BRB Nos. 95-1224
and 96-0359

RUFUS L. SMITH, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVENS SHIPPING & TERMINAL COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
THE SCHAFFER COMPANIES, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits, Order Rejecting Motion for Reconsideration and/or to Supplement the Record and Order Denying Modification of George P. Morin, Administrative Law Judge, United States Department of Labor.

Rufus L. Smith, Charleston, South Carolina, *pro se*.

Benford L. Samuels, Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits, the Order Rejecting Motion for Reconsideration and/or to Supplement the Record, and the Order Denying Modification (93-LHC-2956) of Administrative Law Judge George P. Morin 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). In an appeal by a *pro se* claimant, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleges that he sustained disabling injuries to his cervical spine and back in a work-

related accident on September 25, 1992, and he has not worked since that date. Employer voluntarily paid claimant temporary total disability benefits from September 25, 1992, the date of the injury, until January 29, 1993. Claimant sought temporary total disability compensation from January 29, 1993 to the date of the hearing, May 19, 1994, and permanent partial disability compensation thereafter, as well as expenses for continued medical treatment.

The administrative law judge denied benefits, finding that claimant failed to establish that he sustained any work-related harm to his back and neck due to the September 24, 1992, work accident and that claimant's back and neck problems were the result of his heavy weight lifting and prolonged workouts at the gym. The administrative law judge further found that assuming, *arguendo*, that claimant's back and neck problems are work-related, they are not disabling. As support for this finding, the administrative law judge noted that a majority of the physicians found no objective basis for claimant's pain and that his subjective complaints of pain are incredible given the surveillance evidence introduced by employer which depicted claimant performing heavy and long workouts at the gym.[1] Accordingly, both claimant's compensation claim and his claim for medical benefits were denied.

Thereafter, after requesting substitution of counsel, claimant filed a petition for reconsideration and/or petition to supplement the record with the administrative law judge, in which he asserted that all of the relevant evidence had not been presented and that employer would suffer no harm if claimant were allowed to supplement the record with additional medical evidence which was in existence but not submitted at the time of the initial hearing. The administrative law judge denied claimant's motion as untimely and instructed claimant to resubmit his motion with supporting documentation to the district director within one year as a timely filed motion for modification. Claimant appealed both the Decision and Order - Denying Benefits and Order Rejecting Motion for Reconsideration and/or to Supplement the Record, BRB No. 95-1224.

While the case was pending on appeal, claimant sought modification before the administrative law judge pursuant to Section 22 of the Act, 33 U.S.C. §922, contending that there had been a mistake in a determination of fact because certain medical evidence was not offered into evidence at the hearing. Claimant did not submit any supporting documentation or make any arguments regarding the relevancy of any evidence which he intended to submit. By Order dated June 27, 1995, the Board dismissed claimant's appeal and remanded the case for modification proceedings.

In an Order dated September 29, 1995, the administrative law judge denied modification, noting that claimant was represented by counsel at the initial hearing, that counsel's job was to determine what course claimant's case would take, and that it appeared that claimant was attempting to impermissibly utilize the modification provision as a "back door" to retry the case. In so

[1]Employer introduced surveillance evidence which indicated that claimant regularly engaged in heavy exercise and weight lifting, bench pressing 230 lbs. and performing several pyramid routines. EX-17.

concluding, the administrative law judge noted that it was not clear what evidence would be introduced since none had been included with claimant's modification petition and that, based on his review of the medical narratives which claimant presented as a part of his petition for reconsideration, no basis existed for reaching a result different from that reached in the original Decision and Order. Claimant then appealed the administrative law judge's Order Denying Modification and requested reinstatement of his prior appeal in BRB No. 95-1224. By Order dated March 7, 1996, the Board reinstated claimant's prior appeal and consolidated it with claimant's appeal of the administrative law judge's Order Denying Modification, BRB No. 96-0359, for purposes of decision.[2] 20 C.F.R. §802.104(a).

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 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a) presumption operates to link the harm or pain with claimant's employment. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 295-96, 24 BRBS 75, 80 (CRT) (D.C. Cir. 1990). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In order to establish rebuttal under Section 20(a), employer must establish that claimant's employment did not cause, aggravate or contribute to his disability. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2nd Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

After consideration of the administrative law judge's initial Decision and Order in light of the record evidence, we affirm his finding that claimant failed to establish that he sustained any work-related back or neck injury as it is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. at 359. The administrative law judge properly found that claimant established his *prima facie* case pursuant to Section 20(a), inasmuch as several physicians opined that claimant exhibited disc bulges and possible herniations, and the occurrence of the September 1992 work accident was not in dispute. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The administrative law judge also properly found rebuttal established based on his crediting of the opinion of claimant's treating physician, Dr. Howell, that there was no causal link between claimant's

[2]The Board has determined that the one year period for review provided by Public Law No. 104-134 commenced for both appeals no earlier than the date the new appeal and request for reinstatement were filed, November 15, 1995.

work-related September 1992 accident and his degenerative disc disease. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Having found rebuttal established, he proceeded to consider the causation issue based on an evaluation of the evidence as a whole. The administrative law judge found that Dr. Schimenti's opinion relating claimant's back and neck conditions to the September 1992 work accident was entitled to less weight than the other physicians' opinions because of her limited contact with claimant as an examining physician and the fact that her opinion that claimant exhibited evidence of cervical radiculopathy on an October 1992 MRI was inconsistent with the assessment of Dr. Howell and claimant's other treating physician, Dr. Jones. In addition, he noted that on claimant's second visit, Dr. Schimenti found no evidence of radiculopathy. CX-3, EX-18. In contrast, the administrative law judge found Dr. Howell's opinion that claimant's condition was, to a reasonable degree of medical probability, related to claimant's weight lifting activities and not the work accident, entitled to determinative weight based on his on-going treatment of claimant between March and November 1993. The administrative law judge also credited Dr. Howell's deposition testimony that the work accident did not make claimant's pre-existing degenerative disease symptomatic, because if it had, there would have been evidence of cord or nerve compression on claimant's October 1992 MRI which was not present. EX-15 at 18-19. Based on Dr. Howell's opinion, the administrative law judge ultimately concluded that claimant did not incur physical harm as a result of the September 24, 1992, work accident. EXS-12, 15.[3]

The opinion of Dr. Howell provides substantial evidence to support the administrative law judge's finding that claimant's disc problems are not related to the work injury. The administrative law judge's decision to credit Dr. Howell's opinion over that of Dr. Schimenti based on Dr. Howell's status as claimant's treating physician is a credibility determination within his discretionary authority. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1589 (1991). Inasmuch as the administrative law judge's decision to accord determinative weight to Dr. Howell's opinion is neither inherently incredible nor patently unreasonable, his denial of disability and medical benefits based on claimant's failure to establish that his disc problems are causally related to the September 1992 work injury is affirmed. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).[4]

[3]In weighing the evidence as a whole, the administrative law judge did not discuss the opinion of Dr. Jones, who found that based on claimant's description of his injury at the time he was initially seen there is the possibility that at least claimant's cervical pain with disc bulge at C6-7, and thoracic pain with disc protrusion at T1-2 with a more minimal protrusion at T6-7 is related to his September 25, 1992 work accident. EX-14. Any error the administrative law judge may have made in this regard is harmless on the facts presented, because the administrative law judge considered Dr. Jones's opinion in analyzing invocation and rebuttal of the presumption and ultimately found that claimant's testimony, which formed the basis of Dr. Jones's opinion, was incredible. *See* Decision and Order at 24, 26.

[4]In light of our affirmance of the administrative law judge's causation findings, we need not

We need not determine whether the administrative law judge's Order Rejecting Motion for Reconsideration and/or to Supplement the Record as untimely comports with applicable law. Any error which the administrative law judge may have made in this regard is harmless on the facts presented, inasmuch as the evidence which claimant sought to admit on reconsideration was ultimately considered by the administrative law judge in the modification proceedings, as discussed *infra*.

We affirm the administrative law judge's Order Denying Modification. In order to reopen the record under Section 22, 33 U.S.C. §922, the moving party must allege a mistake of fact or change of condition and assert that the evidence to be produced or of record would bring the case within the scope of Section 22. *Moore v. Washington Metropolitan Transit Authority*, 23 BRBS 49, 52-53 (1989). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aeroject-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *Dobson v. Todd Pacific Shipyards Corporation*, 21 BRBS 174 (1988); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968).

In the present case, claimant argued below that the administrative law judge's initial Decision and Order was premised on a mistake in a determination of fact because in the initial proceedings before the administrative law judge, claimant's prior counsel failed to submit certain relevant medical evidence. While recognizing that he possessed the authority to reopen the proceeding with regard to all mistaken determinations of fact, the administrative law judge nonetheless found that modification was not warranted. The administrative law judge noted that claimant had been represented by counsel at the initial hearing, and his job was to determine what course claimant's case would take. Citing *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371(D.C. Cir. 1976), the administrative law judge found that an allegation of a mistake in fact should not be a back door method to retry the case, which was what counsel here was attempting to do. Inasmuch as claimant's counsel conceded in his petition for reconsideration that the additional evidence he was seeking to introduce was available as of the time of the initial hearing, the administrative law judge's determination that counsel's failure to introduce this evidence initially was a mistaken trial tactic was not unreasonable. As Section 22 is not intended to shield a party from its litigation mistakes, the administrative law judge's denial of modification was a proper exercise of his discretionary authority on the facts presented in this case. *Id. See also General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits and Order Rejecting Motion for Reconsideration and/or to Supplement the Record are affirmed. BRB No. 95-1224. His Order Denying Modification is also affirmed. BRB No. 96-0359.

SO ORDERED.

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address the administrative law judge's alternative findings regarding disability.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge