



BRB No. 16-0079

McGILL C. PARFAIT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PERFORMANCE ENERGY SERVICES,)	
LLC)	
)	DATE ISSUED: <u>Aug. 5, 2016</u>
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Jerry C. von Sternberg (Spagnoletti & Co.), Houston, Texas, for claimant.

Scott A. Soule and Josephine A. Hood (Blue Williams, L.L.P.), Metairie, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-01213) of Administrative Law Judge Lee J. Romero, 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On June 30, 2013, while working as a pipefitter for employer, claimant was injured when a 45-pound flange hit him in the chest and knocked him to the ground. Claimant alleged that he suffered compensable chest and back injuries in this accident. Employer conceded that claimant suffered a compensable chest injury, but countered that claimant did not sustain a back injury in the incident. The administrative law judge found that claimant sustained a work-related chest injury, but did not establish a prima facie case with respect to any back injury. Therefore, the administrative law judge found the Section 20(a) presumption, 33 U.S.C. §920(a), inapplicable, and he denied the claim for a back injury. The administrative law judge awarded claimant temporary total and partial disability benefits for his chest injury. Decision and Order at 27-28, 39.

Claimant appeals the denial of the claim for a back injury. Claimant contends the administrative law judge erred by not invoking the Section 20(a) presumption as he established that he has a harm to his back and that the work incident could have caused this harm. Employer responds, urging affirmance of the denial of the claim.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which applies only after the claimant establishes that: (1) he suffered a harm; and (2) an accident occurred or conditions existed at work which could have caused that harm. *See Bis Salamis, Inc. v. Director, OWCP*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). The administrative law judge did not definitively address the “harm” element of claimant’s prima facie case.¹ The administrative law judge found that claimant did not establish that the work accident on June 30, 2013, could have caused back pain because claimant did not complain of such pain until August 8, 2013, despite having had the opportunity to do so at an earlier date. The administrative law judge rejected claimant’s hearing testimony that he had immediate back pain following the June 2013 accident. Decision and Order at 21-22, 26-27; *see* Tr. at 33-36.

In rejecting claimant’s hearing testimony, the administrative law judge observed that it is inconsistent with his prior statements and uncorroborated by the record. Decision and Order at 21-22. Specifically, claimant stated that his back began to hurt at different times: immediately after the work accident; within two to three days after the

¹ The administrative law judge credited objective medical evidence including an August 2013 MRI, which showed internal disc disruption and desiccation at L4-5 and a bulge at L5-S1. CX 5 at 13. Dr. Voorhies stated that the abnormality at L4-5 can be a clinically active pain generator. However, the administrative law judge also noted that claimant’s July 2, 2014 x-rays revealed no areas suggestive of pain or inflammation. EX 5 at 3; *see* Decision and Order at 25 n.10.

accident; three to four weeks after the accident; four weeks after the accident; and four to five weeks after the accident. EX 2 at 7; EX 8 at 26, 27, 31; Tr. at 35-36, 92-93. Claimant also testified that his back pain was “severe” three weeks after the accident, or approximately by July 21, 2013. Tr. at 35. Despite these statements, claimant told his medical examiners on July 1, 5, and 9, 2013, that he experienced pain only in his chest area, informed carrier’s claims adjuster on July 17, 2013, that he did not have back pain, and reported no history of a back injury to his medical providers until August 8, 2013. CXs 4 at 10-12; 7 at 6; EX 2 at 7; Tr. at 58-60. Crediting the written medical reports, the administrative law judge found claimant did not report back pain until six weeks after the work accident. Decision and Order at 22, 26-27.

Further, although Dr. Voorhies, the neurosurgeon who treated claimant’s back pain, attributed claimant’s back pain to the work accident, the administrative law judge rejected this aspect of Dr. Voorhies’s opinion, as it was premised on claimant’s report that his back hurt immediately after his work accident. Decision and Order at 25; CX 5 at 12, 14; EX 12 at 2. Dr. Voorhies also stated that there would be no causal link between claimant’s back symptoms and the June 2013 accident if claimant were asymptomatic for six weeks following the accident. EX 12 at 1-2. The administrative law judge further noted that Dr. Cenac opined there is no evidence that claimant had an acute spinal injury causally related to the June 2013 accident, CX 7 at 2-3, and that Dr. Applebaum opined it was “unlikely” that claimant sustained a back injury in the accident. EX 8 at 3. Given claimant’s inconsistent reports regarding the onset of his back pain and the lack of objective medical evidence that the pain could have been caused by the work accident, the administrative law judge concluded that claimant is not entitled to the benefit of the Section 20(a) presumption. Decision and Order at 26-27.

We reject claimant’s contentions that this conclusion is contrary to law and unsupported by substantial evidence. It is well established that an administrative law judge’s credibility determinations must be affirmed unless they are inherently incredible or patently unreasonable. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Given claimant’s inconsistent reports concerning the onset of his back pain and the medical evidence reflecting that claimant first sought treatment for back pain on August 8, 2013, we cannot say that the administrative law judge irrationally discounted claimant’s hearing testimony that he experienced immediate back pain following the accident. *Id.* Similarly, the administrative law judge did not abuse his discretion in assigning little weight to Dr. Voorhies’s opinion that claimant’s back pain is due to the work accident in view of the doctor’s statement that such an opinion was predicated on the accuracy of claimant’s report of immediate back pain. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Board is not

entitled to reweigh the evidence and may not disregard the administrative law judge's findings on the ground that other inferences could have been drawn from the evidence. See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976).

Moreover, the administrative law judge's decision accords with law. In *Bis Salamis, Inc.*, 819 F.3d 116, 50 BRBS 29(CRT), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, recently held that an administrative law judge was entitled to find that the Section 20(a) presumption was not invoked where he rationally discredited the evidence relevant to the issue of whether the work accident *could have* caused the claimant's harm, notwithstanding that the claimant bears a "fairly light burden" in establishing his prima facie case.² *Id.*, 819 F.3d at 127-130, 50 BRBS at 36-38(CRT). As we have discussed, in this case the administrative law judge did not abuse his discretion in rejecting claimant's testimony that his back started to hurt immediately after the accident given the lack of contemporaneous evidence to that effect, rationally rejected Dr. Voorhies's opinion to the extent he relied on claimant's account of the onset of back pain, and noted the absence of acute harm based on the opinions of Drs. Cenac and Applebaum. See generally *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Thus, claimant has failed to establish error in the administrative law judge's conclusion that the Section 20(a) presumption is not applicable to claimant's claim of a back injury resulting from the work accident.³ *Bis Salamis, Inc.*, 819 F.3d at 130, 50 BRBS at 37-38(CRT). Therefore, as it

² In *Bis Salamis*, the claimant was involved in a work incident involving a fall from a personnel basket in which he allegedly aggravated a pre-existing degenerative back condition. Finding claimant's statements concerning the incident and complaints of injury wholly incredible and the doctors' opinions tainted by their reliance on claimant's subjective complaints, the administrative law judge found the Section 20(a) presumption inapplicable due to the absence of credible evidence that the work incident *could have* caused anything more than the transient back strain claimant reported initially. The Fifth Circuit reversed the Board's reversal of this finding, reiterating that the administrative law judge is entitled to choose from among reasonable inferences and to determine the weight to be accorded to the evidence. Although the court referred to the case as a "difficult one," the court deferred to the administrative law judge's analysis of the sufficiency of the evidence offered to establish claimant's prima facie case. *Bis Salamis*, 819 F.3d at 129-130 50 BRBS at 37-38(CRT).

³ We note, moreover, that the opinions of Drs. Cenac and Applebaum would rebut the Section 20(a) presumption, see *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003), and, the administrative law judge relied on their opinions regarding the lack of an acute harm to establish on the

is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's denial of benefits for claimant's back injury.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

record as a whole the absence of a causal relationship between claimant's back condition and the work accident. *See Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).