



BRB No. 16-0420

SERGE LAJEUNESSE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MTC EAST d/b/a PORTS AMERICA,)	DATE ISSUED: <u>Jan. 17, 2017</u>
INCORPORATED)	
)	
and)	
)	
PORTS INSURANCE COMPANY,)	
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Serge Lajeunesse, Charleston, South Carolina, self-represented.

Brian P. McElreath and Kate K. Hemingway (Lueder, Larkin & Hunter, L.L.C.), Mount Pleasant, South Carolina, for employer/carrier.

Before: BOGGS, BUZZARD, and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant, who is self-represented, appeals the Decision and Order Denying Benefits (2015-LHC-00016) of Administrative Law Judge Alan L. Bergstrom 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 claimant who is not represented by counsel, 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. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls*

Associates, Inc., 380 U.S. 359 (1965).

Claimant, a longshoreman, alleged that on December 11, 2013, he sustained injuries to both feet, as well as aggravation injuries to his back and head, when he was hit by a shuttle wagon.¹ Tr. at 52-55. He went to the emergency room later that day, complaining of pain in both feet and in his low back. EX 2. He saw Dr. Gudas the next day, also complaining of pain in his back and in both feet, the right more than the left. Based on claimant's descriptions, an x-ray which showed a possible fracture, and his own suspicion that claimant had suffered a fracture of the lateral sesamoid bone in the right foot, Dr. Gudas kept claimant out of work and advised him to wear a CAM boot for several weeks. CX 1; EX 13. Claimant returned to his usual work on October 7, 2014.

After a thorough review of the testimony from the witnesses and the medical evidence, Decision and Order at 3-29, the administrative law judge found that there are too many inconsistencies in the witnesses' testimony and the complaints noted in the medical reports and too little objective evidence to support claimant's allegations. Therefore, the administrative law judge found that claimant failed to establish a prima facie case and is not entitled to the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption for any of the alleged injuries. Decision and Order at 31-39. Accordingly, the administrative law judge denied the claim for disability and medical benefits. *Id.* at 39-40. Claimant appeals the denial of benefits. Employer responds, urging affirmance.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish a prima facie case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The claimant bears the burden of establishing the elements of his prima facie case without the benefit of the Section 20(a) presumption. *Bolden*, 30 BRBS 71; *Kelaita*, 13 BRBS 326.

Claimant testified that he worked with another flagman, Ms. Clay-King, to control traffic going on and off the car transport vessel. He stated that he told the shuttle driver, Mr. Banks, to stop the shuttle, but concluded there must have been a miscommunication

¹ The shuttle wagon is a station wagon that transports the car drivers between the ship and the parking area. Mr. Banks was driving the shuttle on December 11, 2013, and denied having hit claimant or driven over his foot. EX 11.

because Mr. Banks kept driving. Claimant stated that as soon as he turned around to face the on-coming car, he was hit. He stated that his left foot got stuck under the front passenger tire, his right foot got caught under the bumper, and his head and back hit the steel floor when he fell. Claimant testified that he screamed for Mr. Banks to put the car in reverse. Claimant also stated that Ms. Clay-King, who was working approximately 130 feet away and one deck above claimant, witnessed the incident. Tr. at 52-55; *see also* EX 6 at 32-34.

The administrative law judge found that claimant is not a credible witness, as there are many inconsistencies in his testimony and complaints to doctors, and there is substantial contrary evidence. Decision and Order at 31, 33-34. First, the administrative law judge found that claimant did not establish an injury to his left foot. Specifically, he found that, while Ms. Clay-King testified in a deposition that she saw the right front tire of the shuttle on claimant's left foot, and she heard and saw claimant screaming and hitting the hood of the car, as well as claimant and Mr. Banks arguing, Mr. Banks testified that he did not drive over claimant's foot, that claimant was walking around normally shortly after claiming injury, and that claimant's light-colored shoes showed no indication of having been run over by black tires. EXs 11, 18 at 7-8, 11-19, 21, exh. 1. Moreover, the administrative law judge noted that the medical reports from the emergency room the afternoon of the alleged incident indicate there was no deformity or swelling and claimant's lower extremities appeared "grossly normal."² Decision and Order at 31-31; EX 2. X-rays of claimant's left foot showed no evidence of fracture or dislocation, no soft tissue injury, and no evidence of acute trauma.³ *Id.* The next day, Dr. Gudas, claimant's treating physician, noted claimant's pre-existing bunion and diagnosed a sprain/strain of the left foot. CX 1; EX 13. Giving greater weight to the emergency room records, the administrative law judge found that claimant did not establish a left foot injury on December 11, 2013, and is not entitled to invocation of the Section 20(a) presumption for that claimed injury. Decision and Order at 32.

With regard to claimant's alleged back and head injuries/aggravations, the administrative law judge found that claimant's vague descriptions of his pain do not

² Despite claimant's complaints to hospital doctors and nurses that he was struck by a vehicle, knocked to the ground, and both feet became stuck under the vehicle, examination revealed "no apparent associated signs or symptoms" of trauma, and claimant was not in distress. His joints were all "normal with full range of motion," his extremities showed "no appreciated pain with palpation," his circulation was intact, and neurovascular exam of his extremities was normal. EX 2 at 4.

³ The left foot x-ray showed a bone issue on the ankle that "does not appear related to recent injury." EX 2 at 7.

establish a flare up or aggravation of a pre-existing condition.⁴ Ms. Clay-King said she had a clear view of the accident and did not see claimant fall to the ground. Rather, she stated that it was “kind of almost impossible” for him to do so. EX 18 at 24. Records from the emergency room on December 11, 2013, indicate that claimant did not complain of a head injury, and, although he complained of back pain, physical examination and x-rays revealed a normal back with no fracture, dislocation, misalignment, or soft tissue injury. Indeed, clinical examination revealed that back pain “is absent,” range of motion is normal, muscle spasm “is not present,” and straight leg raise test of both legs “does not illicit pain.” EX 2 at 4, 7. The administrative law judge gave little weight to the opinion of Dr. Gudas because his opinion is based on claimant’s subjective complaints and is not supported by objective or clinical findings, and he was unaware of claimant’s prior head and back injuries. Moreover, Dr. Gudas referred claimant to another doctor for his back pain. Decision and Order at 33; CX 1; EX 13. As he determined the only evidence supportive of an aggravation to claimant’s head and back conditions was claimant’s own non-credible statements, the administrative law judge concluded that claimant failed to establish injuries to his back and head as alleged.⁵ Therefore, the administrative law judge found that claimant is not entitled to the Section 20(a) presumption for these injuries. *Id.* at 34.

Finally, the administrative law judge addressed claimant’s alleged right foot injury. He first noted that, despite claimant’s testimony, there is no corroborating evidence from Ms. Clay-King, Mr. Banks, or the emergency room records to support a finding that there was a work-related injury to claimant’s right foot. Indeed, the hospital medical records indicate there was no evidence of any traumatic injury to claimant’s right foot on December 11, 2013.⁶ EXs 2, 11, 18. The next day, Dr. Gudas recorded

⁴ Claimant injured multiple body parts, including his head, back, and lower extremities, in a work-related vehicle-moped collision in April 2013. EXs 6 at 22-24, 17; Tr. at 21. In addition to the claims related to the April and December 2013 incidents, claimant has filed seven other claims against waterfront employers since 2008. They have included claimed injuries to his head, face, hands, fingers, upper and lower extremities, lungs, back, and hearing. EX 17.

⁵ The administrative law judge gave great weight to the opinion of Dr. Jones, who examined claimant in 2015 and reviewed his medical records. Based on the discrepancies between the hospital reports and those of Dr. Gudas, and his own examination of claimant, Dr. Jones stated that he could not state with any certainty that claimant sustained any injury as described on December 11, 2013. Decision and Order at 33; EX 12.

⁶ X-rays of the right foot revealed a pre-existing osteophyte formation at claimant’s ankle. EX 2.

complaints of severe right heel pain but reported no clinical findings such as swelling or discoloration, and he noted claimant's overall general appearance as having "no deformities, normal body habitus, . . . in no acute distress and relaxed." EX 13 at 5. Dr. Gudas nevertheless diagnosed claimant with a fractured lateral sesamoid and recommended claimant wear a CAM boot to protect his right foot. After claimant fell down some steps in January 2014 while wearing the boot, Dr. Gudas first reported pain and swelling of claimant's right foot; an MRI he ordered in July 2014 showed no evidence of a sesamoid fracture. CX 1; EX 13. Again, the administrative law judge gave little weight to Dr. Gudas's inadequately explained opinion and gave great weight to the opinion of Dr. Jones, who stated that, if claimant had suffered injury as described, he should have had bruising, abrasions, bone injuries, or lacerations in the affected areas, and there were no medical findings to support such injury.⁷ Decision and Order at 36; EX 12. The administrative law judge concluded that claimant failed to establish a right foot injury from an incident at work in December 2013, and he declined to invoke the Section 20(a) presumption. Decision and Order at 37.

As stated above, claimant bears the burden of establishing the elements of his case. In this case, the administrative law judge found that claimant is not a credible witness and that the preponderance of the evidence contradicts claimant's allegations. The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, including medical evidence, to address the credibility and sufficiency of any testimony, and to make the choice among reasonable inferences. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *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). 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).

The administrative law judge's credibility findings are not unreasonable. As he stated, claimant's testimony and the information he gave to his medical providers contain inconsistencies that undermine the veracity of his claim that he was injured at work. For example, claimant's statements as to the incident differ or are contradicted. Claimant testified that an incident occurred, and Mr. Banks said it did not. Claimant claimed his left foot was run over and his right foot was caught in the bumper, but Dr. Gudas reported that claimant said both feet were run over by a car. Claimant stated he fell to the ground and hit his head, but his testimony is contradicted by Ms. Clay-King, who stated it would have been impossible for him to fall. Claimant alleged he sustained a head injury in his

⁷ Dr. Jones also noted that the location of claimant's complained-of pain changed during the course of Dr. Gudas's treatment of claimant's right foot. EX 12.

claim, but denied a head injury at the hospital the day of the accident, and did not mention a head injury to Dr. Gudas the very next day. He also did not report multiple prior injuries to the examining physicians. CX 1; EXs 2, 13, 18; Tr. at 16-19, 55-57. As the administrative law judge's credibility determination is not unreasonable, we affirm the finding that claimant is not a credible witness. *See generally Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Additionally, despite claimant's complaints of being injured when he was hit by a car and knocked to the ground, the objective medical reports from the emergency room contemporaneous with the alleged incident demonstrate a normal back, head, and extremities, and do not establish that claimant sustained any trauma that day. EX 2. Similarly, although Dr. Gudas presumed a possible fracture in the right foot based on an x-ray he took the next day, he noted no swelling or abrasions until his February 2014 report after claimant fell down the stairs in January 2014, and a later MRI showed no evidence of a fracture. CX 1; EX 13. Dr. Jones found it difficult to explain the discrepancy between the hospital reports one day and Dr. Gudas's diagnosis of a possible fracture in the right foot the next day. EX 12. As the administrative law judge credited the objective hospital reports over both claimant's testimony and Dr. Gudas's opinion, which relied on claimant's statements, his finding that claimant did not sustain the injuries he claimed on December 11, 2013, is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's findings that claimant failed to establish a prima facie case for any of the alleged injuries. *See Bis Salamis, Inc. v. Director, OWCP*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). As claimant failed to establish essential elements of a claim for benefits, we affirm the denial of the claim.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge