BRB No. 11-0583

JOHN E. GINDVILLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREENWICH TERMINALS, L.L.C.	)	DATE ISSUED: 02/28/2012
	)	
and	)	
	)	
COMPANION COMMERCIAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United Sates Department of Labor.

Stanley B. Gruber (Freedman & Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Oder Denying Benefits (2010-LHC-0705) of Administrative Law Judge Adele Higgins Odegard 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 stated that he twisted his knee when walking down a gangway on June 30, 2009, while working for employer. There were no witnesses to this accident. Claimant worked intermittently thereafter, until mid-July 2009, when his knee pain prevented him from working. Tr. at 86-102. Dr. DeLuca diagnosed degenerative joint disease and recommended a total right knee replacement.[1] CX 6. Claimant filed a claim under the Act on September 17, 2009, seeking treatment for his right knee condition. Employer has not paid any medical or disability compensation benefits to claimant for the alleged June 30, 2009, work injury.

The administrative law judge found that claimant suffers from a debilitating knee condition, but that he failed to establish that an accident occurred at work on June 30, 2009, or that working conditions existed that could have caused or aggravated his knee condition.[2] The administrative law judge, therefore, found that claimant is not entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his knee injury is work-related. Accordingly, the administrative law judge denied benefits. Claimant appeals the decision. Employer responds, urging affirmance.

On appeal, claimant challenges the administrative law judge's finding that he failed to establish a *prima facie* case of a compensable injury pursuant to Section 20(a).[3] He asserts that the administrative law judge erred in addressing employer's evidence when considering whether a *prima facie* case was made and that he submitted sufficient evidence to establish an injury at work on June 30, 2009. Employer responds, urging affirmance of the administrative law judge's decision.

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[1]On July 17, 2009, Dr. DeLuca restricted claimant from returning to work until after he had a total knee replacement.

[2]Claimant's knee problems began in the 1970s with a swimming accident that resulted in an open surgery to his right knee. Tr. at 25, 44-46, 112; CX 11. On November 27, 2000, claimant was diagnosed with advanced osteoarthritis in his right knee and was recommended for a total knee replacement as early as 2006. *Id*. at 114. In November 2007, claimant suffered a fall while working for employer and injured his left knee, which kept him out of work for three months. *Id*. at 46-47. Claimant had a right knee arthroscopy in 2000 and a left knee arthroscopy in 2008. CX 8-9.

[3]Claimant does not challenge the administrative law judge's finding that he did not establish that his general working conditions could have caused or aggravated his knee condition.

The claimant bears the burden of establishing the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated that harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes these two elements, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment, and the burden shifts to the employer to rebut the presumption by producing substantial evidence that the injury is not related to the employment. 33 U.S.C. §920(a); *see C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). When it is alleged that a prior injury is the cause of the claimant's current condition, the aggravation rule is implicated. The aggravation rule states that if an employment-related injury contributes to, combines with, or aggravates a pre-existing condition, the employer is liable for the entire resulting disability. *Id.*; *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc).*

Initially, claimant contends the administrative law judge erred in addressing evidence other than claimant's submissions to determine whether he established a *prima facie* case. We disagree. It is claimant's burden to establish the facts that: (1) he is injured; and (2) an accident occurred at work that could have caused the injury. *See Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Bolden*, 30 BRBS 71. The administrative law judge may assess the sufficiency of claimant's evidence supportive of his *prima facie* case in light of evidence that detracts therefrom. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Mackey v. Maine Terminals Corp.*, 21 BRBS 129 (1988). Further, it is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, the administrative law judge rationally assessed the credibility of claimant's testimony regarding the occurrence of a work-related accident in light of other relevant evidence of record. *Id.*; *see also Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *Bolden*, 30 BRBS 71; *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated on other grounds on recon.*, 24 BRBS 63 (1990).

Claimant also contends the administrative law judge erred in failing to find that an accident occurred at work on June 30, 2009. The administrative law judge found that claimant's testimony was inconsistent with, and uncorroborated by, the record as a whole. Claimant testified that he twisted his right knee while walking down the gangway on June 30, 2009, which caused him to limp. Claimant additionally stated that he then reported the accident to Captain Sammons, employer's Director of Safety, who was distributing safety vests on the terminal, and that Mr. Kosofsky, a co-worker, was with

Captain Sammons at the time. Tr. at 82-84. The administrative law judge noted there were no witnesses to the alleged incident.[4] Next, although claimant testified that he told each physician that he twisted his right knee on June 30, 2009, none of the physicians recorded any information about an incident at work occurring on that date. CX 6, 7, 10, 11; EX 14, 17. Drs. Arena, Lee and Freedman all noted that claimant's pain increased when he changed to a job that required more ladder climbing and gangplank walking.[5] CX 10; EX 14 at 37, 17 at 46. Dr. DeLuca stated, on July 6, 2009, only that claimant had a "recent" work injury but he did not date or describe any incident. CX 6 at 18. Dr. Sharkey made no reference to any incidents in 2009. CX 11. Based on this, the administrative law judge found it very unlikely that five separate orthopedic physicians examining claimant's knees would fail to record a new knee injury reported to them. This is a reasonable inference especially in light of the administrative law judge's finding that Dr. DeLuca, who had treated claimant's prior knee injuries in 2000 and 2007, recorded the circumstances surrounding those injuries in his treatment notes.[6] Decision and Order at 14; CX 6, 8 at 23, 9 at 35. Moreover, although Dr. DeLuca amended his July 6, 2009, work restriction document on May 25, 2010, changing the date of injury from November 13, 2007, to June 30, 2009, the administrative law judge found that Dr. DeLuca was not sure how the change was initiated and confirmed that the date of June 30, 2009, appears nowhere else in his treatment records and was not part of the original history he obtained. Decision and Order at 10; CX 6; CX 22 at 41.

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[4]Claimant asserts that the testimony of his son, John M. Gindville, that he witnessed claimant limping at work on June 30, 2009, supports his allegation of a work-related accident on that date. We disagree that this demonstrates error in the administrative law judge's finding. Mr. Gindville did not state that he witnessed claimant twist his knee on June 30, 2009.

[5]The administrative law judge found that claimant's alleged injury occurred within the first 70 minutes of working the first day of his new assignment and, thereafter, he did not perform any work, such as climbing ladders, that would have aggravated his condition. Decision and Order at 15.

[6]With regard to claimant's knee injury in 2000, Dr. DeLuca examined claimant on January 24, 2009, and specifically noted that claimant reported that "on January 2, 2000 while at work he was unloading a heavy object and when he twisted he felt a catching sensation in his knee. Recurrent swelling and pain followed this on the medial side of his knee." CX 8 at 23. With regard to claimant's knee injury in 2007, Dr. DeLuca examined claimant on December 14, 2007, and noted that claimant reported "[o]n November 13, 2007 while at work he fell from a ladder twisting his knee. He had immediate pain on the medial side of his knee." CX 9 at 35.

The administrative law judge also found claimant's testimony inconsistent with the testimony of Captain Sammons. Specifically, the administrative law judge found that, although claimant testified that he reported the June 30, 2009, work accident to Captain Sammons on June 30 and again on July 7 and July 20, 2009, Captain Sammons did not recall any such injury being reported. Tr. at 217, 220. Captain Sammons also stated there were no documents to support claimant's alleged reporting. *Id*. at 217. Moreover, although claimant's testimony is consistent with the testimony of Mr. Kosofsky, that while exchanging a safety vest with Captain Sammons on June 30, 2009, he heard claimant tell Captain Sammons that he twisted his knee, the administrative law judge was not persuaded by Mr. Kosofsky's testimony. The administrative law judge found Mr. Kosofsky's testimony contradicted by the testimony and records of Captain Sammons, which she found to be credible, because she witnessed Captain Sammons testify at the hearing and because his role as Director of Safety requires him to keep precise and accurate records.[7]

As the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence, her 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); *Donovan*, 300 F.2d 741. The Board is not empowered to reweigh the evidence. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge extensively explained her reasons for finding claimant's testimony incredible. Her credibility determinations are not patently unreasonable or inherently incredible, and they are affirmed. Consequently, as the administrative law judge found no credible evidence in the record to support claimant's assertion that an accident occurred at work on June 30, 2009, we affirm the administrative law judge's determination that claimant failed to establish the existence of a work-related incident on June 30, 2009, which could have caused his right knee condition. *See Goldsmith*, 838 F.2d 1079, 21 BRBS 27(CRT); *Bolden*, 30 BRBS 71; *Hartman*, 23 BRBS 201. As claimant failed to establish an essential element of his *prima facie* case, the administrative law judge properly denied his claim for benefits. *See U.S. Industries*, 455 U.S. at 608, 14 BRBS at 631; *Goldsmith*, 838 F.2d 1079, 21 BRBS 27(CRT).

[7]Captain Sammons's records showed that he issued only two safety vests on June 30, 2009, neither of which he issued to Mr. Kosofsky. EX 23; Tr. at 247. Thus, the administrative law judge found Mr. Kosofsky's testimony of having overheard a conversation while being issued a vest to be tenuous. Decision and Order at 8-9.

Accordingly, the administrative law judge's Decision and Order Denying Benefits 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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REGINA C. McGRANERY
Administrative Appeals Judge