

BRB No. 14-0170

BRIAN O. HULSEY)
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 Claimant-Petitioner)
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 v.)
)
 BAE SYSTEMS NORFOLK SHIP REPAIR) DATE ISSUED: Dec. 16, 2014
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION, LIMITED)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

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

Gregory Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Gerard E. W. Voyer (Taylor Walker, P.C.), Norfolk, Virginia, for employer/carrier.

Before: HALL, Acting Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2013-LHC-00667 and 2013-LHC-01507) of Administrative Law Judge Kenneth A. Krantz rendered on claims 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 8, 2006, while working as a rigger for employer, claimant suffered an injury to his back. Employer paid medical benefits for claimant's lumbar surgery on June 10, 2008, and temporary total disability benefits until September 11, 2008, when it filed a Notice of Final Payment form. Claimant returned to work on September 8, 2008, and never filed a claim for benefits for this injury.

For over three years following his 2008 surgery and recovery period, claimant performed his full-duty work for employer, though he continued to seek medical treatment for back pain. Claimant alleged that in January/February 2012, his symptoms worsened due to accidents he sustained at work. Specifically, he stated he had increased lumbar pain and began to experience radicular pain. Subsequently, a May 7, 2012, x-ray showed that the pedical screws, which were placed in claimant's spine during the 2008 surgery, were broken. Claimant underwent two additional back surgeries on June 13 and November 14, 2012, to repair the fusion and to remove hardware, respectively. Employer considered these surgeries related to the 2006 injury and it paid claimant's medical expenses. 33 U.S.C. §907. Claimant lost time from work due to these surgeries; however, employer did not pay any disability benefits under the Act. 33 U.S.C. §908. On September 26, 2012, claimant filed a claim for benefits, alleging that he injured his lower back on January 30, 2012, when he felt instant pain carrying reduction gear bearings off and on a ship. CX 1-2. On November 28, 2012, claimant filed another claim for benefits, alleging that he injured his back "on or about 2/15/2012," when he felt a shooting pain down his left leg while hanging a shackle. CX 2-2. Claimant argued before the administrative law judge that these two incidents aggravated his prior back condition and led to the need for the surgeries. Employer disputed the occurrence of these incidents and argued it is not liable for disability benefits under the Act because claimant did not file a claim for his 2006 injury and the statute of limitations had expired.

The administrative law judge found that claimant established he suffered a harm in the form of several significant back problems;¹ however, the administrative law judge found claimant did not establish that accidents occurred at work in January and/or February 2012 and, therefore, did not establish a prima facie case relating his back problems to his employment. Accordingly, the administrative law judge found claimant is not entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, and he denied

¹ Specifically, the administrative law judge found that: in 2007, claimant was diagnosed with degenerative disc disease; in 2008, he underwent a laminectomy; in 2009, he suffered sacroiliac joint pain; and, in 2012, he was diagnosed with herniated nucleus pulposus with central stenosis, adjacent segment disc disease, a disc protrusion, and compression fractures, and underwent two back surgeries. Decision and Order at 19.

benefits. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

In order to be entitled to the Section 20(a) presumption linking his harm to his employment, a claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. 33 U.S.C. §920(a); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); see *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut it with substantial evidence that the claimant's condition was not caused or aggravated by the employment events. See *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). If the administrative law judge finds the Section 20(a) presumption rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Claimant contends he was injured at work in January and February 2012. In support of his argument that an accident occurred on or about January 30, 2012, claimant submitted his own testimony, treatment notes dated February 2, 2012, and a November 2012 letter from Dr. Goss, his treating orthopedic surgeon. Claimant testified that he was carrying gear bearings off the U.S.S. Barry when his back started hurting "real bad," and that he reported this injury to his supervisor, Mr. Roundtree, that same night. Tr. 17-18. Claimant's treatment records with Dr. Goss show that, on July 14, 2011, he was doing well with injections and an occasional Percocet, and that at his next appointment on February 2, 2012, his symptoms were worse, having been precipitated by repetitive lifting at work. CX 10 at 6-7. The administrative law judge did not find claimant's evidence persuasive in light of the following: claimant did not file a notice of injury report within 30 days of the incident;² the employment records show claimant was working on the U.S.S. Bulkeley, and not the U.S.S. Barry, on January 30, 2012; Mr. Roundtree testified that claimant did not report an injury to him at any time while working on the U.S.S. Barry; and Mr. Sisko, claimant's department head, testified that he did not receive an injury report from any of the supervisors stating that claimant had suffered an accident or injury on January 30, 2012. EX 12; Tr. at 38, 65. It is well-established that the administrative law judge may weigh the evidence and draw his own inferences therefrom, and that the Board is not entitled to reweigh the evidence. See *Pittman Mech. Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.2d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Director*,

² Claimant did file a notice of injury on June 1, 2012. CX 5 at 1.

OWCP [Hess], 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). As substantial evidence supports his conclusion, we affirm the administrative law judge's finding that claimant did not establish the occurrence of a work accident on or about January 30, 2012.

In support of his contention that an accident occurred on or about February 15, 2012, claimant submitted his testimony, medical records, and a November 12, 2012, letter from Dr. Goss to claimant's counsel. Specifically, claimant testified that he experienced radicular pain for the first time since his 2008 surgery on February 15, 2012, while attempting to hang a shackle at work, and that he reported this injury to his supervisor, Mr. Willis. Further, in a November 2012 letter to claimant's counsel, Dr. Goss opined that claimant aggravated a pre-existing work injury in February 2012 while hanging a shackle at work, and that this aggravation necessitated the lateral lumbar interbody fusion in June 2012. The administrative law judge did not find this evidence persuasive in light of the following: a March 2010 treatment record noting that claimant complained of pain radiating to his buttock; Mr. Willis's testimony that he did not recall claimant reporting any back pain while trying to hang a shackle or having to assign another employee to hang the shackle; and Dr. Goss's deposition testimony that claimant never mentioned any new accidents to him during his treatment, and that the need for surgery in 2012 was a result of the 2006 work injury and not a new injury.³ CX 10 at 1; EX 11 at 3; EX 22 at 22; Tr. 19, 42, 47. As the administrative law judge may weigh the evidence and draw inferences, and his findings are rational and supported by substantial evidence, we affirm the administrative law judge's determination that claimant did not establish the occurrence of a work accident on February 15, 2012. *See Simonds*, 35 F.2d 122, 28 BRBS 89(CRT); *Hess*, 681 F.2d 938, 14 BRBS 1004. As claimant did not establish essential elements of his claims, we affirm the denial of disability benefits.⁴ *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631.

³ Dr. Goss additionally testified that claimant told him just prior to the deposition that his complaints did not result from the February 15, 2012 incident involving the shackles, rather it resulted from the incident involving the reduction gear bearings. EX 22 at 22.

⁴ The administrative law judge noted that claimant did not assert a claim that his cumulative working conditions aggravated his pre-existing condition. Decision and Order at 19; *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge