

GARY N. JOHNSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
AIR FORCE INSURANCE)	DATE ISSUED:
FUND)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Granting Summary Decision and Order Denying Motion for Reconsideration of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Gary N. Johnson, Sacramento, California, *pro se*.

Roy H. Leonard (Office of Legal Counsel, Air Force Services Agency), San Antonio, Texas, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without representation, appeals the Order Granting Summary Decision and Order Denying Motion for Reconsideration (99-LHC-2391) of Administrative Law Judge Daniel L. Stewart 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without representation, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are supported by substantial evidence, rational and in accordance with law. 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220; *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S.

359 (1965). If they are, they must be affirmed.¹

Claimant, a welder at McClellan Air Force Base in Sacramento, California, was involved in a traffic accident on the base in 1982, in which he injured his head, right arm and shoulder, and right knee. In 1983, 1986, and 1987, claimant sustained cumulative trauma injuries to his right shoulder. Claimant received awards for a 14 percent impairment to his right arm and a 23 percent impairment to his right knee pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. §8101 *et seq.* Upon an appeal to the Employees' Compensation Appeals Board, claimant was awarded continuing disability benefits after his employer failed to offer him a specific job within his physical restrictions.²

Thereafter, claimant filed a claim under the Nonappropriated Fund Instrumentalities Act, contending his work-related injuries are compensable under that extension of the Longshore Act. The Office of Workers' Compensation Programs denied the claim on the basis that claimant's sole remedy is under the FECA. RX 4. Upon referral of the claim to the Office of Administrative Law Judges, employer filed a motion for summary decision on the ground that claimant was not paid out of nonappropriated funds and therefore is limited to his recovery under the FECA.

The administrative law judge granted employer's motion for summary decision. The administrative law judge stated that employer's evidence that claimant was paid out of appropriated funds is uncontradicted, and he therefore concluded that claimant's claim does not come within the jurisdiction of the Act. Claimant filed a motion for reconsideration, contending that because he believes a third party may be liable for some of his injuries, jurisdiction under the Act attaches pursuant to Section 33 of the Act, 33 U.S.C. §933. The administrative law judge denied the motion, stating that Section 33 does not confer jurisdiction. Claimant appeals the administrative law judge's decisions.

¹Employer's motion to dismiss claimant's appeal for failure to raise a "substantial issue of law or fact" is denied in view of claimant's *pro se* status. 20 C.F.R. §§802.211(e), 802.220.

²Claimant subsequently received a disability retirement from the federal government and had to elect to receive one award or the other.

After consideration of the administrative law judge's decisions in light of the evidence of record and our statutory standard of review, we affirm the denial of benefits under the Act. The administrative law judge properly applied the standard for determining whether to grant summary decision. Summary decision is proper when there are no genuine issues of material fact and no controversy concerning inferences to be drawn from the facts, and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); 29 C.F.R. §18.41. The administrative law judge must look at the facts in the light most favorable to the party opposing summary decision to determine whether there is an absence of a genuine issue of fact. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

The administrative law judge's finding that there is no genuine issue of material fact is borne out by the record. As the administrative law judge stated, claimant offered no evidence or argument to contradict employer's submissions establishing that claimant was not paid out of nonappropriated funds.³ Employer submitted some of claimant's personnel records which show his pay classification as "WG 3806." RX 1, 5, 6, 7. Employer further offered the affidavit of Lynne Raft, Chief of the Human Resources Division, Air Force Services Agency. She affirmed that an employee in a "WG" pay classification is paid out of appropriated funds, and that no one paid out of nonappropriated funds would have such a classification. RX 8. The administrative law judge noted, moreover, that claimant received compensation for his injuries under the FECA, which is the exclusive remedy for the work-related injuries of those federal employees paid out of appropriated funds. *See* 5 U.S.C. §8116(c); *see McCall v. United States*, 901 F.2d 548 (6th Cir. 1990). The Longshore Act, by virtue of the Nonappropriated Fund Instrumentalities Act, is the exclusive remedy for the work-related injuries of those federal employees paid out of nonappropriated funds, as the FECA specifically excludes such persons from its coverage. 5 U.S.C. §§2105(c), 8171, 8173; *see Wilder v. United States*, 873 F.2d 285 (11th Cir. 1989); *Calder v. Crall*, 726 F.2d 598 (9th Cir. 1984); *Johnson v. United States*, 600 F.2d 1218 (6th Cir. 1979). As claimant did not counter employer's evidence establishing that he was paid out of appropriated funds, the administrative law judge's grant of employer's motion for summary decision is affirmed, as claimant's recovery under the Act is precluded as a matter of law.

³"Nonappropriated fund instrumentalities," such as recreational and retail activities on military bases, are not funded by congressional appropriations, and their expenses, including the salaries of their employees, are paid out of the earnings generated by the activity. *See generally Vilanova v. United States*, 851 F.2d 1 (1st Cir. 1988); *Calder v. Crall*, 726 F.2d 598 (9th Cir. 1984).

The administrative law judge's denial of claimant's motion for reconsideration also is affirmed. The administrative law judge properly noted that Section 33 of the Act, 33 U.S.C. §933, does not confer jurisdiction under the Act. Section 33(a) merely provides that a claimant need not choose between a workers' compensation remedy under the Longshore Act and a third-party suit for damages arising from the same injury, but it does not aid claimant in establishing that his claim comes within the jurisdiction of the Act or one of its extensions.

Accordingly, the administrative law judge's Order Granting Summary Decision and Order Denying Motion for Reconsideration are affirmed.⁴

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

³Claimant moved for an enlargement of time in which to file additional materials, and attached to this pleading copies of medical records from the Veterans Administration. Claimant's motion is denied. This evidence was not submitted to the administrative law judge for consideration, and the Board is not empowered to receive new evidence. *See* 20 C.F.R. §802.301(b); *Williams v. Hunt Shipyards, Geosource Inc.*, 17 BRBS 32 (1985). Nonetheless, we note that these documents do not aid claimant in establishing that his claim comes under the jurisdiction of the Act. Moreover, claimant has filed documents with the Board alleging "discrimination" and "prohibited personnel practices" by employer and the State of California under 38 U.S.C. Chapter 43. Claimant is advised that the Benefits Review Board's jurisdiction does not encompass this statute, and therefore this complaint cannot be addressed by the Benefits Review Board. Employer's motion to dismiss claimant's appeal due to his filing motions with new documents attached thereto is denied.

Administrative Appeals Judge