

LEONARDO C. MARIANO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNITED STATES)	DATE ISSUED: <u>JUN 30, 2003</u>
NAVY EXCHANGE)	
)	
and)	
)	
CRAWFORD AND COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order Denying Petition for Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Leonardo C. Mariano, Everett, Washington, *pro se*.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of legal representation, appeals the Decision and Order Denying Benefits and the Decision and Order Denying Petition for Reconsideration (2001-LHC-1232) of Administrative Law Judge Alexander Karst 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant who is not represented by counsel, we 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant worked as a part-time sales clerk for employer at its Sand Point and Smokey Point stores near Seattle, Washington, from 1991 until 1997. He alleges that age and race discrimination and discriminatory reprisal at work caused a psychological injury, depression, and that he is totally disabled due to this injury. Specifically, claimant alleges he was twice denied a promotion due to his age and/or race,¹ that he was subjected to a racist remark from a supervisor, that his immediate supervisor was biased against him, and that he was denied access to certain documents as reprisal for filing two complaints with the Equal Employment Opportunity Commission, thereby causing him to file a third complaint. The parties reached an agreement settling the three EEO complaints prior to the hearing. Claimant accepted \$20,000 in return for dismissing his complaints and for agreeing to never again seek employment with the Department of Defense; employer did not admit to any discriminatory acts, and the settlement did not affect the status of claimant's workers' compensation claim under the Act. Cl. Ex. G.

In the workers' compensation claim, the administrative law judge considered each charge alleged by claimant and found that employer did not commit any discriminatory acts and, thus, that conditions did not exist at work which could have caused claimant's depression. Consequently, he concluded claimant failed to establish a *prima facie* case that his injury is compensable. Decision and Order at 4. Further, he found that even if the Section 20(a), 33 U.S.C. §920(a), presumption were invoked, employer rebutted the presumption, and, on the record as a whole, claimant did not establish his claim by a preponderance of the evidence. He also found that claimant is not disabled as a result of his depression. Decision and Order at 4, 24-25. The administrative law judge then summarily denied claimant's motion for reconsideration. Claimant appeals, and employer responds, urging affirmance.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. 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. *See, e.g., Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *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). In this case, the parties stipulated that claimant suffers

¹Claimant is a native of the Philippines born in 1931. He immigrated to the United States in 1991 and later became a United States citizen. Cl. Exs. D, KK.

from depression; thus, it is undisputed that he has demonstrated a harm. Claimant's claim that he is entitled to benefits is premised on his allegation that employer committed acts of discrimination against him based on his age and/or race. To establish the compensability of his claim, claimant must convince the administrative law judge that the discriminatory acts in fact occurred, *i.e.*, that the alleged working conditions existed. *See Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Jones v. J. F. Shea Co., Inc.*, 14 BRBS 207, 210-211 (1981).

The administrative law judge, however, discredited claimant's testimony, he thoroughly discussed each allegation, and found that claimant was not the victim of discriminatory working conditions. With regard to the first allegation, that claimant was not selected for a supervisory position, the administrative law judge rationally found that claimant did not apply for the position and, therefore, could not have been selected. Additionally, the administrative law judge found that, contrary to claimant's assertion, he was not deterred by his supervisor from applying for the lead sales clerk position. Decision and Order at 7; Cl. Exs. A, X, WW; Emp. Ex. 3. As to claimant's second complaint, that he was not selected by the promotion panel for another supervisory position, the administrative law judge reasonably found that claimant was not deemed to be the best candidate and that, in any event, employer cancelled the opening and filled the job by transferring an employee, whose position was to be eliminated by a reduction-in-force, before any of the candidates was notified of the panel's decision. *Id.* at 7-10; Cl. Exs. A, FF; Tr. at 90, 93-94. The administrative law judge also found that claimant was not subjected to a racist comment from his second-level supervisor and that claimant's immediate supervisor did not discriminate against him. *Id.* at 14, 16; Cl. Ex. H, FF; Tr. at 109, 112. Finally, with regard to the third complaint filed, the administrative law judge determined that any delay claimant faced in obtaining certain documents was normal and not provoked by discriminatory animus. *Id.* at 17; Tr. at 78-81. Thereafter, the administrative law judge discredited the reports of claimant's various psychologists and therapists as to the cause of claimant's depression because they were too reliant on claimant's version of the facts, which the administrative law judge specifically found incredible. Further, he discredited Dr. Fink's opinion because it is not well-reasoned and is based on incomplete information. *Id.* at 5, 19-24.² Thus, the administrative law judge determined that working conditions which could have caused claimant's depression did not exist, and he denied benefits. Additionally, the administrative law judge stated that claimant is not disabled by his depression, as he has "amply demonstrated an ability to work" both in pursuit of his lawsuits and in subsequent employment. *Id.* at 24-25.

²The administrative law judge noted that Dr. Carter's opinion, which was the most persuasive, did not address the cause of claimant's depression. Decision and Order at 24; Cl. Ex. D; Emp. Ex. 7.

Claimant argues that the administrative law judge's decision and credibility findings are irrational and not in accordance with law. We reject this contention. 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 (2^d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and they will not be disturbed unless found to be "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). The administrative law judge specifically explained that claimant's changing versions of one of the events, his tendency to exaggerate, and the fact that his testimony was not corroborated by any other evidence or witness made his testimony less persuasive than that of employer's witnesses.³ Decision and Order at 5-16. This determination is rational. See Cl. Exs. A, G, H, FF (claimant's differing versions of the "racist comment" incident); Cl. Exs. DD, WW (witness statements); Emp. Exs. 13-16 (witness statements); Tr. at 42, 74-76, 91-92, 109, 111-113 (testimony directly contradicting claimant's claims of discrimination). Accordingly, we affirm the administrative law judge's rejection of claimant's testimony.

Without corroborating testimony, and with substantial evidence establishing that employer's personnel decisions were not discriminatory in nature, *see, e.g.*, Cl. Exs. A, X; Emp. Exs. 13-16; Tr. at 61, 63, 75, 93-94, 103-104, 110-111, 113, substantial evidence of record supports the administrative law judge's conclusion that claimant was not the victim of discrimination at his work place. See *Marino v. Navy Exchange*, 20 BRBS 166 (1988). Absent the alleged discriminatory working conditions, claimant has not established an essential element of his *prima facie* case, and his claim, as the administrative law judge found, must fail.⁴ See *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 304 (1989) (decision on remand); *Marino*, 20 BRBS 166. Consequently, we affirm the denial of benefits. See *Bolden*, 30 BRBS 71; *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201, *vacated on other grounds on recon.*, 24 BRBS

³The administrative law judge also noted that some of claimant's former co-workers and supervisors are Asians or Pacific Islanders who would have been sensitive to any discriminatory practices at the work place. Decision and Order at 10; Tr. at 46, 59, 74, 91-92.

⁴In light of our affirmance of the administrative law judge's conclusion that claimant did not establish a *prima facie* case, we need not address the argument that employer did not rebut the Section 20(a) presumption. In any event, the administrative law judge relied on substantially the same evidence to find rebuttal. Additionally, he credited Dr. Carter's opinion that claimant can return to his usual work, despite the diagnosis of depression. Emp. Ex. 7.

63 (1990).

Accordingly, the administrative law judge's Decision and Order and his denial of the motion for reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge