BRB No. 10-0725

MICHAEL A. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIG WORLDSOURCE	)	DATE ISSUED: 08/23/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Charles H. Raley, Jr. (Raley & Raley, P.C.), Savannah, Georgia, for claimant.

Grover E. Asmus (Asmus & Gaddy, LLC), Mobile, Alabama, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Motion for Reconsideration (2009-LDA-00505) of Administrative Law Judge Richard K. Malamphy 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

Claimant began working for employer in Iraq in April 2007. His duties involved loading and transporting military vehicles from one military base to another. Claimant's duties changed in December 2007 to driving a water tanker. Claimant asserted that he injured his back on January 12, 2008, when he slipped while unloading water from a tanker. Claimant reported the injury the same day; he subsequently returned to the United States for treatment. Claimant underwent back surgery in April and August 2008. Thereafter, claimant began receiving spinal cord injections for back discomfort. Employer paid claimant temporary total disability benefits, 33 U.S.C. §908(b), from January 22, 2008 to March 31, 2009.

Claimant had two prior work-related back injuries. He was involved in a tractor-trailer accident in 1998 while working for Toto Distribution (Toto). Claimant underwent two back surgeries for this injury, and he settled his state workers' compensation claim in March 2001. While recovering from this injury, claimant filed for and was awarded Social Security Disability Income (SSDI) benefits in July 2000. Claimant returned to work in 2003 for Kenan Transport (Kenan). He notified the Social Security Administration (SSA) that he was capable of working and that his benefits should be terminated; however, the SSA determined that claimant remained disabled and that his SSDI benefits would continue subject to restrictions on claimant's monthly earnings and number of hours worked. EX 18 at 2-3, 8. Claimant's work at Kenan exceeded these restrictions. Claimant re-injured his back on September 11, 2005, when he slipped while climbing down from a truck cabin and hit his back on one of its steps. Claimant underwent a third back surgery in March 2006. Claimant settled his state workers' compensation claim with Kenan in December 2007. In the meantime, claimant had started work with employer in April 2007.

In his decision, the administrative law judge initially rejected employer's contention that claimant should be judicially estopped from asserting entitlement to disability compensation under the Act in this case since he had previously received two state workers' compensation settlements, was receiving SSDI benefits based on his back

condition, and had averred that he was totally disabled. The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that he aggravated his back condition as a result of the work incident in Iraq on January 12, 2008. The administrative law judge found that the opinions of Drs. Murray and Richmond rebut the presumption. The administrative law judge found, however, that these physicians did not account for claimant's testimony that he did not require pain medication or treatment during the 40 weeks he worked for employer prior to January 12, 2008. The administrative law judge also found that claimant's treating physician after the work injury, Dr. Dewberry, diagnosed a herniated disc at L3-L4 in April 2008 and that there is no evidence that claimant had a herniated disc at this level prior to working in Iraq. The administrative law judge therefore concluded that claimant's back condition was aggravated by the January 12, 2008, work injury.

The administrative law judge found that claimant is totally disabled and that his back condition has not reached maximum medical improvement. The administrative law judge determined claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), as $1,865.33, based on claimant's earnings in Iraq. The administrative law judge found claimant entitled to medical benefits under Section 7 of the Act, 33 U.S.C. §907, which include a spinal cord stimulator that was recommended by Drs. Dewberry and McKenzie-Brown.[1] The administrative law judge found employer liable for a Section 14(e) assessment, 33 U.S.C. §914(e), for the amounts due between January 12, 2008 and June 23, 2008. Employer's claim for Section 8(f) relief, 33 U.S.C. §908(f), was determined to be not yet ripe for review since claimant is temporarily disabled. The administrative law judge stated that information concerning claimant's continued receipt of SSDI benefits since 2000 despite his earnings in the last 10 years should be referred to the Social Security Administration. On reconsideration, the administrative law judge summarily rejected employer's arguments regarding claimant's credibility.

On appeal, employer challenges the administrative law judge's finding that the doctrine of judicial estoppel does not preclude claimant from receiving compensation benefits. Employer also challenges the administrative law judge's finding that claimant invoked the Section 20(a) presumption, and his finding, based on the record as a whole, that claimant aggravated his back condition on January 12, 2008, during the course of his employment for employer. Claimant responds, urging affirmance of the compensation award.

[1]Dr. McKenzie-Brown became claimant's treating physician after he moved from Savannah to Atlanta.

The gravamen of employer's contentions regarding judicial estoppel and invocation of the Section 20(a) presumption is that claimant engaged in deceitful and fraudulent conduct. Specifically, employer avers that claimant did not disclose to employer in either of the pre-employment questionnaires he completed in February and April 2007, or at his pre-employment interviews, that he was receiving SSDI benefits and that he had injured his back with Kenan on September 11, 2005, for which he had undergone back surgery and was receiving disability compensation.[2] Employer also notes that claimant continued to receive SSDI benefits while working for Kenan and for employer. While claimant was working for employer, claimant engaged in settlement negotiations with Kenan concerning his 2005 injury and employer avers that claimant did not disclose that he was working 12 hours a day, 7 days a week in Iraq for employer. Claimant suffered his alleged work injury with employer on January 12, 2008, 10 days after the Georgia Workers' Compensation Board approved a $200,000 settlement with Kenan.[3] Accordingly, employer asserts that claimant should be judicially estopped from receiving additional benefits under the Act for his back condition and that, in any event, claimant's allegation of a work injury on January 12, 2008, is not credible.

The administrative law judge found that, in pursuing a settlement agreement with Kenan, claimant asserted that he had an ongoing disability from the September 2005 work injury, but that it was unclear whether, at the time of the settlement, claimant was seeking compensation for temporary total disability, temporary partial disability or permanent partial disability. EX 19B at 42, 43. Additionally, the administrative law judge noted that Dr. Dewberry had assigned claimant a 17 percent whole body impairment. EX 19B at 49. The administrative law judge stated that to find that claimant's position in settlement negotiations for a prior injury would estop him from receiving compensation for a subsequent accident would discourage settlements and a return to work, whereas it is an intention of the Act to encourage disabled workers to return to the workforce. The administrative law judge also found that it is in claimant's interest to seek benefits for the greatest level of permanent disability and that he should not be penalized for being able to return to work. The administrative law judge also found that "disability" is not identically defined under the Longshore Act and the Social

[2]Claimant did disclose on his pre-employment applications with employer the 1998 injury with Toto and resulting surgery.

[3]The settlement was for permanent partial disability and it released Kenan from further liability for medical and compensation benefits. It also included a Medicare Set Aside allocation totaling $15,755.10. EX 19B at 44. The settlement agreement provided that $50,000 of the settlement amount was for claimant's attorney's fee.

Security Act and that the claims under each Act are therefore not identical; therefore, claimant's entitlement to SSDI benefits is not pertinent to his claim under the Act. Accordingly, the administrative law judge rejected employer's contention that claimant should be judicially estopped from claiming disability compensation in this case. Decision and Order at 15-16.

Judicial estoppel is a common-law doctrine designed to protect the integrity of the judicial process by preventing a party from asserting one position in a legal proceeding and then asserting an inconsistent position in a second proceeding. It is an equitable doctrine invoked at a court's discretion. *See New Hampshire v. Maine*, 532 U.S. 742 (2001); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002); *Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 11, *aff'd on recon.*, 44 BRBS 77 (2010). The essential elements for the application of judicial estoppel are: (1) an unequivocal assertion of law or fact by a party in one judicial proceeding; (2) the assertion by that party of an intentionally inconsistent position of law or fact in a subsequent judicial proceeding; (3) in order to mislead the court and obtain unfair advantage as against another party. The party against whom this doctrine is invoked must have been successful in the prior proceeding or at least have received some benefit from the previously taken inconsistent position. *See Sparks*, 44 BRBS at 13-14; *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Employer asserts that the inconsistent positions in this case are: (1) claimant's allegation that he was capable of full-duty work during the course of his deployment with employer from April 2007 until the date of his alleged work injury on January 12, 2008, (2) while simultaneously receiving SSDI benefits and disability compensation from Kenan. Moreover, claimant alleged in settlement negotiations with Kenan that he was permanently totally disabled despite his continued employment with employer. *See* Tr. at 125, 130. The administrative law judge found that claimant should not be penalized by both seeking benefits for his prior injury and attempting to return to work, and that the present case involves a claim for a new, aggravating injury that was not the subject of claimant's state workers' compensation claim against Kenan.

Judicial estoppel cannot be applied as a matter of law, as its application is left to the discretion of the trier-of-fact. *Burnes*, 291 F.3d at 1285; *Sparks*, 44 BRBS at 13. We cannot say that the administrative law judge abused his discretion in finding that the equitable remedy of judicial estoppel should not be invoked to bar claimant's receipt of compensation from employer under the Act. The administrative law judge found that claimant is entitled to seek the greatest award possible for his injuries. The Kenan settlement states that the parties agreed to a settlement for a lump sum of permanent partial disability benefits and also agreed that claimant was no longer in need of medical

care. EX 19B at 77. Contrary to employer's contention, there was not an accepted legal position in the Kenan claim that claimant was unable to work at all. In addition, the record shows that claimant attempted on two occasions to have his SSDI benefits suspended in 2003 when he began working for Kenan, but the SSA declined to do so on a permanent basis. EX 18 at 7-11. This action is not inconsistent with claimant's actually working for employer beginning in 2007.[4] As the administrative law judge properly noted, claimant is asserting that a new work injury occurred on January 12, 2008. The Act is a no-fault scheme that expressly provides limited provisions for conduct-based claim preclusion. *See* 33 U.S.C. §§903(c), 904(b); *see generally Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982). While employer may assert that claimant's pre-injury conduct in relation to the Kenan claim is pertinent to assessing his credibility in this case, the Act contains no provision that would deny claimant benefits *ab initio.* Accordingly, we reject employer's contention that the administrative law judge erred by not applying the equitable doctrine of judicial estoppel to bar this claim for compensation under the Act.

Employer also challenges the administrative law judge's finding that claimant established that a work accident occurred and that therefore the Section 20(a) presumption is invoked. Employer contends that claimant's allegation of a work injury is not credible in view of claimant's continuing receipt of SSDI benefits, his continued pursuit of benefits from Kenan while working for employer, his failure to disclose to employer his prior injury with Kenan and the resulting back surgery, and the timing of the injury only 10 days after his settlement with Kenan was approved by the Georgia Workers' Compensation Board. Employer also challenges the administrative law judge's crediting of Dr. Dewberry's opinion based on the record as a whole.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See generally Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). The aggravation rule provides that

[4]In contesting the nature and extent of claimant's disability, employer argued that claimant's receipt of SSDI benefits and the June 21, 2006 opinion of Dr. Dewberry that claimant would never be employable establish that claimant was totally disabled prior to his working for employer. Decision and Order at 20; *see* EX 12 at 12. The administrative law judge rejected employer's contention as claimant was able to work for employer without the need for pain medication or medical attention prior to the date of his alleged injury in 2008. *Id.*; *see* Tr. at 67.

employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Claimant is not required to affirmatively prove that his work injury in fact caused or aggravated the harm; rather, claimant need establish only that the work injury could have caused or aggravated the harm alleged. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

The work accident in this case was unwitnessed. Claimant alleged he injured his back on January 12, 2008, when he slipped on the side of the road while unloading water from a tanker trunk. The administrative law judge found that claimant consistently gave this version of the accident to employer on the day it happened, *see* EX 5, 6, to his physicians, *see* CXs 16, 24PP, and in his testimony at the hearing. *See* Tr. at 72-78. The administrative law judge also discussed claimant's prior work injuries and his failure to disclose his 2006 back surgery on either of two pre-employment applications he completed for employer. The administrative law judge noted the contradiction between the testimony of claimant, that he was advised by a recruiter for employer not to disclose his full medical history, and that of Terry Youngs, who was involved in claimant's recruitment, that she would never have advised claimant to lie on his employment application. *Compare* Tr. at 50, 115-116 *with* EX 21 at 3-4. The administrative law judge found that claimant's non-disclosure of the March 2006 back surgery was not significant enough to discredit his testimony concerning the work injury and that it was not clear that he did not disclose all of his prior surgeries to an employee other than Ms. Youngs.[5] Decision and Order at 18. The administrative law judge further noted that Dr. Dewberry reported that claimant was very reliable. CX 24LLL. The administrative law judge therefore, concluded that claimant's testimony that he sustained a work injury on January 12, 2008, was credible. Decision and Order at 18. The administrative law judge further found that, although MRIs taken prior to 2008 indicated that claimant had some disc disease at the L3-L4 level, there is no evidence that in the 40 weeks he was employed in Iraq that claimant was suffering from the severity of back pain he experienced after January 12, 2008. Accordingly, the administrative law judge found claimant entitled to the Section 20(a) presumption that the work injury aggravated his

[5]*See* note 3, *supra*.

underlying disc disease and added to and worsened his previous back injuries.[6] Decision and Order at 19.

The administrative law judge found the Section 20(a) presumption rebutted by the opinions of Drs. Murray and Richmond that claimant's current condition is not due to or contributed to by the 2008 work accident. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). On weighing the evidence as a whole, the administrative law judge noted Dr. Richmond's opinion that there was no significant difference in the MRI taken in February 2006 with the one taken in 2008 following the work accident. Decision and Order at 19. The administrative law judge found, however, that the opinions of Dr. Richmond and Dr. Murray fail to account for claimant's testimony that he did not require pain medication or medical treatment for his back condition for the 40 weeks he worked for employer prior to January 12, 2008. *See* Tr. at 67, 97. The administrative law judge credited Dr. Dewberry's opinion that the 2008 MRI showed a "disc bulge or herniation" at L3-4 and that this condition was related to the January 12, 2008, work injury. *See* CXs 23Y, 24QQ. Accordingly, the administrative law judge concluded that claimant sustained a work injury on January 12, 2008, which aggravated his pre-existing back condition. Decision and Order at 19.

The administrative law judge has the authority to make credibility determinations and to weigh the evidence, and it is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). A claimant's failure to disclose prior injuries on an employment application does not bar a claim for compensation. *See Hallford v. Ingalls Shipbuilding*, 15 BRBS 112, 114 (1982) (Ramsey, J., dissenting); *see also Hall*, 674 F.2d 248, 14 BRBS 641. In this case, claimant's injury reports and testimony, which the administrative law judge found credible, support the administrative law judge's finding that claimant was in an "accident" at work in January 12, 2008, and claimant's reports and testimony and the medical evidence he submitted support the administrative law judge's invocation of the

[6]On reconsideration, the administrative law judge found that employer's arguments regarding claimant's credibility in light of the evidence of record had been considered "carefully and extensively" in his decision, and he denied employer's motion that he reconsider his findings in this regard. Order Denying Motion for Reconsideration at 2.

Section 20(a) presumption that claimant's back condition was aggravated by a work injury on January 12, 2008. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Moreover, substantial evidence supports the administrative law judge's finding, on the record as a whole, that claimant's back condition was aggravated by his work injury. The administrative law judge is entitled to draw his own inferences from the evidence, and his selection from among competing inferences must be affirmed if it is supported by substantial evidence and in accordance with law. *See Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). The administrative law judge's decision to credit the disc herniation diagnosis of Dr. Dewberry over the contrary opinions of Drs. Murray and Richmond, and to credit claimant's testimony that he was able to work without pain for employer prior to January 12, 2008 and that his back condition was aggravated by the work injury, is within his discretion as fact-finder. *Id.* Accordingly, we affirm the administrative law judge's finding that claimant's pre-existing back condition was aggravated by a work injury on January 12, 2008. *Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Therefore, we affirm the administrative law judge's award of compensation and medical benefits.

Accordingly, the administrative law judge's Decision and Order and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge