

BRB No. 92-2500

GLADYS E. DAVIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
U.S. DEPARTMENT OF ARMY/NAFC)	
)	
and)	
)	
ARMY CENTRAL INSURANCE FUND)	DATE ISSUED:_____
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

V. Lyle McPheeters, Oklahoma City, Oklahoma, for the claimant.

Tenal S. Cooley, III (Looney, Nichols, Johnson & Hayes), Oklahoma City, Oklahoma, for the employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-2160) of Administrative Law Judge G. Marvin Bober denying benefits on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). 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).

On December 17, 1987, claimant sustained injuries to her shoulders, lower back, and right hip, when she slipped on some ice and fell down a flight of stairs while working for employer as a janitor/housekeeper at the Fort Sill Military Base in Fort Sill, Oklahoma.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant was treated initially at the Memorial Hospital emergency room in Lawton, Oklahoma, and later by Dr. Barnes, a general practitioner. In June 1988, Dr. Barnes referred claimant to Dr. Simpson, an orthopedist, who diagnosed an axial spine injury secondary to the work accident, radiculopathy secondary to disc herniation, and a significant clinical depression secondary to her work situation and injuries. Claimant has not returned to gainful employment since the work injury. Employer voluntarily paid claimant temporary total disability compensation from December 18, 1987 through April 4, 1989, and temporary partial disability benefits from April 29, 1989 through February 12, 1990. 33 U.S.C. §908(b), (e). Claimant sought continuing permanent disability compensation under the Act.

Crediting the opinion of employer's physician, Dr. Tate, a neurosurgeon, that claimant exhibited no evidence of physical impairment and is physically able to perform her usual work, over the contrary opinion of claimant's treating physician, Dr. Simpson, the administrative law judge denied the claim, finding that claimant failed to establish a *prima facie* case of total disability. The administrative law judge also denied claimant's request for future medical benefits pursuant to 33 U.S.C. §907, and her request for an attorney's fee pursuant to 33 U.S.C. §928.

Claimant appeals the denial of disability compensation, arguing that the administrative law judge erred in failing to consider whether she was entitled to permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), inasmuch as Dr. Simpson opined in his September 20, 1990, report that claimant has a 28 percent total person impairment based on her back injury and a 15 percent impairment based on her clinical depression, which amounted to a combined total impairment of 39 percent. *See* CX. 1 at 4. Claimant asserts that although claimant's injuries are not visible through objective medical testing, Dr. Simpson's opinion is sufficient to establish that claimant is permanently partially disabled within the meaning of the Act. Claimant further contends that the administrative law judge erred in concluding that she did not establish a compensable work injury based on the report of Dr. Tate, inasmuch as this report is inconclusive and does not identify her impairment due to clinical depression. Claimant, in addition, asserts that inasmuch as the parties stipulated that her injury arose out of and in the course of her employment, the administrative law judge erred in concluding that claimant had not introduced evidence sufficient to establish a *prima facie* case under Section 20(a), 33 U.S.C. §920(a). Finally, claimant maintains that, in any event, employer has not met its burden of rebutting the presumption afforded to claimant by Section 20(a).

After careful review of the record, we affirm the administrative law judge's denial of disability compensation in this case. Initially, we agree with the claimant that inasmuch as the parties stipulated that claimant's injury arose out of and in the course of her employment, there was no need for the administrative law judge to have addressed the question of whether claimant introduced evidence sufficient to establish her *prima facie* case under Section 20(a).¹ Although the

¹Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that her disabling condition is causally related to her employment if she shows that she suffered a harm and that employment conditions existed, or a work accident occurred, which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1992). The Section 20(a) presumption does not, however, aid claimant in establishing the extent of

administrative law judge erroneously concluded that claimant did not succeed in establishing her *prima facie* case under Section 20(a), this error is harmless on the facts presented because the administrative law judge nonetheless considered and properly evaluated the evidence relating to the extent of claimant's disability.

Contrary to claimant's assertions, Dr. Simpson's opinion that claimant has a 28 percent impairment based on her back injury and a 15 percent impairment based on her clinical depression does not establish entitlement to an award of permanent partial disability compensation pursuant to Section 8(c)(21) of the Act. Disability is an economic as well as a medical concept. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69,74 (CRT) (D.C. Cir 1990); *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 798, 21 BRBS 45, 47 (CRT)(D.C. Cir. 1988), citing *Crum v. General Adjustment Bureau*, 738 F.2d 474, 479, 16 BRBS 115, 122 (CRT)(D.C. Cir. 1984). See also *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259, 23 BRBS 89, 93-94 (CRT)(9th Cir. 1990), cert. denied, 111 S.Ct. 798 (1991).

In the present case, the administrative law judge credited evidence demonstrating that claimant suffers no impairment precluding her return to work. The administrative law judge found the January 15, 1992, opinion of Dr. Tate, employer's medical expert, indicating that claimant exhibited no evidence of physical impairment and was capable of performing her usual work more persuasive than that of Dr. Simpson. The administrative law judge noted that the record was devoid of any objective medical evidence to support Dr. Simpson's diagnosis of a 39 percent total person impairment. The administrative law judge also noted that Dr. Tate's opinion was in accordance with claimant's negative medical test results; claimant underwent several X-rays, an MRI, and a CT scan, all of which proved to be normal. After weighing all of the medical evidence, the administrative law judge found that there was no persuasive evidence to support a finding that claimant is unable to return to her usual employment as a custodial worker.

We conclude that Dr. Tate's opinion that claimant has no objective evidence of any residual impairment due to the subject work injury which would preclude her from performing her usual work in conjunction with the administrative law judge's negative credibility assessment of Dr. Simpson's opinion provides substantial evidence to support the administrative law judge's denial of disability compensation in this case. Although claimant suggests that Dr. Tate's opinion cannot properly support the denial of benefits because he did not address her clinical depression, we note that the administrative law judge found that there was no objective evidence to support Dr. Simpson's 39 percent impairment rating, which included the 15 percent impairment due to her depression. We further note that Dr. Simpson indicated that claimant's clinical depression was secondary to the residual effects of her physical injury, which the administrative law judge in essence found did not exist based on Dr. Tate's opinion. Accordingly, on the facts presented, we find no merit to claimant's assertion. As claimant has failed to raise any reversible error committed by the administrative law judge in weighing the conflicting medical evidence and making credibility determinations, we affirm the administrative law judge's denial of disability benefits in this case. See *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

her disability. See *Holten v. Independent Stevedoring Co.*, 14 BRBS 441, 443 (1982).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge