

BRB Nos. 88-2016  
and 94-405

LEILA PARDEN )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ALABAMA DRY DOCK AND ) DATE ISSUED:  
 SHIPBUILDING COMPANY )  
 )  
 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeals of the Decision and Order - Rejection of Claim, Decision and Order Denying Motion and Amended Motion for Consideration, and Decision and Order on Remand of Administrative Law Judge A.A. Simpson, Jr., United States Department of Labor.

Leila Parden, Saraland, Alabama, *pro se*.

Douglas L. Brown (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves), Mobile, Alabama, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Rejection of a Claim, Decision and Order Denying Motion and Amended Motion for Consideration, and Decision and Order on Remand (87-LHC-1021 and 87-LHC-1022) of Administrative Law Judge A.A. Simpson, 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). The Board must affirm the administrative law judge's findings of fact and conclusions of law if they 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); 20 C.F.R. §§802.211(e), 802.220.

While working for employer as a welder, claimant alleged that she injured her neck on April 4, 1986. Claimant testified that the injury occurred when she caught one of her feet while climbing down a scaffold and fell backwards onto the deck of a vessel, with her head hitting the steel deck. No one witnessed claimant's fall, but a co-worker, Bobby Nummy, testified that he saw claimant get up from the deck, that when he asked if she were hurt, she answered, "well, I don't think so," and she told him she did not want to go to the first aid department. July 20, 1987 Tr. at 18. Claimant

testified, however, that before the end of the night, her neck and shoulders became stiff and painful.

The next evening, while working for employer, a vein burst in claimant's leg, and she went to the infirmary. Claimant testified that she told the nurse, Mr. Petersen, about her burst vein as well as her fall the previous day, and that he recorded each injury on a card, which she signed. Claimant testified that on the next day, Sunday, while at home, the pain in her shoulder became very severe, and she saw the shipyard doctor, Dr. Coleman, on Monday morning, who treated her for neck pain. Claimant was diagnosed as having degenerative disc disease and a bulge at C5-6. She last worked for employer on April 14, 1986.

The administrative law judge found that claimant saw four physicians, Drs. Coleman, McVay, Semon and Mudd between April 8 and April 15, 1986, for neck pain, but did not tell any of them that she fell at work on April 4, 1986. The administrative law judge considered that claimant informed Dr. Semon on June 27, 1986, and Dr. Zarzour in July 1986, that she fell at work on April 4, 1986, but found that claimant's account of her alleged accident was not credible because she first reported it when a dispute regarding the compensability of her medical treatment arose, *see* Emp. Ex. 11 at 16, 24, and she testified that she had neck pain on April 5, 1986, due to the fall, yet did not report the fall to Dr. Coleman on April 7. The administrative law judge also found employer's infirmary records do not indicate she fell on April 4, and Dr. Zarzour's July 26, 1986 report of claimant's work-related fall was not probative due to his reliance on claimant's recitation of the accident. The administrative law judge found that an incident did not occur at work on April 4, and that claimant's sudden onset of pain occurring at home on April 6 is not compensable.<sup>1</sup> The administrative law judge denied claimant's motion for reconsideration.

Claimant, through her attorney, appealed the decision to the Board. Claimant's counsel filed a Petition for Review and brief alleging that the administrative law judge erred in failing to find that a work accident occurred on April 4, 1986, that could have caused claimant's neck pain. While the appeal was pending, claimant sought to modify the administrative law judge's decision pursuant to Section 22, 33 U.S.C. §922, based on a mistake of fact, alleging that the administrative law judge erroneously determined that she did not report her alleged April 4 injury to Mr. Petersen, employer's nurse on duty that day.<sup>2</sup> Specifically, claimant's attorney, Stephen J. Flynn, stated that in a phone conversation on October 14, 1988, Mr. Petersen told him that claimant had reported her April 4 fall when she reported her burst vein, that he wrote a separate card for each injury, and that several weeks later the card describing the April 4 injury had been removed from the records by employer's Director of Insurance, Medical and Safety, Vernon Duke. The Board remanded the case for the administrative law judge to address claimant's request for modification, and dismissed claimant's

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<sup>1</sup>The administrative law judge found that even if claimant had suffered a work-related injury, Dr. Mostellar's opinion establishes that claimant had no permanent disability. In the alternative, assuming claimant could not return to her welding job, the administrative law judge found that claimant could work for employer as a safety inspector, a job which employer offered claimant and she refused.

<sup>2</sup>Simultaneous with filing the motion for modification, claimant's attorney withdrew from the case, as he had moved from Mobile to Boston.

appeal, BRB No. 88-2016, stating that if claimant's request were denied, claimant could request that the appeal be reinstated.

The administrative law judge denied claimant's motion for modification, stating that claimant had ample opportunity to submit additional testimony by Mr. Petersen prior to the close of the record and it was not in the interest of justice to now consider Mr. Petersen's deposition and supplemental hearing testimony. The administrative law judge nonetheless discussed Mr. Petersen's testimony, and found that he stated he completed only one card on April 5 for claimant's burst vein, and that although claimant mentioned a fall from a scaffold, she denied she had hurt herself and refused to have the fall documented. Mr. Petersen also testified that a card reporting claimant's alleged April 4 fall could not have been removed because he never wrote one. May 22, 1990 Tr. at 12, 14, 21. The administrative law judge noted that although there were some ambiguities in Mr. Petersen's deposition about which injury he recorded on April 5, his hearing testimony makes clear that he only recorded the April 5 burst vein injury. The administrative law judge also found that the medical evidence corroborates Mr. Petersen's hearing testimony in that Dr. Coleman stated claimant gave no history of an injury at work, Dr. McVay stated claimant experienced the onset of excruciating pain in her arm and shoulder in her kitchen at home, and Dr. Semon stated that the onset of claimant's severe neck, right shoulder and right arm pain occurred nine days prior to his examination, which would be Sunday, April 6. The administrative law judge concluded the evidence establishes that claimant's injury was caused by an April 6 incident at her home and not by a fall off the scaffold at work on April 4.

Claimant, appearing without counsel, appeals the administrative law judge's denial of her request for modification. In an Order dated February 4, 1994, the Board reinstated claimant's appeal, BRB No. 88-2016, and assigned claimant's appeal of the administrative law judge's denial of modification BRB No. 94-405. In BRB No. 88-2016, claimant contends that the administrative law judge erred in failing to apply the Section 20(a), 33 U.S.C. §920(a), presumption, and in failing to consider Mr. Nummy's testimony that he saw claimant rise from the deck which, claimant contends, establishes that she injured herself on April 4. Claimant also contends that the administrative law judge erred in finding she is not permanently totally disabled. In her appeal of the denial of modification, claimant contends that the administrative law judge erred in failing to find that she reported the April 4 injury to Mr. Petersen. Employer responds to both appeals, urging affirmance of the denial of benefits.

Claimant has the burden of proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case for invocation of the Section 20(a) presumption. *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of her *prima facie* case by affirmative proof. See *Bolden*, 30 BRBS at 72; *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); see also *Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994). Section 22 allows for modification of a compensation order on the ground of a change in conditions or because of a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v.*

*Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). The administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *Bolden*, 30 BRBS at 73; *see also 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).

We hold that substantial evidence supports the administrative law judge's finding that an accident did not occur at work on April 4, 1986. That evidence consists of Dr. McVay's record of the onset of pain on April 6 at claimant's home, Dr. Semon's April 14 note corroborating Dr. McVay's record, and Mr. Petersen's testimony in the modification proceedings. The administrative law judge's conclusion is further supported by the rational inference he drew from the absence of any record of claimant's alleged April 4 fall within the first two weeks of its alleged occurrence. Although the administrative law judge did not weigh Mr. Nummy's testimony, that he saw claimant get up from an apparent fall, this error is harmless in light of the administrative law judge's reliance on the medical records.<sup>3</sup> Further, the administrative law judge acted within his discretion in denying claimant's motion for modification on the basis of mistake in fact. Claimant has raised no reversible error in the administrative law judge's distinct determinations that claimant should have sought to introduce Mr. Petersen's testimony in the initial proceedings, and his finding that Mr. Petersen's subsequent testimony does not support claimant's allegation of a fall at work on the day in question. As claimant failed to establish the occurrence of an accident at work on April 4, 1986, that could have caused her neck problems, we affirm the administrative law judge's finding that the Section 20(a) presumption is not invoked and the consequent denial of benefits.<sup>4</sup> *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

Accordingly, the administrative law judge's Decision and Order - Rejection of a Claim, Decision and Order Denying Motion and Amended Motion for Consideration, and Decision and Order on Remand are affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

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<sup>3</sup>Moreover, Mr. Nummy testified that he did not witness the fall, *see* July 20, 1987 Tr. at 19, and he stated that "she tripped over some cables." *Id.* at 18.

<sup>4</sup>In view of our decision, we need not address claimant's contentions regarding the extent of disability.

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge