

BRB No. 97-1216

HARRY BONIN)
)
 Claimant-Petitioner) DATE ISSUED: _____
)
 v.)
)
 THAMES VALLEY STEEL)
 CORPORATION)
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Thomas Burke, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

David C. Davis (McGann, Bartlett & Brown), Vernon, Connecticut, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (91-LHC-2408) of Administrative Law Judge Thomas Burke 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965).

This is the second time this case has come before the Board. To reiterate, claimant was employed as a fitter for employer working on contracts for General Dynamics' Electric Boat Division. He testified that he previously had a good working relationship with his supervisors but that a misunderstanding with the personnel office regarding leave was the catalyst for later problems. Following his dismissal for absenteeism and subsequent reinstatement through the grievance procedure, claimant testified that he was assigned to a new supervisor, was assigned jobs normally assigned to less skilled co-workers, was given warnings for unexcused absences that occurred prior to his termination, was refused an excused absence despite a doctor's note, was told his supervisors were "out to get" him, and was repeatedly watched while performing his work. Tr. at 41-45. Claimant testified he could not "deal with" "these harassing" conditions, and he voluntarily admitted himself to the hospital for six days beginning on April 22, 1990, due to his mental condition. *Id.* at 45-46. He has not worked since April 20, 1990, and he filed claims for state workers' compensation and for benefits under the Act, alleging harassment and discrimination at work caused his temporary total disability.

Administrative Law Judge Dolan found that claimant satisfied both the status and situs requirements of the Act, 33 U.S.C. §§902(3), 903(a), and he found that claimant established that he has a "harm," *i.e.*, depression. Nevertheless, Judge Dolan found that claimant failed to establish working conditions which could have caused this harm; therefore, he found the evidence insufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption, and he denied benefits. Specifically, Judge Dolan found that claimant was not a credible witness, and he found unpersuasive the evidence claimant offered as corroborative of his testimony. Both claimant and employer appealed this decision. On appeal, the Board affirmed the status and situs findings, as well as the administrative law judge's assessment of claimant's credibility, but it held that Judge Dolan failed to discuss a letter from a union official which could be sufficient to establish working conditions and thus to invoke the Section 20(a) presumption. Therefore, the Board vacated the denial of benefits and remanded the case for further consideration. *Bonin v. Thames Valley Steel Corp.*, BRB Nos. 93-1943/A (July 30, 1996) (unpublished).

On remand, the case was assigned to Administrative Law Judge Burke because Judge Dolan is no longer with the Office of Administrative Law Judges. Judge Burke reviewed the evidence of record and identified the specific issue for his consideration: whether a letter from the union official, Cl. Ex. 9, is sufficient to establish the existence of working conditions which could have caused claimant's depression. Judge Burke determined that the letter contained facts which can be found elsewhere in the record, that all these facts were known to Judge Dolan, and that the facts in the letter were considered by Judge Dolan. Decision and Order on Remand at 3-4. Specifically, Judge Burke found that the letter was cumulative of

claimant's testimony, which was discredited by Judge Dolan, and that he was not bound by the opinion of the union Executive Board that claimant was being harassed at work; therefore, he found that the letter does not satisfy claimant's burden of establishing working conditions which could have caused his injury. Consequently, he denied the claim for benefits. *Id.* at 4. Claimant appeals the decision on remand, and employer responds, urging affirmance.

Claimant contends Judge Burke erred in finding that he failed to establish the working conditions element of his *prima facie* case. Claimant also argues that Judge Burke erred in placing on him the burden of showing an actual causal relationship between his depression and his work. 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. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated in part on reconsideration*, 24 BRBS 63 (1990); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT) (4th Cir. 1982); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Claimant must affirmatively establish both elements of his *prima facie* case. See, e.g., *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). In this case, because Judge Dolan discredited the testimony of claimant and his witnesses and because these credibility determinations were upheld by the Board in its prior decision, *Bonin*, slip op. at 3, claimant relies solely on the letter written by a union official to establish the existence of working conditions that could have caused his depression. The letter is quoted in full by Judge Burke. The letter, "To whom it may concern," recites claimant's allegations of harassing incidents, and further notes that the union Executive Board considered the treatment of claimant to be harassment and that meetings to resolve claimant's grievance were requested but there was no final outcome prior to the May 1990 closing of employer's facility. Cl. Ex. 9.

We affirm Judge Burke's conclusion that the letter does not establish the "working conditions" element of claimant's *prima facie* case. Judge Burke clearly reviewed every aspect of the letter, found that it was cumulative of other evidence of record which had already been discredited by Judge Dolan, stated that he was not bound by the findings of a union Executive Board, and held that claimant failed to meet his burden of proof.¹ See *U.S. Industries/Federal Sheet Metal, Inc. v. Director*,

¹We reject claimant's contention that Judge Burke erred in not considering

OWCP, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). These findings are rational and thus are affirmed. See generally *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT)(2d Cir. 1993).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

the letter as "evidence." Although Judge Burke stated that the letter was "not evidence[,] he thoroughly considered it as ordered by the Board; thus, his statement is harmless. Further, we reject claimant's assertion that Judge Burke placed the burden on claimant of establishing a causal relationship between his work and his depression. While Judge Burke stated that claimant did not show that any depression he was suffering from was due to the working conditions at employer's facility, in the context of his entire decision finding the absence of "working conditions," any error in this regard is harmless.