BRB No. 96-0534

CORINE LEVY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JACKSONVILLE SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Douglas E. Daze, Jacksonville, Florida, for claimant.

Richard M. Stoudemire and Darlene D. Sapiera (Cole, Stone & Stoudemire, P.A.), Jacksonville, Florida, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-53) of Administrative Law Judge Vivian Schreter-Murray 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).[1] 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).

Claimant, a second class mechanic for employer, injured her back on December 22,

[1]In an Order dated December 16, 1996, the Board remanded this case to the district director for reconstruction of the record. We hereby reinstate claimant's appeal of the administrative law judge 's denial of benefits as the Board received the record in this case from the district director on March 13, 1997. The one-year period for review provided by Public Laws 104-134 and 104-208 thus runs from this date. Additionally, we note that despite employer's filing for bankruptcy, we may adjudicate the merits of this claim. *See In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981).

1989, while reaching overhead to insert a pin in a porthole door to a passenger ship. She never returned to work for employer, and employer voluntarily paid claimant temporary total disability benefits from the date of injury. In her Decision and Order, the administrative law judge discredited claimant's complaints of pain and found that claimant is able to perform light and sedentary work within the restrictions set by Dr. Rogozinski. The administrative law judge further found that employer established the availability of suitable alternate employment, and that claimant is not entitled to permanent partial disability benefits as her post-injury wage-earning capacity exceeded her pre-injury average weekly wage. The administrative law judge also denied claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, claimant challenges the administrative law judge's denial of additional compensation and medical benefits, asserting that she erred in discrediting her testimony and Dr. Smith's opinion. Claimant also contends the administrative law judge exhibited bias against her, and that, therefore, the case should be remanded for a new hearing before a different administrative law judge. Employer responds in support of the administrative law judge 's denial of benefits.

Claimant initially contends that the administrative law judge erred in finding that her testimony of severe constant pain is not credible or consistent with the medical evidence of record. Claimant contends this evidence establishes she is totally disabled.

The administrative law judge discussed and weighed claimant's testimony and the medical reports of Drs. Rogozinski and Smith. Claimant testified that she is unable to return to her former shipyard work and cannot do any work because of the pain she experiences. Tr. at 44, 55. Claimant also testified that she spends seven hours a day in bed in addition to the time she is asleep at night, and if she is not in bed, she is in a recliner chair. Tr. at 40. Dr. Rogozinski, who last saw claimant in 1992, returned claimant to light duty work and noted that she was not a surgical candidate as a discogram performed on August 9, 1991, did not reproduce back pain. Cl. Ex. 1; Emp. Ex. 4. Dr. Smith stated in 1995 that claimant cannot return to her former occupation and her chronic low back pain would make it difficult for her to carry out an occupation eight hours a day and that if she returned to part-time work, she would have to change positions from sitting to standing due to discomfort. Cl. Ex. 1.

Contrary to claimant's contention, the administrative law judge acted within her discretion as trier-of-fact in finding that claimant's testimony and complaints of severe constant pain were not credible, nor supported by the medical evidence of record. The administrative law judge questioned claimant's testimony, as she found no medical evidence of prolonged physical inactivity. Decision and Order at 5-6; Cl. Ex. 1. She noted that Dr. Rogozinski did not find any measurable atrophy in claimant's thigh or calf musculature or any evidence of nerve root involvement or other neurological disease or deficit. Cl. Ex. 1; Emp. Ex. 4. Moreover, the administrative law judge found that Dr. Smith described no muscle atrophy and did not diagnose any neurological or objective findings that support claimant's contentions of prolonged physical inactivity. Cl. Ex. 1. The

administrative law judge further discredited claimant's testimony because five months before the hearing Dr. Smith noted that claimant stood straight and moved easily when arising from a chair, whereas the administrative law judge noted that claimant limped slowly into the courtroom leaning heavily on a cane. Decision and Order at 5-6; Cl. Ex. 1. Additionally, the administrative law judge noted that Dr. Rogozinski's discogram did not reproduce back pain and she found significant the fact that claimant did not obtain any treatment for her back between the time she was evaluated by Dr. Rogozinski in 1992 and the time she was seen by Dr. Smith in 1995. Decision and Order at 6-7; Cl. Ex. 1; Emp. Ex. 4. The administrative law judge reasoned that had claimant been in significant pain, she would have obtained treatment and her attorney would have placed the medical records of that treatment into evidence. Consequently, as the determination is neither inherently incredible or patently unreasonable, we affirm the administrative law judge's finding that claimant's testimony is not credible . *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Claimant also contends that the administrative law judge erred in discrediting Dr. Smith's opinion because it was prepared in anticipation of litigation. The Board has recognized that there is no logic in an inference that evidence prepared for trial is more likely to be less reliable than other reports. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Although the administrative law judge noted that Dr. Smith's opinion was prepared in anticipation of litigation, the administrative law judge did not discredit Dr. Smith's opinion on this basis. Decision and Order at 4, 6-7; Cl. Ex. 1. Rather, the administrative law judge found that Dr. Rogozinski's opinion that claimant can return to light duty work was more thorough and complete than Dr. Smith's opinion that claimant's chronic low back pain would make it difficult for her to carry out an occupation eight hours a day. The administrative law judge therefore acted within her discretion in crediting the opinion of Dr. Rogozinski over that of Dr. Smith, *see Cordero*, 580 F.2d at 1331, 8 BRBS at 744, and we affirm the administrative law judge's denial of additional compensation to claimant.[2]

[2]The administrative law judge's findings with regard to suitable alternate employment and wage-earning capacity are affirmed as unchallenged on appeal.

Claimant next contends that the administrative law judge erred in denying medical benefits. We disagree. In order to be entitled to medical benefits, claimant must establish that treatment is necessary for her work-related injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Although the administrative law judge summarily denied claimant medical benefits, there is no medical evidence of record which establishes that medical treatment is necessary for claimant's work-related back injury. Decision and Order at 10. Dr. Rogozinski stated that he had nothing more in the way of medical treatment to offer claimant; likewise, Dr. Smith stated that no further medical treatment was required as she has now stopped work. Cl. Ex. 1; Tr. at 54. Consequently, we affirm the administrative law judge's denial of medical benefits as it is supported by substantial evidence.[3] *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP,* 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order denying claimant benefits is affirmed.[4]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[3]As a claim for medical benefits is never time-barred, *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990), claimant may seek reimbursement consistent with Section 7 of the Act, 33 U.S.C. §907, for medical expenses if any physician subsequently determines that she needs treatment for her work-related back injury.

[4]We reject claimant's assertion that the administrative law judge was biased, and her request for a new hearing before a different administrative law judge on that ground, as claimant untimely raised the issue after the adverse decision was issued in this case. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Moreover, adverse rulings alone are insufficient to show bias. Consequently, claimant's request for a new hearing before a different administrative law judge is denied.

NANCY S. DOLDER
Administrative Appeals Judge