BRB No. 02-0772

CEDRICK C. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 07/29/2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Robert E. O=Dell, Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2002-LHC-0063) of Administrative Law Judge Clement J. Kennington 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 administrative law judge=s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. '921(b)(3); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On May 24, 1990, claimant, age 21, began working for employer as a chipper. On June 26, 1990, claimant injured his back lifting a steel bar during the course of his employment. Claimant saw Dr. Enger, who opined after his initial examination on June 29, 1990, that claimant sustained a back strain with functional overlay, and that he could remain at work performing light duty. EX 8 at 1-2. Based on claimant=s continued complaints of back pain, he underwent testing. Dr. Enger reported that x-rays, a bone scan, and myelogram

were normal. An MRI study of the lower spine showed degeneration at L4-5 with loss of water content, which Dr. Enger opined may account for some of claimant=s back pain. *Id*. at 10, 14. On October 24, 1990, Dr. Enger released claimant from further treatment, and he stated that claimant could return to work with restrictions lasting three weeks prohibiting working overhead or on an incline plane. On June 5, 1991, Dr. Enger opined that claimant=s back injury did not result in any permanent disability. *Id*. at 22-23.

Employer terminated claimant on June 25, 1992, for failure to return from a leave of absence. From June to September 1995, claimant saw Dr. Longnecker for back pain. Claimant returned to Dr. Longnecker in May 1998. On October 12, 1998, Dr. Longnecker opined that claimant has degenerative disc disease, which is related to claimant=s June 1990 work injury with employer, and that, as a result, claimant is restricted from heavy lifting, bending, stooping, and climbing stairs and ladders, and has a two percent permanent partial disability. CX 6 at 9-11. Subsequently, in a letter dated May 27, 1999, Dr. Longnecker agreed with Dr. Enger=s June 1991 opinion that claimant had no restrictions. EX 9 at 17. However, at his post-hearing deposition on June 4, 2002, Dr. Longnecker re-stated his opinion that claimant has a two percent permanent partial back disability based on the objective evidence of degenerative disc disease and claimant=s 12-year history of subjective back pain. CX 17 at 12.

In his decision, the administrative law judge initially denied claimant=s objection to the admission of Dr. Longnecker=s May 27, 1999, letter. Decision and Order at 2-3. The administrative law judge granted claimant=s motion to submit, post-hearing, employer=s interrogatory answers, wherein employer admitted that Dr. Longnecker rated claimant as having a two percent impairment. However, the administrative law judge allowed employer to withdraw this admission. The administrative law judge next found that claimant is not a credible witness and that his testimony is of little value. Decision and Order at 21-22. The administrative law judge determined that claimant is entitled to the Section 20(a) presumption linking his back condition to the work injury, 33 U.S.C. '920(a), and that Dr. Enger=s opinion that claimant did not sustain any permanent disability due to his work-related back injury rebuts the presumption. Decision and Order at 23. The administrative law judge further determined, based on the record as a whole, that claimant=s testimony and the opinion of Dr. Longnecker are not sufficient to establish that claimant=s back condition after January 1992 is related to his June 26, 1990, work injury, and he denied the claim. Decision and Order at 23-26. In the alternative, the administrative law judge found that claimant sustained only a back strain at work on June 26, 1990, without any resulting permanent disability or restrictions that would keep him from working after September 13, 1990, when claimant=s back condition reached maximum medical improvement. Decision and Order at 27-29.

On appeal, claimant challenges the administrative law judge=s permitting employer to withdraw its admission as to Dr. Longnecker=s impairment rating of claimant=s back, his finding that employer established rebuttal of the Section 20(a) presumption, and his determination that claimant sustained only a back strain that caused no permanent disability. Employer responds, urging affirmance.

We initially address claimant=s contention that he was prejudiced by the administrative law judge=s allowing employer to withdraw its admission that Aalthough Dr. Enger released claimant without a permanent partial disability, Dr. Longnecker assigned a 2% permanent partial disability.@ CX 16 at 6. The administrative law judge has the authority to permit a party to withdraw admissions. 29 C.F.R. ' 18.14(e).[1] In this case, the administrative law judge rationally construed employer=s admission as limited to its acknowledging Dr. Longnecker=s two percent rating of claimant=s back condition in his October 12, 1998, report, and not as an admission that claimant actually has a two percent permanent partial disability of the back.[2] Moreover, the administrative law judge rationally found that claimant was not prejudiced by the withdrawal of the admission, as he allowed claimant to depose Dr. Longnecker after the hearing in order to clarify the discrepancies in his opinion. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff=d mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Accordingly, we affirm the administrative law judge=s ruling, as claimant has not established an abuse of discretion in this regard.

[1]Section 18.14(e) specifically provides that any matter admitted is conclusively established unless the administrative law judge on motion permits withdrawal or amendment. 29 C.F.R. ' 18.14(e).

[2]Even if the admission were construed as a statement that claimant actually has a two percent impairment, such would not establish that claimant is disabled within the meaning of the Act, as Adisability@ under the Act is an economic concept. *See* 33 U.S.C. ' 902(10); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968).

We next address the administrative law judge's finding that claimant sustained only a temporarily disabling back strain on June 26, 1990, and was capable of returning to his usual employment as a chipper without restrictions as of September 13, 1990. Accordingly, the administrative law judge rejected claimant=s contentions that he is entitled to compensation for temporary total disability, 33 U.S.C. '908(b), from May 20 to June 16, 1998, and for permanent partial disability from June 16, 1998, based on a loss of wage-earning capacity, 33 U.S.C. '908(c)(21), (h). Decision and Order at 27-30. In his decision, the administrative law judge found that claimant has degenerative changes at L4-5 and subjective pain symptomatology. CXs 1 at 20, 2 at 5, 6 at 4, 14; Tr. at 54-55. In determining the extent of claimant=s disability, the administrative law judge credited the opinion of Dr. Enger over that of Dr. Longnecker. Decision and Order at 29. Specifically, the administrative law judge credited Dr. Enger=s opinion that claimant sustained only a back strain at work on June 26, 1990, and that he could return to work performing light-duty immediately, and to full duty on September 13, 1990. CX 1 at 20-22, 34-35. In June 1991, Dr. Enger stated that he had never found anything significant to explain claimant=s pain symptomatology, which he characterized as bizarre, and that a myelogram, CT scan and MRI studies were normal. EX 8 at 22. The administrative law judge specifically credited Dr. Enger=s opinion that he could not assign any permanent disability to claimant=s back based on the lack of sufficient objective findings. *Id*. at 23. On January 22, 1992, Dr. Enger stated that he could find nothing objective to verify claimant=s subjective symptoms, apart from limited motion in arm raises, and he released claimant to return to his former work for employer as chipper without restrictions. The administrative law judge found that this opinion was the same as the opinion Dr. Enger rendered in September 1990, and thus, found that claimant could return to his usual work as of September 1990.[3]

The administrative law judge also found that claimant is not a credible witness and he gave little weight to his subjective complaints of pain. Decision and Order at 29. In reaching this determination, the administrative law judge credited, *inter alia*, inconsistent statements by claimant, including claimant=s relating to Dr. Longnecker that he was not working and had been unable to work since his work injury, when, in fact, claimant had held numerous jobs after leaving work for employer in June 1992. CXs 9 at 1, 5; 17 at 16-17; EX 13 at 2; Tr. at 51-53. The administrative law judge rejected Dr. Longnecker=s opinion that claimant has a two percent permanent impairment as well as work restrictions due to his work injury. CXs 6 at 11; 17 at 11-12. The administrative law judge reasoned that Dr. Longnecker first examined claimant five years after the date of his work injury and after claimant had worked for other employers. Decision and Order at 29. The administrative law judge also noted Dr. Longnecker=s deposition testimony, in which Dr. Longnecker stated that he based his opinion solely on claimant=s subjective complaints, which the administrative law judge rejected, that he could not establish objectively that claimant has a permanent back disability, and that he viewed his impairment rating as a compromise between claimant=s persistent subjective complaints and the absence of any objective evidence of impairment. CX 17 at

[3]Dr. Enger stated that any restrictions he gave claimant were based solely on his subjective complaints, which neither Dr. Enger nor the administrative law judge believed. CX 1 at 7; Decision and Order at 22.

26-28.

In adjudicating a claim, it is well established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We hold that the administrative law judge=s decision to reject claimant=s subjective complaints and the opinion of Dr. Longnecker, and to credit instead the opinion of Dr. Enger that claimant had no residual permanent impairment is rational. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, the administrative law judge=s finding that claimant failed to establish that he has a disability as a result of his June 26, 1990, work injury is supported by substantial evidence, and is affirmed.[4] *See generally Gacki v. Sea-Land Service, Inc.*, 33 BRBS 128 (1998).

[4]Accordingly, we need not address claimant=s contention that the administrative law judge erred in finding the Section 20(a) presumption rebutted, as the administrative law judge properly found that claimant does not have a compensable disability. Claimant also argues that the administrative law judge erred in finding that claimant failed to show that further medical treatment was warranted, because employer had not contested claimant=s entitlement to future medical care for his back condition. Decision and Order at 5-6. Nonetheless, claimant has not demonstrated error in the administrative law judge=s finding on this record. Dr. Enger informed claimant that there was nothing he could do to treat claimant and stated that claimant was a malingerer. CX 1 at 17. Dr. Jackson stated in July 1999 that claimant=s Aproblems@ did not warrant further medical intervention, EX 10 at 4, and Dr. Longnecker stated that Athere certainly was nothing more I could do for him . . .we all got very tired of hearing him and repeating these very expensive tests . . ., CX 17 at 27. Based on this evidence, the administrative law judge did not err in finding that claimant is not entitled to further medical treatment for his injury. *See generally* 33 U.S.C. '907; *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff=d mem.*, 32 Fed. Appx. 126 (5th Cir. 2002)(table); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff=d sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

Accordingly, the administrative law judge=s Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge