BRB No. 00-0353

J. L. BOSARGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIONEER INDUSTRIES, INCORPORATED	)	DATE ISSUED: Dec. 6, 2000
	)	
and	)	
	)	
FREEMONT COMPENSATION INSURANCE GROUP COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor .

J.L. Borsage, Spanaway, Washington, *pro se*.

Raymond H. Warns (Holmes, Weddle & Barcott), Seattle, Washington, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order Denying Benefits of Henry B. Lasky (1999-LHC-0406) 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 reviewing an appeal by a claimant without representation, the Board will assess 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. *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), 802.301. If they are, they must be affirmed.

Claimant began working for employer as a painter on April 10, 1998, and alleged that he injured his back on April 20, 1998, while he was painting the ceiling of a cargo deck, when he felt a burning sensation and sharp pain between his shoulders. Claimant finished his

shift without reporting the incident or seeking medical treatment, alleging that he believed that he had simply "pulled a muscle." The parties dispute when claimant first informed employer about the injury, with claimant maintaining that it was on April 21, 1998, while employer contends that it had no notice until claimant filed a claim form on July 20, 1998. Claimant last worked for employer on April 21, 1998. Claimant sought treatment for upper back pain at the emergency room on June 15, 1998, and he ultimately was diagnosed with a small disc herniation at T3-4.

In his Decision and Order, the administrative law judge found that claimant failed to produce sufficient evidence to establish a *prima facie* case for invocation of the presumption at Section 20(a) of the Act, 33 U.S.C.§920(a), which would serve to link his injury to his employment. Alternatively, the administrative law judge found that if claimant invoked the Section 20(a) presumption, employer rebutted it, and weighing the evidence as a whole, concluded that claimant did not establish that his injury is work-related. The administrative law judge also found, in the alternative, that if claimant established that his injury is work-related, he did not give employer timely notice of his injury pursuant to Section 12(a) of the Act, 33 U.S.C. §912(a), and that such failure was not excused pursuant to Section 12(d) of the Act, 33 U.S.C. §912(d).

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

We affirm the administrative law judge's finding that a work-related accident did not occur on April 20, 1998, as alleged by claimant. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 91996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). 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). In presenting his case, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather claimant must show that working conditions existed which could have caused his harm. *See generally Sinclair*, 23 BRBS at 193.

Claimant testified that he injured his back on April 20, 1998, while he was painting the ceiling of a boat deck. Tr. at 13. The administrative law judge found that claimant's testimony regarding the occurrence of the injury was not credible due to inconsistencies in the evidence regarding the date of the alleged accident and the activity claimant was engaged in at the time of the alleged injury, his failure to tell the first doctors who treated him that he injured himself at work, and the fact that the pain first occurred at home two months after the alleged incident. Specifically, the administrative law judge noted that claimant initially claimed on his claim form, on medical questionnaires, in written responses to employer's interrogatories, and in his deposition, that he was injured on April 17, 1998. The

administrative law judge then noted that claimant's employment records of that date reflected that he was a "no-show"on April 17. Tr. at 92. Claimant also claimed he was injured on April 21, but the employment records indicate that he "disappeared" from work after only one hour on that date. *Id.* The administrative law judge stated that it was not until claimant testified at the hearing that he claimed he was injured on April 20. Tr. at 22.

Next, the administrative law judge found that claimant was unable to remember what he was doing at the time of the alleged injury. In this regard, claimant testified at the hearing that he was painting the ceiling, but then testified that he was painting the deck, and upon the administrative law judge's request for clarification, returned to his earlier testimony that he was painting the ceiling. *See* Tr. at 22. The administrative law judge also found that claimant's credibility is undermined by the fact that he failed to report the alleged accident to employer or anyone at the work-site at the time of the alleged injury.

Additionally, the administrative law judge found claimant's testimony weakened by his failure to tell any of the first several doctors from whom he received treatment in June 1998 that he sustained a work-related injury. *See* CX 2 at 8; CX 3-1:14; CX 5. In this regard, the administrative law judge found suspect claimant's realization in July 1998 that he had sustained a work-related injury after a diagnosis of a herniated disk by the medical practice where his wife worked as a nurse. Consequently, the administrative law judge decided to rely on the more contemporaneous medical histories, recorded for diagnostic and treatment purposes, which do not mention a work-related incident. Finally, the administrative law judge found that one of the most persuasive reasons to discredit claimant's testimony regarding the occurrence of a work accident is claimant's claim that his pain began on June 15, 1998, nearly two months after claimant last worked for employer. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

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). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In the instant case, the administrative law judge considered the inconsistencies in the record regarding the occurrence of the alleged accident, and concluded that claimant did not, in fact, sustain a work-related accident. The administrative law judge's decision to discredit the testimony of claimant is neither inherently incredible nor patently unreasonable. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish the existence of a work-related incident which could have caused his present back condition. As claimant failed to establish an essential element of his *prima*

[1]The administrative law judge found, moreover, that if the Section 20(a) presumption

facie case, his claim for benefits was properly denied. *See U.S. Industries*, 455 U.S. at 608, 14 BRBS at 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988).

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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were invoked, it was rebutted by the opinion of Dr. McCollum. Dr. McCollum stated that claimant's medical complaints are not work-related, and that his herniation at T3-4 is likely asymptomatic, as claimant's alleged pain is not consistent with a herniation at this point. This finding is affirmed, *see generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), as is the administrative law judge's decision to credit this opinion based on the record as a whole.

[2]Thus, we need not review the administrative law judge's findings under Section 12 of the Act.