BRB No. 14-0171

RONALD PARTAIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED	)	DATE ISSUED: Nov. 20, 2014
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits and the Order Granting Joint Motion for Reconsideration and Order Upon Reconsideration Amending December 16, 2013 Decision and Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Awarding Benefits and the Order Granting Joint Motion for Reconsideration and Order Upon Reconsideration Amending December 16, 2013 Decision and Order (2013-LHC-00241, 00242) of Administrative Law Judge Alan L. Bergstrom 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 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).

In this case, the parties stipulated that claimant sustained a work-related injury to his right shoulder on January 10, 2008, while performing his assigned duties as a mobile equipment operator. He gave employer timely notice of and filed a timely claim for benefits for that injury. Claimant's average weekly wage at the time of the 2008 injury was $663.08. Claimant continued to work; however, he alleged he aggravated his right shoulder condition on January 12, 2011, when he slipped and fell in a parking lot at work prior to the start of his work day. His average weekly wage in January 2011 was $819.47. Claimant did not immediately lose time from work, but due to worsening pain, he underwent treatment and had right rotator cuff surgery on March 28, 2011. Claimant returned to work on May 26, 2011, following his recuperation. Claimant filed a claim for benefits, alleging that the 2011 fall aggravated his prior shoulder condition. He sought temporary total disability benefits for the closed period between March 28 and May 25, 2011.

In his decision, the administrative law judge awarded claimant temporary total disability compensation for the closed period, March 28 through May 25, 2011. He found, as employer argued, that no work accident occurred in January 2011. He also found that the need for surgery was due to the January 2008 injury. Claimant appeals the administrative law judge's finding that he is not a credible witness and that he failed to establish by a preponderance of the evidence that he fell in employer's parking lot on January 12, 2011. Employer responds, urging affirmance.

Claimant bears the initial burden of establishing 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. 33 U.S.C. §920(a); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *Bolden v. G.A. T. X. Terminals Corp.*, 30 BRBS 71 (1996); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

In this case, the administrative law judge addressed the totality of the evidence, medical and testimonial, and found claimant failed to establish that an accident occurred on January 12, 2011, as claimant alleged. Specifically, he found that claimant's testimony as to the incident was not credible because he first reported the fall to employer

on February 23, 2011; however, prior thereto, on February 10 and 22, claimant had seen Dr. McCracken and Dr. McGee, and had reported to both that his shoulder was bothering him and that he had fallen in the snow in December 2010.[1] Further, the administrative law judge noted that, after having performed the surgery, Dr. McGee opined that the right rotator cuff injury was not "new," but was approximately three years old. Decision and Order at 12-13; CXs 5, 8, 10-11. Having found that claimant did not testify credibly to the occurrence of a January 2011 fall, and that the medical evidence does not support his claim of a newer injury, the administrative law judge found that claimant did not establish that he fell in the parking lot before his shift on January 12, 2011. Decision and Order at 13; *Bolden*, 30 BRBS 71; *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201, *vacated on other grounds on recon.*, 24 BRBS 63 (1990). Because the administrative law judge's findings and credibility determinations are rational and are supported by substantial evidence, we affirm them. Therefore, as it is not challenged on appeal, we affirm the administrative law judge's conclusions that claimant's 2011 surgery was related to his January 2008 injury and that he is entitled to temporary total disability benefits based on his 2008 average weekly wage.[2]

[1] Because claimant had had a prior work-related shoulder injury, the administrative law judge determined that claimant was aware of the implications of timely reporting his injuries. Thus, the administrative law judge found that claimant's "delayed" reporting, especially when combined with the medical evidence which does not mention the alleged incident, did not enhance claimant's credibility.

[2] In light of our affirmance of the administrative law judge's finding that no accident occurred on January 12, 2011, we need not address employer's assertion that claimant did not give timely notice of the injury pursuant to 33 U.S.C. §912, which employer raised below, but which the administrative law judge found was moot. Decision and Order at 13.

Accordingly, the administrative law judge's award of benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge