

GARY NITSCHKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COASTAL TANK CLEANING	)	DATE ISSUED: 07/27/2006
	)	
and	)	
	)	
AMERICAN INTERNATIONAL	)	
ADJUSTMENT COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary Nitschke, Pacific, Washington, *pro se*.

Robert J. Burke, Jr., and Raymond H. Warns, Jr. (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

Before: DOLDER, Chief Administrative Law Judge, SMITH and BOGGS, Administrative Law Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (2001-LHC-2330) of Administrative Law Judge Richard K. Malamphy 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 filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). This case is before the Board for the third time.

Claimant alleged that he was physically and psychologically injured at work on January 25, 1990, after falling 20 feet into a tank of the *U.S.S. Nimitz*. In his first Decision and Order, the administrative law judge found that claimant injured only his knees in this accident and that claimant's psychological disorders are not work-related. The administrative law judge ordered employer to pay claimant temporary total disability benefits from January 25, 1990, through May 22, 1991, and permanent partial disability benefits for a five percent impairment to each leg, 33 U.S.C. §908(c)(2), as stipulated by the parties. Subsequently, the administrative law judge awarded claimant's counsel an attorney's fee of \$25,077. Claimant, without the assistance of counsel, appealed the administrative law judge's decision. Employer responded in support of the decision on the merits, but appealed the administrative law judge's award of an attorney's fee.

In its first Decision and Order, *Nitschke v. Coastal Tank Cleaning*, BRB Nos. 02-0799/A (Aug. 12, 2003) (unpublished), the Board vacated the administrative law judge's finding that claimant injured only his knees in the accident and remanded the case for findings, pursuant to Section 20(a), 33 U.S.C. §920(a), as to whether claimant suffered any additional work-related injuries. The Board also vacated the administrative law judge's award of an attorney's fee and remanded for further consideration of the amount of an appropriate fee, consistent with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), as well as the criteria at 20 C.F.R. §702.132.

On remand, the administrative law judge applied the Section 20(a) presumption to claimant's alleged injuries to his back, hips, thighs, feet, ankles, shoulder, neck, and wrist, as well as to the alleged aggravation of his pre-existing psychological condition, finding that although claimant was entitled to invocation of the presumption, employer had produced sufficient evidence to rebut it. After weighing the evidence as a whole, the administrative law judge concluded that any injuries, other than those to claimant's knees, are not related to his January 25, 1990, fall. Further, the administrative law judge found his previous fee award disproportionate to claimant's overall success and awarded counsel a fee of \$7,000, payable by employer. Claimant, without the assistance of counsel, again appealed the administrative law judge's denial of additional compensation.

In its second Decision and Order, *Nitschke v. Coastal Tank Cleaning*, BRB No. 04-0512 (Feb. 3, 2005) (unpublished), the Board affirmed the administrative law judge's finding that claimant's psychological condition is not work-related. The Board affirmed the finding that employer rebutted the Section 20(a) presumption with respect to claimant's physical complaints, but vacated his finding that none of claimant's alleged physical injuries, except to his knees, is work-related due to the administrative law judge's failure to weigh all the relevant evidence. Thus, the case was again remanded to the administrative law judge. On second remand, the administrative law judge found that claimant did not establish that any injuries to his back, neck, or ankles are related to the

work accident. Claimant appeals this decision, without legal representation. Employer responds, urging affirmance.

Once the administrative law judge finds that the Section 20(a) presumption is invoked and rebutted, as in this case, he must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The administrative law judge found that claimant failed to satisfy his burden of establishing that he sustained other work-related injuries, as the administrative law judge found the opinions of Drs. O'Neill and Billett entitled to little weight.

It is well established that the administrative law judge is entitled to draw inferences from the evidence and to determine the weight to be accorded to medical opinions. The Board may not reweigh the evidence or substitute its judgment for that of the administrative law judge. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9<sup>th</sup> Cir. 1988); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999). The administrative law judge rationally gave less weight to Dr. Billett's opinion, as he did not first examine claimant until nine years after the accident. *See generally Palmer Coking Coal Co. v. Director, OWCP*, 720 F.2d 1054 (9<sup>th</sup> Cir. 1983). The administrative law judge also rationally gave less weight to the opinion of Dr. O'Neill, as he found her opinion that claimant's complaints are work-related is not based on objective criteria and is contrary to the weight of the medical evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge rationally rejected the evidence supportive of claimant's claim that he injured body parts other than his knee in the work-related fall, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. *Goldsmith*, 838 F.2d 1079, 21 BRBS 30(CRT).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge