BRB No. 99-0455

ROGER LEE LAWRENCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAM MARINE, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
AIG CLAIMS SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Sabrina Johnson (Gardner Law Firm), Biloxi, Mississippi, for claimant.

Michael J. McElhaney, Jr. and Gina Bardwell Tompkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-LHC-1660) of Administrative Law Judge David Di Nardi 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 facts of this claim are disputed by the parties. Claimant, a shipfitter, alleged that he suffered a work-related injury on August 6, 1997, when he fell while walking on scaffolding pipes and hit his head. Employer disputes claimant's account of this incident. It is undisputed that claimant was wearing his hard hat at the time of the incident, and that claimant was taken to the emergency room and hospitalized for 10 days, where he underwent tests and treatment for neck and head pain, and psychological aberrations. Claimant was diagnosed by Drs. Millette and McCloskey, both neurologists, as suffering from post-concussion syndrome, as evidenced by bilateral sixth nerve palsy, memory loss, depression and cognitive dysfunction. Dr. Tracy, a psychiatrist, initially opined that claimant's psychological condition was secondary to his head injury. However, after claimant was hospitalized in January 1998 because of aberrant behavior, she changed her opinion due to inconsistencies in claimant's memory, and now believes that claimant is malingering. The parties do not dispute that prior to his work accident, claimant suffered head and neck trauma on two occasions: when he was injured in a car accident in July 1997, and on August 3, 1997, three days before the work-accident, when he fell down a staircase while serving a jail term. Claimant has not worked since the August 6, 1997, incident, and continues to complain of pain in his head, neck and lower back, memory loss and cognitive impairment.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, which links his pain and psychological disability to his employment, and that employer failed to rebut the presumption. The administrative law judge awarded claimant temporary total disability benefits commencing on August 6, 1997, and continuing, 33 U.S.C. §908(b), interest, and reasonable, appropriate and necessary medical benefits, 33 U.S.C. §907. With regard to previously rendered medical treatment, the administrative law judge found that claimant was excused from complying with the reporting procedures under Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2)(1994), as employer had refused to accept the claim. Lastly, the administrative law judge found that claimant's counsel was entitled to an attorney's fee award, ordering counsel to file an itemized petition within 30 days of receipt of the Decision and Order. To date, such fee petition has yet to be filed with the administrative law judge.

On appeal, employer challenges the administrative law judge's award of benefits. Specifically, employer asserts that the administrative law judge erred in invoking the Section 20(a) presumption, and in finding that employer did not establish rebuttal of the presumption. Employer further contends that the administrative law judge erred in awarding claimant temporary total disability compensation, medical benefits and interest. Lastly, employer argues that since

claimant's counsel did not file an itemized fee petition within the required time period, counsel should not be entitled to an attorney's fee. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

We first address employer's contentions with regard to causation. A psychological impairment which is work-related is compensable under the Act. *American National Red Cross v. Hagen,* 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). Furthermore, the Section 20(a) presumption, which provides a presumed causal nexus between the injury and employment, is applicable in psychological injury cases. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n.2 (1990); 33 U.S.C. §920(a). In order to be entitled to the Section 20(a) presumption, however, claimant must establish a *prima facie* case by showing not only that he has a psychological condition but also that a work-related accident occurred or that working conditions existed which could have caused or aggravated the condition. *See Stevens v. Tacoma Boatbuilding Co.,* 23 BRBS 191 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). 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 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 Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684 (5th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (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 generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

Employer initially contends that the administrative law judge erred in finding that claimant established that an accident occurred on August 6, 1997, and in invoking the Section 20(a) presumption. Employer asserts that the testimony of two eyewitnesses, Eric Thompson and Steven Currie, demonstrates that contrary to claimant's account, claimant never actually fell and struck his head on August 6,

1997, but rather, claimant laid himself down on the scaffolding pipes and exaggerated his complaints of pain. Employer maintains that its version of the incident is supported by the testimony of Jeffrey Tipton, the paramedic called to the scene, and Dave Melton, employer's employee in charge of emergency medical care, each of whom stated that claimant suffered no signs of external trauma. Moreover, employer asserts that claimant's physical and psychological symptoms are fabrications, or are related to claimant's two accidents prior to August 6, 1997. We reject employer's contention.

In the instant case, the administrative law judge noted that claimant's testimony was vague and uncertain at times, but found that this was due to his altered mental state as a result of the incident, as opposed to malingering, and specifically credited claimant's testimony that he fell and struck his head on August 6, 1997.[1] *See* Decision and Order at 20, 26-27. The administrative law judge acted within his discretion as fact-finder in crediting claimant's testimony and finding that an accident occurred at work on August 6, 1997. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 470 U.S. 911 (1979). The administrative law judge further found that claimant established that the work accident could have caused, aggravated or accelerated claimant's residual cervical pain symptoms and altered mental state based on the opinions of Drs. Millette, McCloskey, Trahant and Stoudenmire. Drs. Millette and McCloskey each diagnosed post-concussion syndrome with residual cognitive impairment and sixth nerve palsy. Cl. Exs. 7-8. Dr. McCloskey testified that sixth nerve palsy is an objective finding that cannot be faked, and that claimant's overall condition is related to the August 6, 1997 incident.[2] Cl. Ex. 3 at 7-11. As this evidence is sufficient to

[1]Two co-workers of claimant who were witnesses at the accident site, Eric Thompson and Steven Currie, stated that they did not see claimant fall but did see him lying on the ground. Mr. Currie testified that he saw claimant lay his hand down as if to catch himself and was unsure as to whether claimant actually fell. Emp. Ex. 30 at 13-15. Mr. Thompson testified that he turned around when he heard claimant holler and saw him on the ground. Emp. Ex. 31 at 12.

[2]Dr. Trahant, a neurologist who treated claimant on September 16, 1997, opined that claimant did suffer a head injury and had some post-concussion symptoms. While Dr. Trahant believed there was a great deal of psychological component, he also believed there was an organic component as well. Cl. Ex. 1 at 19-20. Dr. Stoudenmire, a psychologist to whom Dr. Tracy referred claimant, stated that claimant consistently tested low in intellectual, memory and neuropsychological areas, which suggested the possibility of dementia. Dr. Stoudenmire did not suspect that claimant was malingering and believed the majority of his difficulties were a reflection of claimant's true limitations. Cl. Ex. 12.

entitle claimant to the benefit of the Section 20(a) presumption, *see Sinclair*, 23 BRBS at 152-154, we affirm the administrative law judge's finding in this regard.

Next, the administrative law judge found that employer introduced no evidence which severed the connection between claimant's harm and his employment with employer. Employer argues that, contrary to the administrative law judge's determination, it introduced evidence sufficient to rebut the presumption. In support of this contention, employer relies on the evidence showing that claimant suffered head trauma as a result of the July 1997 car accident and the fall down a staircase three days before the August 6, 1997 work incident. We reject employer's contention in this regard. The fact that claimant suffered two previous head injuries alone is insufficient to establish rebuttal, as it is employer's burden to establish on rebuttal that claimant's condition was not caused, contributed to or aggravated by his employment. *See Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996); *Peterson*, 25 BRBS at 78. In the instant case, the administrative law judge specifically found, based on the credited medical evidence, that while claimant suffered residual neck and head pain from the previous July 1997 and August 3, 1997 incidents, these symptoms were aggravated and accelerated by the August 6, 1997 work incident. *See* Decision and Order at 27.

Employer further contends that the opinion of Dr. Tracy that claimant is malingering is sufficient to establish rebuttal of the Section 20(a) presumption of causation.[3] We need not address this specific contention because, assuming

[3]Dr. Tracy, who initially believed that claimant suffered residual head injuries as a result of the car accident and the August 6, 1997, work accident, changed her opinion after claimant exhibited glaring inconsistencies in his memory during his January 1998 hospitalization, and testified that she now believes that claimant is malingering and falsifying his symptoms for personal gain. Regarding claimant's January 1998 hospitalization, Dr. Tracy testified in pertinent part:

> [A]t first, I thought that given the history . . . he certainly could be demented from a blow to the head. But during this admission where I could see him on an ongoing basis day to day, talking to the staff, see the inconsistencies in his memory, more or less, it follows no pattern that I know of medically. . . . To be perfectly honest, I think he is a malingerer . . . .

Emp. Ex. 26 at 22-23. Dr. Tracy cautioned that malingering is very difficult to prove, but ultimately opined, to a reasonable medical probability, that claimant is a malingerer. *Id.* at 21, 38.

arguendo that Dr. Tracy's opinion is sufficient to rebut the Section 20(a) presumption, the administrative law judge's finding that causation is established is rational and supported by substantial evidence. Specifically, the administrative law judge, after setting forth all of the medical evidence of record, fully weighed that evidence. Although he did so in addressing the issue of whether employer established rebuttal of the presumption, any error is harmless if his conclusion is supported by substantial evidence.

In this regard, the administrative law judge gave little weight to Dr. Tracy's opinion as she conceded that malingering was difficult to prove. *See* Emp. Ex. 26 at 21. The administrative law judge further noted that Dr. Stoudenmire, after he performed psychological tests on claimant at Dr. Tracy's request, did not suspect that claimant was malingering. Cl. Ex. 12. Ultimately, the administrative law judge relied on claimant's testimony of the events surrounding the August 6, 1997 incident, and the opinions of Drs. Millette, McCloskey and Trahant, each of whom opined that claimant had in fact suffered a head injury. Specifically, Drs. Millette and McCloskey related claimant's post-concussion symptoms in part to the August 6, 1997 incident. We hold that the administrative law judge could properly rely on the opinions of Drs. Millette, McCloskey, Trahant and Stoudenmire in concluding that claimant's physical and psychological problems are related to the August 6, 1997 work incident, as it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, as the administrative law judge rationally accorded greater weight to the opinions of Drs. Millette, McCloskey, Trahant and Stoudenmire, over the opinion of Dr. Tracy, we affirm the administrative law judge's determination that claimant's physical and psychological conditions are related to his employment with employer.

Next, we consider employer's challenge to the administrative law judge's award of medical benefits. In his decision, the administrative law judge determined that employer was liable for the reasonable, necessary and appropriate medical care related to the August 6, 1997 work accident, including the expenses contained in Claimant's Exhibits 17 and 18. In so holding, the administrative law judge found that claimant was excused from complying with the filing requirements under Section 7(d)(2), 33 U.S.C. §907(d)(2), as employer did not accept the claim and did not authorize claimant's treatment. On appeal, employer contends that since the administrative law judge erred in finding that claimant's physical and psychological conditions are work-related, the administrative law judge erred in finding that

claimant is entitled to reasonable, necessary and appropriate care for these conditions. We disagree. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Claimant is entitled to medical benefits for a work-related injury even if that injury is not economically disabling if the treatment is necessary for his work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997). In light of our affirmance of the administrative law judge's finding that claimant's conditions are work-related, we affirm the administrative law judge's finding that employer is liable for medical benefits.[4]

However, with regard to the medical treatment previously rendered, we hold that the administrative law judge's finding that claimant was excused from his failure to comply with the reporting procedures set forth in Section 7(d)(2) of the Act cannot be affirmed. Under Section 7(d)(2), an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. The Secretary may excuse the failure to comply with the provisions of this section in the interest of justice. 33 U.S.C. §907(d)(2)(1994); *see Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pertinent part*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991); *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997); 20 C.F.R. §702.422.[5] The Board has held that the Secretary's authority to determine whether the "interest of justice" warrants excusing the failure to comply

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[4]Employer contends that it should not be liable for the extended treatment rendered by Drs. Millette and McCloskey, as claimant's sixth nerve palsy diagnosed by Dr. Millette had resolved itself by September 1997, and the benign brain tumor discovered by Dr. McCloskey pre-dated claimant's alleged work injury. Contrary to employer's contention, Drs. Millette and McCloskey treated claimant for his cervical and head injuries generally, injuries that the administrative law judge found were related to the August 6, 1997 work incident.

[5]The implementing regulation, Section 702.422, states in pertinent part:

> For good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act . . . .

20 C.F.R. §702.422(b).

with the provisions of Section 7(d)(2) is delegated solely to the Director and his delegates, the district directors. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting); *see also Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994)(McGranery, J., dissenting). Thus, the district director, not the administrative law judge, has the authority to determine whether non-compliance with Section 7(d)(2) should be excused. *See Toyer*, 28 BRBS at 353. As the administrative law judge does not have the authority to decide issues under Section 7(d)(2) regarding whether to excuse the untimely filing of initial reports of treatment, we vacate the administrative law judge's determination and remand the case to the district director for a determination in this regard.

Lastly, with regard to claimant's attorney's fee, employer argues that since claimant's counsel has failed to comply with the administrative law judge's order that an itemized fee petition be filed within 30 days of receipt of his decision, it should not be liable for claimant's attorney's fee. We decline to consider this argument. It is well-settled that each adjudicatory level must set the appropriate award of an attorney's fee for services performed before it. 33 U.S.C. §928(c); 20 C.F.R. §702.132(a); *see generally Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980); *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979). In the instant case, the administrative law judge has yet to rule on whether claimant's counsel's failure to comply with the 30-day time period set forth in the Order voids employer's liability for claimant's attorney's fee for work performed at the administrative law judge level. We therefore hold that the issue of employer's liability for an attorney's fee is not ripe for adjudication. *See generally Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995); *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994).

Accordingly, the administrative law judge's determination that claimant was excused from complying with the filing requirements under Section 7(d)(2) of the Act is vacated, and the case is remanded to the district director for a decision as to whether claimant's lack of compliance should be excused under the terms of Section 7(d)(2) of the Act and Section 702.422(b) of the regulations. In all other respects, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.[6]

[6]We reject employer's arguments concerning the administrative law judge's award of temporary total disability compensation and interest. Although employer introduces these contentions, it does not thereafter set forth any arguments or authorities on these issues. Thus, these arguments are inadequately briefed and need not be addressed. *See, e.g., Plappert v. Marine Corps Exchange*, 31 BRBS 13, 18 n.4 (1997), *aff'd on recon. en banc*, 31 BRBS 109, 111 (1997); *Shoemaker v.*

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Schiavone & Sons, Inc., 20 BRBS 214, 218 (1988); 20 C.F.R. §802.211.