BRB No. 06-0852

ROBERT KOHLBECK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRISTOL ENVIRONMENTAL AND ENGINEERING SERVICES CORPORATION	)	DATE ISSUED: 06/25/2007
	)	
and	)	
	)	
ZURICH-AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Order Denying Motion for Reconsideration, and the Attorney Fee Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Christopher D. Kuebler (Obryan Baun Cohen Kuebler), Birmingham, Michigan, for claimant.

Michael W. Thomas (Laughlin Falbo Levy & Moresi LLP), San Francisco, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, the Order Denying Motion for Reconsideration, and the Attorney Fee Order (2004-LHC-148) of Administrative Law Judge Alexander Karst rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 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. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On April 5, 2002, claimant sustained an injury to his left knee while working for employer as a laborer. Claimant immediately sought medical treatment, and was diagnosed as having sustained a left knee contusion. Claimant, who alleges that he has experienced pain and discomfort since the date of this work-incident, has not worked since June 2002. On July 16, 2002, claimant underwent a partial medial meniscectomy. As a result of his work-incident, claimant contends that he is presently totally disabled by his knee condition and accompanying pain.

In his Decision and Order, the administrative law judge determined that claimant established the existence of a work-related knee condition. The administrative law judge found, however, that employer rebutted the Section 20(a) presumption that claimant's alleged reflex sympathetic dystrophy (RSD) was causally related to his employment with employer and that, upon weighing the evidence of record, claimant failed to establish that he had developed this condition as a result of his work-injury. Next, the administrative law judge found that claimant's knee condition reached maximum medical improvement on February 26, 2003, that claimant is unable to return to work as a laborer, and that employer established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant benefits for temporary total disability from April 5, 2002, through February 25, 2003, and permanent partial disability thereafter based upon a two percent impairment to his left lower extremity and an average weekly wage of $922. 33 U.S.C. §908(b), (c)(2). The administrative law judge denied claimant's motion for reconsideration. Claimant subsequently filed a fee petition seeking an attorney's fee totaling $254,446.50, and costs of $28,979.44. Employer filed multiple objections to this requested fee. In his Attorney Fee Order, the administrative law judge denied claimant's counsel's fee request in its entirety, stating that claimant had not successfully prosecuted the claim before him.

On appeal, claimant challenges the administrative law judge's determination that employer's evidence is sufficient to establish rebuttal of the invoked presumption relating his complaints of ongoing pain to his work-injury and that, moreover, the administrative law judge erred in concluding that claimant failed to establish causation regarding this alleged condition based on the record as a whole. Claimant also avers that the administrative law judge erred in determining the extent of claimant's disability and average weekly wage and in denying an attorney's fee payable by employer. Employer responds, urging affirmance.

CAUSATION

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or

a work accident occurred which could have caused the harm. *See, e.g., Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial evidence. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all of the relevant evidence must be weighed to determine if a causal relationship has been established with claimant bearing the burden of persuasion. *See, e.g., Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

The parties agreed that claimant sustained a work-related injury to his left knee. At issue is the cause of the pain claimant alleges he suffers as a result of the April 5, 2002, accident. The administrative law judge invoked the Section 20(a) presumption with regard to this alleged condition.[1] In finding that employer rebutted the presumption linking claimant's alleged RSD to his work-injury, the administrative law judge relied on the opinions of Drs. Billington and Weiss. Dr. Billington, who the administrative law judge found to be a Board-certified orthopedic surgeon trained to recognize and diagnose RSD, testified he would not diagnose claimant with RSD based upon a single objective finding, in this case coolness of claimant's left leg and foot. EX 39 at 23. Dr. Weiss, a Board-certified neurologist, reviewed claimant's medical records and interviewed and examined him prior to concluding that claimant exhibited no objective findings to support a diagnosis of RSD. EX 13 at 79. As these opinions sever the presumed causal link between claimant's alleged RSD and his employment with employer, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant also challenges the administrative law judge's finding that causation was not established based on the record as a whole. Specifically, claimant assigns error to the weight accorded the varying medical opinions by the administrative law judge. After considering all of the evidence of record, the administrative law judge gave greater weight to the opinion of Dr. Billington, as supported by the opinion of Dr. Weiss, than the opinions of Drs. Shannon, Jasper, Chandler, Raymond and McCallum. The administrative law judge gave no weight to the opinions of Dr. Shannon, a chiropractor,

[1] Before the administrative law judge, claimant averred that he developed a condition known as complex regional pain syndrome (CRPS) or reflex sympathetic dystrophy (RSD) following his April 5, 2002, work-injury. *See* Tr. at 26; Clt's post-hearing brief at 7. The administrative law judge in his decision used the acronym RSD to described claimant's alleged post-injury condition. *See* Decision and Order at 4. On brief, claimant uses the acronym CRPS/RSD. Our decision will use the same terminology as the administrative law judge.

and Dr. Jasper, a naturopath and nurse practitioner, both of whom diagnosed claimant with RSD, based upon his determination that these two witnesses lacked the essential credentials to diagnose or offer expert testimony regarding RSD.[2] Decision and Order at 9-10. The administrative law judge found insufficient evidence to establish that the opinions of either Dr. Chandler or Dr. Raymond support a diagnosis of RSD, finding claimant presented to both doctors as having a prior diagnosis of RSD. *Id.* at 10, 12. After stating that he had given weight to Dr. McCallum's testimony as claimant's treating physician, *see Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), the administrative law judge concluded that Dr. McCallum's diagnosis that claimant suffers from RSD is not very persuasive since 1) that diagnosis is based largely on Dr. McCallum's observations of claimant's pain without reference to any other symptoms, 2) Dr. McCallum confused the distinction between RSD and chronic pain syndrome,[3] and 3) Dr. McCallum did not treat claimant for RSD. *Id.* at 12. By contrast, the administrative law judge found Dr. Billington's opinion most persuasive since, unlike Dr. McCallum, Dr. Billington presented an in-depth explanation of the medical signs which support his conclusion that claimant does not have RSD, he gave thorough consideration to claimant's medical records and the opinions of the other medical providers of record, and his conclusion that claimant lacked objective signs related to a diagnosis of RSD is consistent with the record as a whole. *Id.* Furthermore, the administrative law judge found that Dr. Billington's conclusion was consistent with and supported by the credible and persuasive opinion of Dr. Weiss, who testified in detail regarding the lack of signs of RSD. *Id.* Finally, the administrative law judge found persuasive Dr. Billington's conclusion that claimant's chronic pain pre-existed his 2002 knee injury. Dr. Billington found that claimant's complaints of pain were elaborately documented in the medical

[2] The administrative law judge properly concluded that claimant's contention that Dr. Shannon was an agent of employer, and therefore employer was bound by that physician's opinion, lacked merit in view of the absence of evidence establishing an agency relationship and as he gave no weight to Dr. Shannon's opinion. Decision and Order at 9 n. 6.

[3] On appeal, claimant cites a ruling from the Social Security Administration, SSR-03-02P, which he alleges establishes as a matter of law that "RSDS/CRPS is a chronic pain syndrome." Clt's brief at 5. Thus, claimant contends that the administrative law judge erred in failing to recognize that RSD and chronic pain syndrome are not distinct conditions. We disagree. Claimant has raised this regulatory ruling for the first time on appeal. He has not attached a copy of the full ruling or cited any authority supporting his assertion that a SSA ruling is binding on the administrative law judge in this longshore case. The administrative law judge, moreover, properly based his conclusions on the medical evidence before him. *See* discussion of Dr. Billington's opinion, *infra.*

records long before his work-related knee injury and concluded that the knee injury did not cause or aggravate the condition but merely provided a new focus for the pain.[4]

Based on this evidence, the administrative law judge concluded that, while claimant's left knee condition is related to his April 5, 2002, work-injury, claimant failed to establish that he developed RSD as a result of that injury or that any other pain-related impairment was caused or aggravated by that work-incident. We reject claimant's assertions that the administrative law judge erred in weighing this evidence. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom, and he is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In his decision, the administrative law judge discussed all of the relevant medical evidence contained in the record, and rationally found the opinions of Drs. Billington and Weiss to be most persuasive. We therefore affirm the administrative law judge's determination that claimant failed to establish the existence of RSD related to his work-injury, as that finding is rational, supported by substantial evidence, and in accordance with law.[5] *See O'Keeffe*, 380 U.S. 359; *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Coffey*, 34 BRBS 85.

EXTENT OF DISABILITY

Claimant assigns error to the administrative law judge's finding that employer established the availability of suitable alternate employment. Specifically, claimant contends that the combination of his ongoing complaints of pain and use of narcotic medication render him incapable of performing any gainful employment. In the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work-related knee injury. The burden therefore shifted to employer to demonstrate the availability of suitable alternate employment. *Hairston v.*

[4] As Dr. Billington opined that this chronic pain syndrome was neither caused nor aggravated by claimant's April 5, 2002, work-injury, EX 39 at 14, even if chronic pain syndrome and CRPS/RSD are all aspects of the same syndrome, *see* n.3, *supra*, the evidence credited by the administrative law judge is consistent in establishing the lack of a causal relationship between the pain syndrome and claimant's April 5, 2002, work-incident.

[5] As an award of benefits under the Act is predicated upon a finding of causation between claimant's alleged harm and his employment with employer, claimant's contentions that he is entitled to permanent partial disability compensation and medical benefits pursuant to Sections 8(c)(21) and 7 of the Act, 33 U.S.C. §§908(c)(21), 907, for his alleged RSD are rejected. Additionally, claimant's assertion that he is entitled to a Section 14(e), 33 U.S.C. §914(e), assessment on all sums due and owing as a result of his alleged RSD is rendered moot by our affirmance of the administrative law judge's decision on the issue of causation.

Todd Shipyards Corp., 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

In the instant case, the administrative law judge found that employer met its burden of establishing the availability of suitable alternate employment based on the report and testimony of its vocational expert, Ms. Jacobson, which set forth evidence of specific sedentary positions suitable for and available to claimant. In this regard, the administrative law judge found that Ms. Arsenault, who performed claimant's Functional Capacity Evaluation (FCE), Ms. Weginski, claimant's vocational consultant, and Ms. Jacobson agreed that claimant is capable of sedentary employment, although Ms. Weginski then concluded that claimant is permanently totally disabled due to the totality of his condition. In contrast, Ms. Jacobson, after taking into consideration claimant's medical history, his FCE, and her interview with claimant, identified multiple, specific employment opportunities for claimant within sedentary, light and medium categories that were subsequently approved by Dr. Billington.[6] While claimant correctly states that limitations provided by medications and pain must be considered in determining the availability of suitable alternate employment, *see Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992), the record reflects that both Ms. Jacobson and Dr. Billington considered these two factors when addressing the issue of claimant's ability to perform sedentary work post-injury.[7] Moreover, while a claimant's credible complaints of pain may be sufficient to establish disability, the administrative law judge specifically found that he was not convinced that pain precludes claimant from working. Based upon the

[6] The administrative law judge determined that non-sedentary positions identified by Ms. Jacobson were not suitable for claimant, inasmuch as employer did not establish that those positions were within claimant's lifting restrictions. The sedentary employment opportunities identified by Ms. Jacobson included a ship pilot dispatcher and multiple clerical positions.

[7] We reject claimant's argument that Ms. Jacobson's testimony does not indicate that she appropriately considered the effect that claimant's medications would have on his employability, as the record indicates that Ms. Jacobson addressed this issue on both direct and cross-examination at the hearing before the administrative law judge. Tr. at 145, 187-188. Additionally, while claimant repeatedly references Dr. Weiss's comment regarding the amount of medication prescribed to claimant, claimant cites to no medical testimony specifically discussing the effect of medication on his ability to perform the positions identified by Ms. Jacobson.

record before us, the administrative law judge's finding that claimant is capable of performing the identified, sedentary clerical and ship pilot dispatcher jobs is rational, supported by substantial evidence and consistent with law. *See Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment.

Once an employer establishes the availability of suitable alternate employment, claimant can nevertheless establish that he remains totally disabled if he demonstrates that he diligently tried and was unable to secure such employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Palombo v. Director, OWCP*, 937 F.2d 70 25 BRBS 1(CRT) (2d Cir. 1991); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). Claimant contends that an exception exists which allows for a finding of total disability after suitable alternate employment has been established without claimant seeking such employment. Specifically, claimant avers that, even if he is physically and medically capable of performing suitable alternate employment, there is no need for claimant to establish a diligent employment search where it is reasonable to assume that claimant would not procure work that he could adequately perform. *See* Clt's brief at 39. We reject claimant's contention in this regard, as it lacks any support in the law and misconstrues his burden of proof on this issue. If, as claimant alleges, the positions identified as establishing the availability of suitable alternate employment are not truly suitable or available, this fact would be borne out by a diligent, yet unsuccessful, job search. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Claimant does not challenge the administrative law judge's findings that claimant could not recall the details of the telephone calls he allegedly made in search of employment, and that claimant conceded that he did not apply for any sedentary jobs; from these unchallenged findings the administrative law judge concluded that claimant failed to demonstrate due diligence in seeking post-injury employment. Thus, the administrative law judge properly recognized that it is claimant's burden to establish due diligence and concluded that claimant did not meet his burden. Accordingly, the administrative law judge's finding that claimant did not demonstrate due diligence in seeking employment post-injury is affirmed. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

SCHEDULED AWARD

Claimant challenges the administrative law judge's determination that he is entitled, based upon the American Medical Association's *Guides to the Evaluation of Permanent Impairment,* to permanent partial disability compensation based on a two percent impairment to his left lower extremity. 33 U.S.C. §908(c)(2). Specifically, claimant asserts that if an employee is determined to be totally disabled from performing his usual employment duties as a result of a work-related accident to a scheduled member, the injured employee should be entitled to a 100 percent compensation award

under the Act's schedule, irrespective of the actual percentage of impairment found to exist regarding the injured member, so as not to undercompensate the employee for his loss in wage-earning capacity. We disagree.

Where, as here, claimant has sustained an injury to a member specified in the schedule contained in Sections 8(c)(1)-(20), 33 U.S.C. §908(c)(1)-(20), and he is not totally disabled, claimant's permanent partial disability must be compensated under the schedule. *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268, 14 BRBS 363 (1980). An award under the schedule is based solely on the degree of physical impairment, as a loss of wage-earning capacity is presumed. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Thus, the administrative law judge may not consider the degree of any loss of wage-earning capacity in translating the claimant's medical impairment into a rating under the schedule. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998); *see also Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999). The Supreme Court recognized that in limiting certain claimants to a scheduled remedy, application of the statutory schedule "may produce certain incongruous results." *PEPCO*, 449 U.S. at 284, 14 BRBS at 369. The Court stated that "[t]he schedule may seriously undercompensate some employees [with scheduled injuries]…." and that "[t]he result seems particularly unfair when [the employee's] case is compared with an employee who suffers an unscheduled disability resulting in an equivalent impairment of earning capacity." *Id.* Nonetheless, pursuant to *PEPCO*, claimant is limited to an award based on his degree of physical impairment. *Gilchrist*, 135 F.3d at 919, 32 BRBS at 19(CRT). Accordingly, the administrative law judge herein committed no error when he limited claimant's permanent partial disability benefits award to a percentage of impairment under the Act's schedule.

With regard to the calculation of claimant's permanent impairment, the administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of his symptoms and the physical effects of his injury. *See, e.g., Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Serv. Inc.*, 27 BRBS 154 (1993). The administrative law judge, in awarding claimant compensation based on a two percent rating, relied upon the opinion of Dr. Billington over the opinion of Dr. Shannon. In rendering this determination, the administrative law judge specifically noted that Dr. Billington is a medical doctor and Board-certified orthopedic surgeon, while Dr. Shannon is a chiropractor. Additionally, the administrative law judge found that Dr. Billington presented a thorough explanation of his opinion, and that his opinion regarding the presence of non-physiological factors was supported by the findings of Dr. Weiss.

We affirm the administrative law judge's award of benefits for a two percent impairment to claimant's left lower extremity. The administrative law judge provided

rational reasons for giving less weight to Dr. Shannon's opinion concerning the degree of claimant's impairment. Moreover, the administrative law judge reasonably found Dr. Billington's opinion that claimant has a two percent impairment to his left lower extremity to be more convincing. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As it is supported by substantial evidence, we affirm the administrative law judge's award of benefits under Section 8(c)(2) for a two percent impairment.

AVERAGE WEEKLY WAGE

Claimant avers that the administrative law judge erred in calculating claimant's average weekly wage at the time of his injury. Specifically, claimant summarily asserts that he is entitled to compensation at the maximum rate allowed by the Act.[8] For the reasons that follow, we affirm the administrative law judge's calculation of claimant's average weekly wage.

In his decision, the administrative law judge initially determined that Section 10(c) of the Act, 33 U.S.C. §910(c), was to be used in calculating claimant's average weekly wage. Next, the administrative law judge divided the average of claimant's total yearly earnings during the two calendar years immediately preceding his work-injury, $47,992, by 52, in arriving at an average weekly wage of $922.

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. *See Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); *Richardson, v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c), *Fox v. West State Inc.*, 31 BRBS 118 (1997), and that the Board will affirm an administrative law judge's determination of claimant's average weekly wage under that subsection if the amount calculated represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Story*, 33 BRBS 111; *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). The result reached by the administrative law judge in this case is reasonable and is supported by substantial evidence. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). We therefore affirm the administrative law judge's determination of claimant's average weekly wage.

[8] Claimant seeks benefits at a rate of $996.54 per week, or 2/3 of $1,494.82, alleging that claimant was earning $22 per hour and that employer made its voluntary payments at a rate of $966.08. Claimant contends these sums more accurately reflect his wage-earning capacity at the time of injury. Clt's brief at 59. The statutory maximum weekly rate in effect for injuries sustained between October 1, 2001 and September 30, 2002, is $966.08.

ATTORNEY'S FEE

Lastly, claimant challenges the administrative law judge's determination that employer is not liable for his counsel's fee.[9] We affirm the administrative law judge's decision on this issue.

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay any benefits. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Section 28(b), in general, allows an employer-paid attorney's fee if an employer timely pays or tenders compensation and thereafter a controversy develops over additional compensation owed, and a claimant successfully obtains additional compensation after following the procedures set forth in the Act. 33 U.S.C. §928(b); *National Steel & Shipbuilding, Co. v. U.S. Dep't of Labor, OWCP*, 606 F.2d 875, 880, 11 BRBS 68 (9th Cir. 1979).

In this case, the administrative law judge rationally determined that counsel was not entitled to a fee as claimant did not successfully prosecute his claim for benefits. *See Richardson,* 336 F.3d 1103, 37 BRBS 80(CRT). Specifically, as a result of the overpayment of voluntary benefits made by employer, claimant in the instant case received no additional benefits on his claim; rather, claimant obtained only the possibility of future relief should his work-related knee condition require subsequent medical attention. Accordingly, as claimant did not successfully prosecute his claim for additional benefits, he is not entitled to an attorney's fee pursuant to the Act.[10] *Id.*

[9] Claimant filed a supplemental appeal with the Board challenging the administrative law judge's denial of his request to hold employer liable for his counsel's fees and costs on November 24, 2006. BRB No. 06-0852S. Claimant's brief in support of this appeal was filed with the Office of Administrative Law Judges and employer on February 12, 2007. On March 1, 2007, employer forwarded this brief to the Board and, on March 16, 2007, employer filed its response brief. We hereby accept claimant's brief as timely filed and, as employer has filed its response, this issue is ripe for adjudication. *See* 20 C.F.R. §802.217.

[10] Should claimant in the future require additional medical treatment for his knee condition, he may seek an attorney's fee at that time.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Order Denying Motion for Reconsideration, and Attorney Fee Order are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge