

BRB No. 13-0575

ANTHONY SHAKOOR)
)
 Claimant-Petitioner)
)
 v.)
)
 AEGIS, MISSION ESSENTIAL)
 PERSONNEL)
) DATE ISSUED: June 17, 2014
 and)
)
 ZURICH AMERICAN INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Robert N. Dengler and Mark J. Lesorgen (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-LDA-00161) of Administrative Law Judge Theresa C. Timlin 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer as a linguist in Afghanistan in November 2009. EX 4 at 50-51. Claimant injured his left buttock on March 31, 2010, when he fell on the edge of his cot at Camp Marjeh. Tr. at 36. A military physician diagnosed claimant with a “left buttocks contusion” and a “sciatic nerve inflammation, secondary to adjacent contusion.” CX 1. Claimant was unable to continue working because of the pain from his injury. Tr. at 37. Upon his return to the United States, claimant sought treatment from an orthopedic physician, Dr. Leupold, who opined that claimant suffered a contusion of the sciatic nerve and “is still disabled until we have an explanation for his leg weakness.” CX 4 at 97. On June 6, 2011, claimant began treating with Dr. Apicella, a pain management specialist, with whom claimant continued to treat through the June 7, 2012, hearing. On July 12, 2011, Dr. Buckner, an orthopedic surgeon, examined claimant on behalf of employer. Dr. Buckner opined that claimant was embellishing his symptoms, that he had no work restrictions, and that he was not in need of further treatment. EX 1 at 4-5. Given Dr. Buckner’s evaluation, employer ceased paying claimant, having voluntarily paid temporary total disability benefits between May 2 and December 19, 2010, and temporary partial disability benefits from December 20, 2010, to July 24, 2011.¹

The issues raised before the administrative law judge were whether claimant continued to be disabled by his work injury as of July 25, 2011, and whether employer is liable for the payment of past and future medical treatment. Based on Dr. Buckner’s opinion, the administrative law judge found that claimant’s condition reached maximum medical improvement and claimant was not disabled as of Dr. Buckner’s July 12, 2011, evaluation. Thus, the administrative law judge determined that claimant is not entitled to continuing disability benefits, to reimbursement for any medical expenses incurred after July 12, 2011, or to payment of medical treatment after that date. Claimant appeals the denial of benefits, contending the administrative law judge erred in weighing the evidence as a whole to find that claimant’s disability resolved as of July 25, 2011, without first addressing the Section 20(a), 33 U.S.C. §920(a), presumption. Claimant also argues that the administrative law judge’s weighing of the evidence is irrational. Employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in failing to address the Section 20(a) presumption in ascertaining whether he has a continuing disability. We reject this contention. It is undisputed that the work accident occurred and that claimant was disabled as a result of the injury resulting from this accident. Thus, the work-

¹ On December 20, 2010, claimant obtained employment as a branch manager for Citizen’s Bank. EX 4 at 141.

relatedness of claimant's disability is not at issue.² Rather, the issues presented to the administrative law judge concerned the nature and extent of claimant's disability, if any, resulting from the work injury. The Section 20(a) presumption does not apply to these issues, *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). It is claimant's burden to establish that he is disabled by his work injury without the benefit of the Section 20(a) presumption. *Id.*

Claimant next asserts that, in finding his work-related injury had fully resolved, the administrative law judge erred in finding claimant's subjective complaints of pain are insufficient to establish ongoing disability. It is claimant's burden to establish that the work injury prevents him from returning to his usual work. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991). The administrative law judge properly acknowledged that a claimant's subjective complaints can support an award of disability benefits. Decision and Order at 28. Nonetheless, she found that claimant's testimony concerning his symptoms is not credible. *Id.* at 26-28. The administrative law judge found that claimant gave inconsistent versions of his abilities, and offered "conflicting and evasive" answers to questions at the hearing. *Id.*; compare EX 4 at 152 with Tr. at 42; see CX 6 at 158, 160, 182; Tr. at 73; compare EX 4 at 151 with Tr. at 63-64; compare Tr. at 74 with CX 15. The administrative law judge is entitled to weigh the evidence and to determine the credibility of witnesses. The Board is not empowered to weigh the evidence. See *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2^d Cir. 1993); see also *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). As the administrative law judge's credibility determination is neither "inherently incredible" nor "patently unreasonable," we affirm the finding that claimant's testimony is insufficient to establish that he is unable to return to his usual work. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Claimant next asserts the administrative law judge erred in discounting Dr. Apicella's opinion. The administrative law judge found Dr. Apicella's June 6, 2012, opinion, that claimant may have had some permanent work limitations, to be of limited value because the physician expressed uncertainty as to the extent of claimant's work limitations and his opinion was premised on claimant's unreliable complaints of pain as well as an "equivocal" December 19, 2011, nerve conduction study. Decision and Order at 28; CXs 5 at 154; 6; 15 at 18, 21, 23-25; EX 2 at 61. We affirm the administrative law judge's finding that Dr. Apicella's opinion is insufficient to establish that claimant's

² The parties stipulated that an accident occurred on March 31, 2010, and medical evidence of record establishes the existence of a harm, *i.e.*, injury to claimant's left buttock and sciatic pain.

injury disables him. The administrative law judge rationally found that the equivocal nature of Dr. Apicella's opinion weakens it, and that Dr. Apicella conceded that his opinion regarding claimant's disability was based on claimant's complaints of pain, which the administrative law judge found not credible. CX 15 at 49-50. Therefore, we reject claimant's contention of error. *Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT).

We also reject claimant's assertion that the administrative law judge erred in crediting Dr. Buckner's opinion. The administrative law judge found Dr. Buckner's opinion, that claimant reached maximum medical improvement by July 12, 2011 and was not disabled as of that date, to be well-reasoned, documented, and consistent with negative objective test results.³ The administrative law judge noted Dr. Buckner's extensive review of claimant's medical records and the absence of objective findings to support claimant's complaints of pain. Decision and Order at 28; EX 2 at 11-14, 61. Although claimant accurately notes that Dr. Buckner was unaware that claimant's job required heavy lifting, the administrative law judge properly found that this does not preclude her from crediting his opinion, because Dr. Buckner stated that claimant has no disability or work restrictions. Decision and Order at 28; EX 2 at 75; *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127, 128 (1998) (holding that because physicians determined the claimant has no disability and no work restrictions it is irrelevant whether they were aware of claimant's job duties). Consequently, as it is rational and supported by substantial evidence in the form of Dr. Buckner's opinion, we affirm the administrative law judge's finding that claimant has not been disabled by his work injury after July 25, 2011.

Further, the administrative law judge rationally found claimant is not entitled to future medical benefits in light of Dr. Buckner's opinion that claimant is not in need of further medical treatment. We therefore affirm the denial of future medical benefits. See 33 U.S.C. §907(a); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F. App'x 126 (5th Cir. 2002); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director*, OWCP, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

³ The December 19, 2011, EMG study was interpreted as "equivocal." CX 5. Dr. Buckner reviewed the diagnostic testing of record and concluded there are no objective findings to explain claimant's subjective complaints of pain. CX 14 at 37-38; EXs 1; 2 at 21, 61. Dr. Leupold also concluded there were no objective findings. For example, he characterized an October 27, 2010, EMG as "borderline," stating it was "possibly consistent with compression of the sciatic nerve on the left but [] none of the nerves going to the muscles were involved." CX 14 at 21-22

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge