BRB No. 92-0767

TRACY LEE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	DATE ISSUED:_____)
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter & Montagna), Norfolk, Virginia, for claimant.

M. Janet Palmer (Wilder & Gregory), Richmond, Virginia, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-1718) of Administrative Law Judge Daniel A. Sarno, Jr., denying benefits 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant allegedly sustained head and neck injuries on September 11, 1989 or September 18, 1989 while in the course of his employment as a shipfitter with employer. In his Decision and Order, the administrative law judge found the evidence sufficient to invoke the presumption contained in Section 20(a) of the Act, 33 U.S.C. §920(a), that claimant's injury is work-related. The administrative law judge further found, however, that employer presented sufficient evidence to rebut the presumption, thereby requiring the administrative law judge to weigh the evidence as a whole. In weighing the evidence, the administrative law judge found that claimant's testimony concerning the occurrence of a work-related accident was not credible given the discrepancies in the record evidence. The administrative law judge concluded that the evidence of record severed the

causal nexus between the injury and work environment, and he therefore denied temporary total disability benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the Section 20(a) presumption is rebutted and that the evidence establishes the absence of a causal connection between the injury and work environment. Claimant also contends that the administrative law judge's rationale fails to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). Employer responds, urging affirmance of the administrative law judge's decision.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a) presumption which applies to the issue of whether an injury is causally related to his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Before Section 20(a) is applicable, however, claimant must establish his *prima facie* case, *i.e.*, that he sustained some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1991). In this case, it is uncontroverted that claimant has suffered a harm, *i.e.*, headaches and neck pain. The first element of his *prima facie* case is thus not at issue. In order to invoke Section 20(a), however, claimant must establish that an accident occurred that could have caused the harm.

In the instant case, the administrative law judge concluded that claimant failed to establish that a work-related accident occurred on September 11, 1989 or September 18, 1989.[1] The administrative law judge found that a review of the records submitted by employer demonstrates that claimant related conflicting accounts of how the injury occurred; he also noted that claimant failed to tell some physicians that it was work-related.[2] Moreover, the administrative law judge considered

[1]The administrative law judge noted that the evidence is conflicting as to the actual date the accident occurred. The administrative law judge pointed out various inconsistencies including that although claimant consistently maintained that the incident occurred on September 11, some doctors' records indicate it occurred on September 18, the date that appears on claimant's claim for compensation. The administrative law judge also pointed out that claimant filed a duplicate claim, again giving the date of injury as September 18, 1989 but stating that the earliest date his supervisor knew about the accident was September 12, 1989. The administrative law judge further noted that claimant testified that the injury occurred on a Thursday or a Friday which would be neither September 11 nor 18, 1989.

[2]The records reflect the following accounts of the injury: (a) the foreman's accident report dated September 20, 1989 in which it was reported that claimant stepped off a ladder and felt "cramps" appear. Emp. Ex. 7A, B; (b) employer's clinic notes of September 20, 1989 in which it was reported that claimant was "climbing up a ladder and turned to the right." Emp. Ex. 13D; (c) the emergency room note of Roanoke-Chowan hospital dated September 30, 1989 does not mention a work incident. Emp. Ex 16; (d) the notes of Dr. Cabinum of October 3, 1989 in which it was reported that claimant was at work crawling at the time he hit his head. Emp. Ex. 14A; (e) Dr. Clayton stated he had no knowledge of a work-related incident. Emp. Ex. 19A; (f) Dr. Shuping's notes of January 11,

claimant's history of tension headaches and neck problems prior to the alleged accident, claimant's treatment with Dr. Clayton for complaints of headaches and neck pain prior to the alleged work-related accident of September 1989 and claimant's treatment at employer's clinic for neck pain prior to the alleged work-related accident. The administrative law judge stated that, the medical records notwithstanding, claimant testified that he had never sought medical treatment for headaches or neck pain prior to September 1989. Finally, the administrative law judge stated that when Dr. Clayton admitted claimant to the hospital for tension headaches on July 25, 1990, there was no mention of these headaches being work-related and that the diagnosis of tension headaches is consistent with the pre-injury diagnosis.

In viewing the totality of the evidence, the administrative law judge concluded that claimant's credibility was doubtful based on his misleading answers about his medical history prior to the alleged accident, and the differing versions given by claimant with regard to the time and account of the injury. In evaluating the evidence, the fact-finder is entitled to weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular witness. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is within the discretion of the administrative law judge 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); *see also Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979). Thus, as the administrative law judge's credibility determination is rational and within his authority as factfinder, and the administrative law judge's ultimate findings are supported by substantial evidence, we affirm the denial of benefits.[3]

Additionally, contrary to claimant's contention, the administrative law judge's decision comports with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3) (A). The administrative law judge independently analyzed and discussed the evidence, including claimant's treatment by Dr. Clayton and treatment by employer's clinic prior to the alleged accident, and the administrative law judge gave specific reasons for his rationale in refusing to credit claimant's testimony concerning the occurrence of an accident. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

Accordingly, the Decision and Order denying benefits of the administrative law judge is affirmed.

SO ORDERED.

1991 in which it was reported that claimant injured himself when he tripped and had to jump to catch his balance, with no reference to its being work-related, and in which claimant's injuries were expanded to include crippling pain in his jaw and posterior scalp as well as neck and head pain. Emp. Ex. 15.

[3]Inasmuch as the administrative law judge's ultimate conclusion is rational and supported by substantial evidence, any error in not weighing the evidence prior to invocation of the Section 20(a) presumption is harmless. *See generally Seaman v. Jacksonville Shipyards, Inc.*, 14 BRBS 148.9 (1981).

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge