BRB No. 92-766

CHARLES J. FERRELL, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

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

Robert J. Macbeth, Jr. (Rutter & Motagna), Norfolk, Virginia, for claimant.

Shannon T. Mason, Jr. and Benjamin M. Mason, Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-3111) of Administrative Law Judge Richard K. Malamphy denying benefits 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 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, a shipfitter for employer, first reported an injury to his back on December 14, 1982, and was diagnosed with lower back strain in December 1982 and November 1986. Claimant also visited the shipyard clinic with complaints of back pain in February and September 1987. In addition, claimant had suffered a series of left knee problems since 1983. In the present case, claimant alleges that on July 3, 1989, he injured his back and left knee in a work-related incident. Claimant was working on the ballast tanks of a submarine when he contends he bumped his knee, and either simultaneously, or soon thereafter, strained his back. Claimant sought benefits for either a new or aggravating injury to his left knee and back.

The administrative law judge found that claimant had neither suffered a new injury on July 3, 1989, nor aggravated his existing knee and back conditions. Thus, benefits were denied.

Claimant contends that the administrative law judge erred in failing to apply the Section 20(a) presumption, 33 U.S.C. §920(a), and in failing to find that the claimant sustained work-related injuries on July 3, 1989. Employer responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence.

Claimant contends on appeal that the administrative law judge erred in finding the evidence insufficient to establish that claimant suffered an injury or an aggravation of a pre-existing condition on July 3, 1989. We disagree. Section 20(a) of the Act aids a claimant in proving that his injury is work-related. However, in order to invoke the Section 20(a) presumption, claimant must show that he sustained a harm, and that either an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The Section 20(a) presumption does not aid claimant in establishing these elements of his *prima facie* case. *See generally Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990).

In the present case, the administrative law judge concluded that claimant did not suffer a new or aggravated back and left knee injury on July 3, 1989, based on his finding that no accident occurred on that day, and that claimant demonstrated no bodily harm. The administrative law judge stated that the only evidence of the occurrence of an accident consisted of claimant's testimony, which the administrative law judge discredited due to lack of corroboration. Although claimant asserts that a co-worker witnessed the accident, he did not produce this witness at the hearing. Moreover, the administrative law judge noted that claimant's testimony that he told his supervisor of the accident is not supported by employer's records.

In addition, the administrative law judge found that the medical evidence does not independently support claimant's assertion that he sustained a harm. In weighing the medical evidence, the administrative law judge gave greatest weight to the opinion of Dr. Lenthall, inasmuch as he examined claimant within one week of the alleged accident. Dr. Lenthall originally opined on July 11, 1989, that claimant suffered a lumbar strain, but had no evidence of a new knee injury. Emp. Ex. 3. His diagnosis of back strain was based upon the history given by claimant. Following an examination on July 12, 1989, however, he concluded that the physical findings indicated intentional deception on the part of claimant as to the condition of his back.[1]

Credible complaints of subjective symptoms and pains can be sufficient to establish the element of physical harm. *See generally Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). However, the administrative law judge in the present case did not find claimant's testimony to be credible. He found that the claimant intentionally deceived Dr. Lenthall, and denied his previous long history of back problems. Moreover, the administrative law judge rationally credited the testimony of Dr. Lenthall. *See generally Pittman v. Mechanical Contractors, Inc.*, 35 F.3d 122, 28 BRBS 89 (CRT) (9th Cir. 1994). Inasmuch as the administrative law judge thoroughly reviewed the

[1]Claimant also was examined on August 22, 1989 by Dr. White, who concluded that claimant suffered a contusion of the left knee with previous existing knee discomfort. Emp. Ex. 4. In a report dated August 8, 1989, following an examination of claimant's back, Dr. Prillaman noted that the objective findings were normal and the only diagnosis he could make was mild strain of the lumbosacral spine. Emp. Ex. 5. The administrative law judge gave greater weight to the opinion of Dr. Lenthall inasmuch as he examined claimant closer in time to the alleged accident.

evidence of record, and claimant has raised no error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations, *see generally John W. McGrath v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we affirm the administrative law judge's finding that an accident did not occur on July 3, 1989, causing claimant to suffer a new harm or an aggravation of his previous conditions. The Section 20(a) presumption therefore is inapplicable. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated on other grounds on recon.*, 24 BRBS 63 (1990).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge