BRB No. 10-0437

WILLIAM THORNTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUTCO, INCORPORATED	)	DATE ISSUED: 01/27/2011
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

William Thornton, Kansas City, Missouri, *pro se*.

Henry H. LeBas (LeBas Law Offices), Lafayette, Louisiana, for employer/ carrier.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order (2009-LHC-01161) 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 reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are rational, supported by substantial evidence and in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his right knee on December 12, 2007, during the course of his employment for employer. Claimant underwent an arthroscopy and partial menisectomy by Dr. Bostick on December 21, 2007. Claimant began treating with Dr. Watson on February 13, 2008, for right knee pain. On May 13, 2009, Dr. Watson opined that claimant's right knee had reached maximum medical improvement. Dr. Katz examined claimant at employer's request on October 21, 2008. He opined that claimant's right knee was at maximum medical improvement at that time and that claimant sustained a seven percent permanent right knee impairment. Employer voluntarily paid claimant compensation for periods of temporary total disability, 33 U.S.C. §908(b), and for claimant's seven percent permanent partial disability. 33 U.S.C. §908(c)(2), (19). Claimant, appearing without representation before the administrative law judge, alleged that he also injured his lower back on December 12, 2007, and he sought additional compensation and medical benefits for his right knee and back conditions.

The administrative law judge found that claimant did not provide timely notice of a back injury under Section 12 of the Act, 33 U.S.C. §912, and that claimant's untimely notice prejudiced employer from determining whether claimant's back pain is the result of a fall at work or due to degenerative changes brought on by claimant's prior back injuries. The administrative law judge alternatively found that claimant did not establish a *prima facie* case of a work-related back injury. Specifically, the administrative law judge found that claimant did not show that he suffered a physical harm to his back or that he fell from a ladder at work on December 12, 2007. He thus denied claimant's claim for benefits relating to his alleged work-related back condition.

The administrative law judge found, however, that claimant is unable to return to work as a shipfitter and welder due to his work-related right knee injury. The administrative law judge credited Dr. Watson's opinion that claimant's knee reached maximum medical improvement on May 13, 2009. The administrative law judge therefore found that claimant obtained suitable alternate employment on June 3, 2009, as a health aide, which paid $10 per hour for 32 hours per week. The administrative law judge found that claimant is entitled to compensation for temporary total disability from December 12, 2007 until May 12, 2009, and for permanent total disability, 33 U.S.C. §908(a), from May 13 to June 3, 2009; thereafter, the administrative law judge found that claimant is entitled to scheduled compensation for a seven percent permanent partial disability of the right knee. The administrative law judge found that claimant does not require further treatment at this time for his right knee injury. The administrative law judge determined claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), by dividing claimant's total wages for employer of $5,991 by the 14 weeks claimant worked for employer prior to his injury, which corresponds to an average weekly wage of $427.92.

We first address the administrative law judge's finding that claimant did not establish a *prima facie* case that he injured his back on December 12, 2007, when it was undisputed that claimant injured his right knee. The administrative law judge found that claimant did not submit any evidence other than his testimony that he also hurt his back that day at work. Decision and Order at 16. The administrative law judge found that there are no medical records showing that claimant suffered an actual harm to his back, other than pre-existing degenerative changes and that the accident record is devoid of any indication that claimant fell from a ladder at work as he alleged. *Id*.

Claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to bring the claim within the scope of Section 20(a). *Bolden v. G.A.T.X. Terminals*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *see U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). If these two elements are satisfied, Section 20(a) presumes, in the absence of substantial evidence to the contrary, that claimant's injury is work-related. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

Claimant testified at his deposition on October 21, 2009, and at the November 17, 2009, hearing that he injured his right knee climbing up a ladder while assisting a co-worker, who was carrying a 70 pound piece of metal, and that he injured his back due to a fall while descending the ladder. Tr. at 59-60, 67-71; EX 25 at 21-22. Claimant also testified that he told employer and his treating doctors about his back pain from the fall. Tr. at 70-71; EX 25 at 23-25, 32. Employer's internal accident report and its LS-202 First Report of Injury, state only that claimant injured his right knee while ascending a ladder. EXs 4, 5. Morris Griffin, the manager of employer's New Orleans office, testified at his deposition that he was informed by a co-worker that claimant injured his right knee, that claimant did not report a back injury, and that the accident report would have included claimant's alleged fall while descending the ladder if claimant had informed employer of such a fall. EX 26 at 13-15. Jose Ramirez, a site coordinator for employer whose duties included taking claimant to medical appointments, testified that claimant never told him about the alleged fall or that he hurt his back. EX 27 at 9-10, 13, 16. Robert Hutchins, a claims examiner, testified at his deposition that claimant initially reported only a knee injury.[1] EX 28 at 15.

[1]The insurance carrier's claims file for this work accident, which documents claim activity from December 14, 2007 to July 30, 2008, does not contain a notation of a back injury. EX 28 at ex 1.

The medical records from December 14, 2007, to October 21, 2008, do not note a complaint of back pain or an accident history of a fall while descending a ladder.[2] EXs 7-12. Dr. Katz's October 21, 2008, report notes back pain but claimant describes his work accident as involving only a right knee injury while ascending a ladder. EX 9 at 2. Dr. Katz opined that the work injury aggravated pre-existing degenerative disease in claimant's right knee and that claimant's reported problems with his left knee and "with any of the rest of his body" are not related to the work accident. *Id*. at 7. There is no other mention of back pain in the medical records until claimant was examined after the hearing at employer's request on December 14, 2009, by Dr. Clymer. Claimant gave a history of falling approximately 30 feet while descending the ladder on December 12, 2007. EX 33 at 1. Dr. Clymer agreed with the assessment made by Dr. Katz that the work injury aggravated claimant's pre-existing degenerative right knee condition; he also opined that claimant's back complaints are unrelated to the work accident. *Id*. at 2-3.

It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir.1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). *See Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge rationally rejected claimant's hearing testimony that he fell from a ladder, in view of the deposition testimony of Messrs. Griffin, Ramirez and Hutchins, the contemporaneous reports of the work injury, and the medical evidence stating that the only injury occurred while claimant was ascending a ladder. *Id*.; *see also Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish that he injured his back in a fall from a ladder at work on December 12, 2007. As claimant failed to establish an essential element of his *prima facie* case regarding this specific alleged injury, his claim for benefits for a back condition was properly denied.[3] *See U.S.*

[2]Claimant's medical records include the December 14, 2007, report from Westbank Industrial Medicine, an MRI of the right knee taken on December 18, 2007, Dr. Bostick's December 19, 2007 and January 3, 2008 reports, and Dr. Watson's reports from February 13, 2008 to May 13, 2009. EXs 7, 8, 10, 12.

[3]Accordingly, we need not address the administrative law judge's finding that claimant did not provide employer with timely notice of his alleged back injury and that employer was prejudiced by the absence of timely notice. *See* 33 U.S.C. §912(a), (d)(2).

Industries, 455 U.S. 608, 14 BRBS 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71.

We also affirm the administrative law judge's findings as to the nature and extent of claimant's work-related right knee injury as they are supported by substantial evidence. The administrative law judge rationally credited the opinion of claimant's treating physician, Dr. Watson, to find that claimant's right knee reached maximum medical improvement on May 13, 2009, EX 12 at 4, and the opinions of Drs. Katz and Clymer to find that claimant has a seven percent knee impairment,[4] EXs 9 at 7, 33 at 4. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). The administrative law judge found that claimant can return only to light-duty or sedentary employment and that he is unable to return to work for employer. Decision and Order at 17. The administrative law judge rejected claimant's testimony that he is unable to perform any work. The administrative law judge found that claimant attempted to magnify his right knee disability, was purposely uncooperative at a functional capacity evaluation, and was often difficult during his deposition. Decision and Order at 11; *see* Tr. at 89-92; EXs 14-16, 25, 30-32. The administrative law judge further found claimant not credible because he did not inform employer of his past medical history or notify employer of his current employment situation. Tr. at 57-62, 73-80; *see* EXs 1, 18, 25, 31. Based on this evidence, we affirm the administrative law judge's rejection of claimant's testimony that he is unable to work at all. *See Calbeck*, 306 F.2d 696. Moreover, the administrative law judge rationally concluded that employer established the availability of suitable alternate employment from the date claimant started working as a health aide on June 3, 2009. Tr. at 35-37; EX 18; *Neff v. Foss Maritime Co.*, 41 BRBS 46 (2007); *see generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Therefore, we affirm the award of benefits under the schedule commencing June 3, 2009.

The administrative law judge calculated claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), by dividing claimant's total wages for employer of $5,991 by the number of weeks claimant worked for employer, 14, to derive an average weekly wage of $427.92. We affirm the administrative law judge's average weekly wage calculation as Sections 10(a), and (b), 33 U.S.C. §910(a), (b), cannot be applied and the administrative law judge applied a rational method to determine claimant's average weekly wage under Section 10(c). *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.* 25 BRBS 88 (1991).

[4]Dr. Watson did not provide an impairment rating.

Finally, the administrative law judge found that employer is responsible for necessary treatment of claimant's right knee. *See* 33 U.S.C. §907. Substantial evidence supports the administrative law judge's finding that additionally treatment is not warranted at this time. Decision and Order at 24; *see* EXs 9 at 7, 33 at 5. The administrative law judge rationally concluded that employer would be liable for future right knee treatment should claimant's treating physician, Dr. Watson, determine that claimant needs some form of reasonable and necessary medical treatment for that condition. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge