BRB Nos. 10-0486
and 10-0486A

JEROLD M. McELVAINE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TRADESMAN INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 04/20/2011
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Scott C. Ford and Brian A. Richardson (McCandlish Holton, P.C.), Richmond, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (2007-LHC-0119) 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). 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, a shipfitter, alleged that his current condition, demyelinating polyneuropathy, was caused by his exposure to harmful dusts while he was detailed to the sandblasting department at Newport News Shipbuilding for three weeks in June and July 2004. Claimant sought compensation for total disability, as well as medical benefits. In his initial decision, the administrative law judge found that claimant established a *prima facie* case that his injury is work-related but that employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a). Upon weighing the relevant evidence, the administrative law judge found that claimant failed to establish that his condition is related to his work. Accordingly, he denied benefits.

Claimant appealed, contending the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption and in his weighing of the evidence as a whole. Employer cross-appealed, arguing that the administrative law judge erred in finding that claimant established his *prima facie* case and in failing to address its objection to the admission of evidence used to establish claimant's *prima facie* case. The Board vacated the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case and that employer established rebuttal of the Section 20(a) presumption, and remanded the case for reconsideration of those issues. *J.M.* [*McElvaine*] *v. Tradesman Int'l, Inc.*, BRB Nos. 09-0159/A (Aug. 28, 2009) (unpub.). The Board, however, affirmed the administrative law judge's finding that claimant failed to establish the work-relatedness of his condition based on the evidence of record as a whole, and thus stated that "the administrative law judge's denial of benefits may be reinstated if the administrative law judge again finds the Section 20(a) presumption invoked and rebutted." *Id.*, slip op. at 5. On remand, the administrative law judge found that claimant did not meet his burden of proving the existence of working conditions that could have caused his harm and, therefore, held that claimant is not entitled to the Section 20(a) presumption that his demyelinating polyneuropathy is related to his work for employer. Consequently, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he did not establish the working conditions element for purposes of invoking the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's decision on this issue. On cross-appeal, employer argues that the administrative law judge erred in admitting into evidence the Material Safety Data (MSD) sheets which claimant submitted. Claimant responds, urging affirmance of the administrative law judge's decision on this issue.

Claimant argues that the administrative law judge erred in finding that he did not establish the working conditions element of his *prima facie* case pursuant to Section 20(a). Claimant maintains that his testimony, that he sandblasted in an indoor facility, in conjunction with Dr. Lee's opinion that there is a causal connection between claimant's demyelinating polyneuropathy and his work, is sufficient to establish his entitlement to the Section 20(a) presumption.

Claimant bears the burden of proving the existence of an injury or 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. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Claimant is not required to prove that working conditions in fact caused his harm in order to invoke the presumption; rather, claimant must show the existence of working conditions which could have caused the harm alleged. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). Thus, the "working conditions" prong of a claimant's *prima facie* case requires that the administrative law judge determine whether employment events which could have caused the harm sustained by claimant in fact occurred. *See Bolden*, 30 BRBS 71. A claimant's credible testimony may be sufficient to support invocation of the Section 20(a) presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

On remand, the administrative law judge found there is evidence contradicting claimant's testimony regarding the length of his exposure to any deleterious substances and that he was denied a respirator at work. Specifically, the administrative law judge found that claimant's testimony that he "constantly" sandblasted for "eight hours a day" for about "three weeks," HT at 22-23, 24, 40, and that he asked for, but was denied the use of, a respirator in performing that work, *id.* at 20-21, is refuted by the credible testimony of Mr. Evans and Mr. Gillespie. According to Mr. Evans, an employee of Northrop Grumman Newport News who served as claimant's supervisor during the time of claimant's alleged extended exposure to sandblasting dust, claimant worked in sandblasting for only three or four hours a day for no more than four days. *Id.* at 72. Mr. Evans also stated that claimant did not ask him for, nor was claimant denied access to, a respirator during the course of his work for employer. *Id.* at 74, 80. Mr. Gillespie, who was employer's manager for the Northrop Grumman account, similarly testified that claimant never asked him for a respirator.[1] Additionally, while the MSD sheets show that

[1]Claimant testified that when he went to employer for a respirator, Mr. Gillespie told him that they did not have one to give him, and that they offered him a paper cup filter instead. HT at 22, 41. Mr. Gillespie refuted this testimony, stating that, to the best

certain substances, *i.e.*, iron, copper, nickel and manganese, were used at the shipyard as of March 29, 2002, the date that the testing occurred, the administrative law judge found that claimant failed to produce any evidence showing that he was exposed to these specific substances during his work for employer in 2004 or that they are components of sandblasting dust.

Moreover, the administrative law judge rationally found that Dr. Lee's opinion, when considered in its entirety, is too speculative to support a finding that claimant was exposed to harmful substances. In his office notes dated October 7 and November 29, 2005, Dr. Lee diagnosed chronic inflammatory demyelinating polyneuritis from an "unspecified inflammatory or toxic neuropathy." CX 7. Similarly, on a document dated February 14, 2007, Dr. Lee checked "agree" when he was asked as to whether "you are unable to determine the cause of [claimant's] polyneuropathy." EX 21. During his deposition, however, Dr. Lee responded, when asked whether claimant's work for employer may have caused his condition, that "it's more likely to be the case because [claimant] has no neurological problem before and after exposure to the sand blasting, he has all kinds of neurologic conditions so if that history is correct, I would say more likely be the case."[2] CX 20, Dep. at 10. Dr. Lee explained that the opinion he expressed in the February 14, 2007, questionnaire, in essence stating that he could not determine the cause of claimant's condition, was due to the fact that he "cannot determine the real cause," and because "everything is possible." CX 20, Dep. at 12. Dr. Lee also stated that he was not familiar with the chemicals to which claimant was exposed at work. *Id.* at 17-18.

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, and that the Board is not empowered to reweigh 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). The administrative law judge's decision to reject claimant's testimony regarding the extent of his exposures, as well as Dr. Lee's speculative opinion, is affirmed as it is rational and within his discretion. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Based upon these rational

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of his knowledge, employer "never once bought, purchased, or provided paper masks." *Id.* at 61, 66.

[2]Dr. Lee conceded that he based his causation finding entirely on the history that claimant gave to him regarding his work exposure to sanding dust. CX 20, Dep. at 10, 15. The administrative law judge's finding that claimant's testimony as to his alleged exposures at work is "suspect" thus diminishes the credibility of Dr. Lee's statement that claimant's work exposure "more likely" caused his neurological problems.

findings, the administrative law judge concluded that claimant failed to establish that working conditions existed which could have caused his demyelinating polyneuropathy and that claimant therefore failed to invoke the Section 20(a) presumption. We affirm this finding as it is supported by substantial evidence. *See, e.g.*, *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997); *Bolden*, 30 BRBS at 73. As claimant failed to establish an essential element of his *prima facie* case, the denial of benefits is affirmed.[3] *See U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

[3]In light of our affirmance of the administrative law judge's denial of benefits, we need not address employer's argument on cross-appeal that the administrative law judge erred in admitting the MSD sheets into evidence.