BRB No. 08-0105

F.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LABOR FINDERS	)	DATE ISSUED: 06/20/2008
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

F.C., Mobile. Alabama, *pro se.*

John J. Rabalais, Janice B. Unland, Robert T. Loria and Heather W. Blackburn (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2007-LHC-233) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they 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 alleges that a specific work incident occurred, on or about December 22, 2005, which caused his current back condition. Specifically, claimant testified that on December 20, 2005, he was struck by a crane bucket while descending a ladder on a barge. Tr. at 44. Claimant stated that while the crane bucket initially pinned him against the side of the vessel, he did not fall since his arm was hooked around the ladder. Once the bucket swung away from him, claimant testified that he released himself from the ladder and fell to the floor in order to avoid being struck a second time by the bucket. *Id.* at 45. Claimant testified that he did not complete his shift on the day of the alleged incident. *Id.* at 48. In contrast, employer's Accident Investigation Report dated November 27, 2005, states that claimant "claims a bucket hit and smashed him into vessel while climbing into hole. No marks were found on body where he claims a 12,000 pound bucket hit him. It seems impossible to me that a bucket could hit him and have no marks and not fall down ladder;" it also stated that claimant refused medical treatment and returned to work. Emp. Ex. 9. Claimant further testified that he subsequently signed an accident report which described the alleged incident,[1] Tr. at 46 – 47; Emp. Ex. 10 at 44, and that he then worked on and off until January 5, 2006, at which time he sought treatment with Dr. Taylor. While claimant informed Dr. Taylor on January 5, 2006, that he had sustained a work-related injury on December 20, 2005, Clt. Ex. 1 at 49 – 51, he thereafter reported to Dr. Allen on July 24, 2006, that his injury occurred on either December 22 or 26, 2005. Clt. Ex. 1 at 11 – 12, 52, 53. Claimant's LS-203 Claim for Compensation, dated September 19, 2006, states that the work incident occurred on December 22, 2005. Clt. Ex. 2 at 1.

In his Decision and Order, the administrative law judge determined that while claimant had established a harm, specifically back pain, he failed to establish that he suffered the specific accident during the course of his employment that he alleged as the cause of that harm. Accordingly, having found that claimant failed to establish his *prima facie* case, the administrative law judge denied the claim for benefits under the Act.

Claimant, without the benefit of counsel, has filed a letter with the Board appealing the administrative law judge's denial of his claim. Employer responds, urging affirmance.

Claimant on appeal challenges the sole issue addressed by the administrative law judge below, *i.e.*, the administrative law judge's determination that claimant did not have a work-related accident on either December 20 or 22, 2005. As the administrative law judge committed no error in weighing the evidence, we affirm his decision.

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

[1] This undated document recounts the same events as the earlier accident report, *see* Emp. Ex. 10 at 44, and the administrative law judge stated it was completed at claimant's request. Decision and Order at 4.

caused the harm in order to establish a *prima facie* case. *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.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish each element of his *prima facie* case.[2] *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).

Before the administrative law judge, claimant asserted that a definitive work incident occurred on either December 20 or 22, 2005, which caused his present back condition. The administrative law judge discredited claimant's testimony and concluded that the specific work incident alleged did not occur. In rendering this determination, the administrative law judge found that claimant's evidence supporting the occurrence of an accident in December 2005 is not convincing, that claimant established no clear date of the alleged incident,[3] and that claimant presented no witnesses to the alleged incident. *See* Decision and Order at 10. The administrative law judge stated that he had doubts regarding claimant's description of the alleged incident, noting that although claimant alleges that an 8,000 pound crane bucket pinned him against another piece of metal, claimant sustained no bruising or other visible signs of injury. *Id.* at 10 – 11. In addressing claimant's credibility, the administrative law judge found that while the record establishes that claimant, since 1992, had a history of back incidents, problems and treatment by various doctors and emergency room visits, claimant informed Dr. Allen that his back had not given him much trouble since 1993. *Id.* at 11. Moreover, the administrative law judge found that the record did not support claimant's deposition and hearing testimony that he was pain-free at the time of the alleged work-incident and that he had not seen a doctor regarding his back complaints in the year preceding that work-incident.[4] *Id.* at 11 – 14.

[2] As the administrative law judge's finding that claimant experiences back pain is not challenged on appeal, that finding is affirmed.

[3] The administrative law judge found that while this discrepancy in the date of the alleged incident is not unreasonable in and of itself, it becomes more problematic in light of employer's November 27, 2005, accident report which describes the incident which claimant contends occurred in December. Decision and Order at 10.

[4] The administrative law judge identified twenty-one instances between February 1994 and October 2005 in which claimant received medical treatment for his back condition, and multiple instances where claimant was prescribed pain medication. Decision and Order at 11 – 13.

Based upon claimant's outright denial of his medical history over the 13-year period preceding the alleged December 2005 work-incident, the administrative law judge declined to credit claimant's testimony that he was struck by a crane bucket while at work in December 2005, and he concluded that claimant failed to establish the occurrence of a work incident which could have caused his back condition. Decision and Order at 14. After a review of the record, we affirm the administrative law judge's findings because they are rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. 359. 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*, 372 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. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see Bolden*, 30 BRBS 71. The administrative law judge considered the inconsistencies in claimant's statements regarding the date on which the specific work-incident was said to have occurred, claimant's description of the nature of the unwitnessed work-incident itself, and claimant's testimony regarding his prior medical condition and treatment, and concluded that claimant did not establish that the alleged work event occurred. On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant is neither inherently incredible or patently unreasonable. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish an essential element of his *prima facie* case, and his consequent denial of claimant's claim for benefits.[5] *See U.S. 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.

[5] In his appeal letter to the Board, claimant states that he has found a witness to his alleged work-incident who is willing to testify on his behalf. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Under Section 22, claimant may file a request for modification based on a change in condition or mistake of fact within one year of the final rejection of his claim. Accordingly, should claimant seek to present new evidence in support of an allegation that a mistake in fact occurred regarding the alleged incident, he must file a request for modification. *See* 20 C.F.R. §702.373.

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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JUDITH S. BOGGS
Administrative Appeals Judge