BRB No. 14-0138

MICHAEL MONK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN K-9 DETECTION SERVICES, INCORPORATED	)	DATE ISSUED: Dec. 16, 2014
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Monica F. Markovich and Christina A. Culver (Brown Sims), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2012-LDA-00291) of Administrative Law Judge Patrick A. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In mid-2010, claimant was hired by employer to work as a security dog handler in Afghanistan. Upon his arrival in Afghanistan, claimant was assigned to Kandahar Air Base for several weeks. He was then transferred to a forward operation base at Jelewar, where his employment duties included controlling the entry point and patrolling the perimeter of the base. Within a month or two of his deployment to Jelewar, claimant alleges that he developed a severe case of diarrhea and shoulder pain, both of which subsequently resolved. Additionally, claimant testified that, during his tenure of employment, the forward operating base received small arms, mortar and missile fire on a nightly basis, and that a sniper targeted the security dogs. On October 20, 2010, claimant injured his ankle while training; he returned to the United States in November 2010, for surgery on his ankle. While in the United States, claimant saw his family physician for shoulder pain and swelling in his shoulders and hands. Claimant alleges that, upon his return to Afghanistan in February 2011, he experienced hand, shoulder, knee and ankle pain, as well as a reoccurrence of diarrhea. In May 2011, claimant returned to the United States on scheduled leave. Claimant did not return to work for employer and subsequently treated with multiple physicians for joint pain and arthritis, as well as anxiety and psychological stress symptoms. He filed claims for compensation under the Act on September 15, 2011, and on May 24, 2012, asserting that he sustained physical and psychological injuries as a result of the working conditions he experienced in Afghanistan.[1]

In his Decision and Order, the administrative law judge acknowledged the "complex constellation of medical issues" alleged by claimant, and summarized claimant's three main complaints as: 1) joint pain arising from an arthritic condition precipitated by drinking non-potable water; 2) avascular necrosis of the hip arising as the result of the medications prescribed for claimant's joint pain; and 3) a work-related exacerbation of claimant's psychological condition from his physical pain and/or stress. Decision and Order at 2. The administrative law judge found that claimant's credibility was seriously compromised by inconsistencies in his testimony, and that he failed to establish the existence of working conditions, specifically, his drinking non-potable water and suffering from diarrhea while in Afghanistan, which could have caused his joint pain and arthritis. Similarly, the administrative law judge found that the record does not support a causal relationship between claimant's arthritis and the stress he experienced while working for employer. With regard to claimant's psychological conditions, the

[1] In his amended LS-023 Employee's Claim for Compensation dated May 24, 2012, claimant described the nature of his injury as: "stress-precipitated and/or aggravated or accelerated rheumatoid arthritis and pain in joints in arms, shoulders, legs, hands, feet; short term memory problems/confusion; pulmonary embolism/blood clots; minor strokes; avascular necrosis of the hips; fluid in lungs; and injury to body generally, including worsening of psychological condition." CX 3.

administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that those conditions were aggravated by claimant's work for employer in Afghanistan. The administrative law judge found that employer rebutted the Section 20(a) presumption and determined, based on the record as a whole, that claimant did not establish a causal connection between his psychological conditions and his employment with employer. Accordingly, having found that claimant failed to establish his prima facie case with regard to his physical conditions or the work-relatedness of his psychological conditions, the administrative law judge denied claimant's claim for disability and medical benefits.

Claimant appeals the administrative law judge's decision. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends the administrative law judge erred in failing to apply the Section 20(a) presumption to his claims that: (1) his joint pain and arthritis are related to his drinking non-potable water in Afghanistan and resultant gastrointestinal illness; (2) his hip necrosis is related to steroid treatment for the arthritis caused by the work-related gastrointestinal condition; and (3) his pre-existing psychological conditions have been aggravated by his work-related joint pain. Assuming the administrative law judge applied the Section 20(a) presumption to his claims, claimant contends the administrative law judge erred in finding that employer produced substantial evidence to rebut the presumed causal connection and that claimant did not sustain his burden of providing the work-relatedness of his conditions.

Claimant bears the initial 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 his 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 also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant has established his prima facie case, he is entitled to the Section 20(a) presumption, which links his harm to the work accident or working conditions. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). In this case, the administrative law judge found that claimant has experienced various physical and psychological symptoms with a temporal relationship to his employment in Afghanistan. Thus, the administrative law judge found the "harm" element of claimant's prima facie case was established. *See* Decision and Order at 30; *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964).

Contrary to claimant's contention, the administrative law judge properly recognized that claimant bears the burden of establishing that working conditions in fact

existed that could have caused his harm.[2] If claimant establishes that such working conditions existed, Section 20(a) applies to presume that claimant's harms are due to those working conditions. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986). However, the Section 20(a) presumption does not aid claimant in establishing that the alleged working conditions actually existed. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, although claimant correctly asserts that he need not establish that non-potable water or a gastrointestinal condition actually caused his joint condition, *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013), the administrative law judge properly framed the issue in this case as: "Claimant needs to show according to his theory of the case that he ingested non-potable water or otherwise was exposed to pathogens that could have caused an inflammatory arthritic response." Decision and Order at 30.

The administrative law judge found that claimant failed to establish that he ingested non-potable water or experienced gastrointestinal problems during his employment in Afghanistan. Claimant asserted that he drank non-potable water in Afghanistan, that he, on two occasions, experienced severe diarrhea that required antibiotic and fluid treatment from medics, and that his joint pain commenced following his recovery from these bouts. The record contains no evidence regarding the potability of the drinking water at Kandahar Air Base or the forward operation base at Jelewar. The administrative law judge found that claimant's testimony is "full of contradictions and lapses in memory that impacted his credibility, limited the probative value of what he said, and made it difficult for him to sustain his burden…." Decision and Order at 30.[3]

[2] In this regard, we reject claimant's contention that the administrative law judge erred in failing to apply "the zone of special danger" principle to this case. Under the Act, an injury generally occurs in the course of employment if it occurs within the time and space boundaries of the employment and in the course of an activity related to the employment. *Palumbo v. Port Houston Terminal, Inc*., 18 BRBS 33 (1986); *Mulvaney v. Bethlehem Steel Corp*., 14 BRBS 593 (1981). However, in cases arising under the Defense Base Act, the United States Supreme Court has held the injury may be within the course of employment even if the injury did not occur within the space and time boundaries of work, so long as the employment creates a "zone of special danger" out of which the injury arises. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951). In this case, the issue does not concern whether claimant's injuries occurred in the course of his employment but whether they arose out of his employment, *i.e.*, were they caused by the employment. *See* 33 U.S.C. §902(2). The "zone of special danger" doctrine does not aid claimant in this inquiry.

[3] The administrative law judge also noted the record supports a finding that claimant has engaged in "drug-seeking behavior" which further "clouds" claimant's credibility. Decision and Order at 31.

In this regard, the administrative law judge found that the record contains no contemporaneous medical evidence to corroborate claimant's assertion that he experienced weeks of diarrhea for which he received treatment in Afghanistan; the records from medical treatment claimant received in Afghanistan are silent as to any such condition.[4] *Id.*; EX 7. Similarly, the administrative law judge found that while claimant telephoned his wife regarding his joint pain, he did not inform her of his alleged gastrointestinal condition or any treatment therefor. Decision and Order at 30. The administrative law judge also found that the recitations of Dr. Wright (in September 2011), Dr. Twomey (in July 2012), and of Dr. Rushing (in March 2013), of claimant's drinking non-potable water and suffering from diarrhea were based solely on claimant's statements to the physicians. *Id.* at 31; CX 1 at 69; EXs 1, 5. In conclusion, the administrative law judge found that claimant's testimony, which he found to be seriously compromised, is the only evidence of record regarding his alleged drinking of non-potable water and suffering from extended bouts of diarrhea while working in Afghanistan.[5] Decision and Order at 31-32. The administrative law judge thus concluded that claimant did not establish the existence of working conditions that could have caused his joint/arthritic condition.

We affirm the administrative law judge's decision as it is rational, supported by substantial evidence, and in accordance with law. As discussed above, the administrative law judge applied the proper standard regarding claimant's burden to produce creditable evidence concerning the elements of his prima facie case, before the Section 20(a) presumption is applicable. *Kelaita*, 13 BRBS 326. Moreover, 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. 1961), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A*

[4] The administrative law judge found that, upon claimant's return to the United States in May 2011, medical records dated May 31, June 4, June 8 and late June 2011, contain no reference to gastrointestinal problems occurring while claimant was overseas. The administrative law judge found that claimant's first reference to such a condition was on September 20, 2011 to Dr. Wright. Decision and Order at 31; CX 1 at 69.

[5] Dr. Twomey stated that, "if indeed, [claimant] consumed non-potable water," there is a suggestion of an etiological relationship between claimant's polyarthritis and his work environment. EX 1 at 6. The administrative law judge properly recognized that if claimant established he drank non-potable water and suffered from a gastrointestinal illness, Dr. Twomey's opinion would be sufficient for application of the Section 20(a) presumption. Decision and Order at 31.

Machine Shop, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge addressed at length the evidence relating to the working conditions alleged to have caused claimant's joint pain/arthritis, explained the basis for his credibility determinations, and rationally concluded that claimant did not establish that he drank non-potable water and experienced episodes of diarrhea as he alleged.[6] *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71; Decision and Order at 31-32. Therefore, as claimant failed to establish an essential element of his prima facie case, we reject claimant's contention that the administrative law judge erred in failing to apply the Section 20(a) presumption in this case. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631. The denial of benefits is affirmed.[7]

[6] Thus, we reject claimant's contention that the administrative law judge's decision does not comport with the Administrative Procedure Act. *See H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

[7] As a result of this disposition, we need not address the parties' contentions regarding employer's potential liability for sequela of claimant's joint condition, such as hip necrosis, or for aggravation of any psychological conditions. Moreover, although claimant raised a claim before the administrative law judge that stressful working conditions caused or aggravated claimant's joint pain, claimant did not sufficiently raise in his Petition for Review and brief any issues concerning the administrative law judge's denial of this claim. *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997). That employer addressed this issue in its response brief, triggering claimant's reply brief in which he first alleges error in this regard, is insufficient to invoke the Board's review of this issue.

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge