BRB No. 98-918

ROBERT L. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED: May 14, 1999
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Robert L. Williams, New London, Connecticut, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration (97-LHC-827 and 97-LHC-828) of Administrative Law Judge David W. Di Nardi 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).[1] In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to

[1]Claimant filed his appeal on March 31, 1998. By Order dated March 2, 1999, the Board dismissed claimant's appeal and remanded the case to the district director for reconstruction of the record, or alternatively, to the Office of the Administrative Appeals Judges for a new hearing. By Order dated March 27, 1999, the Board, upon noting receipt of the reconstructed record, reinstated the appeal and stated that the one-year review period commenced from the date of the Order.

determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). Employer has not responded to this appeal.

Claimant, a shipfitter, injured his back at work on May 15, 1991, while lifting a heavy cannon plate and alleged that an additional work-related back injury occurred on June 19, 1995, while he was climbing a ladder on a submarine. Claimant previously suffered back injuries at work in 1984 and 1985, and was paid various periods of compensation for these injuries. Employer voluntarily paid claimant temporary total disability benefits for the 1991 injury from May 15, 1991, through August 19, 1991, and from June 25, 1993, through June 29, 1993. 33 U.S.C. §908(b) No benefits were paid on the alleged 1995 injury. With respect to the 1995 injury, claimant sought permanent total disability benefits from June 20, 1995, and continuing, or alternatively, permanent total disability benefits from June 20, 1995, through November 3, 1995, permanent partial disability benefits from November 4, 1995, through June 4, 1996, and permanent total disability benefits from June 4, 1996, and continuing. Claimant was terminated from work on September 25, 1995.

In his Decision and Order, the administrative law judge found that claimant's 1995 back claim was barred by Section 12 of the Act, 33 U.S.C. §912. Even if claimant had given timely notice of an injury occurring in 1995, the administrative law judge found that claimant did not establish the occurrence of a work accident. The administrative law judge also found that claimant has no residual disability from the 1991 injury, and is not entitled to medical benefits after June 20, 1995. The administrative law judge concluded that claimant's termination from employment was not in violation of any provision of the Act. The administrative law judge denied claimant an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). With regard to claimant's mugging on November 4, 1995, the administrative law judge found this to be the intervening cause of any disability claimant now suffers; thus, employer is not responsible for any disability or medical expenses following this incident. The administrative law judge denied claimant's motion for reconsideration after admitting and discussing the depositions of Drs. Zeppieri and Willetts, which he had not admitted and discussed in his initial Decision and Order.

Initially, the administrative law judge denied claimant additional compensation for his 1991 back claim. To establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). The administrative law judge's finding that claimant could return to work without restrictions is supported by Dr. Zeppieri's opinion, returning claimant to work without

restrictions on August 19, 1991, and by the fact there is no clear testimony from claimant that he could not perform his usual work after his 1991 injury.[2] Decision and Order at 4, 18; RX 12R; Tr. at 38, 64-65, 75-78. We, therefore, affirm the administrative law judge's denial of additional benefits on the 1991 claim as it is rational and supported by substantial evidence. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

[2]Claimant testified that some supervisors, including Messrs. Burgess, Miller and Woods, helped him perform his work by giving him breaks, but he did not know when they did so - whether it was closer to 1989, after he returned to work from his 1985 injury, or closer to 1995. Tr. at 38, 64-65, 75-78.

The administrative law judge also denied claimant benefits for an alleged 1995 injury.[3] The Section 20(a), 33 U.S.C. §920(a), presumption is invoked if claimant establishes a *prima facie* case, *i.e.,* that he sustained a harm and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In determining that no accident took place on June 19, 1995, the administrative law judge acted within his discretion in finding that claimant's testimony regarding the alleged incident was not credible, as claimant failed to follow the procedures for reporting work-related injuries when he was well aware of them, claimant did not seek medical care until August 8, 1995, and, at the time of this visit, Dr. Miller noted only claimant's subjective complaints.[4] *See Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988); Decision and Order at 15, 17; RX 14; Tr. at 39-51. Moreover, the administrative law judge rationally determined that no harm occurred on June 19, 1995, as there were little or no

[3]Contrary to the administrative law judge's finding, the 1995 claim is not barred by Section 12. First, this issue may not have been properly considered by the administrative law judge as it was withdrawn by employer at the hearing, and as the administrative law judge did not provide the parties with notice that he would consider this issue. 20 C.F.R. §702.336(b); RX 2; Tr. at 26-27. Even if the administrative law judge properly considered the timeliness issue, the 1995 claim is still not barred by Section 12 as there is no evidence to support the administrative law judge's conclusory determination that employer established that it was prejudiced by its failure to receive timely notice in that it did not have the opportunity to investigate the claim shortly after the accident was alleged to have occurred. *See ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989); *Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97 (1988); Decision and Order at 15. In any event, the Section 12 issue is not dispositive based on our affirmance of the administrative law judge's finding that no work-related injury occurred in 1995. *See infra.*

[4]Claimant testified that on the day after the alleged 1995 injury, June 20, 1995, he called in to his department and told them he was out sick due to a back problem. Tr. at 43, 78. Claimant was not sure of whether he told the yard hospital of his new injury. Tr. at 78. Claimant also testified that he did not seek medical care until August 8, 1995, because he learned on June 20, 1995, that Dr. Zeppieri did not treat back conditions any more and he was tracking down his medical records, without which the hospital would not treat him. Tr. at 44-48. Claimant did not know how long it took to set up the appointment with Dr. Miller. Tr. at 57. Dr. Miller reported on August 8, 1995, that claimant had back pain and some tingling to his left leg and calf but that his physical examination found no evidence of fixed neurologic deficits and that his sensory examination was essentially normal. RX 14A.

objective findings to support claimant's subjective complaints. Decision and Order at 17; RX 14A. Furthermore, the administrative law judge accurately noted on reconsideration that the opinion of Dr. Willetts, who doubted that an injury occurred on June 19, 1995, supported his conclusion.[5] Decision on Motion for Reconsideration at 2; RX 34 at 23-29. Consequently, we affirm the administrative law judge's finding that no injury occurred on June 19, 1995. *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996).

The administrative law judge also determined that the November 4, 1995, mugging incident was an intervening cause which broke the chain of causation between claimant's work-related conditions and his present condition. On November 4, 1995, claimant was mugged as he was arriving home at night and was thrown off a railing about five feet to the ground. Decision and Order at 7; Tr. at 67-68. He sustained a fractured left hip and had to undergo surgery. RX 18. The administrative law judge properly determined that employer is not responsible for any disability or medical expenses relating to this incident. *See Davison v. Bender Shipbuilding & Repair Co.*, *Inc.*, 30 BRBS 45 (1996). Moreover, Dr. Willetts' opinion that any current disability claimant has is due to the hip fracture and not to his prior work injuries supports the administrative law judge's conclusion that there is no ongoing disability due to any work-related conditions. *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). Decision and Order at 20-23; RXS 16J, 18, 34 at 12-13.

We affirm the administrative law judge's finding that claimant's termination from employment on September 25, 1995, in accordance with employer's policy on failure to report to work, does not violate Section 49 of the Act, 33 U.S.C. §948a . Decision and Order at 18; RXS 5, 22. Claimant did not establish that the discriminatory act, *i.e.,* the discharge, was motivated by a discriminatory animus or intent. *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT)(4th Cir. 1988); *Geddes v. Director, OWCP*, 851 F.2d 440, 21

[5]Dr. Willetts doubted that a work injury occurred to claimant in June 1995 because of claimant's markedly flawed memory concerning the history of the injury, Dr. Miller's judgment that claimant could work at full duty as of August 15, 1995, and the fact that there were no supporting objective physical findings. RX 34 at 23-29.

BRBS 103 (CRT)(D.C. Cir. 1988); *see also Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 3 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993); Tr. at 14-15; *see also* Tr. at 60-61.

We also affirm the administrative law judge's denial of a Section 14(e) assessment, as it is in accordance with law. The parties stipulated that employer filed timely notices of controversion and this stipulation is supported by employer's notices of controversion. *See* 33 U.S.C. §914(d), (e); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); Decision and Order at 3, 20; RXS 2, 4.

The administrative law judge's denial of medical benefits after June 20, 1995, is also affirmed. Claimant was required to request employer's authorization for medical treatment, even that treatment rendered by his initial, free choice of a physician, but conceded he did not do so.[6] *See* 33 U.S.C. §907(c); *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981); Decision and Order at 18-20; Tr. at 48-49. Thus, the administrative law judge properly found that claimant is not entitled to medical benefits after June 20, 1995.[7]

[6]Claimant initially sought help from Dr. Zeppieri's office and this office referred him to Dr. Miller's office. Tr. at 48-49.

[7]Moreover, claimant is not entitled to medical benefits after June 20, 1995, based on our affirmance of the administrative law judge's finding that no work injury occurred on June 19, 1995.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge