BRB No. 04-0397

DAVID R. VERSIGA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRIEDE GOLDMAN OFFSHORE	)	DATE ISSUED: 12/22/04
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY c/o MIGA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Order Denying Petition for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-0647) of Administrative Law Judge Larry W. Price 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).

Claimant sustained a facial laceration at work on November 10, 1999. Claimant testified that his neck was sore for four or five days after the incident. Tr. at 34. Employer terminated claimant in January 2000 for violating a company rule. Claimant testified he had flare-ups of neck pain in January and March 2000. Tr. at 30. Claimant began receiving medical treatment for his neck pain in July and August 2000. An MRI obtained on September 21, 2000, showed a disc bulge at C5-6 producing mild stenosis. CX 34 at 19. However, a 1998 MRI showed essentially the same thing, as claimant had had a neck injury in 1991.[1] *Id.* at 20. Claimant testified at the September 16, 2003, hearing that he continues to have intermittent neck pain that increases with activity.

The record was left open after the hearing for employer to obtain the deposition of Dr. Bazzone, which claimant opposed. Claimant contended that employer had had the opportunity to schedule this deposition before the formal hearing, and that prejudice to claimant could ensue, because, essentially, employer could tailor the questions to knowledge it obtained at the formal hearing. In his decision, the administrative law judge noted claimant's objection, but admitted Dr. Bazzone's deposition into the record. Decision and Order at 2.

The administrative law judge found claimant entitled to invocation of the Section 20(a) presumption linking claimant's neck condition to his 1999 injury with employer. 33 U.S.C. §920(a). The administrative law judge found the presumption rebutted by the medical opinions of Drs. McCloskey and Bazzone. On weighing the evidence as whole, the administrative law judge discredited claimant's testimony in favor of the medical opinions, none of which conclusively links claimant's neck condition to the work accident. The administrative law judge therefore found that claimant's neck condition is not related to his work injury with employer, and he denied disability and medical benefits.

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[1] In 1991, claimant injured his neck while in the employ of Ingalls Shipbuilding. By Order dated August 13, 2001, the administrative law judge dismissed Ingalls (now Northrop Grumman) from the proceedings. The administrative law judge stated that as claimant sustained an injury in 1999, Friede Goldman (employer) is the responsible employer. Employer filed a motion for reconsideration on the ground that a scheduled deposition would reveal facts which would prove that the administrative law judge had erred in dismissing Ingalls. Claimant objected to employer's motion, and the administrative law judge denied employer's motion for reconsideration. After employer took Dr. Bazzone's deposition, claimant filed a motion to reconsider the dismissal of Ingalls because Dr. Bazzone attributed claimant's injury to the natural progression of the 1991 injury. The administrative law judge denied claimant's motion as untimely and because claimant had previously sought Ingalls' dismissal and the case had proceeded to a hearing without Ingalls' participation.

Claimant moved for reconsideration, first arguing he was prejudiced by the admission of Dr. Bazzone's deposition. The administrative law judge rejected this contention, noting that Dr. Bazzone's report, issued before the hearing, was not favorable to claimant. He also noted that claimant had the opportunity to, and did in fact, cross-examine Dr. Bazzone. *See* EX 31. The administrative law judge stated that merely because evidence is unfavorable does not make its admission prejudicial. Claimant also contended that the administrative law judge's causation finding was in error. The administrative law judge rejected this contention and denied claimant's motion for reconsideration. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

We first address claimant's contention that the administrative law judge erred in admitting into evidence the post-hearing deposition of Dr. Bazzone. Employer scheduled claimant for an examination by Dr. Bazzone, a physician of employer's choosing, for August 7, 2003. The deposition of Dr. McCloskey was on September 5, 2003, and that of Dr. Fortier-Benson on September 10, 2003. At this latter deposition, claimant was first provided with a copy of the report of Dr. Bazzone, which was dated August 13, 2003. On September 13, 2003, three days before the formal hearing, employer moved to depose Dr. Bazzone post-hearing. The ground for employer's motion was that a deposition could not be scheduled prior to the hearing due to the other depositions and the unavailability of Dr. Bazzone. Claimant objected to the motion on the grounds that it was untimely and that employer had had ample opportunity to gather its evidence before the hearing. Claimant alleged that prejudice would ensue because employer would have the benefit of the hearing testimony prior to deposing Dr. Bazzone.

In his decision, the administrative law judge admitted Dr. Bazzone's deposition into evidence, stating that he has the discretion to admit relevant evidence at any time and is not bound by formal rules of evidence. Decision and Order at 2 & n.2. In denying claimant's motion for reconsideration on this point, the administrative law judge rejected claimant's summary claim of prejudice. The administrative law judge stated that merely because the evidence is contrary to claimant's claim is not a basis for excluding evidence from the record. The administrative law judge stated that claimant had the opportunity to cross-examine Dr. Bazzone in an attempt to elicit favorable responses. Moreover, the administrative law judge observed that the denial of claimant's claim was not based solely on Dr. Bazzone's deposition testimony.

We review the administrative law judge's decision to admit evidence into the record under the abuse of discretion standard. *See, e.g., Burley v. Tidewater Temps*, 35 BRBS 185 (2002); *Olsen v. Triple A Machine Ships, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 2003) (table). The regulation at 20 C.F.R. §702.338 provides that the administrative law judge should inquire fully into the matters at issue and should admit relevant and material evidence.

On appeal, claimant makes only a bare allegation that employer's motion was untimely and that admission of Dr. Bazzone's deposition was prejudicial. The administrative law judge has the discretion to admit post-hearing evidence, *see generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988), and the administrative law judge provided rational reasons for rejecting claimant's contention that he was prejudiced by the admission of Dr. Bazzone's deposition. As claimant has not demonstrated that the administrative law judge abused his discretion in admitting into the record relevant evidence, the administrative law judge's decision in this regard is affirmed. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

Claimant also challenges the denial of benefits for his cervical condition. In his Petition for Review, claimant generally contends that the administrative law judge failed to properly apply the Section 20(a) and therefore erred in denying benefits. Claimant's brief in support of his Petition for Review is virtually identical to the one he submitted to the administrative law judge and contains many pages of facts and boilerplate case citations, much of it irrelevant to the facts of this case. The administrative law judge afforded claimant the benefit of the Section 20(a) presumption, but found it rebutted. *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Claimant's only mention of this in his brief is, "Friede has failed to offer substantial evidence severing the connection between [claimant's] work accident of November 10, 1999, and the resulting cervical injury. Therefore, [claimant] has proven a compensable case." Cl. Brief at 16.

We decline to review the administrative law judge's rebuttal findings as claimant has not discussed the medical evidence or the administrative law judge's decision at all, much less in terms of applicable law. Moreover, the boilerplate brief does not contain the citation to any cases discussing the applicable rebuttal standard. The Board's regulation at 20 C.F.R. §802.211(b) states:

> Each petition for review shall be accompanied by a supporting brief, memorandum of law or other statement which: Specifically states the issues to be considered by the Board; presents, with appropriate headings, an argument with respect to each issue presented with references to transcripts, pieces of evidence and other parts of the record to which the petitioner wishes the Board to refer; . . . .

The Board has held that a brief filed by a party represented by counsel must address the administrative law judge's decision and provide a discussion as to why that decision is not supported by substantial evidence or in accordance with law. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227, 229 (1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988). "[M]ere assignment of error is not sufficient to invoke Board review." *Carnegie v. C&P Telephone Co.*, 19 BRBS 57, 58-59 (1986). As claimant has failed to

address the rebuttal issue in terms of why the administrative law judge's finding might be in error pursuant to applicable law, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted.[2] *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 124 S.Ct. 825 (2003).

We also affirm the administrative law judge's finding that, upon weighing the evidence as a whole, claimant's cervical condition is not work-related. The administrative law judge found claimant's testimony concerning his pain and its origins less credible than the medical evidence, a finding that is within his discretion. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge found that none of the doctors stated that claimant's condition was definitely caused or aggravated by the 1999 work injury. Claimant fails to allege, much less demonstrate, error in these findings. Therefore, we affirm the finding that claimant's condition is not related to his employment with employer, and the resultant denial of benefits.[3] *See generally Sistrunk*

v. Ingalls Shipbuilding, Inc., 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

[2] On the face of the administrative law judge's decision, there is no error in his rebuttal finding based on Dr. Bazzone's opinion that claimant's 1999 injury did not accelerate claimant's pre-existing cervical condition. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

[3] In his Petition for Review, claimant states that the administrative law judge erred in entering the Order on August 13, 2003, dismissing Ingalls from the proceedings. *See* n. 1, *supra*. Claimant first raised this issue in his motion for reconsideration, which was filed after the administrative law judge issued his Decision and Order denying benefits. The administrative law judge found that this issue was untimely raised, as claimant had previously agreed with the motion to dismiss Ingalls, and had permitted the formal hearing to go forward without Ingalls' participation. Claimant's brief in support of his appeal does not further discuss this issue, and therefore we decline to address it. *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc*, 31 BRBS 13 (1997). Moreover, there is no error apparent in the administrative law judge's finding that claimant did not raise this objection in a timely manner.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and the Order Denying Petition for Reconsideration 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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REGINA C. McGRANERY
Administrative Appeals Judge