BRB No. 97-1353

MICHAEL JOHNSON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
UNITED COATINGS, INCORPORATED	)	
	)	
and	)	
	)	
RICHARD-FLAGSHIP SERVICES,	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits for a Back Impairment of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Michael Johnson, Portsmouth, Virginia, *pro se*.

Robert M. Tata and Wendy T. Cohen (Hunton & Williams), Norfolk,Virginia, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order Denying Benefits for a Back Impairment (96-LHC-1233) of Administrative Law Judge Richard K. Malamphy 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 an appeal by a claimant without counsel, we review 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; if so, they must be affirmed. *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.

On January 21, 1996, claimant allegedly sustained an injury to his back when he fell in a tank on a ship at work. On January 22, 1996, claimant received emergency room treatment for unspecified complaints. Thereafter, claimant received treatment for his back. Claimant filed a claim for temporary total disability benefits. Employer argued that its records showed that the tanks at issue were sealed on January 21, 1996, and that employees were not assigned to that area on that date.

In his Decision and Order, the administrative law judge found that claimant is entitled to invocation of the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), but that the presumption is rebutted due to inconsistencies in the record regarding the occurrence of the accident on the date in question. The administrative law judge denied benefits after weighing the evidence and concluding that claimant failed to establish that his back impairment is work-related.

On appeal, claimant challenges the administrative law judge's denial of benefits. In response, employer asserts that claimant's appeal was not timely filed in accordance with 20 C.F.R. §802.205, and that, in any event, substantial evidence supports the administrative law judge's denial of benefits.

Claimant has the burden of proving the existence of a harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *Bolden v. G.A.T. X. Terminals Corp.,* 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *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). Once claimant establishes his *prima facie* case, Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the instant case, the administrative law judge found that claimant

established his *prima facie* case*, i.e.*, claimant reported low back complaints in January 1996 which he attributed to an injury at work, received treatment for pertinent complaints in early 1996, and several physicians recorded claimant's recitation of an injury at work. The administrative law judge, found, however, that employer established rebuttal of the Section 20(a) presumption based on employer's records demonstrating that the tanks were sealed on the date of the alleged accident and that employees were not assigned to that area on that date, and the fact that claimant made no mention of an injury to a supervisor on January 21, 1996. In finding that employer established rebuttal, the administrative law judge also found inconsistencies in the record concerning the date of the alleged accident. The administrative law judge noted that in information supplied by claimant on January 23 and 24, 1996, to physicians, he indicated that back pain had been present for three weeks and that he had fallen in a tank one week earlier. The administrative law judge further credited this evidence on the record as a whole and denied benefits.

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 Calback 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). In denying claimant's claim, the administrative law judge considered the inconsistencies between claimant's testimony regarding the circumstances concerning the alleged January 21, 1996 accident and employer's business records, as well as with the medical records relating differing dates of the onset of back pain. On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant is not irrational. We, therefore, affirm the administrative law judge's determination that claimant failed to establish the existence of a work-related incident occurring on January 21, 1996, which could have caused his back condition. As claimant failed to establish an essential element of his *prima facie* case, his claim for benefits was properly denied. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT) (9th Cir.1988). We note that the evidence as to whether the alleged event at work occurred should have been weighed in determining whether the Section 20(a) presumption was invoked. *See Jones v. J.F. Shea Co.*, 14 BRBS 207 (1981). Any error is harmless, however, as the administrative law judge weighed the relevant evidence and his denial of benefits is supported by substantial evidence. *Bartelle v. McLean Trucking Co.,* 14 BRBS 166 (1981)(Miller dissenting), *aff'd*, 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982).

Accordingly, the administrative law judge's Decision and Order Denying Benefits for a Back Impairment is affirmed.[1]

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

[1]Contrary to employer's contention, claimant's notice of appeal is timely filed inasmuch as the administrative law judge's decision was issued on May 20, 1997, and claimant's notice of appeal is postmarked June 18, 1997. *See* 20 C.F.R. §§802.205(a), 802.207(b), 802.208(b).