

BRB No. 92-1817

BRENDA LEE CAMPBELL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNITED STATES DEPARTMENT)	DATE ISSUED:
OF THE NAVY)	
)	
and)	
)	
ESIS, INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

B. Anne Smith (Zirkle and Smith), Atlanta, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (87-LHC-660) of Administrative Law Judge G. Marvin Bober awarding benefits 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

This case is before the Board on appeal for the second time. To briefly recapitulate, claimant sustained an injury to her back and coccyx on February 23, 1985, when she slipped and fell while in the course of her employment as a bartender at the Kings Bay Naval Base (employer). Claimant was initially treated for an acute lumbosacral strain and a sacro-coccygeal contusion by Drs. Victoria and Hudson. After continuing treatment, Dr. Hudson opined, on January 6, 1986, that claimant would become less symptomatic over time and could return to work within two or three

months. Subsequently, on May 27, 1986, claimant was examined by Dr. McAuley, an orthopedic surgeon, regarding continued complaints of sharp pain in the tip of her spine and pain radiating down into both legs. Dr. McAuley concluded that claimant had probably suffered a fracture of her coccyx on February 23, 1985, but that it had healed; Dr. McAuley further opined that claimant had reached maximum medical improvement, had not suffered any permanent partial disability as a result of her February 23, 1985 fall and, considering claimant's duties as a bartender, concluded that claimant could return to work in that capacity as of May 27, 1986. Claimant did not return to work for employer and she was ultimately terminated on September 8, 1986.

Thereafter, on March 23, 1987, claimant, complaining of pain in her tailbone and intermittent amnesia in both lower limbs, treated with Dr. Graham-Smith, an orthopedic surgeon, who diagnosed coccygodynia and non-specific low-back pain. On June 6, 1987, claimant underwent a surgical procedure for the removal of her coccyx. Employer made voluntary payments of temporary total disability benefits to claimant from February 23, 1985 to August 2, 1986 at the rate of \$144.92 per week, for a total of \$10,869. 33 U.S.C. §908(b).

In his initial Decision and Order, the administrative law judge, after setting forth the medical evidence of record, gave determinative weight to the medical testimony of Drs. Hudson, Victoria and McAuley and concluded that claimant was incapable of performing her usual employment duties with employer from February 23, 1985 to May 27, 1986, at which time claimant was diagnosed as having reached maximum medical improvement and was released to return to work. Claimant was thus awarded temporary total disability compensation from February 23, 1985 through May 26, 1986. 33 U.S.C. §908(b). Additionally, the administrative law judge found that the medical charges of Drs. Victoria, Hudson, and McAuley were compensable under the Act; the administrative law judge concluded, however, that Dr. Graham-Smith's treatment of claimant was not related to her February 23, 1985 injury and, therefore, Dr. Graham-Smith's charges were not compensable under the Act. *See* 33 U.S.C. §907.

Claimant appealed the Decision and Order to the Board. *See Campbell v. United States Department of the Navy*, BRB No. 88-2493 (Oct. 18, 1991) (unpublished). The Board affirmed the administrative law judge's findings that claimant reached maximum medical improvement and was capable of returning to work on May 27, 1986, and the administrative law judge's consequent award of benefits for temporary total disability from February 23, 1985 to May 26, 1986. The Board reversed the administrative law judge's finding that there was no causal relationship after May 27, 1986, between claimant's coccygeal complaints and the work injury. The Board affirmed the administrative law judge's finding that the treatment and surgery by Dr. Graham-Smith for claimant's coccyx discomfort was not necessary under Section 7 of the Act, and thus that these charges were not compensable. *See* 33 U.S.C. §907(a). Finally, the Board vacated the administrative law judge's denial of disability benefits subsequent to claimant's June 6, 1987, surgery, and remanded the case for the administrative law judge to determine whether any disability claimant suffered after that surgery is compensable.

On remand, the administrative law judge concluded that claimant failed to establish that her back surgery caused any increase in disability. Specifically, the administrative law judge found there was no medical evidence that claimant's back condition deteriorated post-surgery or that she was not capable of returning to her usual employment as a bartender. Moreover, the administrative

law judge credited Dr. Graham-Smith's testimony, which he found indicated that claimant's condition improved after the surgery. Accordingly, the administrative law judge denied the claim for compensation based upon claimant's post-surgical coccygeal condition.

On appeal, claimant contends the administrative law judge erred in finding that she is not entitled to disability benefits after her surgery on June 6, 1987. Claimant also contends that the medical treatment and surgery by Dr. Graham-Smith are compensable under the Act. Employer responds, urging affirmance.

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. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Under the Act, the aggravation of a primary work-related injury by medical or surgical treatment is compensable. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 5 (1995). Thus, an employer may be held liable for disability resulting from the treatment of a work-related injury. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, the administrative law judge relied upon the opinion of Dr. Graham-Smith in concluding that claimant was capable of performing her usual employment duties, and that claimant thus did not sustain a compensable impairment subsequent to June 6, 1987. Dr. Graham-Smith, who is the only physician of record who offered an opinion as to claimant's post-surgical condition, testified that claimant's coccygeal condition improved after her June 6, 1987 surgery, that claimant was unable to return to work as a bartender prior to October 1987, but that he released claimant to return to work on October 28, 1987. *See CX 10.*

The administrative law judge could rationally credit the testimony of Dr. Graham-Smith when addressing the issue of claimant's post-surgical disability. *See generally Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380 (1990). In addressing this issue, the administrative law judge relied upon Dr. Graham-Smith's testimony to find that claimant sustained no impairment subsequent to June 6, 1987. Dr. Graham-Smith's testimony, however, unequivocally states that claimant was unable to return to her former employment as a bartender from June 6, 1987, to October 28, 1987, at which time he released claimant to return to work. Thus, as Dr. Graham-Smith's testimony was rationally credited by the administrative law judge and constitutes the only medical evidence of record which addresses claimant's post-surgical condition, we modify the administrative law judge's decision to award claimant temporary total disability compensation under the Act from June 6, 1987, through October 28, 1987. We affirm the administrative law judge's determination that claimant sustained no permanent impairment and no impairment subsequent to that date, as his finding is supported by the credited opinion of Dr. Graham-Smith. *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).

Finally, claimant argues that the administrative law judge erred in his initial Decision and Order in which he determined that Dr. Graham-Smith's treatment and surgery were not compensable under the Act. In its initial Decision and Order, the Board affirmed this determination. *See*

Campbell, slip op. at 5-6. The Board has held that where a party appeals a Decision and Order on remand raising issues rejected by the Board in its prior decision, the first decision of the Board constitutes the law of the case. *See, e.g., Wayland v. Moore Dry Dock*, 25 BRBS 53, 58 (1991). We therefore decline to address claimant's contention regarding this issue, as it was fully resolved in the Board's first Decision and Order.

Accordingly, the administrative law judge's Decision and Order on Remand is modified to award claimant compensation for temporary total disability from June 6, 1987 to October 28, 1987. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge