

BRB No. 08-0736

T.S.)
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 Claimant-Petitioner)
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 v.)
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 NORTHROP GRUMMAN/AVONDALE) DATE ISSUED: 02/27/2009
 INDUSTRIES)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

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

T.S., New Orleans, Louisiana, *pro se*.

Richard S. Vale, Frank J. Towers, and Pamela F. Noya (Blue Williams,
L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order on Remand (2005-LHC-1837) 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). In an appeal by a claimant without an attorney, we will review the findings of fact and conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. This is the second time this case is before the Board.

To briefly reiterate the facts of this claim, claimant, a cable puller, was involved in an altercation with another employee on October 5, 2004. As a result, she was suspended for three days and subsequently terminated on October 11, 2004. Claimant sought

compensation and medical benefits, alleging that her pre-existing psychological disorder was aggravated by the incident at work.

In his initial decision, the administrative law judge found that although claimant established a *prima facie* case that her condition was aggravated by the fight at work, employer established rebuttal of the Section 20(a) presumption, 33 U.S.C. §920(a). Upon weighing the evidence, the administrative law judge concluded that claimant's pre-existing condition was not aggravated by the fight. Accordingly, the administrative law judge denied compensation and medical benefits. Claimant appealed to the Board.

On appeal, the Board stated that the administrative law judge erred in finding rebuttal of the Section 20(a) presumption because Dr. Roniger, upon whose opinion the administrative law judge had relied, was unable to determine whether the incident did or did not temporarily aggravate claimant's condition. Emp. Ex. 9 at 22-23. As there was no other evidence of record which addressed whether claimant's psychiatric condition was aggravated by the work incident, the Board reversed the administrative law judge's finding that the Section 20(a) presumption was rebutted. The Board thus held that claimant's psychological condition was related to her employment as a matter of law. *T.S. v. Northrop Grumman-Avondale Industries*, BRB No. 07-0213 (Nov. 23, 2007)(unpub.). The case was remanded to the administrative law judge to address any remaining issues.

On remand, the administrative law judge admitted into evidence additional documents offered by claimant. The administrative law judge permitted Dr. Roniger to review these materials and to be deposed on June 8, 2008. Upon reviewing the evidence of record, the administrative law judge found that claimant did not establish that she sustained any disability due to her work injury. Accordingly, he again denied benefits.

Claimant appeals contending the administrative law judge erred in denying benefits.¹ Employer responds, urging affirmance of the administrative law judge's denial of compensation. Claimant has filed a reply brief to which employer responded.²

¹ Contrary to claimant's assertion, the Board's remand to the administrative law judge to consider any remaining issues was not limited solely to the admission of new evidence submitted with claimant's appeal. See Board's Decision and Order at n.1. Employer had raised the issue of the nature and extent of claimant's disability, if any, before the administrative law judge. Decision and Order Denying Benefits at 2. These issues, therefore, were properly before the administrative law judge on remand.

² Claimant's reply brief alleges that employer's response brief was untimely filed. We reject this contention, as employer's response brief was mailed within 30 days of its

We reject claimant's contention that the administrative law judge erred in permitting Dr. Roniger to review the documents submitted into the record by claimant on remand. The administrative law judge acted within his discretion in this regard, as it ensured that Dr. Roniger reviewed all relevant documents prior to giving his opinion on claimant's ability to work. The administrative law judge appropriately gave employer the opportunity to respond to the additional evidence presented and admitted Dr. Roniger's 2008 deposition into the record. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); 20 C.F.R. §§702.338, 702.339.

We also reject claimant's contention that the administrative law judge erred in denying disability benefits. Claimant bears the initial burden of establishing that she cannot perform her usual work because of her work injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In this case, the administrative law judge reviewed claimant's medical records and the opinion of Dr. Roniger. The administrative law judge found that the evidence does not establish that claimant was incapable of performing her usual job duties. Claimant's treatment records from the day after the work incident note contusions of the scalp, back and lower limb, and state that she was released "in good condition." Cl. Ex. 4. The records of the Florida Medical Health Center state that claimant was treated sporadically as an out-patient for depression and impulse control problems, and was released on medication; no work restrictions were noted. Cl. Exs. 2, 3, 10, 12, 13, 14. Dr. Roniger stated that if the work incident had caused disability, it would have been evident through worsening symptoms in the months after the incident. He stated that such symptoms were not apparent, and that, therefore, claimant would have been able to return to work without psychiatric restrictions the day after the incident. Dr. Roniger stated that claimant's inability to work when he examined her on April 28, 2006 was related to inadequate medication and not to the altercation. Roniger Dep. at 20, 28-29, 38-39. Claimant testified that she would like to work and has applied for jobs. HT at 35.

Substantial evidence thus supports the administrative law judge's finding that claimant failed to demonstrate any disability due to her work injury. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Peterson v. Washington Metropolitan Area Transit Authority*, 13 BRBS 891 (1981). Claimant's loss of her job due to the fight is not compensable as the firing was due solely to claimant's malfeasance and was not related to her work-related condition. *See generally Brooks v. Newport News Shipbuilding &*

receipt of the Board's acknowledgment of claimant's appeal, which was accompanied by a petition for review and brief filed by her mother. 20 C.F.R. §§802.210, 802.211(e), 802.212.

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); *cf. McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988). Therefore, as the administrative law judge's decision is rational, supported by substantial evidence and in accordance with law, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge