BRB No. 97-1415

LARRY MANEN	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
EXXON CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

John A. Ferrone (Sparagna, Sparagna, Ferrone & Ferrone), Encino, California, for claimant.

Ira J. Rosenzweig (Smith Martin), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-2521) 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 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).

Claimant, who was employed by employer as a maintenance specialist, alleged that he suffered an injury to his back on February 17, 1995, while loosening a bolt from a large pipe in a cramped area. Claimant continued performing his usual job until March 15, 1995, when he reported the alleged injury to employer and sought medical treatment. He has not returned to his usual employment since that time and was terminated by employer in October 1995.

In his Decision and Order, the administrative law judge concluded that claimant had established a *prima facie* case for a work-related injury, that claimant was therefore entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to rebut the presumption; accordingly, the administrative law judge found causation established. Thereafter, the administrative law judge determined that claimant had not yet reached maximum medical improvement, and he concluded that claimant remained temporarily totally disabled from March 17, 1995. Accordingly, he awarded claimant continuing temporary total disability compensation plus medical benefits.

On appeal, employer contends that the administrative law judge erred in finding that an accident or injury occurred during the course of claimant's employment and in determining that claimant remains temporarily totally disabled. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer initially challenges the administrative law judge's determination that claimant established the existence of a work-related accident or injury which could have caused his present back condition. It is well-established that claimant bears 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 establish his *prima facie* case. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). 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*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, employer does not dispute that claimant has suffered a harm, *i.e.*, a disc herniation, but argues that no work incident occurred which could have resulted in claimant's current condition. In raising this contention, employer notes that claimant failed to immediately report the alleged injury but continued to perform his usual work for a period of time, that claimant had a motive for faking an injury, *i.e*, he wanted a transfer to a different facility, and that claimant's being injured at almost exactly the same time as his brother, who also works for employer, is an uncanny coincidence. In concluding that a specific incident occurred on February 17, 1995, the administrative law judge addressed and rejected each of employer's contentions, and relied upon claimant's testimony as supported by the testimony of his work colleagues. Specifically, the administrative law judge found that claimant

provided consistent, straight-forward, credible and unequivocal testimony which is supported by the medical evidence of record. 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*, 371 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). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 3 (1988). In the instant case, the administrative law judge considered each of employer's concerns and concluded that claimant did, in fact, sustain a work related accident as described on February 17, 1995. On the basis of the record, the administrative law judge's decision to credit the testimony of claimant is neither inherently incredible nor patently unreasonable; accordingly, we affirm the administrative law judge's finding that claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Next, employer contends that the administrative law judge erred in failing to find that claimant reached maximum medical improvement. We disagree. It is well-established that a claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Assn. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994). In concluding that claimant has not yet reached maximum medical improvement, the administrative law judge relied on the opinion of Dr. Kendrick, claimant's treating physician, that claimant requires surgery on his back; in this regard, the administrative law judge specifically found that Dr. Kendrick's repeated suggestions of surgical intervention indicate that claimant's condition will improve with that surgery. We hold that the administrative law judge could properly find that Dr. Kendrick's surgical recommendation constitutes substantial evidence that claimant has not yet reached maximum medical improvement, and, therefore, we affirm the administrative law judge's finding on this issue. *See generally Leone v. Sealand Terminals Corp.*, 19 BRBS 100 (1986).

Lastly, employer challenges the administrative law judge's finding regarding the extent of claimant's disability; specifically, employer contends that the administrative law judge erred in failing to address the testimony of its rehabilitation expert and in failing to find that it established the availability of suitable alternate employment. Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Hairston v.*

Todd Shipyards Corp., 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Anderson v. Lockheed Shipbuilding & Const. Co.*, 28 BRBS 290 (1994).

We agree with employer that the administrative law judge's finding that claimant is presently totally disabled cannot be affirmed. In addressing this issue, the administrative law judge did not discuss the vocational testimony and evidence submitted by employer into the record. In this regard, we note that Ms. Favaloro, employer's vocational witness, specifically identified five jobs as being available and suitable for claimant. *See* Tr. at 285; EX 14. Moreover, although the administrative law judge acknowledged that claimant's treating physician, Dr. Kendrick, indicated that claimant was capable of performing the identified positions, he ultimately declined to rely on that physician's testimony based upon an inference that Dr. Kendrick "approved the job positions based on the fact that claimant would not undergo surgical intervention [sic] elected to live with his back pain and symptoms." *See* Decision and Order at 22. The administrative law judge, however, provided no support for this inference; moreover, contrary to the administrative law judge's finding, it is claimant's ability to perform the identified jobs which is dispositive of this issue. *See generally Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). We therefore vacate the administrative law judge's finding that claimant is presently totally disabled, and we remand the case to the administrative law judge for consideration of the evidence of record regarding the issue of whether employer established the availability of suitable alternate employment.

Accordingly the administrative law judge's determination that claimant is totally disabled is vacated and the case remanded for consideration of this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge