BRB Nos. 97-1217
and 97-1217A

NILES WILLIAMS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order - Granting Benefits and Supplemental Decision and Order Awarding Attorney's Fees of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Robert J. Lynott (Thomas & Libowitz, P.A.), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Granting Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (96-LHC-1604, 96-LHC-1605, 96-LHC-1606, 96-LHC-1607) of Administrative Law Judge John C. Holmes 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 injured his back on February 8, 1991, his right knee on April 4, 1992, and his left knee on January 19, 1994, and May 10, 1994, while working as a heavy equipment operator for employer. Claimant sought permanent total disability benefits for his back and knee injuries. The administrative law judge awarded claimant temporary total disability benefits from February 10 through 14, 1991, for the 1991 back injury, from April 7 through September 30, 1992, for the right knee injury, and from May 10 through November 16, 1994, for the left knee injury.[1] Additionally, the administrative law judge awarded claimant scheduled permanent partial disability benefits for a 40 percent impairment to the right leg for the 1992 injury, and for a five percent impairment to the left leg for the 1994 injury, *see*, 33 U.S.C. §908(c)(2), (19), and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of $23,021.62, representing 99.5 hours at $200 per hour, and $3,121.62 in expenses. Employer filed objections to the fee petition to which claimant's counsel replied. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel an attorney's fee of $14,821.62, representing 58.5 hours at $200 per hour, and $3,121.62 in expenses.

On appeal, claimant challenges the administrative law judge's finding that he is limited to scheduled awards for his injuries, asserting that the administrative law judge erred in entering the schedule awards and that the administrative law judge erred in denying benefits for claimant's back impairment. In its appeal, employer contests the administrative law judge's award of an attorney's fee.

[1]There was no time lost due to the January 19, 1994 left knee injury.

Claimant first contends that the administrative law judge erred in denying him permanent total disability benefits. To establish a *prima facie* case of total disability, claimant must establish that he is unable to return to his usual employment due to his work-related disability. *See, e.g., Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Once claimant establishes an inability to perform his usual employment because of a job-related injury, the burden shifts to employer to establish the availability of other jobs that claimant can perform given, *inter alia,* his age, medical restrictions and education. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). Although the administrative law judge recited these legal principles, he did not consider claimant's claim for permanent total disability benefits in light of the medical evidence of record. Consequently, we remand this case to the administrative law judge to discuss all relevant medical evidence of record and determine whether claimant established his *prima facie* case of total disability due to the right knee injury, the left knee injury, or the injuries to both knees in combination.[2] If claimant establishes his *prima facie* case, the burden shifts to employer to establish suitable alternate employment.[3] *See Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT); *Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT). If employer does not establish suitable alternate employment, claimant is entitled to permanent total disability benefits and is not limited to scheduled awards.[4] *PEPCO v. Director, OWCP*, 449 U.S. 268, 277 n. 17, 14 BRBS 363, 366-367 n. 17 (1980); *Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT). If employer establishes suitable alternate employment, claimant is limited to two scheduled

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[2]The administrative law judge noted that there was no apparent dispute that claimant cannot go back to his usual longshore work but found that claimant could not go back to work due to his disability retirement award rather than any actual medical disability. Decision and Order at 9. Contrary to the administrative law judge's finding, however, the fact that claimant retired on disability is not relevant to the issue of whether claimant's work injury precludes his return to usual work. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

[3]The administrative law judge incorrectly stated in his decision that, "It was unnecessary, therefore, for Employer to conduct a job market survey, although given the liberality of the Act and the unusual fact situation here, Employer was fully justified in doing so in order to protect its own interests." Decision and Order at 14.

[4]However, claimant cannot be awarded a permanent total disability award for one knee and a scheduled award for the other knee. *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

awards for his knee impairments.[5] *PEPCO*, 449 U.S. at 268, 14 BRBS at 363; *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986); *Brandt v. Avondale Shipyards, Inc.*, 16 BRBS 120 (1984); 33 U.S.C. §908(c)(22).

Assuming the administrative law judge again awards claimant benefits under the schedule, we address claimant's contention that the administrative law judge erred in finding he has only a 40 percent impairment to the right leg. With regard to the right knee injury, the administrative law judge discussed and weighed the opinions of Drs. Hunt, Honick, and Reahl, who found that claimant suffered an impairment to the right leg of 50 percent, 45 percent, and 35 percent, respectively. Decision and Order at 11-12; Cl. Ex. 9; Emp. Exs. 4, 11. The administrative law judge found that 50 percent seemed a little high, and that a rating of 40 percent represented a reasonable approximation of impairment to claimant's right leg, after noting that he was not bound to accept any physician's report as definitive. Decision and Order at 12. The administrative law judge, however, did not discuss and weigh the relevant opinion of Dr. O'Hearn that claimant has a 60 percent impairment to the right leg. Cl. Ex. 7. We, therefore, vacate the administrative law judge's determination that claimant suffered a 40 percent permanent partial impairment to the right leg. If, on remand, the administrative law judge finds that employer established suitable alternate employment, the administrative law judge must discuss and weigh Dr. O'Hearn's opinion with the opinions of Drs. Hunt, Honick, and Reahl, before determining the percentage permanent partial impairment claimant has to his right leg. *See generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993); *Bachich v. Seatrain Terminals of California,* 9 BRBS 184 (1978); *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978).

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[5]Although claimant injured both legs, he is not presumed to be permanently totally disabled under Section 8(a) of the Act, 33 U.S.C. §908(a), because he did not sustain a total loss of use of both legs. *See Collins v. Todd Shipyards Corp.*, 9 BRBS 1015 (1979). Moreover, we reject claimant's contention that he should receive a permanent total disability award on his two scheduled knee injuries based on a "multiple impairment principle," *i.e.*, a claimant with multiple injuries can be permanently totally disabled, even though each individual injury alone would be subject to the schedule, as there is no authority under the Act for such an award.

Claimant also contends that the administrative law judge erred in awarding him benefits for only a five percent impairment to the left leg. Contrary to claimant's contention, however, the administrative law judge acted within his discretion in crediting Dr. Hunt's opinion that claimant has a five percent impairment after noting that Dr. Reahl, who provided the other relevant opinion of record, did not explain his reason for concluding that claimant suffered a 28 percent impairment to the left knee. Decision and Order at 12; Cl. Ex. 9; Emp. Ex. 4. Consequently, we affirm the administrative law judge's award of permanent partial disability benefits to claimant's left leg if on remand the administrative law judge finds that employer established suitable alternate employment.

Claimant additionally contends that the administrative law judge abused his discretion in considering Dr. Halikman's reports as to the date claimant was able to return to work from his left knee injury, as they were not admitted into the record. At the hearing before the administrative law judge, a dispute arose between the parties as to the amount of compensation paid claimant for the left knee injury. Tr. at 17-27. Employer offered to take the post-hearing deposition of Mr. Wessel, employer's assistant vice-president, to clarify the amount paid claimant. Tr. at 42-44, 287. At Mr. Wessel's post-hearing deposition, over objection by claimant's counsel, employer submitted Dr. Halikman's reports to explain why employer stopped paying claimant temporary total disability benefits on November 16, 1994, for the left knee injury. Emp. Ex. 16 at 8-10. In his decision, the administrative law judge relied on Dr. Halikman's reports, *see* discussion, *infra*, but never formally admitted them. *See* Decision and Order at 13. Although claimant's counsel objected to Dr. Halikman's reports at the post-hearing deposition of Mr. Wessel, claimant's counsel never presented his objections before the administrative law judge in his post-hearing memorandum or in a motion for reconsideration. Consequently, we hold that claimant's counsel failed to preserve his objection to Dr. Halikman's reports. *See generally Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); Cl. Exs. 4 and 5 to Emp. Ex. 16; Emp. Exs. 2 and 5 to Emp. Ex. 16. Nevertheless, we note that the administrative law judge should formally admit Dr. Halikman's reports into the record on remand.

Claimant next contends that the administrative law judge erred in stopping his temporary total disability benefits for the left leg on November 16, 1994. We reject this contention as the administrative law judge rationally relied on the opinion of Dr. Halikman, that claimant's left knee had recovered sufficiently by that date so that he could return to his job, as supported by the opinions of Drs. Hunt and Matz, that claimant could return to work from the left leg injury absent the degenerative right

knee.[6] Decision and Order at 13-14; Emp. Exs. 3, 4; Emp. Ex. 2 to Emp. Ex. 16. We, therefore, affirm the administrative law judge's cessation of temporary total disability benefits for the left knee injury on November 16, 1994.

Claimant lastly contends that the administrative law judge erred in denying him benefits for his back injury. Section 20(a) applies to the issue of whether claimant's injury or disability is work-related. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). The presumption is invoked if claimant establishes his *prima facie* case--the existence of a harm and working conditions that could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros*., 19 BRBS 288 (1987). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it falls out of the case and claimant must establish a causal relationship based on the record as a whole. *See*

[6]Claimant's remaining contentions with regard to this issue lack merit. The administrative law judge was not required to award claimant temporary total disability benefits until he completed the vocational rehabilitation process on September 8, 1995. *Price v. Dravo Corp.*, 20 BRBS 94 (1987); 33 U.S.C. §939(c)(2); 20 C.F.R. §§702.501-702.508. Despite the administrative law judge's assertion that claimant's attendance at the Apple Butter Festival could indicate an intervening cause of claimant's left knee disability, the administrative law judge did not rely on this reasoning in ceasing temporary total disability benefits. Decision and Order at 13; Cl. Ex. 7. Also, the administrative law judge did not rely on his observation that surgery on the left knee was unnecessary to cease temporary total disability benefits, but rather relied on Dr. Halikman's reports as supported by the opinions of Drs. Hunt and Matz. Decision and Order at 12-13.

Moore, 126 F.3d at 256, 31 BRBS at 119 (CRT).

Although the administrative law judge in this case did not analyze the evidence in terms of the Section 20(a) presumption, any error is harmless as the administrative law judge's finding that claimant's impairment to his low back is not work-related is supported by substantial evidence. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). In concluding that claimant's injury to his low back was not work-related, the administrative law judge discussed and weighed the relevant opinions of Drs. Oleynick, Fiore, Hunt, and Matz, that claimant's back injury was not caused or aggravated by his employment, and gave these opinions greater weight than the contrary opinions of Drs. Reahl, O'Hearn, and MacGibbon.[7] Decision and Order at 9-11; Emp. Exs. 1, 3, 4, 6; Tr. at 183-187. As this finding is within his discretion, *see Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991), we affirm the administrative law judge's denial of benefits for claimant's back injury.

Turning to employer's appeal of the administrative law judge's award of an attorney's fee to claimant's counsel, we hold that the administrative law judge's reduction in the number of hours from 99.5 to 58.5 is reasonable in light of the amount of the award of benefits. Moreover, by virtue of our remand herein, claimant's success may increase. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). In addition, contrary to employer's contention, the fee petition comports with the requirements of 20 C.F.R. §702.132. We reject employer's challenge to the administrative law judge's award of the requested hourly rate of $200 as employer has failed to establish that the administrative law

[7]Claimant alleged that his back injury was caused or aggravated by his work-related knee injuries.

judge abused his discretion in this regard.[8] *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). We, therefore, affirm the administrative law judge's award of an attorney's fee.

Accordingly, the administrative law judge's decision denying total disability benefits, and his finding that claimant has a 40 percent impairment to the right leg are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the Decision and Order - Granting Benefits is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[8]We deny claimant's motion to dismiss employer's appeal as claimant did not file the motion in a separate document as required by the regulations and as we accept employer's memorandum of law in support of its appeal as employer's petition for review and brief as within our discretionary authority. 20 C.F.R. §§802.211(d); 802.219(b). We will not address employer's challenge to counsel's use of the quarter-hour minimum billing method for the first time on appeal as employer did not raise it below. *See Ross v. Ingalls Shipbuilding, Inc*, 29 BRBS 42 (1995).

JAMES F. BROWN
Administrative Appeals Judge