BRB No. 11-0239

ANTONIO DEL CASTILLO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA MARINE TERMINALS, LLC	)	DATE ISSUED: 10/26/2011
	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Antonio Del Castillo, San Francisco, California, *pro se*.

Gursimmar Sibia and Laura G. Bruyneel (Bruyneel & Leichtnam, LLC), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2006-LHC-00840) of Administrative Law Judge William Dorsey 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleges that a work incident occurred on August 31, 2005, which caused him to be temporarily totally disabled from September 1, 2005, through October 28, 2006. Specifically, claimant testified that he fell head-first down a flight of stairs, consisting of between five and eight steps, striking his elbow and left knee. Claimant, who conceded that his fall was unwitnessed, testified that he reported this incident and showed his bloodied knee to his superintendent, filled out an injury report, and then drove himself to an emergency room in San Francisco. Claimant testified he returned to the emergency room on September 2, 2005, complaining of low back and thigh pain, and on September 4, 2005, reporting left leg pain and apparent bruising. Claimant then sought medical treatment for a variety of complaints regarding his left leg, left knee, and back, and did not return to work until October 29, 2006. In responding to claimant's claim for benefits, employer averred that claimant's initial emergency room medical records do not document either bruises or contusions to claimant's knee, and that claimant had an ulterior motive for claiming that he sustained a work-related injury.

In his Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's medical complaints are related to the work incident that he alleges occurred on August 31, 2005. The administrative law judge further found, however, that employer produced substantial evidence sufficient to rebut the presumption. The administrative law judge concluded that claimant did not establish, based upon the evidence of record as a whole, that he actually fell on August 31, 2005, or that claimant's fall, if it did occur, was the cause of claimant's complaints. Accordingly, the administrative law judge denied claimant's claim for disability and medical benefits.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim. 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. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, the administrative law judge, after addressing the totality of the medical evidence as well as claimant's testimony, found that claimant failed to establish the work-related "accident" element of his *prima facie* case.[1]

Before the administrative law judge, claimant asserted that a definitive work incident occurred on August 31, 2005. The administrative law judge found that claimant is not a credible witness, that his testimony is unreliable, and that, therefore, the specific

[1]Although the administrative law judge addressed the issue of whether claimant affirmatively established the occurrence of a work-related accident after he had invoked the Section 20(a), 33 U.S.C. §920(a), presumption, the administrative law judge properly considered the totality of the record in addressing this issue.

work incident did not occur as claimant alleged. The administrative law judge found that claimant gave inconsistent accounts of his alleged August 31, 2005, fall with respect to the number of steps from which he fell. *See* Hearing Transcript at 46; EX 31. The administrative law judge also found that claimant's testimony that he scraped and bloodied his knee in the fall was not corroborated by the medical records prepared immediately following the alleged work-incident. *See* EX 16. The administrative law judge further noted that while claimant's initial two emergency room visits did not record a report of leg bruising or contusions, four days after the alleged fall claimant reported to an emergency room with leg bruises that were subsequently opined to be inconsistent with his description of his fall. *See* EX 24. Lastly, the administrative law judge determined that employer demonstrated an ulterior motive for claimant's alleging the occurrence of a work-related injury.[2]

Finding claimant's testimony to be inconsistent, uncorroborated, and contradicted by the medical evidence, the administrative law judge determined that claimant's "misstatements go beyond minor inconsistencies that may be attributable to the passage of time or to his confusion over details," and he therefore concluded that claimant failed to establish the occurrence of a work incident on August 31, 2005. Decision and Order at 21, 23. We affirm the administrative law judge's findings because they are rational, supported by substantial evidence, and in accordance with law. 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 his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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). 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); *see Bolden*, 30 BRBS 71. In this case, the administrative law judge addressed the inconsistencies in claimant's statements regarding his alleged fall, claimant's statements to his physicians regarding the alleged fall and his physical complaints, and employer's assertion that claimant had an ulterior motive for alleging a work-related injury. The administrative law judge rationally concluded that claimant did not establish that the

[2]Claimant has had a history of disciplinary actions. At the time of the alleged incident that gives rise to this claim, claimant was returning to work from a one-year penalty, with four-months suspended. Claimant, whose transfer to a separate clerks union had been denied in part due to his work record, was required to be "violation-free" for a one-year probationary period in order to avoid the reinstatement of the suspended four-month penalty. In responding to claimant's report of a work incident, employer asserted that claimant's motive was to remain off work during his probationary year so as to avoid another disciplinary action which would prevent his transfer into the clerks union. *See* Employer Post-Hearing Brief at 3, 22.

work accident occurred as he alleged due to the lack of corroborative evidence. Decision and Order at 23. On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant is neither inherently incredible or patently unreasonable. *Cordero*, 580 F.2d 1331, 8 BRBS 744. Therefore, we affirm the administrative law judge's determination that claimant failed to establish an essential element of his claim for benefits, and the administrative law judge's consequent denial of his claim for benefits. *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.

In his appeal to the Board, claimant seeks a new hearing with a licensed attorney; additionally, claimant states that his former representative did not bring his "main witness to trial to testify on [his] behalf." Claimant's May 14, 2011 Letter to the Board. Following the formal hearing in this case, and after it was revealed that claimant's representative did not have an active license to practice law, claimant filed a letter with the administrative law judge stating that it was his intent to proceed *pro se*.[3] Consequently, the administrative law judge properly proceeded to issue his decision.[4] Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Under Section 22, claimant may file a request for modification based on a change in condition or mistake of fact within one year of the final rejection of his claim. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Should claimant seek to present new evidence in support of an allegation that a mistake in fact occurred regarding the administrative law judge's findings concerning the alleged incident, he must file a request for modification. *See* 20 C.F.R. §702.373.

[3]The administrative law judge noted that claimant notified the Office of Administrative Law Judges he was not requesting a new hearing. The administrative law judge also noted that claimant's representative had not been disciplined and was admitted to the District of Columbia bar in July 2010. *See* Decision and Order at 24 – 25.

[4]While claimant questions the 42 month lapse between the date of the hearing and the issuance of the administrative law judge's Decision and Order, there is no indication that the delay resulted in prejudice to claimant. *See Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981); *V.M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge