

JAMES BRUNSWICK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNIVERSAL MARITIME SERVICE)	
CORPORATION)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: 06/15/2011
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	
)	
CERES MARINE TERMINALS)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting Motions for Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

James E. Brunswick, Greenwood, California, *pro se*.

Melanie B. Rother and Peter C. Tipps (Fulbright & Jaworski LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Awarding Benefits and the Order Granting Motions for Reconsideration (2006-LHC-01562) of Administrative Law Judge Russell D. Pulver 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). In an appeal by a claimant without legal representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured on November 20, 2005, when he was struck from behind by a forklift while working as a gang foreman for Universal Maritime Service Corporation (Universal). Claimant, who experienced knee, shoulder and neck pain following this incident, subsequently received medical treatment from a number of physicians and returned to longshore employment for other employers on March 18, 2006. Claimant continued working until May 27, 2007. On June 22, 2007, he underwent surgery on his left shoulder and elbow. Claimant returned to longshore employment on September 22, 2007, but underwent surgery on his right shoulder on July 7, 2008.

Claimant filed a claim against Universal seeking temporary total disability and medical benefits under the Act, contending that he has disabling shoulder, elbow, knee and right ankle conditions related to his November 20, 2005, work injury. On February 1, 2008, while this case was pending before the administrative law judge, Universal filed a motion to join Ceres Marine Terminals (Ceres) as a potentially responsible employer; specifically, Universal averred that Ceres was claimant's last employer prior to his June 22, 2007, shoulder surgery. Ceres and claimant responded to this motion, maintaining that, as claimant's medical conditions are related solely to his November 20, 2005, work injury with Universal, Ceres need not be joined to the proceedings. In an Order dated April 21, 2008, Administrative Law Judge Mosser joined Ceres to the proceedings, stating that, in light of the aggravation rule, it would be in Ceres's best interest to be added to the claim. The case was thereafter reassigned to Administrative Law Judge Pulver (the administrative law judge), before whom claimant's counsel unequivocally stated that claimant was not making a claim for benefits under the Act against Ceres. *See* Tr. at 6; Cl. Post-Hearing Br. at 6, 77-78.

In his Decision and Order, the administrative law judge accepted a stipulation between Universal and claimant that claimant's November 20, 2005, work incident resulted in injuries to claimant's shoulders and elbows. The administrative law judge

found that claimant failed to establish he has any harm to his right ankle, but that claimant's bilateral knee conditions are causally related to his November 20, 2005, work accident with Universal. The administrative law judge found that claimant had no disability attributable to the accident after March 3, 2006. Accordingly, the administrative law judge awarded claimant temporary total disability from November 20, 2005, through March 3, 2006, payable by Universal. Order on Recon at 2. The administrative law judge found that the shoulder surgeries claimant had in 2007 and 2008 were not necessitated by the work injury and that, therefore, Universal is not responsible for that treatment or any disability resulting from the surgeries.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of additional benefits. Universal responds, urging affirmance of the administrative law judge's decision in its entirety. Ceres has not responded to this appeal.

As claimant has appealed without representation by counsel, we will address those findings of the administrative law judge which are adverse to claimant. Consequently, we first address the administrative law judge's finding that claimant did not establish he sustained a work-related injury to his right ankle. Claimant bears the burden of establishing the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated that harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant establishes these two elements, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. 33 U.S.C. §920(a); *see Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT).

The administrative law judge, after discussing claimant's testimony at length, *see* Decision and Order at 5–26, found his testimony that he sustained an ankle injury was not credible.¹ *Id.* at 26–30. The administrative law judge also found no evidence in the medical records documenting any ankle pain. The administrative law judge therefore concluded that claimant failed to establish the harm element of his *prima facie* case with

¹The administrative law judge specifically found that claimant's belligerence as a witness conveyed a lack of respect for the adjudicatory process and his oath to tell the truth, and that inconsistencies exist between claimant's testimony, the information he provided to his physicians, and the level of activity he performed following the November 20, 2005, work incident. Decision and Order at 28 - 29.

regard to his ankle. *Id.* at 72. As the administrative law judge's finding is rational and supported by substantial evidence, we affirm the determination that claimant did not establish that he has a harm to his ankle. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge's consequent finding that the Section 20(a) presumption was not invoked with regard to claimant's purported ankle condition is affirmed. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). Therefore, claimant is not entitled to benefits for an ankle condition.

The administrative law judge next addressed the extent of claimant's disability due to the work-related injuries he sustained to his shoulders, knees, and elbow in the November 20, 2005, incident. In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). In this case, the administrative law judge credited the opinion of Dr. Masson, in conjunction with claimant's having returned to his usual longshore work on March 18, 2006, to conclude that claimant did not establish he was disabled subsequent to March 3, 2006, due to conditions related to his November 20, 2005, work injury. *See Decision and Order at 76–78.*

We affirm the administrative law judge's decision. The administrative law judge rationally relied on the opinion of Dr. Masson, claimant's treating physician through March 3, 2006. Following his examination of claimant on March 3, 2006, Dr. Masson found claimant's neck, shoulders and left elbow to be normal, while claimant's right elbow revealed tenderness. CX 8. Dr. Masson opined that, as of his March 3, 2006 examination of claimant, claimant's shoulder symptoms had resolved and no surgical intervention was required or recommended.² RCX 38. Dr. Masson noted that claimant still complained of bilateral knee pain. Nonetheless, claimant returned to longshore employment on March 18, 2006, and remained employed until May 27, 2007.³ The administrative law judge inferred from this action that claimant's knee condition did not prevent claimant from returning to his usual work. The administrative law judge acted

²While the administrative law judge specifically credited the opinion of Dr. Masson, *see Decision and Order at 67–68*, he further acknowledged that Dr. Winston concurred in that opinion, stating that “It is my opinion that [claimant] was fit to return to work in March 2006. . . .” *Id.* at 67; *see RUX 45.*

³Claimant commenced employment as a longshoreman in 1966; consequently, his seniority allowed him to selectively determine which longshore jobs to accept upon his return to work on March 18, 2006. *See Tr.* at 45–46, 137–139. Claimant did not work for Universal after the November 20, 2005 injury.

within his discretion in relying on Dr. Masson's opinion regarding claimant's condition as of March 3, 2006, as well as claimant's return to work for fourteen months after March 18, 2006, as support for his finding that claimant was not disabled due to the work accident after March 3, 2006. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As substantial evidence supports it, we affirm the administrative law judge's finding that claimant was not disabled as a result of his November 20, 2005, work incident subsequent to March 3, 2006.⁴

We additionally affirm the administrative law judge's finding that Universal is not liable for the shoulder surgeries claimant had in 2007 and 2008. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Medical care must be appropriate for the injury, *see* 20 C.F.R. §702.402, and claimant must establish that the requested services are necessary for the treatment of the work injury. *See generally Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). The administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to the cause of claimant's shoulder conditions in 2007 and 2008 is supported by substantial evidence. *Ortco Contractors Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). He found the opinions of Drs. Masson and Winston sufficient to rebut the Section 20(a) presumption and to establish the absence of a connection between the surgeries and the work accident. *Id.* Dr. Masson stated that claimant's shoulder symptoms had resolved by March 2006 and that the 2007 surgery was not related to the work accident. Dr. Winston opined that the need for claimant's shoulder surgeries was due to something that occurred after claimant returned to work in March 2006, and that

⁴In this regard, it must be reiterated that claimant sought temporary total disability benefits under the Act solely for the consequences of his November 20, 2005, work injury that occurred when he was employed by Universal; in pursuing this claim, claimant's attorney specifically stated that claimant made no claim for compensation against Ceres. *See* Tr. at 6; Cl. Post-Hearing Brief at 6, 78. Thus, while Universal properly impleaded Ceres as a defense against claimant's claim for benefits, *see Reposky v. Int'l Transportation Services*, 40 BRBS 65 (2006), the administrative law judge properly addressed only those claims made by claimant. *See generally U.S. Industries v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Therefore, the administrative law judge did not address whether claimant's employment after March 3, 2006, aggravated his conditions.

the surgical findings indicated degenerative changes to claimant's shoulders and not acute injuries. *See* n. 4, *supra*. These opinions establish that the 2007 and 2008 shoulder surgeries were not necessitated by the 2005 work injury. *Brooks*, 26 BRBS 1. The administrative law judge therefore properly found that employer is not liable for the shoulder surgeries or for any disability occurring as a result of the surgeries. Thus, as the administrative law judge's finding on this issue is supported by substantial evidence, it is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Motions for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge