

BRB No. 01-0571

DAVID M. ARSENAULT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORFOLK SHIPBUILDING AND)	DATE ISSUED: <u>April 8, 2002</u>
DRY DOCK CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A.Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher J. Wiemken (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-1985) of Administrative Law Judge Daniel A. Sarno, Jr., 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

At the time of the hearing, claimant had worked for employer for approximately 25 years as a blacksmith. He testified that on March 20, 1995, while working on board a ship, he injured his right shoulder when a maul "kicked back" as he was attempting to straighten a steel rail on an elevator shaft. Claimant alleges that he reported the incident to his supervisor, Mack White, on the day that

the incident occurred, even though claimant did not seek treatment at employer's clinic until March 20, 1998, three years after his alleged injury. Medical records and the testimony of claimant's family physician support claimant's testimony that he complained to Dr. Hunter from November 1995 and continuing about pain in his right shoulder from an injury occurring at work. Additionally, Dr. Hunter testified that he advised claimant in 1995 to notify employer of the injury in order to obtain treatment and that he assumed claimant had done so. Claimant testified that he first reported his injury to the clinic on March 20, 1998, when the pain became unbearable.

In September 1999, employer approved claimant's request for treatment with Dr. Wardell, an orthopedic surgeon, who diagnosed claimant as having a torn rotator cuff. Dr. Wardell performed surgery on October 5, 1999, after cortisone shots were unsuccessful in relieving claimant's complaints. Claimant testified that when he returned to work with the restrictions that Dr. Wardell imposed post-surgery, he was "laid off" because employer had no work for him. Thereafter, claimant filed a claim for temporary total disability benefits from April 15, 2000 and continuing. Subsequent to the hearing, claimant returned to work for employer on October 30, 2000. In an unrelated claim for a work-related injury to his leg, the parties stipulated that employer paid claimant temporary total disability benefits from July 18, 2000 through October 29, 2000. The parties therefore agreed that claimant was seeking only temporary total disability benefits for the shoulder injury for the period from April 5, 2000 through July 17, 2000.

The administrative law judge found that claimant failed to give timely notice of his injury to employer under Section 12(a) of the Act, 33 U.S.C. §912(a). He then found that Section 12(d) of the Act, 33 U.S.C. §912(d), did not excuse claimant's failure to give timely notice to employer because employer did not have knowledge of claimant's injury until March 1998 and employer was prejudiced by the late notice, as employer was prevented from effectively investigating the claim and from providing timely medical treatment to prevent the worsening of claimant's progressive injury. Consequently, the administrative law judge denied the claim without reaching its merits. Claimant appeals, and employer responds, urging affirmance.

Section 12(a) of the Act requires that written notice of injury, in a case involving a traumatic injury, be filed within 30 days of the date on which the claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his injury, his disability and his employment.¹ See *Bechtel v. Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT)(D.C.Cir. 1987); 20 C.F.R. §702.212(a). The failure to provide timely written notice pursuant to Section 12(a) will bar a claim unless such failure is excused under Section 12(d), 33 U.S.C. §912(d), which provides alternative bases for excuse either where employer had knowledge of the injury or was not prejudiced by claimant's failure to give timely written notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.* 18 BRBS 1 (1985). The burden of establishing that it did not have actual knowledge of claimant's injury and that it was prejudiced by claimant's failure to provide timely notice is on employer. 33 U.S.C. §920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

¹The parties stipulated that claimant's claim, filed in March 1999, was timely. 33 U.S.C. §913(a); *see also* 33 U.S.C. §930(a).

On appeal, claimant does not argue that he gave timely formal notice under Section 12(a), but focuses on whether his failure to do so is excused by Section 12(d).² Claimant first contends that the administrative law judge erred in finding employer did not have actual knowledge of his injury in 1995. “Knowledge” under Section 12(d)(1) refers to employer’s knowledge that the injury is work-related and a reason to believe that compensation liability is possible. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986); *see also* 33 U.S.C. §914(d). The implementing regulation states that “actual knowledge” of the injury is deemed to exist if claimant’s immediate supervisor is aware of the injury. 20 C.F.R. §702.216.

We affirm the administrative law judge’s finding that employer did not have knowledge of claimant’s injury until March 1998, as it is supported by substantial evidence. The administrative law judge rejected claimant’s testimony that he told his supervisor, Mack White, about the injury when it occurred. Tr. at 27. Mr. White denied being aware that claimant sustained a work-related shoulder injury until March 1998. Tr. at 62. Claimant also testified that he did not seek treatment from employer’s clinic because such was discouraged. Tr. at 26-27, 36-38. The administrative law judge found this testimony belied by the evidence concerning claimant’s other visits to the clinic, *see* EX 21 at 125, 141, 170, and by the visit to the clinic by claimant’s co-worker on the same day that claimant’s alleged injury occurred. Tr. at 35. Thus, the administrative law judge found that Mr. White’s testimony that claimant never told him that his shoulder injury resulted from a March 20, 1995 work injury is more credible than claimant’s testimony that he had so informed Mr. White.

²Claimant thus does not raise any argument regarding his date of awareness, or challenge the administrative law judge’s conclusion that the 30-day period commenced on the stipulated date of injury, March 20, 1995. We will therefore not address this issue as it is not properly raised. *But see Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979) (Section 12(a) notice period does not begin to run until claimant is aware that his work injury impaired his wage-earning capacity); 20 C.F.R. §702.212(a). As employer’s knowledge and prejudice under Section 12(d) are determined within the same time frame as that for giving effective notice under Section 12(a), the applicable date here is March 20, 1995.

Questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck 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 (2^d Cir. 1961), and such determinations must be affirmed unless the are “inherently incredible” or “patently unreasonable.” *Cordero v. Triple Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, claimant has not raised any error in the administrative law judge’s finding that claimant’s testimony was contradictory, lacked credibility and was outweighed by the credible testimony of claimant’s supervisor, Mr. White. To the extent that claimant seeks to have the Board reweigh the evidence, it is beyond the Board’s scope of review. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT)(D.C. Cir. 1994). Consequently, we affirm the administrative law judge’s findings that claimant’s failure to timely notify employer is not excused under Section 12(d)(1) because employer did not have actual knowledge of claimant’s injury until March 20, 1998.

Claimant next contends that the administrative law judge erred in finding that employer was prejudiced by claimant’s failure to give timely notice of his injury, pursuant to Section 12(d)(2). Prejudice under Section 12(d)(2) is established where employer provides substantial evidence that due to claimant’s failure to provide timely written notice, it was unable to effectively investigate the claim in order to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer’s burden of proof. *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 119 S.Ct. 866 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

The administrative law judge found that claimant’s untimely notice of injury prejudiced employer’s ability to timely investigate the circumstances of claimant’s injury and to provide medical care to potentially prevent the worsening of claimant’s condition. This finding is supported by the opinion of Dr. Wardell, an orthopedist. EX 22. Dr. Wardell stated that claimant had a rotator cuff tear when he first examined claimant on July 1, 1999. He also stated that the tear was at least a year old, but that he could not be more specific than that. EX 22 at 24. With regard to the progression of claimant’s injury, Dr. Wardell stated that “the tear progresses over time” and the symptoms worsen. *Id.* at 25; CX 14 at 15. Prior to treating with Dr. Wardell, claimant was seen only by his family physician for shoulder pain. *See* CXS 3, 12.

We affirm the administrative law judge’s finding that employer was prejudiced by claimant’s untimely notice of injury. Based on Dr. Wardell’s opinion, claimant’s injury could have occurred any time prior to July 1, 1998, and employer’s lack of knowledge of claimant’s injury prevented it from investigating the claim at the time it allegedly occurred. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). Moreover, as employer

argued to the administrative law judge, claimant did not see a specialist until over four years after the alleged injury, and Dr. Wardell related that the type of injury claimant sustained can progress through continued work. Thus, the administrative law judge rationally determined that employer's lack of supervision of claimant's medical care was prejudicial to it. *See generally Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *cf. Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999) (employer failed to show that its inability to supervise claimant's medical care would have altered the course of claimant's treatment). As the administrative law judge's finding that employer was prejudiced by claimant's late notice of injury is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's failure to comply with Section 12 bars his claim for disability compensation.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge