BRB Nos. 89-1329

BENJAMIN H. CRAFT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON U.S.A., INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Medical Benefits and Order Denying Reconsideration of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Lloyd C. Melancon (Milling, Benson, Woodward, Hillyer, Pierson & Miller), New Orleans, Louisiana, for the self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Medical Benefits and Order Denying Reconsideration (83-LHC-1466) of Administrative Law Judge Kenneth A. Jennings 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).

This case is before the Board for the second time. Claimant injured his neck on January 7, 1982, when he fell off a bunk bed while working for employer. Claimant was placed on medical leave of absence from January 10, 1982, until April 20, 1982, having undergone surgery for removal of a cervical disc on February 12, 1982.[1] Claimant returned to his usual job as a roustabout thereafter and worked at this position until June 28, 1982, when he quit his job, purportedly because of persistent pain in his lower back. Claimant sought disability and medical benefits under the Act,

[1]Employer voluntarily paid claimant temporary total disability benefits from January 10, 1982 until April 20, 1982.

alleging that his lower back pain was caused by the January 7, 1982, work injury.[2]

At the first hearing, the parties stipulated that claimant was injured in a work-related accident on January 7, 1982. Subsequent to the hearing, however, employer obtained sworn statements from four employees indicating that claimant fabricated the incident which allegedly occurred on that date. Employer then filed a motion to remand to the deputy commissioner or reopen the case, appending the sworn statements from its proposed witnesses. The administrative law judge denied employer's request to remand, but granted its motion to reopen the case for the sole purpose of hearing the testimony of one witness, Mr. Otha Horton. Employer also made a proffer of evidence of the sworn statements of the other three employees, asserting that they would testify in accordance with their statements if the administrative law judge permitted them to be called as witnesses.

In his initial Decision and Order, the administrative law judge credited claimant's testimony that he suffered an accident while in the course of his employment on January 7, 1982, over Mr. Horton's testimony that he fabricated the incident. The administrative law judge also found that claimant suffered a work-related neck injury on January 7, 1982, and was consequently temporarily totally disabled until April 20, 1982, when he was released to return to work by Drs. Tutor and Rabito. The administrative law judge, however, rejected claimant's claim that he suffered an injury to his lower back on January 7, 1982, and concluded that any physical difficulties claimant suffered in this area since February 1982 were not caused by the 1982 work injury. Accordingly, the administrative law judge found that employer was not liable for additional disability compensation beyond that previously paid. The administrative law judge further found that employer was not liable for the medical expenses claimed subsequent to April 20, 1982, pursuant to 33 U.S.C. §907 as they were attributable to claimant's non-work-related back injury. The administrative law judge denied employer's motion for reconsideration.

Claimant appealed the administrative law judge's finding that he did not suffer a work-related back injury on January 7, 1982, and his denial of disability benefits from June 28, 1982 to January 3, 1983. Claimant also maintained he was entitled to medical expenses incurred subsequent to April 20, 1982, for treatment of his back injury. Employer cross-appealed, contending that the administrative law judge erred in crediting claimant's testimony that an accident occurred at work on January 7, 1982, over the conflicting testimony of Mr. Horton. Employer also asserted that the proffered testimony from claimant's three co-workers corroborated and supported Mr. Horton's testimony and should be reviewed by the Board in the interests of justice.

In its Decision and Order dated March 31, 1988, the Board held that in finding claimant did not suffer a work-related back injury on January 7, 1982, the administrative law judge erred in failing to consider the Section 20(a), 33 U.S.C. §920(a), presumption. The Board noted that while the administrative law judge found that there were no objective medical findings to substantiate that claimant suffered an injury to his back, he did not consider whether claimant's complaints of pain were credible and thus sufficient to establish the "harm" element of his *prima facie* case. The Board

[2]Claimant obtained full time employment with Alcoa as a computer controller on January 31, 1983, and is currently employed in that capacity.

also rejected employer's argument on cross-appeal that the administrative law judge erred in not crediting Mr. Horton's testimony regarding the occurrence of the alleged work accident over claimant's testimony, finding that the administrative law judge's decision to credit claimant was neither inherently incredible nor patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

The Board therefore vacated the administrative law judge 's finding on the causation issue and remanded for him to consider whether claimant established the existence of an injury within the meaning of the Act. The Board noted that in finding that claimant's back injury was not work-related, the administrative law judge credited the opinion of Dr. Rabito, a cardiologist, that it is unlikely the fall from the bunk bed could be the cause of claimant's low back complaints, while disregarding that of Dr. Tutor, claimant's treating neurologist, who opined that the low back problem would be due to the fall off a bunk while on the job according to the history provided by claimant. The Board instructed the administrative law judge that if, on remand, he found that claimant invoked the Section 20(a) presumption, he should reconsider whether Dr. Rabito's opinion constitutes specific and comprehensive evidence to sever the causal connection between claimant's back injury and his employment, and if so, whether it is outweighed by Dr. Tutor's opinion regarding the cause of claimant's back injury. After affirming the administrative law judge's finding that claimant is not disabled due to his lower back condition, the Board finally held that if, on remand, the administrative law judge found that claimant's low back injury is causally related to his work, he must consider whether the medical treatment claimed after April 20, 1982, was necessary for the injury. *See* 33 U.S.C. §907.

On remand, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption based on his credible complaints of pain. In so concluding, the administrative law judge noted that the medical evidence in the record establishes that claimant began complaining to Dr. Tutor of lower back pain in mid-March 1982, approximately one month after his cervical disc surgery, and continued to relate back pain to Dr. Tutor through September 7, 1982. The administrative law judge also found that both Drs. Rabito and Banks had reported back complaints. The administrative law judge further determined that Dr. Rabito's "speculation" that it is unlikely claimant's fall from the bunk bed caused his back problems did not constitute specific and comprehensive evidence to sever the causal connection between claimant's back injury and his employment. The administrative law judge noted that Dr. Rabito saw claimant on only one occasion and that, furthermore, he was a heart specialist. Crediting Dr. Tutor's September 7, 1982, opinion that claimant's low back pain was caused by his January 1982 accident, in light of his status as claimant's treating physician, the administrative law judge found that claimant's back injury was caused by his fall from his bunk bed on January 7, 1982, and that accordingly employer was liable for $1,777.08 in past medical expenses as well as reasonable and necessary future medical expenses related to this condition.

On appeal, employer contends that the administrative law judge erred in finding that claimant was entitled to the benefit of the Section 20(a) presumption as there is no objective medical evidence in the record to support claimant's claim that he suffered a work-related back injury on

January 7, 1982. Employer further contends that even if the Section 20(a) presumption was invoked, it was rebutted by the facts that claimant did not complain of back pain until March 15, 1982, more than 2 months after the alleged incident, that Dr. Tutor noted no objective findings of a back problem, and that the record contained several negative diagnostic tests. Moreover, employer contends that because the administrative law judge's first decision establishes that the back injury did not result in any disability, his second decision awarding past and future medical benefits should be reversed. Finally, employer asserts that the testimony it proffered at the second hearing which indicates that claimant's injury occurred when he was off duty and did not arise out of his employment should be considered.

After review of the record, we affirm the administrative law judge's finding that claimant's back injury is work-related as it is rational, supported by the record, and in accordance with law. *See O'Keeffe*, 380 U.S. at 359. Contrary to employer's assertions, the administrative law judge acted within his discretion in finding that claimant established the "harm" element of his *prima facie* case under Section 20(a) based on his credible complaints of pain. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 57 (1992). Moreover, we need not consider employer's arguments regarding rebuttal, as the administrative law judge considered the record as a whole and credited Dr. Tutor's opinion as claimant's treating physician. Inasmuch as Dr. Tutor's opinion, attributing claimant's back injury to the work accident, provides substantial evidence to support the administrative law judge's ultimate finding that claimant's back condition is causally related to his employment, any error which the administrative law judge may have made in analyzing rebuttal is not dispositive. *See Peterson v. Columbia Marine Lines*, 21 BRBS 299, 303 (1988).

Contrary to employer's assertions, it was within the administrative law judge's discretion to credit Dr. Tutor's opinion over Dr. Rabito's opinion. *See Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 111 (CRT) (5th Cir. 1992); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). Accordingly, the administrative law judge's finding that claimant's back condition is work-related is affirmed. Inasmuch as claimant's back condition is work-related, and employer does not otherwise challenge the reasonableness or necessity of the medical services provided, the award of medical benefits is also affirmed. Contrary to employer's assertions, the fact that claimant's back condition did not result in disability is irrelevant, as Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical benefits. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984).

Lastly, we reject employer's assertion that the Board should consider the proffered testimony of claimant's co-workers, indicating that claimant's back injury did not occur in the course of his employment. As the proffered testimony was never admitted into the record before the administrative law judge, it cannot be considered by the Board in rendering its decision on appeal. *See Williams v. Hunt Shipyards Geosource, Inc.,* 17 BRBS 32 (1985). Moreover, the Board fully considered this issue in its initial decision, which constitutes the law of the case and will not be reconsidered. *See Oliver v. Murry's Steak*, 21 BRBS 348 (1988).

Accordingly, the Decision and Order Awarding Medical Benefits and Order Denying Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge