

PERCY E. LOTTS, JR.)
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 Claimant-Petitioner)
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 v.)
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 NORTHROP GRUMMAN SHIP SYSTEMS) DATE ISSUED: 08/09/2005
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Percy E. Lotts, Jr., New Orleans, Louisiana, *pro se*.

Christopher K. Lemieux (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2002-LHC-2611) of Administrative Law Judge Clement J. Kennington 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 counsel, 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant alleged he sustained injuries to his left foot and lower back as a result of a work-related accident on February 6, 2003.¹ On February 21, 2003, Dr. Meyer observed that claimant's symptoms were consistent with a lumbar injury, and an MRI dated March 5, 2003, revealed a disc protrusion at L5-S1, as well as a bulge at L4-5. Claimant thereafter sought compensation for a lumbar injury allegedly sustained as a result of his work accident. Following an unsuccessful course of conservative treatment, Dr. Billings performed surgery on claimant's lumbar region on October 1, 2003. Dr. Billings assigned permanent sedentary restrictions on claimant's activity as of December 9, 2003, and later opined that he expected claimant to reach maximum medical improvement from his back surgery in March or April 2004. Claimant has not worked since February 6, 2003.

In his decision, the administrative law judge determined that claimant did not invoke the Section 20(a) presumption, 33 U.S.C. §920(a), since he did not present sufficient evidence that an injury occurred in the course of his employment. Alternatively, the administrative law judge found that employer established rebuttal of the Section 20(a) presumption, and that the evidence, based on the record as a whole, does not support claimant's assertion of a work-place back or foot injury sustained on February 6, 2003. Accordingly, benefits were denied. Claimant appeals, without representation by counsel, and employer responds, urging affirmance.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case, *i.e.*, he demonstrates that he suffered a harm and that an accident occurred at work or working conditions existed which could have caused that harm. *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); *Kelaita v. 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 his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

¹ The record establishes that claimant had sustained a prior work-related injury on February 14, 2002, when a cable fell onto his left foot, and that he had completely recovered after four months. Claimant also sought treatment at Touro Hospital's emergency room first on November 11, 2002, for complaints of left shoulder, chest, and lumbar pain, and then on December 9, 2002, for injuries, *i.e.*, left elbow abrasion and left leg contusion, sustained when he fell in the street while running from a dog.

In considering claimant's entitlement to the Section 20(a) presumption, the administrative law judge initially determined that claimant sustained a physical harm, notably lumbar disc disease and possible tendonitis of the left foot, as documented by the medical reports of record. The administrative law judge, however, next found that claimant did not establish that an accident occurred at work on February 6, 2003. First, the administrative law judge found that claimant's complaints of left leg, left foot and back pain preceded his alleged February 6, 2003, date of injury, as evidenced by his documented complaints of back pain on November 11, 2002, Dr. Williams' testimony that claimant had constant left leg pain for one month following his December 8, 2002, fall, EX 23, and claimant's statements to the Touro emergency room physician, on February 8, 2003, that his pain had begun at home seven days earlier, EX 5, which is corroborated by a co-worker, Mr. Smith, who stated that claimant had been in some serious pain for one week prior to the alleged February 6, 2003, accident. EX 26.

Secondly, the administrative law judge found that there was no report of an accident or incident on February 6, 2003, or any witnesses to testify that claimant injured his foot or back on that date, as claimant did not report an accident to his co-worker, Mr. Smith, or to Dr. Corcoran at employer's first aid station on the alleged date of injury. In addition, the administrative law judge found that the records from claimant's visit to the Touro emergency room on February 8, 2003, indicated there was no known cause for claimant's pain, no blunt trauma, and that it was a new onset with no injury. EXs 5, 22, 26. The administrative law judge further found that claimant did not tell either Dr. Meyer or Dr. Williams on February 10, 2003, about a work-related accident or incident, EXs 11, 23, and that in his February 28, 2003, weekly disability benefits form, claimant explicitly indicated that there was no accident.² EX 14. The administrative law judge observed that in his recorded statement to the claims adjuster taken on June 20, 2003, claimant first stated that he felt a pull in his left foot while pushing forks. However, the administrative law judge found that even when claimant told Dr. Billings, on August 29, 2003, that his condition was related to a "shipyard mishap," he did not mention any details of the accident or provide a date. EX 12. The administrative law judge further rejected claimant's alleged excuse for not reporting the accident right away, *i.e.*, he thought his pain was related to his prior foot problems, since it does not explain why he would not have reported a new accident, which he alleged caused the aggravation, particularly since, based on his prior work-related injuries, he was well aware of the policy and importance of reporting all accidents.

² In particular, the weekly disability benefits form dated February 28, 2003, stated that claimant was not involved in an accident, that the date of injury is November 2002, and that the injury occurred when claimant fell while running in the street. This document also states that claimant's ailment did not result from his occupation. EX 14.

Thirdly, the administrative law judge found that claimant's complaints of foot and leg pain are not consistent with the details of the accident he alleges occurred. In particular, claimant alleged that he felt a pull in his left foot while working on February 6, 2003, and Dr. Billings characterized claimant's foot and leg pain as "referred pain" from his lumbar injury. EX 12. Dr. Katz, however, testified that referred pain does not usually occur before the lumbar problem, and he expressed doubt that a specific foot injury, such as the one experienced by claimant on February 6, 2003, could cause a lumbar disc herniation. EX 24. Similarly, Dr. Corcoran testified that it is unusual for a person with a back problem to have only foot pain, as claimant did on February 6, 2003. EX 22. Moreover, the administrative law judge found that while claimant reported back pain to the emergency room nurse on February 8, 2003, such pain was not mentioned at all in the physician's report from the same visit. CX 4. Rather, all focus was on treating claimant's leg and foot pain. *Id.*

Lastly, the administrative law judge rationally rejected claimant's representations that he was involved in a work accident on February 6, 2003, as he found that the record was replete with inconsistencies in claimant's testimony.³ See *Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Consequently, as the administrative law judge's findings regarding claimant's allegations of a work accident are supported by substantial evidence, we affirm his conclusion that claimant did not establish the occurrence of a work-related accident on February 6, 2003. *Bolden*, 30 BRBS 71. In turn, as claimant failed to establish an essential element of his *prima facie* case,⁴ the administrative law judge's denial of benefits is affirmed. *Bolden*, 30 BRBS 71.

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

SO ORDERED.

³ For example, the administrative law judge found: that claimant denied his past use of cocaine, despite a diagnosis of cocaine dependency in May 1990; that claimant testified that he did not have any back problems prior to February 6, 2003, but he did report low back pain at Touro emergency room on November 11, 2002, and Mr. Smith testified that claimant had often complained of back pain prior to February 6, 2003; and that although claimant testified that he told his doctors about the work injury, not one of them recorded it in their reports.

⁴ In light of this conclusion, we need not address the administrative law judge's alternative finding regarding rebuttal of the Section 20(a) presumption, as well as his weighing of the evidence on causation as a whole. *Bolden*, 30 BRBS 71.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge