

BRB Nos. 08-0326
and 09-0528

FRANKLYN TARVER)
)
Claimant-Petitioner)
)
v.)
)
SERVICE EMPLOYEES) DATE ISSUED: 03/30/2010
INTERNATIONAL, INCORPORATED)
)
)
and)
)
INSURANCE COMPANY OF THE STATE)
OF PENNSYLVANIA/AMERICAN)
INTERNATIONAL UNDERWRITERS)
)
Employer/Carrier-)
Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits, Order Denying Motion for Reconsideration and Affirming Decision and Order, Decision and Order on Modification, and Order Denying Motion for Reconsideration of Decision and Order on Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Franklyn Tarver, Texas City, Texas, *pro se*.

John Schouest and Limor Ben-Maier (Wilson, Elser, Moskowitz, Edelman & Dicker LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order Denying Benefits, Order Denying Motion for Reconsideration and Affirming Decision and Order, Decision and Order on Modification, and Order Denying Motion for Reconsideration of Decision and Order on Modification (2007-LDA-00129) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was hired by employer on January 15, 2005, to work in Kuwait as a bus driver. After one year of working in Kuwait, claimant was transferred to Iraq. Claimant's transfer required a physical examination, and blood tests on January 15, 2006, revealed that he was positive for Hepatitis C. Claimant continued to work for employer until February 18, 2006. Claimant alleged that he contracted Hepatitis C on or around January 15, 2006, and that he also injured his right knee on three separate occasions while working for employer.¹ Specifically, claimant stated that he contracted Hepatitis C as a result of his blood coming into contact with another person's blood and/or other bodily fluids, which he alleged happened on four separate occasions, during the course of his work for employer. As for his right knee, claimant alleged that he first injured it in January 2006, when turbulence during a flight to the United States from Iraq caused him to twist his right knee, resulting in severe pain. After two weeks of leave in the United States, claimant returned to Iraq and allegedly injured his right knee for a second time during his return flight. The third injury to claimant's right knee allegedly occurred as he retrieved luggage at the Dubai Airport following this return flight.

Claimant filed a claim, asserting that he was temporarily totally disabled, first from March 8, 2006, through May 26, 2006, due to his right knee injury, and thereafter as a result of hypertension, profound fatigue and psychological problems, including depression, associated with his contracting Hepatitis C. Employer controverted the claim, arguing that none of claimant's conditions occurred in the course of his work for employer. In his initial Decision and Order dated September 12, 2007, the administrative law judge found that claimant was not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to either his right knee and/or Hepatitis C conditions, since his assertions regarding the work-related nature of these conditions were not credible in light of the objective evidence of record. The administrative law judge added that even if claimant was entitled to the Section 20(a) presumption with respect to his Hepatitis C, Dr. Rosen's testimony that this condition is not related to claimant's work for employer is

¹ Claimant had no knee or Hepatitis C symptoms before working for employer, and he passed a pre-employment physical, which tested for Hepatitis A but not C.

sufficient to rebut the presumption, and moreover, that the opinions of Drs. Rosen and Moeller establish, based on the record as a whole, that there is no causal connection between that condition and claimant's work for employer.² Accordingly, benefits were denied. Claimant's *pro se* motion for reconsideration was denied by the administrative law judge's Order dated November 29, 2007.³

Claimant, without counsel, appealed these decisions and the Board, by Order dated February 28, 2008, assigned the case BRB No. 08-0326. Claimant, however, filed a letter requesting modification, and the Board issued an Order on June 4, 2008, dismissing the appeal and remanding the case to the Office of Administrative Law Judges for consideration of claimant's petition for modification.

In his Decision and Order on Modification, the administrative law judge found that there is "no basis to reverse the previous decisions in this case and no reason to believe that employer's counsel engaged in any misconduct." He thus denied claimant's petition for modification. Claimant then filed a motion for reconsideration of the administrative law judge's decision on modification, in which he raised allegations of fraud against employer. The administrative law judge concluded that there is no credible evidence to support claimant's assertions of alleged misconduct by employer, that claimant did not provide any new evidence in support of reconsideration, and that there is no record evidence showing any manifest error of law or fact. The administrative law judge thus denied claimant's motion for reconsideration.

Claimant, without representation, appealed the administrative law judge's decisions on modification, and in an Order dated April 23, 2009, the Board acknowledged but dismissed claimant's appeal of the administrative law judge's Decision and Order on Modification, BRB No. 09-0528, as untimely filed. By Order dated June 30, 2009, the Board acknowledged claimant's appeal of the administrative law judge's Order Denying Motion for Reconsideration, vacated its April 23, 2009, order and

² The administrative law judge also rejected claimant's assertion that his hypertension is related to his work for employer and found that claimant's depression and fatigue are a direct result of his treatment for Hepatitis C and, thus, are unrelated to his work for employer.

³ The record establishes that claimant was represented by counsel at the formal hearing and up through the issuance of the administrative law judge's Decision and Order Denying Benefits dated September 12, 2007. In requesting reconsideration, claimant argued, among other issues, that he was not properly represented by counsel.

reinstated claimant's appeal in BRB No. 09-0528, as it was not untimely filed due to the administrative law judge's decision on reconsideration.⁴

Claimant contends that the administrative law judge erred in finding that he is not entitled to benefits for conditions relating to his right knee, Hepatitis C, and hypertension, as well as for his ongoing psychological condition. Claimant argues that employer withheld relevant information related to his case, maintaining that employer has in its possession several documents which would assist him in establishing a causal connection between his disabling conditions and work for employer. Claimant thus asks the Board to compel employer to produce these documents and for the Board to remand this case for reconsideration of his claim. Employer responds, urging affirmance of the administrative law judge's decisions.

Addressing claimant's procedural contention, we note that all of the documents which claimant requests that the Board compel employer to produce are either not material to the issues involved in this case, have already been submitted into evidence, or simply do not exist. The KBR Notice Letter of Medical Screening on December 19, 2005, and the alleged letter from the Kuwaiti government saying that claimant has Hepatitis C, may establish that claimant has Hepatitis C, but, as the administrative law judge previously found, these documents have no relevance to the question of whether that condition is related to claimant's work for employer. Moreover, assuming that the information contained in the two handwritten statements is true, those theories of causation were explicitly rejected by Dr. Rosen, whose testimony was rationally credited by the administrative law judge. HT at 67-70.

Moreover, the KBR Medical Treatment requests dated September 4, 2005, and January 15, 2006, were, in fact, submitted by claimant either as part of the original record or in conjunction with claimant's motion for reconsideration, and thus, were considered by the administrative law judge in resolving this case. CX 10. Lastly, there is no indication that KBR Medical Clinic Records allegedly reporting a February 9, 2006, right knee injury exist, nor is there any evidence to suggest that employer withheld any medical records dated February 9 through 18, 2006, regarding claimant's alleged work-related right knee injury. Claimant's own admission that he never reported his three alleged knee injuries to any person, including his treating physician at that time, Dr. Radoff, or employer, HT at 52-54, 55-57, supports the fact that employer would not have

⁴ For the reasons stated in the Board's June 30, 2009, Order, claimant's appeal of the administrative law judge's original decision, BRB No. 08-0326, is also reinstated and consolidated with BRB No. 09-0528.

any records relating to any such injuries. We, therefore, reject claimant's request to compel employer to produce this evidence.

To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). 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). If these two elements are established, claimant is entitled to a presumption that his injury is work-related. *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT).

In considering claimant's entitlement to the Section 20(a) presumption with regard to claimant's alleged right knee injury, the administrative law judge initially determined there is evidence that claimant sustained a harm, notably right knee derangement. The administrative law judge found, however, that claimant did not establish that any work-related accidents occurred as he described. Specifically, there were no witnesses to these alleged accidents, and the administrative law judge found that claimant's testimony concerning the occurrence of these accidents on flights and in the airport is not credible, given his failure to report the condition until March 8, 2006, when he first saw an orthopedist, Dr. Moore, despite his allegations that he was in intense pain. Additionally, the administrative law judge found that the fact that claimant saw Dr. Radoff on January 23, 2006, and February 21, 2006, following the first, and then after the second and third, of these alleged accidents, without any mention of knee problems, coupled with Dr. Radoff's physical examinations on those dates which revealed no abnormalities, establishes that any knee injury suffered by claimant occurred after February 18, 2006, the date his work for employer ceased. As the administrative law judge's findings are supported by substantial evidence, his finding that claimant failed to establish that he sustained any work-related accidents involving his right knee is affirmed. *See generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71 (1996). We thus affirm the administrative law judge's conclusion that claimant is not entitled to any benefits relating to his right knee condition.

Turning to claimant's Hepatitis C, the administrative law judge likewise found that although claimant established the requisite harm, he did not establish that working conditions existed which could have caused that harm. Nevertheless, the administrative law judge found that even if he were to accept claimant's assertion that he could have contracted Hepatitis C as a result of exposure to contaminated blood or other bodily fluid, Dr. Rosen's testimony rebuts the Section 20(a) presumption. *See Rainey v. Director*,

OWCP, 517 F.3d 632, 42 BRBS 11(CRT) (2^d Cir. 2008); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). Specifically, Dr. Rosen responded “No,” when asked “in your professional opinion, is there any way at all that [the events described by claimant] would have led to his contracting Hepatitis C?” HT at 69. Dr. Rosen explained that there are no reported cases of contracting Hepatitis C by skin contact, and opined based on reasonable medical probability that “the most likely reason [for claimant’s contracting Hepatitis C] is intravenous drug use.” HT at 70, 79. She added that there was nothing in the record to indicate that any pre-existing Hepatitis C was exacerbated by his working conditions with employer. HT at 82. Dr. Rosen further explained that it is quite common for someone to have “no symptoms for often 20 to 30 years post-contracting the disease.” *Id.* We affirm the administrative law judge’s finding that Dr. Rosen’s opinion is sufficient to rebut the Section 20(a) presumption that claimant’s Hepatitis C is related to his work for employer. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *O'Kelley*, 34 BRBS 39.

Moreover, based on Dr. Rosen’s opinion, the administrative law judge rationally concluded that claimant did not establish on the record as a whole that his Hepatitis C is related to his work for employer. Decision and Order at 10. The administrative law judge found that Dr. Rosen’s opinion is bolstered by the testimony of psychiatrist, Dr. Moeller, who, the administrative law judge found, “agreed essentially with Dr. Rosen, finding the most likely cause of claimant’s contraction being the past IV drug use.” Decision and Order at 7. The administrative law judge also credited Dr. Rosen’s opinion that claimant’s pre-existing hypertension was not caused or aggravated by his work for employer. Moreover, he concluded that claimant’s depression, stress and other related alleged disorders are related to claimant’s Hepatitis C treatment and relied on Dr. Moeller’s opinion that these conditions did not result in any psychological condition affecting claimant’s ability to work. As the administrative law judge applied the appropriate standard with regard to causation, and as the opinions of Drs. Rosen and Moeller are substantial evidence supporting his conclusion, the administrative law judge’s decision that claimant is not entitled to benefits for those conditions is affirmed. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The administrative law judge’s original Decision and Order Denying Benefits is therefore affirmed.

In addressing claimant’s motions for reconsiderations and petition for modification, the administrative law judge thoroughly considered claimant’s arguments, as well as any new evidence he submitted, pursuant to the appropriate standards. *See* 33 U.S.C. §922; *see also* 20 C.F.R. §§702.350; 702.373. In this regard, the administrative law judge found, in his Order Denying Motion for Reconsideration and Affirming Decision and Order dated November 29, 2007, that none of the “new” evidence submitted by claimant was material to the issues of the case, or warranted reconsideration

of the original denial of benefits. In his Decision and Order on Modification dated July 31, 2008, the administrative law judge set out the appropriate standard for modification under Section 22, 33 U.S.C. §922, and “after reviewing the arguments and additional documents provided by claimant,” pursuant to that standard, concluded that claimant did not establish the requisite change in condition or mistake in fact to support modification of his prior denial of benefits. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass’n, Inc.*, 390 U.S. 459 (1968); Decision and Order on Modification at 2-3. Lastly, in his Order Denying Motion for Reconsideration of Decision and Order on Modification dated March 5, 2009, the administrative law judge identified claimant’s argument as an allegation of fraud against employer and, after review of the record again in the context of the appropriate standard for reconsideration, he concluded that “there is no credible evidence to support claimant’s assertions that employer/carrier destroyed, withheld, lost or failed to present pertinent evidence of claimant’s medical condition.” Order Denying Motion for Reconsideration of Decision and Order on Modification at 2-3. He thus denied claimant’s motion for reconsideration. As the administrative law judge’s denials of claimant’s requests for modification and reconsideration are supported by substantial evidence, are rational, and are in accordance with law, they are affirmed.

Accordingly, the administrative law judge’s Decision and Order Denying Benefits, Order Denying Motion for Reconsideration and Affirming Decision and Order, his Decision and Order on Modification, and Order Denying Motion for Reconsideration of Decision and Order on Modification are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge