BRB No. 98-458

JOHN BEDNAREK	)	
	)	
Claimant-Respondent	)	DATE ISSUED:_____
	)	
v.	)	
	)	
CERES CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Additional Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Andrew M. Battista, Towson, Maryland, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Additional Benefits (96-LHC-30) of Administrative Law Judge John C. Holmes 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 was injured in 1974 when the boom of a crane fell on his head. He sustained a T5 compression fracture of his spine and a fracture of his left ankle. He returned to his usual work in 1976, continuing medical treatment until 1984 or 1985. Tr.2 at 8-9, 11-12. In 1982, his doctor assessed a 40 percent impairment and stated

that claimant is unable to return to his usual work. Claimant was awarded permanent partial disability benefits, and the Board affirmed this award. Emp. Exs. 44, 50-51; Tr.2 at 19. Nevertheless, claimant continued to perform his usual work.

On February 27, 1992, while working as yard hustler driver for employer, claimant was injured when a crane lifted his tractor along with the container and then the tractor dropped to the ground. He testified he felt severe pain in his back, shoulder and neck, and he stopped working after that shift. Tr.2 at 16-17, 25-27, 30, 32-33. After treatment from many doctors, claimant was released to return to light duty work on January 8, 1993. In reality, claimant performed his usual job and he continued to work for over two years thereafter, except for short periods when he was off due to treatment for pain. On August 28, 1995, claimant voluntarily retired. Tr.2 at 103, 110. Employer paid claimant temporary total disability benefits from March 4, 1992, until his return to work in January 1993, and again from December 28, 1994, through January 7, 1995. Claimant filed a claim for additional temporary and permanent total disability benefits, as well as for medical benefits for his radio frequency ablation treatment.

After reviewing the voluminous record, the administrative law judge credited those doctors who stated claimant has no work-related disability and can return to his usual job. The administrative law judge found further support for this conclusion because claimant actually returned to his usual work after the 1992 injury, working 50 to 60 hours per week during 1994 and 1995. Additionally, the administrative law judge denied medical benefits for claimant's back treatment in the fall of 1995, finding it was not related to any condition caused by the work injury. Decision and Order at 12, 16, 20, 22. Claimant appeals this decision, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in denying permanent total disability benefits. He argues that the administrative law judge erred in crediting only employer's evidence and misinterpreting Dr. Narrow's opinion. We reject claimant's assertions. As stated previously, this record is voluminous, and it is clear from the decision that the administrative law judge considered all documentation and testimony submitted by the parties. While claimant is correct in asserting that many doctors opined that he cannot return to his usual work, he incorrectly asserts that the administrative law judge must credit those opinions. Rather, questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge specifically stated that he credited the opinions of Drs. Narrow, Weiner, Slaughter, Henderson, Halikman and Shear, all of

whom stated that claimant has no work-related disability and/or can return to his usual work. Emp. Exs. 1, 3, 5, 11-13. For example, Dr. Narrow, whose opinion the administrative law judge gave greatest weight, stated in his report of January 3, 1995, that claimant's pain is related to degenerative changes, not to the 1992 incident, and that claimant can return to his usual work. Emp. Ex. 1g. In March 1995, Dr. Narrow stated that claimant's condition had returned to its "baseline functions," Emp. Ex. 1m, and he testified at the hearing that claimant's complaints are not related to the 1992 work incident, but rather are related to a genetic condition.[1] Tr.3 at 250, 259-260. Additionally, the administrative law judge credited Dr. Henderson's opinion, in which he stated that claimant has neither a physical nor a psychological disability that would prevent him from returning to work were he motivated. Emp. Ex. 2. Because substantial evidence supports the administrative law judge's determination that claimant is not disabled, we affirm his denial of permanent total disability benefits. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

[1]We reject claimant's allegation that the administrative law judge misinterpreted Dr. Narrow's opinion. While we note there may be some discrepancies between the doctor's notes written concurrently with the treatment and his testimony at the hearing, Dr. Narrow clearly explained in his testimony that his opinion had changed because of developments which occurred later in the treatment, *e.g.*, claimant's positive test for the genetic condition of ankylosing spondylitis. It is within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

Next, claimant contends the administrative law judge erred in failing to award additional temporary total disability benefits. On appeal, claimant asserts his entitlement to temporary total disability benefits from the date employer ceased its voluntary payments, January 7, 1995, through the date on which Dr. Narrow determined that claimant's condition reached maximum medical improvement, March 23, 1995. Claimant did not raise this argument before the administrative law judge and cannot raise it now for the first time on appeal. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). Moreover, Dr. Narrow released claimant to return to work in January 1995, and it appears claimant resumed his employment at that time. *See* Cl. Ex. 39 at 21-22; Emp. Ex. 47. As entitlement to temporary total disability benefits requires the demonstration of a loss of wage-earning capacity, *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989), we reject claimant's assertion that he is entitled to the additional benefits merely because Dr. Narrow did not assess his condition as permanent until March 1995. Maximum medical improvement need not directly correlate with a claimant's ability to return to work. *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). As claimant has not established entitlement to additional temporary total disability benefits, we affirm the administrative law judge's denial of same.[2] Claimant also contends the administrative law judge erred in finding that his condition is not related to the 1992 incident, as he alleges there was an exacerbation of his pre-existing condition. Contrary to claimant's argument, there is substantial evidence to support the administrative law judge's finding that claimant's current condition is caused by his genetic or degenerative conditions and is not work-related. Specifically, Dr. Narrow testified that the services he provided for claimant were to resolve claimant's genetic problem of ankylosing spondylitis and that any exacerbation caused by the 1992 incident had resolved by the time he first treated claimant in November 1994. Tr.3 at 250, 259-260, 270, 272, 300, 304-305. Dr. Shear, an independent evaluator, noted that claimant's complaints inexplicably involved most of his body with no objective substantiation. He found there is no causal relationship between claimant's current complaints and his 1992 injury. Emp. Ex. 3. Thus, although the evidence cited by claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption, linking his condition to his employment, the evidence presented by employer rebutted the presumption by establishing the cause of claimant's condition to be his genetic and degenerative problems and not his 1992 injury. Therefore, the Section 20(a) presumption drops from the case. *Universal*

[2]We also reject claimant's contention that he is entitled to temporary total disability benefits after he voluntarily retired from his employment, as he cannot show a loss of wage-earning capacity after a voluntary retirement. *Burson*, 22 BRBS at 124.

Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Mariner Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987). On the record as a whole, the administrative law judge credited employer's evidence and found that claimant failed to show that his condition was caused by the work-related injury.[3] *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). We affirm this conclusion as it is rational and supported by substantial evidence.

Finally, claimant avers that employer is liable for his radio frequency ablation treatment. In order to be compensable, medical treatment must be related to and be appropriate for the work-related injury. *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Where the work-related condition has resolved, the administrative law judge may find that further medical treatment is unnecessary and is not compensable. *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). As the administrative law judge found, and as we have affirmed, claimant's work-related condition resolved prior to Dr. Narrow's treatment, and his current condition is due to his degenerative and genetic problems. Consequently, the pain for which Dr. Narrow recommended the ablation treatment, which was first thought to be caused by the work-related injury, was later determined by Dr. Narrow to be caused by claimant's ankylosing spondylitis, a genetic condition. Emp. Ex. 1n; Tr.3 at 250, 259, 267-268, 270. Therefore, the administrative law judge found that the ablation treatment was not related to the work injury, and he properly denied medical benefits for this procedure. *Brooks*, 26 BRBS at 1; *Ballesteros*, 20 BRBS at 184; 20 C.F.R. §702.402.

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

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[3]Although the administrative law judge did not discuss invocation and rebuttal of the Section 20(a) presumption, his error is harmless, as there is substantial evidence on the record as a whole to support his decision. *Reed v. The Macke Co.*, 14 BRBS 568 (1981).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge