BRB No. 99-1155

JEANNETTE A. CANAVATI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED: 08/04/2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Claimant's Petition for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Jeannette A. Canavati, *pro se,* Waco, Texas.

Matthew R. Lavery (Office of the General Counsel), Dallas, Texas, for self-insured employer.

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

PER CURIAM:

Claimant, representing herself, appeals the Decision and Order and Order Denying Claimant's Petition for Reconsideration (96-LHC-2040) of Administrative Law Judge James W. Kerr, 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5. U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant, a custodial worker, sustained an injury to her right knee when the utility golf cart in which she was a passenger collided with another golf cart on June 7, 1995.

Employer paid claimant temporary total disability compensation from the date of this incident until June 14, 1995, at which time claimant was released to return to work without restrictions. 33 U.S.C. §908(b). On June 16, 1995, she was released from employment due to "work incompatibility." EX 4. Claimant thereafter sought permanent total disability compensation under the Act, asserting that the June 7, 1995, incident resulted in injuries to multiple parts of her body.

In his Decision and Order , the administrative law judge found that claimant failed to establish a harm to her head, neck, back, legs or feet,[1] or that a work incident occurred which could have caused the injuries alleged. Next, the administrative law judge found that claimant was capable of resuming her usual employment duties with employer as of June 14, 1995, the date she was released to return to work without restrictions by Dr. Veazey. The administrative law judge further determined, based upon the opinion of Dr. Blair, that claimant reached maximum medical improvement as of September 1, 1995, that her average weekly wage at the time of injury was $217.76, and that employer is liable only for the medical expenses associated with claimant's treatment with Dr. Veazey. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from June 8, 1995 to June 14, 1995.

In his subsequent Order addressing claimant's petition for reconsideration, the administrative law judge denied claimant's request for the appointment of an attorney to assist her, as there is no statutory authorization for him to do so. Further, after review of his decision, he was unpersuaded that any modification of his decision was warranted.

On appeal, claimant, without the assistance of counsel, challenges the administrative law judge's denial of her claim. Employer responds, urging affirmance.

We first address the administrative law judge's finding that claimant did not injure her head, neck, back, legs or feet in the incident at work. Claimant has the burden of proving the existence of an injury or 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 of compensability. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Obert v. John T. Clark & 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 Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also*

[1]The administrative law judge additionally noted that the parties were in agreement that claimant sustained an injury to her right knee as a result of the June 7, 1995, incident.

Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). If claimant establishes her *prima facie* case, Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that her condition is causally related to her employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Employer can rebut the Section 20(a) presumption by producing substantial evidence that claimant's injuries were not caused or aggravated by her employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

The administrative law judge found that claimant did not introduce medical evidence in support of her contention that she sustained multiple injuries in addition to a knee abrasion on June 7, 1995. Thus, he determined that claimant failed to demonstrate a harm to any part of her body other than to her right knee. In addressing this issue, the administrative law judge acknowledged that a claimant's credible complaints of pain may establish this element of her *prima facie* case. *See, e.g., Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). However, the administrative law judge specifically found claimant's testimony regarding her physical complaints to be inconsistent and unreliable, as he noted that her complaints as contained in the medical reports of record were determined to be inconsistent and vague by the physicians and unsupported by any objective findings. 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the administrative law judge rationally relied on the absence of objective evidence of physical injury, we affirm the administrative law judge's determination that claimant failed to establish the existence of a harm to any part of her body other than to her right knee as this finding is supported by substantial evidence. We thus affirm the administrative law judge's finding that claimant is not entitled to invocation of the Section 20(a) presumption. *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

We next address the administrative law judge's finding that claimant had no disability due to her work injury after June 13, 1995. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge, in concluding that claimant did not sustain a compensable impairment subsequent to June 13, 1995, relied on the opinions of Drs. Veazey, Blair and Wharton, all of whom opined that claimant was capable of performing her usual job. In rendering this determination, the administrative law judge rejected claimant's reliance upon

the diagnosis of the Borden McKenzie Chiropractic practice, stating that this report did not address either claimant's ability to return to work or any restrictions to be placed on her. *See* Decision and Order at 15. Inasmuch as the administrative law judge's weighing of the evidence is rational and as the credited medical opinions constitute substantial evidence to support the administrative law judge's finding, we affirm the administrative law judge's determination that claimant sustained no impairment preventing her return to work subsequent to June 13, 1995. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem.*, 909 F.2d 1488 (9th Cir. 1990)(table).

In addressing the issue of employer's liability for claimant's post-accident medical expenses, the administrative law judge determined that employer is liable only for the medical expenses incurred by claimant as a result of her treatment with Dr. Veazey. We affirm this finding. Initially, we note that Section 7(b) of the Act, 33 U.S.C. §907(b), permits an injured employee to choose an attending physician to provide medical care. In the instant case, the administrative law judge found that claimant requested and employer authorized Dr. Veazey as the physician to treat claimant following her work accident. Accordingly, we hold that the administrative law judge rationally concluded that Dr. Veazey was claimant's physician of choice. *See Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988).

Next, the administrative law judge found that claimant was not entitled to reimbursement for the cost of medical treatment provided by physicians subsequent to Dr. Veazey, as she did not request prior authorization from employer for this treatment. Pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d), an employee is entitled to recover medical benefits if she requests her employer's authorization for treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 291 (1992); *Anderson*, 22 BRBS at 20. In this case, the administrative law judge found that claimant did not seek employer's authorization for treatment by any physician following her decision to cease treating with Dr. Veazey. This finding is supported by substantial evidence. Moreover, as we have previously affirmed the finding that Dr. Veazey was claimant's choice of physician, his release of claimant cannot be viewed as a refusal of treatment by employer's physician. *See Slattery Assoc., Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44 (CRT)(D.C. Cir. 1984). We, therefore, affirm the administrative law judge's finding that employer is not liable for the medical treatment provided by physicians subsequent to Dr. Veazey, as that determination is supported by substantial evidence and in accordance with law.

Lastly, we affirm the administrative law judge's denial of claimant's request that he appoint counsel to assist her in the furtherance of her claim for benefits under the Act. As stated by the administrative law judge, neither the Act nor its implementing regulations

authorize an administrative law judge to appoint counsel on behalf of a claimant.[2]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]Claimant may, however, request legal assistance in processing her claim from the Secretary of Labor. *See* 33 U.S.C. §939. The Secretary, however, is not obligated to appoint counsel to represent claimant.