BRB No. 03-0348

JOHN DOLAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KVAERNER PHILADELPHIA SHIPYARD	)	DATE ISSUED:Feb. 12, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Bruce D. Zeidman (Cofsky & Zeidman, LLC), Haddonfield, New Jersey, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion for Reconsideration (2002-LHC-0853) of Administrative Law Judge Ralph A. Romano 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).

Employer hired claimant as a welder in May 2001. Claimant alleges that on Friday, September 7, 2001, he sustained an injury to his lower back while welding at work. Claimant sought continuing temporary total disability compensation from September 7, 2001, as well as medical benefits. Employer terminated claimant on October 3, 2001, after he tested positive for a controlled substance during a routine post-accident drug screening. EX 7.

In his Decision and Order, the administrative law judge found that claimant failed to establish that an accident occurred at work on September 7, 2001. Therefore, the administrative law judge concluded that claimant failed to establish his *prima facie* case, and is not entitled to disability or medical benefits for his current back condition. The administrative law judge summarily denied claimant's motion for reconsideration. On appeal, claimant argues that the administrative law judge erred in finding that claimant failed to establish his *prima facie* case, and thus is not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). Employer responds, urging affirmance of the administrative law judge's decision.

In order to establish his *prima facie* case, claimant has 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. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). 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 these two elements are established, claimant is entitled to a presumption that his injury is work-related. 33 U.S.C. §920(a); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In the instant case, claimant asserted that a work incident occurred on September 7, 2001, which aggravated his pre-existing back condition.[1] Tr. at 5. Although the administrative law judge concluded that claimant did not establish "that he suffered a harm on September 7, 2001," Decision and Order at 8, the administrative law judge's decision as a whole demonstrates that he found that an accident did not occur at work on September 7, 2001, as alleged by claimant. Substantial evidence supports this finding, and it is therefore affirmed. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

[1] Claimant previously underwent surgery at L5-S1 and at C5/6 and C6/7 in May 2000. CX 7.

The administrative law judge provided rational reasons for finding that a specific work-related accident did not occur on September 7, 2001. First, the administrative law judge stated that although claimant testified that he suffered a "pull or cramp" on September 7, 2001, while he was at work, and that he sought emergency room treatment for the injury on Sunday evening, September 9, 2001, the emergency room records establish that claimant did not seek medical treatment until the late evening of September 10, 2001. CX 3. Second, the administrative law judge stated that when claimant visited Dr. Gigliotti on September 12, 2001, a mere five days after the alleged accident and two days after claimant went to the emergency room, Dr. Gigliotti reported that claimant has "no memory of injury." CX 6. Third, the administrative law judge pointed out that in a September 19, 2001, letter to Dr. Gigliotti, Dr. Cervantes states that claimant informed the doctor that he was injured when he was "welding a ballast tank on one of the ships, and he bent to pick up something." CX 7 at 2. The administrative law judge then stated that the above description claimant provided to Dr. Cervantes, while similar to the one claimant provided at the hearing, is not entirely consistent, as claimant's testimony before him described his September 7, 2001, accident as occurring when he was "welding deep in a corner…upside down…in such a tight spot." Tr. at 20. Fourth, the administrative law judge found that claimant's own expert, Dr. David, testified on deposition that claimant told him that he suffered an injury on September 10, 2001, CX 17; 27 at 24, the Monday when claimant was, according to his testimony, Tr. at 69, at home because he was suffering the pain of the alleged September 7, 2001 injury. Decision and Order at 8.

The administrative law judge is entitled to weigh the evidence and to assess the credibility of witnesses' testimony. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Claimant has raised no reversible error in the administrative law judge's consideration of the evidence,[2] and his finding that claimant failed to establish that a work-related incident occurred on September 7, 2001, is rational and supported by substantial evidence. To the extent that claimant seeks a re-weighing of the evidence, such is beyond our scope of review. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). As claimant failed to establish an essential element of his *prima facie* case, we affirm the denial of

[2] While claimant correctly argues that the administrative law judge erred in stating that claimant did not first attempt to call employer about his injury until September 13, as the documentary evidence established that he first called employer on September 10, CX 2 at 2, the first day that claimant was absent from work, any error is harmless, because the administrative law judge did not rely on this erroneous "finding" or accord it any weight in his decision. *See* Decision and Order at 6, 8.

benefits.[3] *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631; *Bolden*, 30 BRBS 71.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3] As claimant has not established that his injury is work-related, he is not entitled to medical benefits. *See* 33 U.S.C. §907.