. br. at 2. Fourteen days later, on August 11, 2003, the administrative law judge entered an Order granting claimant's motion for extension of time; as this Order did not state a deadline for employer's response, employer unilaterally implemented "a 30-day default deadline." Emp. br. at 2. On August 14, 2003, the administrative law judge issued her Supplemental Decision and Order Granting Attorney Fee in which, after determining that employer had not filed objections to the fee requested by claimant's counsel, she awarded the fee sought. On August 27, 2003, employer filed its objections. On October 1, 2003, the administrative law judge denied employer's motion for reconsideration, finding that its objections had not been timely filed.

In support of its contention on appeal, employer argues that as it agreed to claimant's request for an extension of time in which to file his fee petition, it would be manifestly unjust for the administrative law judge's decision to stand. Moreover, employer contends that, since the administrative law judge's Order granting claimant an extension of time in which to file its petition did not specify a time for employer to respond, employer was given neither a reasonable time to respond nor proper notice of a deadline. We disagree and, for the reasons that follow, we affirm the administrative law judge's fee award to claimant's counsel.

As employer properly states on appeal, it is well established that due process requires that employer be given a reasonable time to respond to a fee request. *See Todd*

Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.* 202 F.3d 259 (4th Cir. 1999)(table). In the case at bar, the administrative law judge Decision and Order unequivocally required employer to file its objections to claimant's counsel's fee petition within 10 days of its receipt of that petition. Claimant's counsel thereafter filed his fee petition on July 25, 2003, while his motion for an extension of time was pending, and employer concedes that it received this fee application on or about July 28, 2003. Employer thereafter did not file objections to counsel's fee petition until August 27, 2003.[10] As the administrative law judge's initial decision clearly allowed employer ten days from receipt to respond to claimant's counsel's fee petition, and as employer admittedly received counsel's fee request on July 28, 2003, *see* Emp. br. at 2, employer cannot rationally claim that it was unaware of the deadline for filing its objections or that, alternatively, it was not given a reasonable time to do so. Accordingly, we reject employer's allegation of error, and we affirm the fee awarded to claimant's counsel by the administrative law judge.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. BRB Nos. 03-0780/A. The administrative law judge's Supplemental Decision and Order Granting Attorney Fee and the Order Denying Employer/Carrier's Motion for Reconsideration of Supplemental Decision and Order Granting Attorney Fee are affirmed. BRB No. 04-0748.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[10] Before the administrative law judge on reconsideration, employer apparently argued that this delay was due to a clerical error on its part. Employer makes no similar argument on appeal.