

BRB No. 01-0805

AMILCAR PINEDA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BAY INCORPORATED OF TEXAS)	
)	
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	DATE ISSUED: <u>July 2, 2002</u>
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Amilcar Pineda, Marrero, Louisiana, *pro se*.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (01-LHC-101) of Administrative Law Judge C. Richard Avery 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.¹

Claimant worked for employer as a welder building skids and platforms for offshore oil rigs. During a few days each month or so, claimant boarded barges to weld and secure the skids to the barge's deck for shipment offshore. Claimant alleges that on November 18, 1997, he felt pain in his leg, shoulder and groin while moving compressed gas cylinders. Tr. at 19. Claimant testified that he reported the incident to his welder foreman, completed an accident report and returned it to his foreman. He stated that he did not seek medical treatment immediately because he did not think he was seriously injured. Claimant continued to work after November 18, 1997, and on March 8, 1998, he asked the job superintendent to let him see a doctor. Employer called in the safety officer, and claimant completed a report regarding his accident and was seen by a physician. In April 1998 claimant stopped working and consulted Dr. DiGardo, an orthopedist, who diagnosed rotator cuff tendinitis and in June 1998 recommended an MRI. CX 3. Employer paid \$1989.99 for claimant's medical bills. JX 1. Once employer refused to pay for further medical treatment, claimant was referred to Charity Hospital in New Orleans, where he had an MRI which revealed a partial tear in the rotator cuff, and he underwent shoulder surgery on October 7, 1999. CX5. Claimant went to work as a welder for a different employer on February 2, 2000, at a higher wage. He seeks compensation benefits for temporary total disability during the approximately two years he did not work, from April 1998, until February 2, 2000, and for past medical expenses.²

In his decision, the administrative law judge determined that the alleged work incident of November 18, 1997, did not occur, and that, accordingly, claimant failed to establish his *prima facie* case. Thus, the administrative law judge concluded that claimant was not entitled to the compensation requested and denied the claim. On appeal, claimant, representing himself, challenges the denial of benefits. Employer responds, urging affirmance.

¹ Claimant was represented by counsel in the proceedings before the administrative law judge.

²In his post-trial memorandum, claimant states that he seeks compensation benefits from March 1998 to May 2000.

We affirm the administrative law judge's finding that claimant did not establish that his shoulder condition is causally related to his employment. In order to be entitled to the Section 20(a) presumption that his condition arose out of employment, claimant must establish a *prima facie* case by showing that he suffered a harm and either that a work-related accident occurred or that working conditions existed which could have caused the harm. See *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). 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). If the elements of claimant's *prima facie* case are established, the Section 20(a) presumption applies to link claimant's harm to his employment. 33 U.S.C. §920(a); see *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In the instant case, it is uncontested that claimant has a harm to his shoulder. Claimant asserted that a definitive work incident occurred on November 18, 1997, which caused his shoulder condition. Specifically, claimant alleges that he felt pain in his shoulder, leg, and groin while moving compressed gas cylinders. The administrative law judge discredited claimant's testimony that a specific work-related accident occurred on November 18, 1997. The administrative law judge stated that claimant's testimony was the sole source supporting the occurrence of an incident, and that he was unwilling to accept claimant's testimony as sufficient, because it was unsupported and controverted by the other direct and circumstantial evidence. Decision and Order at 8. In so concluding, the administrative law judge rejected the medical evidence proffered by claimant, because the medical opinions are based solely on a history provided by claimant.

Dr. Richter, a chiropractor who treated claimant, testified that his opinion that claimant's shoulder condition is work-related is based on the history and medical reports which claimant provided him, and conceded that he could not render a conclusive opinion absent a review of claimant's entire medical record. Tr. at 54. Claimant maintains that the day he was injured he was in the company of Dao Nguyen and Joey Martin, but neither man remembered the incident and neither recalls claimant complaining of pain or discomfort. EX 2 at 8, 10; EX 4 at 8-9. Brad Hogan, another welder, deposed that claimant never told him about a work-related accident and did not complain of pain to him. EX 3 at 8. Manuel Fajardo, employer's welder foreman, testified that claimant did not report an accident to him and that he did not provide claimant with an incident report to fill out. Mr. Fajardo remembered claimant's complaining about his shoulder and that he was asked to take claimant to a doctor, but he could not recall the date. EX 5 at 8. He further testified that welding tanks are picked up by cherry pickers and cranes and that employees are instructed in employer's safety manual and at safety meetings not to pick up tanks. *Id.* at 14-15. The

incident report which claimant alleged he filled out in November 1997 was “discovered” in March 1998 by Ms. Hornosky, an employee of employer in personnel and safety, and refers only to pain on the right side of claimant’s leg. CX 1; EX 1. When claimant reported to Ms. Hornosky in March 1998 that he wanted to see a doctor, he told her that he hurt his leg in November and that over time his shoulder also started hurting. EX 1 at 14. A Supervisor’s Accident Investigation dated March 18, 1998, reports that claimant said that he was hurt in November when he lifted a gas bottle and felt pain in his leg. EX 9. Claimant testified that he felt pain in his shoulder right after the accident, Tr. at 19, but did not report pain in his shoulder until a later date.

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 (2^d 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); *see also Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). In the instant case, the administrative law judge fully considered claimant's testimony regarding the occurrence of an alleged accident, as well as the absence of corroborating evidence, and concluded that claimant did not, in fact, sustain a work-related accident as described on November 18, 1997, which could have caused his shoulder condition.³ On the basis of the record before us, the administrative law judge's decision to

³The record contains a judgment issued on February 10, 2000, by the Louisiana Office of Workers’ Compensation (LWCP), dismissing with prejudice claimant’s claim against employer, ordering claimant to pay to the Louisiana Workers’ Compensation Corporation \$1,989.99 in restitution for medical benefits, and \$4,796.89 in civil penalties, for willfully making false statements for the purpose of obtaining workers’ compensation benefits, and referring the matter to the Fraud Division of the LWCP for criminal investigation and proceedings. EX 6. Contrary to employer’s contention, this document does not definitively establish that the work accident did not occur, as the judgment does not reference the alleged date of injury or the harm allegedly sustained.

reject 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 occurring on November 18, 1997, which could have caused his shoulder condition. *See Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). As claimant 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. at 608, 14 BRBS at 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge