RICHARD MCBRIDE	)	BRB Nos. 97-1226
	)	and 97-1226A
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HALTER MARINE, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
	)	
RICHARD MCBRIDE	)	BRB No. 97-1491
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HALTER MARINE, INCORPORATED	)	)
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Supplemental Decision and Order Granting Fee of David W. DiNardi, Administrative Law Judge, United States Department of Labor, and the Compensation Order - Award of Attorney's Fee of Jeana F. Jackson, District Director, United States Department of Labor.

Curtis Hays, Biloxi, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, and employer appeals the Supplemental Decision and Order Granting Fee (95-LHC-1175), of Administrative Law Judge David W. DiNardi. BRB Nos. 97-1226/A. Employer additionally appeals the Compensation Order - Award of Attorney's Fee (Case No. 6-159199) of District Director Jeana F. Jackson. BRB No. 97-1491. These decisions were 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 law.[1] *See, e.g. Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

[1]In an Order dated August 6, 1997, the Board consolidated these appeals for purposes of decision.

Claimant sustained injures to his neck and back on two occasions while working for employer. On March 3, 1994, claimant was involved in a physical altercation with his supervisor during which time it is alleged that the supervisor grabbed claimant's neck.[2] On April 13, 1994, claimant sustained similar injuries to his neck and back when, while he was holding onto a large metal plate, the plate was lifted off the ground by a crane and suddenly dropped.[3] Following these incidents, claimant was diagnosed as suffering from acute and chronic ligamentous muscular injury to his neck and lower back; additionally, claimant alleged various psychological conditions. Claimant returned to work on September 19, 1994, but was terminated on September 22, 1994, for violating a company rule. EX 9.

In his Decision and Order, the administrative law judge found that claimant's physical injuries were related to his employment with employer, but that any psychological problems from which claimant may suffer were not aggravated, accelerated or exacerbated by either of the two incidents described above. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for the disability which arose out of his physical injuries from April 14, 1994, to September 18, 1994, at which time the administrative law judge determined that employer had established the availability of suitable alternate employment within its own facility.[4] 33 U.S.C. §908(b). Thereafter, in a Supplemental Decision and Order, the administrative law judge awarded claimant's attorney at the time of the hearing, Mr. Hess, a fee of $7,075.30. Lastly, in a Compensation Order, the district director awarded claimant's prior attorney, Mr. Hasser, a fee of $3,072.15, for work performed at that level.

On appeal, claimant challenges the administrative law judge's finding that his current psychological condition is unrelated to the two work incidents which he experienced while working for employer, and the administrative law judge's consequent denial of medical treatment and compensation under the Act for that condition. Employer responds, urging affirmance of the administrative law judge's decision. Employer has additionally appealed the fees awarded to claimant by both the administrative law judge and the district director.

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[2]Claimant filed charges against his supervisor as a result of this incident; although the supervisor was convicted of committing a battery against claimant, the district attorney subsequently dropped all charges. *See* Smith depo. at 24-25.

[3]Regarding this second incident, the administrative law judge found and concluded that claimant's co-worker was "certainly 'playing' with the controls of the crane as if to send a message to the Claimant or at least to scare him to be a more compliant and docile employee." *See* Decision and Order at 24-25.

[4]The administrative law judge's findings regarding claimant's physical injuries are not challenged on appeal.

Causation

We first address claimant's contentions regarding the administrative law judge's denial of his claim for compensation based on a work-related psychological injury. BRB No. 97-1226. Claimant bears the burden of proving that he has sustained a harm or pain, and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Sinclair v. United Food and Commercial Workers,* 23 BRBS 148 (1990). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link the harm or pain with claimant's employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). The Section 20(a) presumption is applicable in psychological injury cases. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n.2 (1990). An employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966). Thus, claimant's psychological injury need only be due in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.*, 25 BRBS 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S.Dept. of Labor, OWCP*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 20 (1976). If the presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, the administrative law judge invoked the Section 20(a) presumption linking claimant's psychological condition to his employment with employer since claimant's psychological condition constituted a harm and the occurrence of two work incidents was not in dispute. The administrative law judge next relied on the opinion of Dr. Maggio to find that employer severed the connection between claimant's psychological condition and his maritime employment. *See* Decision and Order at 23. The administrative law judge thereafter evaluated the evidence of record as a whole and found that claimant's psychological condition is not work-related. Accordingly, the administrative law judge denied claimant's claim for compensation based upon his psychological condition.

In reviewing claimant's appeal, the relevant evidence of record addressing the cause of claimant's psychological condition are the medical records and opinions of Drs. Gupta,

Hearne and Maggio.[5] Dr. Maggio, based upon a three-hour examination of claimant and his review of claimant's medical and social history, acknowledged that claimant suffers from anxiety, depression and a substance-induced psychosis and thereafter opined that claimant has undergone no episode sufficient to justify a diagnosis of Post-Traumatic Shock Syndrome Disorder. Dr. Maggio additionally concluded that claimant is neither mentally retarded nor psychotic and is capable of returning to his usual employment. *See* EX 14 at 6.

In concluding that claimant's psychological condition is not work-related, the administrative law judge found rebuttal of the Section 20(a) presumption based upon the testimony of Dr. Maggio. In order to establish rebuttal, however, a medical opinion must unequivocally state that no relationship exists between an injury and claimant's employment; thus, Dr. Maggio's opinion, in order to be sufficient to rebut the Section 20(a) presumption, must establish that claimant's employment did not cause claimant's condition nor aggravate, accelerate, or combine with an underlying condition. *See O'Leary*, 357 F.2d at 812. In the instant case, however, Dr. Maggio's opinion does not sever such a potential relationship. Rather, while diagnosing claimant with multiple conditions including anxiety and depression, Dr. Maggio's opinion is silent as to the effects of claimant's employment with employer on these conditions. Dr. Maggio did state that claimant did not experience an episode sufficient to justify a diagnosis of Post-Traumatic Shock Syndrome Disorder. Dr. Maggio also discussed the effect of other factors, *i.e.*, substance abuse and/or underlying personality components, on claimant's conditions. However, his opinion does not discuss the working condition asserted as affecting his condition and thus does not sever the presumed causal connection between claimant's condition and his employment. As Dr. Maggio at no point stated that claimant's psychological condition was not caused or aggravated by the work incidents at issue here, as a matter of law his opinion cannot support a finding that the Section 20(a) presumption was rebutted. As Dr. Maggio's opinion is the only relevant evidence proffered by employer on rebuttal, there is no need to remand this case for

[5]The administrative law judge discounted the opinions of claimant's long-term treating physicians, Drs. Gupta and Hearne, as based on inaccurate medical and employment histories; moreover, the administrative law judge determined that these physicians relied primarily on claimant's subjective complaints. The record reflects, however, that both physicians maintained their diagnoses, which are supportive of claimant's claim, even when made aware of claimant's complete history. Moreover, we note that claimant's "subjective" complaints were both of a long-standing nature and were documented by his health care providers. In this regard, the United States Court of Appeals for the Second Circuit has recently noted that the distinction between subjective and objective complaints in cases involving a psychological condition has reduced relevance. *See Pietrunti v. Director, OWCP*, 119 F.3d 1033, 31 BRBS 84 (CRT)(2d Cir. 1997).

reconsideration of the issue of causation. Since employer offered no other evidence, the administrative law judge's finding that Section 20(a) was rebutted is not supported by substantial evidence in the record and is reversed. Consequently, the administrative law judge's conclusion that claimant's psychological condition is not work-related is also reversed. Accordingly, the case must be remanded for consideration of the remaining issues.

Administrative Law Judge's Fee Award

Employer challenges the attorney fee award of $7,075.30 made by the administrative law judge to Attorney Hays. Specifically, employer asserts that, since it tendered a settlement offer to claimant in excess of any additional compensation gained by claimant, it should not be held liable for a fee; alternatively, employer contends that the awarded fee is excessive when it is compared to the additional amount of benefits gained by claimant. BRB No. 97-1226A.

Pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), 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, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In this regard, the Board has held that a valid offer to settle a case can constitute a "tender" for purposes of Section 28(b). *See Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990).

In the instant case, the record reflects that claimant agreed to, but subsequently withdrew from, a settlement agreement with employer. In response to employer's objection to its fee liability based upon this agreement, the administrative law judge summarily stated that he was "not persuaded" by employer's argument. *See* Supplemental Decision and Order at 1. This statement is insufficient to address employer's argument, since the tender of greater compensation than claimant ultimately obtained relieves employer of liability for a fee as a matter of law. *See, e.g., Kaczmarek*, 23 BRBS at 379. Moreover, where employer objects on the basis of claimant's limited success, the administrative law judge must address this factor. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the instant case, the administrative law judge's failure to analyze and discuss employer's specific objections makes it impossible for the Board to apply its standard of review. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). We therefore vacate the administrative law judge's fee award, and remand the case for the administrative law judge to address employer's objections, consistent with claimant's success in obtaining benefits in light of our remand of this case for reconsideration.

District Director's Fee Award

Employer additionally challenges the fee awarded to Attorney Hasser by the district director. BRB No. 97-1491. The district director awarded Attorney Hasser a fee of $3,072.15, representing 22.6 hours of services rendered at $125 per hour, plus expenses of $247.15.

Initially, we reject employer's contention that the district director's fee award is premature. Fee awards do not become effective and thus are not enforceable until all appeals have been exhausted. *See, e.g., Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). Thus, the district director may enter her award while an appeal is pending.

Next, employer has not demonstrated that the district director abused her discretion in making this award or that the $3,000 fee is excessive given the benefits awarded.[6] *See Clophus v. Amoco Production Co.*, 21 BRBS 201 (1988). The district director considered employer's objections when awarding counsel a fee, and employer's assertions on appeal are insufficient to meet its burden of proving that the district director abused her discretion in her award of a fee; thus, we decline to reduce or disallow the hours or hourly rate approved by the district director. *See Maddon v. Western Asbestos Co*, 23 BRBS 55 (1989). Accordingly, the district director's award of a fee to Attorney Hasser is affirmed. *See generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Accordingly, the administrative law judge's finding that claimant's psychological condition is not work-related is reversed, and the case is remanded for consideration of the remaining issues. BRB No. 97-1226. The administrative law judge's Supplemental Decision and Order Granting Fee is vacated, and the case is remanded for further consideration. BRB No. 97-1226A. The Compensation Order - Award of Attorney Fees of the district director is affirmed. BRB No. 97-1491.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]We note that this work was performed by claimant's former counsel prior to the alleged tender offer. Moreover, claimant obtained approximately $4,300 in additional benefits for his physical injuries alone. Thus, the fee is not unreasonable given the degree of success.