BRB No. 04-0106

IFFAT A. SANDERLIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CORRPRO COMPANIES, INCORPORATED	)	DATE ISSUED:Sept. 29, 2004
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

George E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Dana Adler Rosen (Clark, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-1594) of Administrative Law Judge Richard E. Huddleston 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).

In October 2000, claimant began working for employer painting ship structures. Claimant alleges that on January 7, 2002, she felt a "pop" in her lower back, while lifting sand blast bags at work. Tr. at 36-37. Employer voluntarily paid claimant temporary total disability benefits from January 8, 2002 to January 22, 2002. On January 21, 2002, employer terminated claimant for a violation of company rules, and claimant has not been employed anywhere since that date.

In his Decision and Order, the administrative law judge found that claimant failed to establish that an accident occurred on January 7, 2002. Therefore, the administrative law judge concluded that claimant failed to establish her *prima facie* case and is not entitled to disability or medical benefits for her current back condition. On appeal, claimant argues that the administrative law judge erred in finding that she failed to establish her *prima facie* case, and thus is not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). Employer responds, urging affirmance of the administrative law judge's decision.

In order to establish her *prima facie* case, 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. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Kelaita 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). 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 Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) 1994). If these two elements are established, claimant is entitled to a presumption that her injury is work-related. 33 U.S.C. §920(a); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In the instant case, claimant asserted that a work incident occurred on January 7, 2002, which caused her current back condition. Tr. at 36-37. Specifically, she argues that the administrative law judge erred in refusing to accord determinative weight to her testimony that the January 7, 2002, work accident occurred as she alleged. The administrative law judge found that an accident did not occur at work on January 7, 2002, as alleged by claimant, and thus denied her claim for benefits. Decision and Order at 11. Substantial evidence supports this conclusion, and it is therefore affirmed. *See Bolden v.G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

After a detailed review of the evidence of record, the administrative law judge provided rational reasons for finding that a specific work-related accident did not occur on January 7, 2002. First, the administrative law judge found that claimant's demeanor in testifying at the formal hearing on October 8, and 9, 2002, appeared to exaggerate her pain; the administrative law judge observed that claimant did not engage in exaggerated behavior until she was called to the witness stand. Decision and Order at 4. The administrative law judge found this behavior affects the credibility of claimant's testimony regarding the alleged accident on January 7, 2002. Decision and Order at 10. Second, the administrative law judge found that the occurrence of the work accident was suspect, based on the testimony of George Cooper, employer's operation manager, that claimant had been upset by a discussion over her job duties on the date of the alleged accident and that he had personally witnessed claimant bending over from the waist "like a ballerina" at a time when she was going to see a doctor about her alleged back condition. Tr. at 101, 104, 107, 111-112. Third, the administrative law judge credited the testimony of employer's administrative office manager, Melissa Tenzca, that Dr. Hayek made an unsolicited phone call to employer concerning the exaggerated nature of claimant's complaints. Decision and Order at 11; Tr. at 149-154; EX 13 at 3-4.[1] In this regard, the administrative law judge noted that both Drs. Hayek and Payne opined that claimant would not permit an examination of her back and that her symptoms appeared exaggerated. Decision and Order at 10; EX 3. The administrative law judge also found that there is no evidence of any relationship between employer and either Dr. Hayek or Dr. Payne. Decision and Order at 10. Fourth, the administrative law judge stated that there is no evidence from any witness in this case who saw an accident occur. The administrative law judge stated that the only evidence that such an accident occurred is claimant's own testimony, which the administrative law judge found entitled to little weight. Thus, the administrative law judge found that the record contains no objective evidence to support a finding that an accident occurred to claimant's back on January 7, 2002. *See, e.g.*, EXS 7, 8, 11. Consequently, the administrative law judge denied claimant's claim for benefits.

The administrative law judge is entitled to weigh the evidence and to assess the credibility of witnesses' testimony. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck*

[1]Dr. Hayek, claimant's primary care doctor, referred her to Dr. Payne, an orthopedic surgeon. EX 3; EX 6. Dr. Payne's diagnosis of claimant included "marked signs of exaggerated responses" and findings indicating attempts to impress the examiner, and that she was "uncooperative on the exam." His notes indicate that claimant was angry with him for refusing to prescribe a narcotic pain reliever and she angrily declined his offer of a second opinion from a spine surgeon. Claimant thereafter reported Dr. Payne to the Virginia Board of Medicine. EX 6.

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). On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant is neither inherently incredible nor patently unreasonable. Claimant has raised no reversible error in the administrative law judge's consideration of the evidence, and his finding that claimant failed to established that a work-related accident occurred on January 7, 2002, is rational and supported by substantial evidence.[2] To the extent that claimant seeks a re-weighing of evidence, that is beyond our scope of review. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). As claimant failed to establish an essential element of her *prima facie* case, we affirm the denial of benefits. *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631; *Bolden*, 30 BRBS 71*; Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *see also Mock v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 275 (1981).

[2] Claimant correctly notes that the administrative law judge did not discuss the medical evidence in which claimant reports that she was involved in a work-related accident. *See, e.g.*, CX 5. This evidence does not aid claimant's case, as the administrative law judge relied on the absence of eye witnesses to the accident and claimant's lack of credibility. The evidence cited by claimant as supportive of her claim are only recitations of the alleged accident given by claimant to the medical providers.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge