BRB No. 96-1743

BENNY LEE WHITE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOUISIANA DOCK COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
AMERICAN COMMERCIAL MARINE SERVICE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Stephen B. Murray and Charles R. Ward, Jr. (Murray Law Firm), New Orleans, Louisiana, for claimant.

Wayne G. Zeringue, Jr. and Brett M. Bollinger (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-2412) of Administrative Law Judge Lee J. Romero, Jr., 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 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 May 17, 1993, while working for employer as a welder, claimant fell from a ladder onto the deck of the dry dock. As a result, claimant felt pain from his back through his neck and numbness throughout the right side of his body. Claimant was treated and released to light duty work, and on May 26, 1993, was released to full duty work, although he was still complaining of pain. Claimant alleged that while he was at work on May 27, 1993, his right knee gave way as a result of the injuries he sustained on May 17, causing him to fall down a flight of stairs. Employer voluntarily paid compensation and medical expenses from May 28, 1993, until July 14, 1993, at which time claimant's treating physician, Dr. Shackleton, found that claimant could return to his regular work insofar as his neck and back were concerned. Claimant thereafter did not return to his regular employment, but obtained employment as an auto mechanic. He sought additional temporary total disability, scheduled permanent partial disability, and medical benefits.

In his Decision and Order, the administrative law judge awarded claimant reasonable and necessary medical expenses and temporary total disability benefits for his back, neck and shoulder injuries from May 17, 1993 until July 14,1993. The administrative law judge denied both disability and medical benefits for claimant's right knee injury, however, based on his determination that it was not work-related. Claimant appeals the denial of benefits for the injury to his knee, arguing that administrative law judge disregarded or misinterpreted the testimony of Drs. Shackleton and Nutik. 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, 145 (1991) (1991); *Gencarelle v. General Dynamics Corp.*22 BRBS 170, 175 (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 evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Department of Labor,* 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). 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); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

We affirm the denial of benefits for claimant's right knee condition as the administrative law judge's determination that claimant's right knee condition is not causally related to his May 1993 work accidents is rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359. After determining that claimant was entitled to invocation of the Section 20(a) presumption, the administrative law judge found that employer introduced evidence sufficient to rebut the presumed causal nexus. In so concluding, the administrative law judge found that all of the treating physicians with the exception of Dr. Shackleton were of the opinion that claimant's knee injury was not causally-related to his

May 1993 work accidents. In this regard, the administrative law judge relied on the testimony of Drs. Cook and Gordillo, who opined that claimant's knee condition was not related to his May 1993 work accidents.[1] EX-16 at 45; CX-15 at 45. In addition, the administrative law judge found that Dr. Reiss did not note any objective findings with regard to claimant's knee and that claimant did not complain about his knee until July 6. As the administrative law judge relied upon substantial evidence rebutting the presumed causal connection between claimant's right knee problems and his May 1993 work accidents, we affirm his rebuttal determination. *See Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21-22 (1995); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Having found rebuttal established, the administrative law judge proceeded to consider the causation issue based on the evidence as a whole. Based on the inconsistencies regarding claimant's complaints of knee pain, his failure to timely complain to employer, and the weight of the medical testimony, the administrative law judge ultimately concluded that claimant's knee injury is not causally-related to either his May 17 or May 27, 1993 work accidents. These findings are supported by substantial evidence. Contrary to claimant's assertions, in making this determination, the administrative law judge did not disregard Dr. Shackleton's opinion that claimant probably injured his knee on May 17, 1993, and that was the reason it gave out on him again on May 27, 1993. EX-14 at 21. Rather, the administrative law judge considered this testimony but found it unpersuasive because Dr. Shackleton indicated in a July 22, 1993, letter that it was beyond his expertise to determine the cause of claimant's knee condition, EX-14 at 12, and because he found that there was overwhelming medical testimony to the contrary. Decision and Order at 20-21. Although claimant argues that the administrative law judge was required to rely on Dr. Shackleton's testimony in light of his status as claimant's treating physician, it is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Moreover, Drs. Nutik and Gordillo, who were credited by the administrative law judge, also were claimant's treating physicians.

[1]The administrative law judge also relied on Dr. Nutik's testimony that he would have difficulty finding a direct relationship between claimant's knee injury and his two work-related accidents in finding rebuttal. While this testimony is not sufficient to sever the presumed causal nexus, any error is harmless in view of the other credited opinions.

We also reject claimant's argument that in so concluding the administrative law judge disregarded and/or misinterpreted Dr. Nutik's testimony. As claimant asserts, Dr. Nutik did depose in response to a hypothetical question posed by claimant's counsel, that a person can have a very small tear in the meniscus caused by trauma which does not result in pain until some time later. EX-13 at 23, 25, 27. Inasmuch, however, as Dr. Nutik also stated that given the delay involved between claimant's work-related accidents and the development of his symptoms he would have difficulty making a direct relationship with the two reported work accidents in the present case, EX-13 at 13, claimant's argument that the administrative law judge mischaracterized his testimony is without merit. As claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, his denial of benefits for claimant's right knee condition is affirmed. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 445 (1980), *cert. denied,* 440 U.S. 911 (1979).[2]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]In its response brief, employer contends that as claimant was paid full salary from May 17, 1993 until May 27, 1993, the administrative law judge erred in awarding him temporary total disability benefits for this period as this will result in double recovery. We decline to address this argument because it was not raised in a timely filed cross-appeal; the Board will only consider issues raised in response briefs when the arguments support the findings made by the administrative law judge. *See Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314, 318 (1988); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 193 (1984)