BRB No. 91-1838

ROGER L. ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
ALABAMA INSURANCE GUARANTY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Claimant's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Jack C. Pickett (Kitchens & Ellis), Pascagoula, Mississippi, for claimant.

Grover E. Asmus, II (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Claimant's Motion for Reconsideration (88-LHC-3383) of Administrative Law Judge Richard D. Mills denying 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.* (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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer from 1967 to 1969 as an electrician, and he claimed he suffers from asbestosis as a result of asbestos exposure during his employment. Employer challenged claimant's claim, but it stipulated that if claimant has asbestosis, then the date of injury is March 26, 1985, and claimant's average weekly wage is $289.93. Jt. Ex. 1; Emp. Ex. 1. Because

employer disputed the existence of an injury, it did not pay any disability or medical benefits. However, employer argued that, in the event claimant establishes that he has an injury, it is entitled to a credit against claimant's net third-party settlement recovery of $8,680. Jt. Ex. 1; Emp. Ex. 3.

A hearing was held on December 6, 1990, wherein the parties disputed whether claimant sustained a work-related injury, the nature and extent of any disability therefrom, and employer's liability for medical expenses. Decision and Order at 1-2. The administrative law judge credited employer's evidence and found that claimant does not have an asbestos-related lung disease. Consequently, he denied benefits. Decision and Order at 4. On February 4, 1991, claimant filed a motion for reconsideration. In response, employer filed a motion to strike an attached exhibit and a paragraph of claimant's motion which concerned the exhibit. The administrative law judge granted employer's motion to strike and denied claimant's motion for reconsideration. Order dated June 18, 1991. Claimant appeals the administrative law judge's denial of benefits, and employer responds, urging affirmance.

Claimant makes several contentions. Claimant contends the administrative law judge erred in finding that claimant does not have an injury, in not invoking the Section 20(a), 33 U.S.C §920(a), presumption, and in not admitting the additional evidence submitted. He also contends that the administrative law judge used improper standards to weigh the evidence. In response, employer maintains that the administrative law judge reviewed and weighed the record evidence, and based on Dr. Weill's credentials and the objective medical evidence, he rationally concluded that claimant does not have an asbestos-related disease.

Claimant contends the administrative law judge erred in not finding that claimant sustained a work-related injury and in not invoking the Section 20(a) presumption. In this regard, claimant contends the administrative law judge erred in crediting Dr. Weill's opinion over that of Dr. Wimberley. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated in part on reconsideration*, 24 BRBS 63 (1990); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT) (4th Cir. 1982); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). To establish a *prima facie* case, a claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at the employer's facility which could have caused that harm or pain. *Id.* In this case, the administrative law judge found that claimant failed to established the existence of any harm.

A review of the medical reports discloses substantial evidence to support the administrative law judge's finding that claimant does not suffer from an asbestos-related disease. Although December 1984 and January 1985 x-rays revealed evidence of "minimal pleural thickening consistent with previous asbestos exposure," which Dr. Wimberley, claimant's doctor, interpreted as mild pleural asbestosis with a chronic cough, an x-ray taken in July 1985 revealed that claimant had clear lungs, and pulmonary function studies revealed that he had normal lung volumes. Cl. Ex. 1; Emp. Ex. 1. Based on the July 1985 x-ray, Dr. Weill concluded there is "no radiographic evidence of asbestos-related disease[.]" Emp. Ex. 1. Additional x-rays were taken in March 1989, showing clear lungs and "essentially normal chest without evidence of acute or active disease." Cl. Ex. 3. Interpretation of pulmonary function studies taken at that time also indicated normal lung volumes.

Id. As the evidence credited by the administrative law judge establishes that claimant does not have an asbestos-related disease, or any lung disease at all, the administrative law judge did not err by not invoking the Section 20(a) presumption. *Hartman*, 23 BRBS at 205-206.

Moreover, the administrative law judge rationally credited Dr. Weill's opinion over that of Dr. Wimberley, based on Dr. Weill's greater qualifications and more recent examination and diagnosis.[1] Decision and Order at 4. Questions of witness credibility, including that of medical witnesses, 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). In this case, as is within his discretion, the administrative law judge credited Dr. Weill over Dr. Wimberley based on Dr. Weill's vast experience and the fact that his diagnosis was corroborated by objective medical evidence. Therefore, we conclude that the administrative law judge's finding is supported by substantial evidence, and claimant has raised no reversible error committed by the administrative law judge in weighing the conflicting evidence and in making credibility determinations. *See Calbeck*, 306 F.2d at 693; *Hartman*, 23 BRBS at 206.

Finally, claimant contends the administrative law judge erred in rejecting the October 1979 newspaper article he submitted as additional evidence with his motion for reconsideration.[2] Section 702.339 of the regulations permits an administrative law judge to investigate a case so as to best ascertain the rights of the parties, and Section 702.338 requires the administrative law judge to inquire fully into the matter and receive relevant testimony and evidence. 20 C.F.R. §§702.338, 702.339. The Board has interpreted these provisions as affording administrative law judges considerable discretion in rendering determinations pertaining to the admissibility of evidence. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991); *Wayland v. Moore Dry Dock*, 22 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). Because the admission of evidence is discretionary, the Board may overturn such a determination only if it is arbitrary, capricious or an abuse of discretion. *See generally Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in pertinent part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992). In this case, the administrative law judge noted the date of the article and rejected it as not constituting "new" evidence. As this ruling does not constitute an abuse of discretion, we affirm the administrative law judge's rejection of the article. *Olsen*, 25 BRBS at 40; 20 C.F.R. §§702.338, 702.339.

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[1]The administrative law judge found Dr. Weill to be an internationally recognized expert in pulmonary medicine, who is Board-certified in both internal medicine and pulmonary diseases. Additionally, Dr. Weill is the Chief of the Pulmonary Diseases Section and Schlieder Foundation Professor of Pulmonary Medicine at Tulane University School of Medicine. Decision and Order at 4. Dr. Wimberley is claimant's treating physician and is also Board-certified in internal medicine and pulmonary diseases.

[2]Attached to his motion for reconsideration, claimant submitted an October 19, 1979 article mentioning Dr. Weill's involvement with an early 1970's government-funded study on the dangers of silica dust inhaled by shipyard workers. Claimant maintains that this article casts suspicion on Dr. Weill's credibility.

Accordingly, the administrative law judge's Decision and Order and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge