BRB No. 07-0873

M.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MAINTENANCE & REPAIR	)	DATE ISSUED: 06/20/2008
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
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.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Maurice Bostick (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-02084) 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 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, a tugboat welder for employer, fell from a ladder at work on December 28, 2001. Claimant suffered a broken nose in this fall, which required surgery on January 25, 2002. Claimant also experienced headaches and back pain which he attributed to the fall. Claimant further alleged that the fall and resulting disability aggravated his pre-existing post-traumatic stress disorder (PTSD). Employer paid claimant temporary total disability benefits from January 22 through May 3, 2002, and some of claimant's medical expenses. Claimant sought ongoing disability benefits and medical benefits for treatment of his headaches, back pain and PTSD. Employer controverted the claim on the grounds that claimant was not disabled after April 15, 2002, that his back and PTSD injuries are not work-related, and that claimant did not seek authorization for specified medical treatment. At the time of the June 30, 2006, formal hearing, claimant had not returned to work for employer, and he alleged that he is unable to perform any work because of his work injuries.

In his Decision and Order, the administrative law judge found that claimant did not sustain a back injury or an aggravation of his PTSD as a result of the fall from the ladder. Therefore, he denied benefits for these conditions. The administrative law judge found that claimant's compensable nose and head injuries reached maximum medical improvement on May 3, 2002, and that claimant thereafter was not precluded from performing his usual work. Therefore, the administrative law judge denied disability benefits beyond those which employer paid. With regard to the claim for medical treatment by Drs. Sudderth and Macgregor, the administrative law judge found that claimant did not seek authorization to treat with these physicians and that employer therefore is not liable for the cost of their treatment. The administrative law judge found that employer remains liable for necessary treatment for claimant's nose injury and headaches.

On appeal, claimant contends that the administrative law judge erred in finding that his back injury is not work-related.[1] Employer responds, urging affirmance of the administrative law judge's denial of benefits. Claimant has filed a reply brief.

Claimant first contends that the administrative law judge erred in requiring him to prove that he sustained a harm to his back. Claimant contends that in order to invoke the

[1] We affirm as unchallenged on appeal the denial of benefits for the alleged work-related aggravation of claimant's PTSD. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Moreover, although claimant contends he is entitled to medical benefits if his back condition is determined to be work-related, claimant did not appeal the administrative law judge's finding that he failed to request authorization for treatment with Dr. Sudderth. Therefore, we affirm the denial of past medical treatment rendered by Dr. Sudderth. *Id.*

Section 20(a) presumption, 33 U.S.C. §920(a), he need only *allege* he sustained a back injury as a result of the fall from the ladder.

We reject this contention. In *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the Supreme Court stated that "a prima facie 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." *Id.*, 455 U.S. at 616, 14 BRBS at 633. The Court did not hold, however, that the claimant did not have to establish he actually sustained a physical harm. Indeed, the claimant in *U.S. Industries* had a neck injury. The administrative law judge found that the claimant fabricated the accident at work which was alleged to have caused the injury. Moreover, in emphasizing that "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer," the Court implicitly recognized that the claimant must establish that "'something unexpectedly [has gone] wrong with the human frame.'" *Id., citing Wheatley v. Adler*, 407 F. 2d 307, 313 (D.C. Cir. 1968).

The Board has consistently required that claimant prove that he sustained a physical or psychological harm or pain and that an accident occurred at work or working conditions existed that could have caused the harm without the benefit of the Section 20(a) presumption. *See, e.g., Kelaita v. Triple A Machine Shop,* (1981); *see also Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). In *Kelaita*, 13 BRBS 331, the Board stated that claimant "must prove these initial allegations which are the very basis of his claim and constitute his *prima facie* case," explaining that proving these facts without benefit of the presumption is not onerous, as claimant is fully capable of garnering evidence on these issues. In addition, the United States Court of Appeals for the Fifth Circuit has approved this two-fold requirement, irrespective of whether the court was called upon to address the precise scope of the "harm" element. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see also H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Indeed, the Fifth Circuit has explicitly stated that claimant must "prove" the harm and accident elements of his claim. *Port Cooper/T. Smith Stevedoring Co. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000);[2] *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Therefore, the administrative law judge properly required claimant to prove that he sustained a harm to his back that could have been caused by his fall from the ladder in order to be entitled to the benefit of the Section 20(a) presumption.

[2] The court stated, "To invoke the Section 920(a) presumption, a claimant must prove (1) that he or she suffered harm, and (2) that conditions existed at work, or an accident occurred at work, that could have caused, aggravated, or accelerated the condition." *Hunter*, 227 F.3d at 287, 34 BRBS at 97(CRT) (emphasis added).

Volpe v. Northeast Marine Terminals, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Contrary to claimant's contention, the administrative law judge did not require claimant to establish that the back pain is, in fact, related to the fall. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

Claimant contends the administrative law judge erred in finding he did not sustain any harm to his back, as Dr. Sudderth diagnosed L-4 radiculopathy related to the fall. Tr. at 207-208. The administrative law judge found that claimant's testimony, in general, cannot be credited because it is "riddled with contradictions, inconsistencies, inexplicable denials, and falsehoods." Decision and Order at 58. The administrative law judge also stated he could not credit Dr. Sudderth's opinion concerning claimant's condition because he testified that he lost his medical records in a tornado, yet was able to produce copies of claimant's records. The administrative law judge also found that Dr. Sudderth's opinion is not entitled to weight because he restricted claimant from working and testified claimant could perform only light-duty but found nothing inconsistent in a surveillance video showing claimant working at a seafood market where he was lifting baskets weighing up to 50 pounds, an action clearly contrary to a light duty restriction. *Id.* at 56-57.

Claimant does not challenge on appeal the administrative law judge's general rejection of his testimony and the opinion of Dr. Sudderth. Rather, he avers only that the administrative law judge misinterpreted one portion of Dr. Sudderth's opinion. Specifically, Dr. Sudderth opined that, generally, a work-related back injury will manifest itself within three months of the accident. Tr. at 211-212. Claimant's fall occurred on December 28, 2001, and claimant first complained of back pain in March 2002. The administrative law judge did not credit Dr. Sudderth's opinion that claimant has a back condition because claimant did not complain of back pain "until nearly three months" after his accident." Decision and Order at 62. The administrative law judge also declined to credit Dr. Mathai's opinion concerning claimant's back pain, finding Dr. Mathai based her opinion on claimant's "fallacious reporting of his symptoms and limitations." *Id.*

Although, contrary to the administrative law judge's finding, claimant did report the onset of back pain within the three-month period posited by Dr. Sudderth,[3] the denial of this claim rests on the findings that Dr. Sudderth's testimony and records are not creditable and that claimant's account of his back pain cannot be credited. Decision and Order at 60. The administrative law judge noted that claimant provided differing accounts of the onset of the back pain, incorrectly testified that Dr. Adkins referred him

[3] The accident occurred on December 28, 2001, and claimant first reported back pain in late March 2002.

to another physician for treatment of back pain, and was observed working at a seafood market despite his assertion of an inability to lift anything or to bend. *Id.* Moreover, claimant admitted lying to the Veteran's Administration in order to receive a greater disability rating and fallaciously alleged he broke his skull in the fall,[4] *see, e.g.*, CX 7; Tr. at 103, and the administrative law judge credited the opinion of Dr. Culver, a psychiatrist, who stated claimant was a malingerer and was fabricating symptoms of physical and mental illness. Tr. at 1212; EX 1 at 20-22. Dr. Sudderth confirmed that he relied on claimant's complaints of pain in concluding that he suffered from pain on palpation and that he suffered from positive straight leg raising at an eighty degree angle to his left side and consistently complained of pain when his leg was raised to a particular degree. Tr. at 210-211.

It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or 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). In this case, the administrative law judge provided rational reasons for finding claimant to lack credibility and for, as a result, rejecting the evidence supportive of claimant's claim that he injured his back. Consequently, as claimant failed to establish an essential element of his *prima facie* case, his claim for benefits was properly denied. *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

[4] Claimant signed an injury report in which he acknowledged falling five feet off a ten-foot ladder. Tr. at 110; EX 5 at 2. Claimant repeatedly increased the height of the ladder until he was informing medical providers that he fell 25 feet. Tr. at 197; EX 14; CX 7.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge