BRB No. 93-1477

DEMOSTHENES BOGDIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED:_____
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of James J. Butler, Administrative Law Judge, United States Department of Labor.

Michael Cohen (Dorsey Redland, Inc.), San Francisco, California, for claimant.

B. James Finnegan (Finnegan, Marks & Hampton), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (86-LHC-109) of Administrative Law Judge James J. Butler 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a broken left little finger in a fight with a co-worker on June 22, 1984. He filed a claim for benefits, and employer controverted the claim. After several continuances, a hearing was scheduled for November 25, 1986. On this date, claimant was in Greece; consequently, Administrative Law Judge Vivian Schreter-Murray dismissed the claim for claimant's failure to show good cause why he was unavailable for trial. The Board vacated the dismissal and remanded

the case for a hearing on the merits before another administrative law judge. *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989).

Claimant alleges he developed psychological problems related to the 1984 incident, as manifested by an April 4, 1990 "injury." Specifically, claimant alleges he began seeing a psychiatrist in 1986 because of the 1984 altercation and injury. He also claims he became physically and emotionally ill when, on April 4, 1990, he encountered the co-worker with whom he fought in 1984 near the site of the fight. He alleges this "injury" resulted in loss of sleep, work, and security. *See* Cl. Ex. II - P at 109-111. Employer controverted this claim. *Id.*

The case was assigned to Administrative Law Judge James J. Butler, and a hearing was scheduled for December 10, 1991.[1] Judge Butler identified the issues as: the nature and extent of disability to claimant's left hand; whether a claim had been filed for an alleged psychiatric injury; and the nature and extent of the alleged psychiatric injury. After sifting through volumes of evidence, the administrative law judge discredited Dr. Charles' opinion and determined that claimant had a work-related temporary total disability to his left hand from June 22 through August 15, 1984.[2] Decision and Order at 5; Emp. Ex. 4. Further, the administrative law judge credited the opinion of Dr. Brown over that of Dr. Harries and concluded that claimant's injury healed, leaving no residual disability. Decision and Order at 7, 13-14; Emp. Ex. 1. With regard to the April 4, 1990 incident, the administrative law judge concluded there was no injury or disability within the meaning of the Act, and that this incident was merely a manifestation of claimant's anger at employer for various alleged unfair labor practices.[3] *Id.* at 8-9, 11, 13-14. With regard to the alleged psychiatric impairment, the administrative law judge initially found that claimant first visited a psychiatrist, Dr. Satten, two years after the hand injury because he was upset his hearing had been delayed. Further, he found that claimant failed to file a claim for this alleged injury and, based on the findings of Dr. Huffaker and on the surveillance tapes, he concluded claimant is not suffering from post-traumatic stress disorder or any other psychiatric problem.[4] *Id.* at 9-10, 13-15.

Claimant appeals this decision, contending that Judge Butler is prejudiced against him and is unable to render a fair decision in this case. He also contends the decision is contrary to the evidence and that, based on filings, letters, and actions of the parties, the administrative law judge erred in finding there was no claim for a psychological injury filed. Employer responds, urging affirmance.

Initially, claimant contends the administrative law judge is biased against him. In claimant's

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[1]The trial lasted for eight non-consecutive days, concluding on January 22, 1992.

[2]Employer accepted liability for a temporary total disability to claimant's left hand, conceding that the injury occurred during the course of claimant's employment. Decision and Order at 4.

[3]The administrative law judge correctly concluded there was no Section 49, 33 U.S.C. §948a, claim filed for retaliatory discrimination and noted he is without jurisdiction to consider complaints concerning union-management relations. Decision and Order at 9.

[4]Judge Butler noted that claimant visited Dr. Satten four times in 1986 and did not see him again until 1991. Decision and Order at 9-11.

132-page brief, he lists numerous rulings on objections and motions which he feels are the result of bias.[5] Employer responds, arguing that claimant failed to file a written affidavit seeking disqualification of the administrative law judge; therefore, the issue is not proper for appeal. Pursuant to Section 18.31 of the Rules of Practice and Procedure Before the Office of Administrative Law Judges (OALJ Rules), 29 C.F.R. §18.31, a party who deems an administrative law judge unqualified for any reason shall file a motion to recuse, supported by an affidavit setting forth grounds, and the administrative law judge shall rule on the motion. Adverse rulings in the proceedings alone are insufficient to show bias. *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Olsen v. Triple A Machine Shops, Inc.* 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In this case, claimant did not comply with Section 18.31 and did not file such motion or affidavit. Claimant orally questioned Judge Butler's impartiality, *see, e.g.*, Tr. at 236-238, and noted in his brief that it would have been impossible to draft and file such a document during the trial; however, the law is clear: the party challenging the qualifications of the administrative law judge must file a motion with a supporting affidavit stating the reasons therefor. 29 C.F.R. §18.31. Claimant did not do so; therefore, he did not preserve this issue for appeal. *See Orange*, 786 F.2d at 728, 8 BLR at 2-198; *Raimer*, 21 BRBS at 100.

In addition, contrary to claimant's conclusion that the administrative law judge's rulings were based on bias, some of his complaints may be easily disposed. For example, that claimant did not receive the benefit of the "true doubt" rule is now in accordance with law. *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994). Moreover, the regulations give the administrative law judge great discretion in officiating the proceedings, especially with regard to the admission of evidence, including hearsay evidence.[6] Although formal

[5]For example, he contends the administrative law judge erred, *inter alia*, in: 1) failing to acknowledge or rule on claimant's motion to compel answers to his second set of interrogatories filed three months before the hearing; 2) disallowing hearsay testimony; 3) refusing to admit certain evidence; 4) failing to discuss all evidence of record in his decision; 5) not giving claimant the benefit of the "true doubt" rule; and 6) permitting a violation of claimant's privacy by allowing employer to search past medical records.

[6]Section 702.339 of the regulations permits an administrative law judge to investigate a case so as to best ascertain the rights of the parties, and Section 702.338 requires the administrative law judge to inquire fully into the matter and receive relevant testimony and evidence. 20 C.F.R. §§702.338, 702.339. The Board has interpreted these provisions as affording administrative law judges considerable discretion in rendering determinations pertaining to the admissibility of evidence. *See Olsen*, 25 BRBS at 44; *Wayland v. Moore Dry Dock*, 22 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). Because the admission of evidence is discretionary, the Board may overturn such a determination only if it is arbitrary, capricious, an abuse of discretion or not in accordance with law. *See generally Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in pertinent part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992).

rules of evidence are not controlling in these administrative proceedings, 33 U.S.C. §923(a), claimant incorrectly asserts that all hearsay must be admitted. Hearings before the administrative law judge follow relaxed standards of admissibility of evidence; however, the admission of evidence, including hearsay, depends on whether it is reliable and probative. *See Richardson v. Perales*, 402 U.S. 389 (1971); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968); *Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124 (1986).

Additionally, while the Administrative Procedure Act (APA) requires the decisions of administrative law judges to be complete, including findings, conclusions and reasons therefor, the APA does not require administrative law judges to discuss every minutiae of evidence presented. 5 U.S.C. §557(c)(3). In voluminous cases like this, such a requirement would be overwhelming and unduly burdensome. Moreover, the administrative law judge stated that he considered all the evidence, and he noted his reasons for discrediting certain evidence. *See* Decision and Order at 4-6. Therefore, the administrative law judge acted within his discretion and in accordance with law. As claimant failed to properly raise the issue of the administrative law judge's impartiality, and as adverse rulings alone do not show bias, we reject the argument that the administrative law judge was unable to decide this case fairly.

Next, claimant contends that based on the actions of the parties the administrative law judge should have found that a claim for a psychological disability had been filed. The administrative law judge determined that claimant filed a notice of injury, as required by Section 12 of the Act, 33 U.S.C. §912, in 1990. This filing, he found, does not constitute a claim for compensation, as such a finding would render Section 13, 33 U.S.C. §913, superfluous. Decision and Order at 11. He also determined that the 1990 document "does not report an "injury" at all" and does not attempt to link his alleged psychological injury "to the hand injury sustained over five years earlier." *Id.* at 8, 11. Although the administrative law judge found that no claim for psychological problems had been filed, we need not address this issue.

As an alternate finding, the administrative law judge stated that even if the Section 12 notice could be considered a timely claim for compensation, claimant does not have a psychological problem. The administrative law judge discredited the opinions of Drs. Doumas and Satten and credited the opinion of Dr. Huffaker[7] that claimant does not have post-traumatic stress syndrome or any other psychological illness.[8] Decision and Order at 13; Emp. Ex. 2. Claimant has the burden of

[7]After claimant's refusal to submit to psychological testing, Dr. Huffaker diagnosed "adjustment disorder with mixed emotional features in full remission[.]" Emp. Ex. 2. Dr. Huffaker concluded that claimant's ability to work and his ability to participate in enjoyable activities do not reflect a psychiatric disability, that anxiety and irritation do not equate to a disability, that claimant has fully recovered from whatever psychological problems he may have had, and that continued treatment with Dr. Satten is unnecessary. *Id.*

[8]The administrative law judge also noted from Dr. Hartocollis' report that claimant had "probably paranoid" ideas about co-workers and that he sought psychiatric disability certification for later use in litigation. Decision and Order at 10; Emp. Ex. 7 at 181.

establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). Based on the rational credibility determinations, claimant has failed to meet his burden. The administrative law judge's finding of no psychological disability is supported by substantial evidence and must, therefore, be affirmed.[9] *See, e.g., Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[9]The administrative law judge's finding that claimant has no residual disability to his hand is also supported by substantial evidence. *See* Emp. Ex. 1.