

BRB No. 92-0740

THOMAS W. KYLE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
POOL COMPANY-GULF ENSEARCH)	DATE ISSUED:
)	
and)	
)	
EMPLOYER'S NATIONAL INSURANCE)	
COMPANY OF DALLAS, TEXAS)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Steven M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Michael D. Murphy (Fullbright & Jaworski), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-2239) of Administrative Law Judge James W. Kerr, 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 the 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).

On March 28, 1987, claimant, who had a history of arthritis and gout in both shoulders, his knees, and his feet, filed a claim for permanent total disability benefits under the Act, alleging that, while working for employer as a safety inspector on April 26, 1986, he sustained a traumatic injury to his left shoulder. On August 10, 1987, claimant amended his claim, alleging that his left shoulder, knees and joints had begun hurting all the time, due to an occupational cause and/or aggravation of his pre-existing medical conditions. CX-1.

The administrative law judge denied benefits, finding that claimant failed to establish that the alleged traumatic injury on April 26, 1986, occurred. The administrative law judge further determined that inasmuch as claimant alleged that his employment aggravated his pre-existing condition for the first time at the hearing, employer would be unfairly prejudiced by his consideration of this theory. The administrative law judge determined, however, that, in any event, while the record supports a conclusion that claimant should engage in less strenuous activities, particularly less climbing, he was not persuaded that claimant's condition is worse than the natural progression of the disease process. Accordingly, he denied the claim, finding that claimant failed to establish a work-related injury.

On appeal, claimant contends that the administrative law judge erred in finding his claim based on an aggravation theory untimely inasmuch as this theory was first raised in his amended claim dated August 10, 1987. Claimant further avers that he is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption as it is undisputed that he suffered a harm, as the medical records are replete with descriptions of claimant's osteoarthritic condition, and he has shown either that an accident occurred or that working conditions existed which could have caused, contributed to, or aggravated the harm. Employer responds, urging affirmance.

After considering claimant's arguments in light of the record evidence, we affirm the administrative law judge's determination that claimant failed to establish the occurrence of the alleged traumatic injury. 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); *see also Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994). The administrative law judge's decision not to credit claimant's testimony regarding the occurrence of the alleged traumatic injury in light of claimant's failure to advise any treating physician of the alleged injury for three and one-half years and his failure to file a claim under the Act until his claim for long-term disability benefits was denied, 11 months after the date of the alleged incident, was a proper exercise of his discretionary authority. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). Because the administrative law judge's finding in this regard is rational, supported by substantial evidence and in accordance with applicable law, and claimant has failed to raise any reversible error made by the administrative law judge in evaluating the relevant evidence and making credibility determinations, his denial of benefits for the alleged traumatic injury is affirmed. *See U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, BRBS , BRB No. 93-0204 (April 25, 1996).

While we affirm the administrative law judge's determination that claimant failed to establish the occurrence of the alleged traumatic injury, we are unable to affirm his findings with regard to claimant's aggravation theory. Although the administrative law judge found that claimant raised this issue for the first time at the hearing, the record supports claimant's assertion that the aggravation theory was actually first raised in his amended claim, Form LS-303, filed on August 10, 1987. CX-1. Moreover, even if claimant had raised this issue for the first time at the hearing, the regulations permit new issues to be raised at the hearing. 20 C.F.R. § 702.336. *See generally Jourdan v. Equitable Equipment Co.*, 25 BRBS 317, 326 (1992)(Dolder, J. dissenting on other grounds). Under Section 702.338, 20 C.F.R. §702.338, the administrative law judge has a duty to resolve all disputed questions of fact and must fully inquire into matters that are fundamental to the disposition of the issues in a case. *Id.* at 323.

Although the administrative law judge did purport to address the aggravation theory, his entire discussion of this issue is limited to the cursory statement that "while the evidence indicates that claimant should engage in less strenuous activities, . . . it does not persuade the Court that Claimant's condition is worse than the natural progression of the disease process." Decision and Order at 6. The record, however, contains conflicting evidence as to the aggravating effect of claimant's working conditions on his pre-existing conditions. Inasmuch as the administrative law judge failed to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion, we vacate the above statement that claimant failed to establish an aggravating injury and remand for him to reconsider this issue consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3) (A). *See generally Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon*, 29 BRBS 103 (1995); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). In considering the aggravation theory on remand, the administrative law judge must also address the Section 20(a) presumption, 33 U.S.C. §920(a). If the administrative law judge finds that claimant's condition is work-related on remand, he must consider all remaining issues necessary to the resolution of the claim.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge