BRB No. 04-0203

QUINTON PRUITT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED:Oct. 28, 2004
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Quinton Pruitt, Sacramento, California, *pro se*.

Katherine F. Theofel (Finnegan, Marks, Hampton & Theofel), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Denying Motion for Reconsideration (02-LHC-2085) of Administrative Law Judge Jennifer Gee 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). As claimant appeals without representation by counsel, we will review the administrative law judge's findings of fact and conclusions of law to determine whether they 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); 20 C.F.R. §§802.211(e), 802.220. If they are, they must be affirmed.

Claimant allegedly sustained injuries to his back, teeth, and hand on March 24, 2000, while working for employer as a dockman, when he fell off a pile of rice. He reported the injury to David Cradit, a superintendent for employer, on April 14, 2000. EX D. In May 2000, claimant went to see Dr. Paterson, a chiropractor, with complaints of constant mild low back pain becoming moderate with most activities, occasional leg pain, frequent mild neck pain and frequent severe frontal headaches. Dr. Paterson diagnosed claimant with "cervical/lumbar subluxation" and recommended treatment three times a week for four weeks, at which time he would reevaluate claimant. EX C. Dr. Paterson completed a permanent and stationary report on October 4, 2000, at which time he diagnosed claimant with a lumbar sprain/strain, cervical sprain/strain and headaches; the doctor indicated that claimant's employment caused or contributed to the injury, and reported that claimant could return to his usual employment and that there were no activities that claimant could not perform. EX B at 6. Dr. Paterson further opined, based on his September 25, 2000, examination of claimant, that claimant did not have objective findings to substantiate his subjective complaints, and he suggested that claimant be examined by a qualified medical examiner. EX B at 8. On November 29, 2000, at employer's request, claimant was examined by Dr. Khasigian, an orthopedic surgeon, who terminated the examination when claimant refused to provide him with information regarding the circumstances surrounding his fall. EX A.

In her Decision and Order Denying Benefits issued on April 14, 2003, the administrative law judge found that claimant failed to establish that he sustained an injury at work on March 24, 2000, as neither claimant's testimony nor the testimony of Mr. James, a fellow employee, was credible in this regard. The administrative law judge accordingly denied the benefits sought by claimant. Claimant, without the assistance of counsel,[1] appealed this decision to the Board, attaching to his appellate letter a number of medical records. The Board returned the attached medical records to claimant with instructions regarding the procedure for seeking modification of the administrative law judge's decision. 33 U.S.C. §922. On June 10, 2003, claimant filed a Request for Modification with the Board. In an Order dated June 19, 2003, the Board advised claimant that it does not conduct modification proceedings, dismissed claimant's appeal and remanded the case to the administrative law judge for consideration of claimant's request for modification. In a conference call held on September 26, 2003, the administrative law judge indicated that it was her intention to admit into evidence the records claimant submitted.

[1] Claimant was represented by an attorney at the formal hearing.

In her Decision and Order on Remand Denying Motion for Reconsideration,[2] the administrative law judge considered the evidence presented by claimant in support of his claim, but denied claimant's request for modification, because she still did not find credible claimant's claim that he fell while at work on March 24, 2000. On appeal, claimant, representing himself, argues that the administrative law judge unfairly discredited his testimony and that of his co-worker, which were given under oath, and that the administrative law judge erred in failing to recognize that his medical records substantiated his injury. Employer responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). When considering a motion for modification, the record from the prior hearing is thus also before the administrative law judge. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In order to obtain modification for a mistake of fact, however, the modification must render justice under the Act. *See McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976).

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 March 24, 2000. 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 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 by affirmative proof. *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).

[2] The administrative law judge, throughout her decision on remand, refers to claimant's motion as one for reconsideration of her initial decision. Claimant, however, sought modification of that decision pursuant to Section 22 of the Act, 33 U.S.C. §922. *See* Employer's September 3, 2003, opposition to claimant's modification request.

Claimant asserted that a definitive work incident, specifically a fall from a pile of rice bags, occurred on March 24, 2000, which caused his back, hand, and dental conditions. After setting forth and discussing at length the testimony of claimant and Mr. James, claimant's co-worker who allegedly witnessed claimant's fall, as well as the medical records submitted by claimant in support of his claim, the administrative law judge discredited the testimony and concluded that the work incident alleged had not occurred. *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631. In rendering this determination, the administrative law judge found "claimant's testimony and the information he has provided about his injury, his medical condition, and his medical care . . . [to be] either implausible or riddled with contradictions and inconsistensies." Decision and Order at 4. In this regard, the administrative law judge cited claimant's testimony that he had fallen seven feet, while Mr. James, his witness, testified that claimant fell 15 to 25 feet. The administrative law judge found it inconceivable that claimant could have fallen 15 to 25 feet, allegedly limping and unable to walk out of the warehouse by himself, yet Mr. James did not call paramedics or offer to take claimant to the doctor. Next, the administrative law judge found that when claimant reported the injury to Mr. Cradit on April 14, 2000, he told Mr. Cradit that initially he felt no pain and that he continued to work, while Mr. James testified that he ran up to claimant right after the fall and that claimant was limping and unable to walk by himself and was complaining that his low back and teeth hurt. Claimant, however, did not report the injury to his teeth either to Mr. Cradit or Dr. Paterson, *see* EXS C, D, and did not consult a dentist until three months after the alleged accident. Tr. at 16.

In addressing the medical records submitted by claimant in support of his claim on modification, the administrative law judge determined that those records make his injury claims less credible, because they substantiate her conclusion that claimant's behavior was inconsistent with the alleged injuries. See Decision and Order on Remand at 5. Specifically, the administrative law judge reasoned that someone with a hand that had been swollen for three weeks, as claimant claimed, would have sought treatment and reported the condition to his employer, or, at minimum, would have reported the hand injury to employer when reporting the accident which allegedly caused the injury, especially since his hand was bandaged at the time he made his report. Decision and Order on Remand at 3.[3] Although claimant testified that he did not seek medical treatment for his hand and had bandaged it himself, he apparently did not mention a hand injury to the physician whom he had consulted two days before he made the report of injury, and the medical records from that visit do not refer to a swollen hand. *See* Medical records submitted by claimant on July 7, 2003: Dr. Jone's April 12, 2000 entry; Decision and Order on Remand at 3, 5. Similarly, the administrative law judge noted that claimant

[3] In this regard, Mr. Cradit reported that claimant said that the bandage on his hand was unrelated to the alleged work-incident. EX F.

failed to report or mention his alleged dental symptoms until May 15, 2000, almost two months after the alleged March 24, 2000, work-incident, and that he had not mentioned a tooth injury to Dr. Paterson. EX C. Lastly, the administrative law judge found that claimant did not seek treatment for his teeth until October 2000, when he mentioned a fall to his dentist but did not say that it was work-related.

Based upon the foregoing findings, and owing to claimant's "overwhelming lack of credibility," Decision on Remand at 5, the administrative law judge concluded that claimant failed to establish the occurrence of a work incident on March 24, 2000, which could have caused his back, hand, and dental conditions. We affirm the administrative law judge's findings because they are rational, supported by substantial evidence, and in accordance with law. *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 her own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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). In this case, the administrative law judge rationally explained in both her original decision and her decision on modification why she did not credit claimant's or Mr. James's testimony regarding the occurrence of a work-related incident on March 24, 2000. As claimant has failed to establish an essential element of his *prima facie* case, his claim for benefits was properly denied. *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.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Motion for Reconsideration is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge