BRB No. 96-0775

FELICIANO LEAL	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

William Turley (William Turley & Associates), San Diego, California, for claimant.

Margaret C. Bell (Littler, Mendelson, Fastiff, Tichy & Mathiason, P.C.), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (94-LHC-3299, 94-LHC-3300) of Administrative Law Judge Daniel L. Stewart 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 if they 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, who had previously sustained other work-related injuries, alleged that he sustained injuries to his back, neck, and shoulders in separate workplace accidents on March 31, 1990, and January 10, 1992, while working as a welder for employer. He did not miss any significant time from work after the alleged March 31, 1990, work accident, and continued to work with light duty restrictions for several months on the recommendation of his treating physician, Dr. Levine. In December 1991, claimant returned to his full welding duties. Shortly thereafter, on January 10, 1992, claimant alleged that he injured his neck and back while lifting a welding line weighing approximately 100 pounds. Tr. at 35-37. After being seen that day at employer's dispensary and being examined by Dr. Levine, the orthopedic surgeon who had treated claimant previously, claimant was placed in a light duty job with employer. Claimant continued to perform light duty

work for employer until April 7, 1992, when he was ordered to return to his full duties based upon an evaluation performed by Dr. Schwab, another orthopedic surgeon. Believing that he could not perform his usual welding duties, claimant discontinued working for employer on April 20, 1992, and has not returned to work since that time. In February 1994, Dr. Levine recommended that claimant undergo cervical spine surgery based upon significant abnormalities present in the cervical spine at the C5-6 and C6-7 levels as indicated by a myelogram administered on December 9, 1993. Employer voluntarily paid claimant temporary partial disability benefits from November 15, 1991 to November 18, 1991, from January 10, 1992 to January 12, 1992, and for January 14, 1992, but refused to authorize the neck surgery recommended by Dr. Levine or to pay additional disability benefits. At the hearing before the administrative law judge, claimant sought to compel employer to pay for the neck surgery recommended by Dr. Levine, and argued that in the event surgery is denied, he is entitled to permanent total disability compensation.

In his Decision and Order, with regard to the March 31, 1990, work accident, the administrative law judge found that claimant did not provide timely notice of a neck, back, or shoulder injury in accordance with Section 12(a) of the Act, 33 U.S.C. §912(a). The administrative law judge then found, however, that claimant's failure to provide timely notice regarding a shoulder or back injury occurring on March 31, 1990, was excused pursuant to Section 12(d)(1) of the Act, 33 U.S.C. §912(d)(1), as employer's dispensary report dated April 2, 1990 established that employer had actual knowledge of the alleged injuries. The administrative law judge, however, ultimately denied claimant compensation for his alleged back or shoulder injury, finding that there was insufficient evidence to establish that these injuries were disabling. The administrative law judge also found that claimant was not entitled to disability benefits for any neck injury he may have sustained on March 31, 1990, because his failure to provide timely notice of this injury was not excused under 33 U.S.C. §912(d)(1) or (2); employer did not have actual knowledge of any neck injury due to that accident and was prejudiced by claimant's failure to provide timely notice.

Relevant to the current appeal, the administrative law judge also found that although claimant asserted that he sustained shoulder, back, and neck injuries as a result of a work-related accident occurring on January 10, 1992, the accident alleged did not occur, and consequently, claimant failed to establish a *prima facie* case for invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). Accordingly, he denied claimant's claim for all compensation arising out of the alleged January 10, 1992, work accident. Moreover, assuming without deciding that claimant had injured his neck as a result of the March 31, 1990, work accident, and had thereby established a work-related cervical injury, the administrative law judge denied claimant's request for the cervical surgery recommended by Dr. Levine, crediting the medical opinions of Drs. Dodge, Schwab, and Freeman that this surgery was unnecessary.[1]

On appeal, claimant contends that in finding that the alleged January 10, 1992, work accident did not occur and that, therefore, claimant was not entitled to disability or medical benefits

[1]The administrative law judge, in addition, noted that the issue of payment of medical bills for claimant's past medical treatment associated with his alleged work accidents was moot, as the parties agreed at the hearing that all such medical bills had been paid by employer. This finding is not challenged on appeal.

resulting from this injury, the administrative law judge erred in discrediting his testimony. In addition, claimant maintains that the administrative law judge erred in failing to afford determinative weight to the opinion of claimant' treating physician, Dr. Levine, regarding the need for the requested cervical surgery. Employer responds, urging affirmance of the administrative law judge's decision.

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, in order to establish a *prima facie* case and invoke the Section 20(a) presumption. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *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. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

After consideration of the Decision and Order in light of the record evidence and claimant's assertions on appeal, we affirm the administrative law judge's finding that the alleged January 10, 1992, accident did not occur because it is rational, in accordance with applicable law, and supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359. After noting that claimant's visit to employer's dispensary and to Dr. Levine on January 10, 1992, where claimant reported that he had just hurt his neck and low back while pulling a heavy electrical cord, tended to support claimant's testimony, and the absence of eyewitness testimony, the administrative law judge, upon weighing the evidence as a whole, concluded that there was a great deal of evidence which caused him to question claimant's credibility regarding the accident claimed. Claimant argues on appeal that the administrative law judge erred in discrediting his testimony and attempts to provide alternate explanations for the facts which the administrative law judge viewed as indicative of claimant's lack of credibility. Credibility determinations, however, are solely within the purview of the administrative law judge. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994). On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant is neither inherently incredible nor patently unreasonable. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Accordingly, we affirm his determination that claimant failed to establish that the alleged January 10, 1992, work-related accident occurred. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As claimant failed to establish an essential element of his *prima facie* case, his claim for disability benefits and medical benefits resulting from the alleged January 10, 1992, work injury was properly denied. *See U.S. Industries*, 455 U.S. at 608, 14 BRBS at 631.

With regard to the denial of the cervical surgery recommended by Dr. Levine, we note that the administrative law judge acted within his discretion in discrediting Dr. Levine's testimony despite his status as claimant's treating physician. The medical opinions of Drs. Dodge, Schwab, and Freeman provide substantial evidence to support the administrative law judge's finding that this surgery is unnecessary. *See generally Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995). In addition, as claimant concedes in his

Petition for Review at 4-6 that the alleged January 10, 1992, accident is the sole reason he needs this surgery, our affirmance of the administrative law judge's determination that the January 10, 1992, accident did not occur, is dispositive.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judges