

BRB No. 02-0374

JOHN WARD)
)
 Claimant-Petitioner)
)
 v.)
)
 NOVOLOG BUCKS COUNTY) DATE ISSUED: Dec. 23, 2002
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Brian R. Steiner (Steiner, Segal & Muller, P.C.), Philadelphia, Pennsylvania, for claimant.

Christopher J. Field (Field, Womack & Kawczynski), South Amboy, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-1214) of Administrative Law Judge Ralph A. Romano 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 worked for employer as a laborer, and, on January 27, 2000, he

broke his ankle and tore a ligament when he slipped and fell. Cl. Ex. 6; Tr. at 16-17.

Employer paid temporary total disability benefits from January 28 to May 3, 2000, and from August 30 to October 6, 2000. Tr. at 4-5. Claimant filed a claim for continuing temporary total disability benefits from May 4, 2000. The administrative law judge discredited claimant's testimony, as well as the opinion of claimant's expert, Dr. Smith, who relied on claimant's statements. He credited the opinions of Drs. Burton, Lee and Mandel, and he found that claimant failed to establish a *prima facie* case of total disability after May 3, 2000. Consequently, the administrative law judge denied disability benefits after May 3, 2000. Claimant appeals, and employer responds, urging affirmance.

Claimant argues that the administrative law judge's credibility determinations were unreasonable and that, absent these determinations, the remainder of the decision is not supported by substantial evidence. Specifically, claimant contends the administrative law judge erred in focusing on his drug conviction instead of on the merits of the case. Employer asserts that the focus was not on the drug conviction itself but, rather, on claimant's failure to testify truthfully and that there is substantial evidence of record supporting the administrative law judge's decision.

To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3^d Cir. 1979); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In this case, claimant testified that, after May 3, 2000, he continued to experience pain and swelling in his ankle, preventing him from returning to his usual work. Emp. Ex. 6; Tr. at 30, 34. Dr. Smith, with whom claimant began treating in April 2000 on the advice of his attorney, reported that claimant still could not return to work as of August 7, 2000, but could be placed in a light duty assignment. By November 2000, he began addressing claimant's complaints of low back pain, and from the diagnostic studies, he determined that climbing ladders, an element of claimant's usual work, is beyond claimant's abilities. As of May 16, 2001, Dr. Smith continued to restrict claimant's activities, and it was not until October 8, 2001, that Dr. Smith released claimant to return to full duty work. Cl. Exs. 8-14, 20, 22.

Employer presented the opinions of Dr. Burton, claimant's original treating physician, Dr. Mandel, employer's expert, and Dr. Lee, an independent medical examiner appointed by the Department of Labor whose credentials the administrative law judge praised as being the most impressive among all the physicians. Dr. Burton advised claimant to attempt his usual work while wearing an ankle brace in April 2000. As of May 3, 2000, Dr. Burton released claimant to return to full duty, as he concluded that claimant's ankle was functionally stable. In a final visit on May 12, 2000, Dr. Burton advised claimant to continue home exercises and to undergo a functional capacity test, but told him to remain at full duty status. Emp. Exs. 9-12. Dr. Mandel examined claimant on April 13, 2000, and stated that claimant should continue physical therapy, but should anticipate a return to his usual work within four weeks. Emp. Ex. 8. Finally, Dr. Lee examined claimant on

September 26, 2000, and he concluded that claimant had fully recovered from the January 2000 injury with no residual disability, making him fit to return to full duty. Emp. Exs. 13, 17 at 17. The MRIs, x-rays, and EMG all revealed essentially normal results. Decision and Order at 4; Cl. Exs. 17-18; Emp. Ex. 13 at 3.

In a deposition taken on July 13, 2001, counsel for employer asked claimant about a 1989 conviction for a drug-related crime. Emp. Ex. 16 at 5-6. Claimant acknowledged the conviction, saying it was the only time he had been convicted of a crime. In a letter attached to employer's post-hearing brief, the parties stipulated that claimant was charged with, found guilty of, and incarcerated for over one year for, another drug-related crime. In assessing the veracity of the witnesses, the administrative law judge cited claimant's deceit on the crime issue as evidence of his overall incredibility. Decision and Order at 4. As a further example of his conclusion that claimant's testimony is not credible, the administrative law judge compared claimant's testimony to Dr. Lee's statements regarding the duration of Dr. Lee's examination of claimant. Claimant stated that the exam took mere seconds, whereas Dr. Lee explained that an examination, resulting in a report with as many details as his has, takes between 20 and 30 minutes to conduct. Emp. Exs. 13, 17 at 9; Tr. at 32, 40-41. The administrative law judge concluded that Dr. Lee's testimony on this matter was more believable than claimant's. After discrediting claimant, the administrative law judge determined that Dr. Smith's opinion and the functional capacity assessment, therefore, were tainted, as they relied heavily on the statements and efforts of claimant. Consequently, the administrative law judge credited the diagnostic testing and the opinions of Drs. Burton, Lee and Mandel over the opinions of claimant and Dr. Smith. Decision and Order at 4.

It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). Contrary to claimant's assertion, the administrative law judge did not hold claimant's past crimes against him. Rather, he clearly stated that the "untruth of claimant's unequivocal assertion under oath[,]'" which was later rebutted by a stipulation that there was an additional crime and conviction, was one reason for discrediting claimant's testimony. The other reason for finding claimant's testimony unworthy of credit was that he believed Dr. Lee's testimony that the evaluation took between 20 and 30 minutes over claimant's "repeated insistence" that it only took a few seconds. This credibility determination, in conjunction with the opinions of Drs.

¹The administrative law judge credited Dr. Lee's interpretation that the EMG demonstrated evidence of only "very, very slightly" positive readings with no evidence of radiculopathy. Decision and Order at 4. Dr. Lee explained that the raw data from the EMG showed that the positive readings were outside the normal range by less than the margin of error of the machine. Cl. Ex. 18; Emp. Ex. 17 at 20-21.

Burton, Lee, and Mandel and the results of the diagnostic testing, support the administrative law judge's determination that claimant's condition resolved and that he was able to return to his usual work as of May 3, 2000. Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's denial of disability benefits after May 3, 2000.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge