

BRB Nos. 96-1030
and 96-1030A

ALONZO WILCOX)
)
 Claimant-Respondent)
 Cross-Petitioner)
)
 v.)
)
 WILMINGTON STEVEDORES)
)
 and) DATE ISSUED: _____
)
 SIGNAL MUTUAL INSURANCE)
 ASSOCIATION)
)
 Employer/Carrier-)
 Petitioners)
 Cross-Respondents) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits and Order Evaluating a Motion for Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Timothy W. Garvey (Marvin I. Barish Law Offices), Philadelphia, Pennsylvania, for claimant.

Andrew B. Klaber (Weber Goldstein Greenberg and Gallagher), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Denying Benefits and Order Evaluating a Motion for Reconsideration (94-LHC-1169) of Administrative Law Judge Ainsworth H. Brown 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). 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 was operating a forklift for employer at the Port of Wilmington when he was injured on July 19, 1993, after being struck in the back by a carton of apples. Claimant filed a claim for benefits under the Act on September 23, 1993, seeking disability benefits after September 12, 1993, and the payment of medical benefits.¹ EX-2. After a formal hearing, the administrative law judge issued a Decision and Order denying continuing disability compensation. The administrative law judge did award medical benefits, however, directing employer to pay \$3,424 for unpaid medical bills that were found to be “reasonable and necessary for [claimant’s] medical treatment.” Decision and Order at 11. On employer’s motion for reconsideration, the administrative law judge reaffirmed his decision to award medical benefits.

Employer appeals the administrative law judge’s award of medical benefits, while claimant contests the denial of disability compensation. Upon consideration of the arguments raised on appeal, the administrative record as a whole, and the decisions of the administrative law judge, we conclude that the Decision and Order denying benefits is supported by substantial evidence and accords with applicable law. We also conclude that the administrative law judge did not abuse his discretion in denying employer’s request for reconsideration of the award of medical benefits in this case. We therefore affirm the Decision and Order and Order Evaluating a Motion for Reconsideration in all respects.

At the outset, we reject employer’s challenge to the award of medical benefits. As the administrative law judge stated, employer did not effectively challenge claimant’s entitlement to medical benefits at the hearing or before the issuance of the Decision and Order. Indeed, in his opening statement, counsel for employer stated simply that it “has provided Claimant with compensation benefits and medical care until they determined that claimant was fully recovered.” Tr. at 17. In his Decision and Order, the administrative law judge therefore found employer liable for the unpaid medical expenses, finding the treatment, physical therapy, and diagnostic studies necessary for the treatment and care of claimant’s work-related injury. 33 U.S.C. §907. Employer challenged the award of medical benefits in a motion for reconsideration before the administrative law judge, asserting for the first time that the medical care for which payment was sought was unauthorized and not supported by the record. The administrative law judge denied these arguments as belated, and declined to address them on the merits.

¹Employer voluntarily paid claimant temporary total disability benefits from July 20 through November 28, 1993.

We review the administrative law judge's denial of reconsideration for an abuse of discretion, see *Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 13 (1993), and find none in this instance. The administrative law judge reasonably concluded that employer failed adequately to raise this issue in a timely manner, and acted within his considerable discretion in declining to entertain employer's belated challenge to the award of medical benefits. Moreover, the administrative law judge's implied finding, that such benefits were reasonable, necessary, and related to the treatment of a work-related injury is supported by substantial evidence, as Drs. Hershey and Lee recommended the treatment for claimant's back injury. See CXs-D, E. Further, we reject employer's assertion that the administrative law judge's finding that claimant was not disabled after September 13, 1993, is inconsistent with his award of medical benefits. Claimant need not suffer economic disability to be entitled to medical benefits, *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187 (1988), and will satisfy the criteria for entitlement to medical benefits by establishing that the medical care is appropriate for, and related to, the work-related injury. *Id.* The administrative law judge's finding that this medical treatment was reasonable and necessary is supported by substantial evidence based on the record as a whole and accords with applicable law. We therefore affirm the award of medical benefits in this case.²

We also reject the argument, raised in claimant's cross-appeal, that the administrative law judge erred in finding that claimant suffered no residual disability after September 13, 1993, when he was found able to return to his former longshore employment. The administrative law judge reviewed all of the medical evidence of record as well as claimant's subjective complaints, and found that the evidence of disability was essentially in "equipoise, at best." Decision and Order at 10. Citing the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994), the administrative law judge concluded that claimant failed to carry his burden of establishing that he was disabled to any extent beyond September 13, 1993.

²Employer contends that claimant's medical benefits should be barred for failure to obtain employer's authorization to change medical service providers. See 33 U.S.C. §907(c)(2). We have no occasion to reach this contention, for not only was this specific issue not raised before the administrative law judge at the hearing or before the issuance of the Decision and Order, but employer failed to develop the record on this point.

Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of his work-related injury, see *Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290, 292 (1994); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1985), and must initially establish that he is unable to return to his usual employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1, 5 (CRT)(2d Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986). The administrative law judge noted that Drs. Gross and Eckbold found no objective evidence of impairment, EXs-9, 10, 11, 35, and that they were suspicious of claimant's subjective complaints, noting inconsistencies between flexibility tests such as leg flexion and sitting root tests which suggested "symptom magnification." EX-35 at 14, 20; see EXs-9-11. The administrative law judge found that Drs. Lee and Hershey also reported no objective evidence of impairment but nevertheless assessed claimant as disabled based on subjective factors.³ See CXs-C, D, L; EX-14.

We affirm the administrative law judge's finding that claimant was not precluded by his injury from returning to his usual longshore work after September 13, 1993. He reasonably found that the opinions of Drs. Lee and Hershey were not sufficiently persuasive to demonstrate that claimant suffered a continuing disability in light of the absence of objective indicia of disability. While the administrative law judge may credit subjective complaints of pain, see *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80 (CRT)(5th Cir. 1991), as well as medical opinions derived therefrom, he is not required to do so. The administrative law judge has considerable discretion in evaluating the evidence of record, see *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962), and we may not engage in a *de novo* review of the record. See *Burns v. Director, OWCP*, 41 F.3d 1555, 1562-63, 29 BRBS 28, 37-39 (CRT)(D.C.Cir. 1994). Because the administrative law judge's findings are neither inherently incredible nor patently unreasonable, see *Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), we affirm the administrative law judge's finding that claimant failed to establish that he was disabled by his work-related injury after September 13, 1993.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits and his Order Evaluating a Motion for Reconsideration are affirmed in all respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

³Dr. Lee assessed claimant as having a 20 percent disability to his back, EX-14, and Dr. Hershey stated that claimant could not return to work as a longshoreman. CX-C, D, L.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge