

BRB No. 93-2018

DOUGLAS McCREADY, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ROGERS TERMINAL AND)	
SHIPPING CORPORATION)	DATE ISSUED:
)	
and)	
)	
LAMORTE BURNS (NORTHWEST),)	
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Decision and Order Denying Request for Attorney's Fees of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Donald L. Wilson (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler), Portland, Oregon, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits and Decision and Order Denying Request For Attorney's Fees (92-LHC-3157) of Administrative Law Judge Paul A. Mapes 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).

Claimant fractured his right arm on February 26, 1990, during the course of his employment

with employer. Employer voluntarily provided medical benefits and compensation for temporary total disability, 33 U.S.C. §908(b), until July 2, 1990, when claimant returned to work. Subsequently, a dispute arose between the parties concerning the extent of permanent disability claimant sustained to his right arm as a result of the work injury. The parties attempted to resolve the issue informally through the district director's office, which issued a recommendation that claimant receive compensation under the Act for a twenty percent permanent partial disability of the right arm. *See* 33 U.S.C. §908(c)(1). Employer accepted this recommendation, but claimant elected to resolve the dispute by requesting a formal hearing before the Office of Administrative Law Judges.

In his Decision and Order, the administrative law judge credited the medical reports and testimony of Drs. Colletti and Vessely in determining that claimant was entitled to compensation under the schedule for a twenty percent impairment to his right arm. In a Supplemental Decision and Order, the administrative law judge determined that employer was not liable for the payment of claimant's attorney's fees because the award was no greater than the amount tendered by employer. 33 U.S.C. §928(b).

On appeal, claimant contends the administrative law judge erred in finding that claimant is entitled to compensation based on a twenty percent impairment to his right arm. Claimant also challenges the administrative law judge's denial of an attorney's fee payable by employer. Employer responds, urging affirmance.

Claimant initially challenges the administrative law judge's decision to award claimant permanent partial disability compensation for a twenty percent impairment to his right arm pursuant to Section 8(c)(1) of the Act. Specifically, claimant asserts that the administrative law judge erred in crediting the opinions of Drs. Colletti and Vessely, which were based in part on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (*AMA Guides*), over the opinion of his treating physician, Dr. Matteri, who opined that claimant sustained a forty percent impairment. We disagree.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge, in awarding claimant compensation based upon a twenty percent impairment rating, averaged the impairment ratings of Drs. Colletti and Vessely, which were based in part on the *AMA Guides*. In rendering this determination, the administrative law judge specifically noted that, under the *AMA Guides*, an impairment rating should not be based on strength and shoulder joint crepitation when there is measurable loss of motion. The administrative law judge declined to rely on the opinion of Dr. Matteri because that physician had no experience in rendering disability evaluations, he did not use any established guidelines to formulate his rating, and he did not explain the basis for his rating. *See Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 1033, 22 BRBS 57, 61-62 (CRT)(D.C. Cir. 1989).

We hold that the administrative law judge committed no error in relying upon the opinions

of Drs. Colletti and Vessely in determining claimant's right arm impairment. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as the administrative law judge's credibility determinations are rational and within his authority as factfinder, and as these opinions constitute substantial evidence to support the administrative law judge's ultimate finding, we affirm the administrative law judge's determination that claimant suffers from a twenty percent permanent partial disability to his right arm. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Pimpinella v. Universal Maritime Service*, 27 BRBS 154 (1993); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987).

Claimant next contends the administrative law judge erred in finding that employer was not liable for his attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). In support of his contention of error, claimant asserts that he obtained the right to seek modification pursuant to Section 22 of the Act, 33 U.S.C. §922, and thus the possibility of future benefits, by rejecting employer's settlement offer and receiving an award from the administrative law judge. Claimant also argues that Section 28(b) requires that employer respond to the written recommendation of the district director's office following an informal conference within fourteen days while employer in this case did not indicate its acceptance until thirty-six days after receiving the recommendation.

In the instant case, after an informal conference, the district director's office issued on May 13, 1992, a recommendation that claimant receive compensation under the Act for a twenty percent impairment to his right arm. On June 18, 1992, employer informed both claimant and the district director that it accepted the recommendation. On June 23, 1992, claimant informed employer that he refused employer's tender of compensation, and he subsequently requested a formal hearing before the Office of Administrative Law Judges; the case was thereafter transferred to the Office of Administrative Law Judges. In his Decision and Order Denying Request for Attorney's Fees, the administrative law judge found that employer made a valid tender on June 18, 1992, of an amount of compensation equal to that which claimant was ultimately awarded by the administrative law judge. The administrative law judge determined that claimant's ability to seek modification of the award does not constitute sufficient grounds to hold employer liable for a fee; moreover, citing to *Todd Shipyards v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT)(9th Cir. 1991), the administrative law judge found that employer's acceptance of the district director's recommendation thirty-six days after its issuance did not render it liable for payment of claimant's counsel's fee. The administrative law judge therefore denied claimant's request for an attorney's fee payable by employer.

Under Section 28(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 paid or tendered by the employer. See *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). We reject claimant's contentions of error, as the administrative law judge's finding that employer tendered compensation to claimant for a twenty percent impairment to claimant's right arm, pursuant to the recommendation of the district director's office, prior to the claim's transfer to the Office of Administrative Law Judges is supported by substantial evidence; thus, claimant failed to gain additional compensation while this case was pending before the administrative law judge. Moreover, we agree with the administrative law judge that claimant's ability to obtain modification and employer's arguably tardy acceptance of the recommendation issued by the district director's office are not sufficient grounds to render employer liable for payment of claimant's attorney's fee under Section 28(b). See *Armor*, 19 BRBS at 122. Under the plain language of Section 28(b), employer is not liable for counsel's fee. Accordingly, the administrative law judge's finding that claimant's counsel is not entitled to a fee paid by employer is affirmed.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Decision and Order Denying Request for Attorney's Fees are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge