

WILLIAM E. SMITH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: _____
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

William E. Smith, Richton, Mississippi, *pro se*.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, proceeding without representation, appeals the Decision and Order Denying Benefits (91-LHC-294) of Administrative Law Judge Kenneth A. Jennings 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 in which claimant is not represented by counsel, the Board will review the administrative law judge's Decision and Order under its statutory standard of review. We must affirm the findings and conclusions 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant has worked for employer as a pipefitter and in various supervisory positions since 1971. On June 25, 1987, claimant sustained a work-related right ankle and knee injury. Dr. Bomboy, claimant's treating orthopedic surgeon, performed arthroscopic surgery on August 14, 1987. Claimant was released to return to work with the use of a knee brace on November 16, 1987, but continued to have ongoing problems with his knee which caused him to be off work for various periods. On February 8, 1988, claimant sustained a second work-related knee injury when his brace

was caught in some machinery. At that time, claimant also complained about straining his back. These symptoms apparently resolved within a few weeks, however, and he was released to return to work on February 29, 1988. Claimant's knee problems persisted, and he was restricted from climbing in October 1988. On November 14, 1988, Dr. Bomboy indicated that claimant had reached maximum medical improvement with a 30 percent permanent partial disability to the right leg. Employer paid claimant for all of his time off work, as well as a 30 percent scheduled award of the right leg. *See* 33 U.S.C. §908(c)(3).

On June 5, 1989, claimant returned to work in employer's pipefitting department, where he had not worked since 1983. Emp. Ex. 18 at 17. Claimant testified that in that department the employees were required to stand while working. Moreover, the fact that a hand-operated crane used for heavy lifting was not operating at the time is not disputed. *Id.* at 19. Claimant stated that on that day he lifted some things alone and helped another employee to lift a heavy item and that the following day, June 6, 1989, his knee began to bother him severely. Claimant further testified that by the time he got home his back hurt so much that he could not get out of his truck without help. Although claimant apparently saw Dr. Bomboy on June 9 and 13, 1989, Dr. Bomboy could find no objective evidence of any new knee pathology and his notes do not mention any back complaints until July 27, 1989, over a month and a half later. Cl. Ex. 1 at 8. Emp. Ex. 13 at 1, 1(a). According to Dr. Bomboy, claimant only complained to him twice about back pain in the multitude of times the doctor saw him. Those occasions were once in February 1988, and on July 27, 1989.

When a disagreement developed between claimant and Dr. Bomboy over Dr. Bomboy's handling of his case, claimant consulted Dr. Dyas, another orthopedic surgeon, for his alleged back problem on November 11, 1989. Claimant did not relate any history of any work-related injury, however, until March 1991, when he was admitted into the hospital for diagnostic testing of his back, hips and legs. Claimant's neurological examination at that time was essentially normal with the exception of a positive straight leg raising test above 60 degrees. A CT scan, myelogram, EMG and MRI were performed, which revealed bulging of the L2-3, L3-4 and L5-S1 disks, Cl. Ex. 3 at 7, which Dr. Dyas interpreted as showing degenerative changes in the back and early stenosis of the spinal canal at L3-4, attributable to aging. Cl. Ex. 2. at 9, 17, 18. Dr. Dyas deposed that limping caused by claimant's 1987 knee injury put a strain on claimant's back and aggravated his symptoms. *Id.* at 19. Dr. Dyas further opined that the back studies did not indicate any acute problem and that of the possible problems associated with claimant's back, the only one that could be related to the claimed June 6, 1989, injury was a back strain which should have resolved itself in 6 to 12 weeks. *Id.* at 19-20. Dr. Dyas believed that claimant could not return to his usual work at Ingalls but felt that claimant could perform light to sedentary work. Cl. Ex. 2 at 24, 32.

The administrative law judge denied the claim, finding that claimant failed to establish the injury or harm element of his *prima facie* case. Crediting Dr. Bomboy's testimony, the administrative law judge found that claimant failed to establish any new injury to his right knee above the 30 percent permanent physical impairment for which he had already been compensated. With respect to claimant's alleged back injury, the administrative law judge found that claimant's testimony that he reported back pain to Dr. Bomboy when he saw him on June 9 and 13, 1989, lacked credibility in comparison to Dr. Bomboy's records which did not mention any complaints of back pain until July 27, 1989, and which indicated that there were no objective findings to support claimant's complaints. The administrative law judge noted that claimant had not informed his supervisor of any back pain when he had requested permission to go to employer's medical facility on June 6, 1989, and that he failed to mention any back pain when he arrived at that facility. Finally, the administrative law judge rejected claimant's assertion that Dr. Dyas' testimony supports his claim of a back injury. The administrative law judge noted that Dr. Dyas testified and that his reports reflected that claimant had no new injury to his back and that the objective testing performed proved normal with the exception of spinal stenosis, which was not trauma-induced but rather related to the aging process and not unexpected in individuals of claimant's age and size. The administrative law judge further concluded that at most, Dr. Dyas stated that claimant suffered a back strain which should have resolved within 6 to 12 weeks and that this conclusion was not entitled to any weight because in making this diagnosis Dr. Dyas erroneously assumed that claimant had been complaining of back pain since June 6, 1989, an assumption not supported by the record. The administrative law judge also rejected Dr. Dyas' opinion that the abnormal gait resulting from claimant's 1987 knee injury was a factor in his back sprain, concluding that claimant's knee condition had not changed appreciably since 1988 and that if his gait were the cause of his strain, it would have manifested itself earlier.

The administrative law judge further found that even if claimant established the first prong of his *prima facie* case, *i.e.*, harm to his back, he did not establish the second, *i.e.*, that working conditions or circumstances which could cause the harm existed. The administrative law judge then determined that even if claimant established his *prima facie* case, the evidence supports rebuttal of the Section 20(a) presumption, and that upon weighing the evidence as a whole, he would find that claimant did not suffer any new impairment or aggravation of his knee condition or any work-related back injury after June 6, 1989. Assuming further that claimant did establish a work-related injury, the administrative law judge reasoned that he would only be entitled to permanent partial disability, because employer established the availability of suitable alternate employment. Finally, the administrative law judge determined that claimant was not entitled to reimbursement for the treatment provided by Dr. Dyas inasmuch as this treatment was unauthorized. Claimant, representing himself, appeals the denial of benefits. Employer responds, urging affirmance.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

After careful review of the record, we affirm the administrative law judge's denial of benefits because his finding that claimant failed to establish the injury/harm element of his *prima facie* case is rational, supported by substantial evidence, and in accordance with law. See *O'Keeffe*, 380 U.S. at 359. The administrative law judge acted within his discretion in crediting Dr. Bomboy's opinion that claimant sustained no new impairment or aggravation of his knee after June 6, 1989, and exhibited no objective clinical signs of any back injury or disability over Dr. Dyas' diagnosis of a lumbosacral strain. It was not unreasonable for him to have done so based on the admitted lack of supporting objective findings to support claimant's complaints, the fact that Dr. Dyas' diagnosis was premised on an erroneous factual assumption as to when claimant first began complaining of back pain, and in light of claimant's failure to contemporaneously report the alleged back injury. The administrative law judge, as the trier-of-fact, is not bound by the opinion of any particular medical expert, but is free to accept or reject all or any part of the evidence as he sees fit. See generally *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); see also *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). The administrative law judge, however, did improperly set his expertise against that of Dr. Dyas in rejecting his opinion that the abnormal gait resulting from claimant's prior 1987 knee injury was a factor affecting his back strain based on his own determination that if that had been the case, this problem would have manifested itself sooner. We conclude, however, that on the facts presented any error was harmless because the administrative law judge ultimately rejected Dr. Dyas' diagnosis of a back strain in favor of Dr. Bomboy's contrary opinion. Because the administrative law judge's finding that claimant failed to establish his *prima facie* case is rational and supported by substantial evidence, his denial of disability compensation is affirmed. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Inasmuch as we affirm the administrative law judge's finding that claimant does not have a work-related back problem, his determination that claimant is not entitled to reimbursement of the medical treatment for his back provided by Dr. Dyas is also affirmed. See generally *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 7, *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993). Moreover, as we affirm the administrative law judge's finding that a work-related back impairment was not demonstrated, we need not address his remaining findings.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge