

BRB No. 96-0905

JOSEPH BARTANUS)
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 Claimant-Petitioner) DATE ISSUED:
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 v.)
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 DEPARTMENT OF THE ARMY/NAF)
)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Lawrence R. Chaban (Yablonski, Costello, Leckie & Chaban), Washington, Pennsylvania, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (95-LHC-0215) of Administrative Law Judge Gerald M. Tierney 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.*, as incorporated by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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, on July 8, 1992, allegedly sustained an injury to his right hip when he fell while removing equipment from a youth center at a military base located near Munich, Germany, during the course of his employment with employer. Claimant has not worked since that date; he was terminated on July 31, 1992, as a result of the closing of the Army facility. As a result of the alleged incident, claimant contends that he is presently totally disabled by his hip condition.

In his Decision and Order, the administrative law judge found that claimant

failed to establish that his right hip problems were due to an injury sustained during the course and scope of his employment with employer; accordingly, he denied compensation.¹ On appeal, claimant argues that the administrative law judge erred in weighing the evidence and concluding that claimant did not suffer a work-related injury on July 8, 1992, which aggravated and rendered symptomatic his underlying degenerative hip condition. Employer responds, urging affirmance.

After review of the administrative law judge's Decision and Order in light of the evidence of record, we reject claimant's assertion that the administrative law judge erred in finding that his hip condition was not work-related. 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. *Obert v. John T. Clark and 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); 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), 33 U.S.C. §920(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 substantial 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).

¹In so finding, the administrative law judge did not address the other unresolved issues before him regarding the timeliness of the claim, the nature and extent of claimant's disability, claimant's wage-earning capacity, and employer's entitlement, if any, to relief under Section 8(f), 33 U.S.C. §908(f). Decision and Order at 2.

In the instant case, the administrative law judge stated that inasmuch as claimant claimed to have a hip condition and to have been moving heavy equipment on July 8, 1992, he was entitled to the benefit of the Section 20(a) presumption. The administrative law judge, citing to the medical reports of Drs. Mirza, Svoboda and Rosemeyer, then determined that there was substantial evidence in the record to rebut the presumption. Next, the administrative law judge weighed all of the evidence. The administrative law judge specifically noted the contemporaneous medical reports of Drs. Mirza, Svoboda, and Rosemeyer, EXS 1, 14, which reflect that claimant made no mention of the July 8, 1992, work accident but that claimant attributed his condition to an injury suffered two years prior to the alleged incident. He further found that there were no contemporaneous accident reports made to employer, that there was no supporting testimony,² other than claimant's, from either the co-worker, Mr. Cofield, who was allegedly present at the time of the fall, or claimant's supervisor that an accident occurred, and that claimant failed to inform employer of the alleged accident until December 28, 1992, approximately five months after the alleged incident was supposed to have taken place. Finally, the administrative law judge found claimant's testimony to be self-serving.

Based upon the foregoing findings, the administrative law judge concluded that claimant failed to establish that he sustained the alleged injury during the course and scope of his employment with employer. After review of the record, we affirm the administrative law judge's finding because it is rational, supported by substantial evidence, and in accordance with law. See *O'Keeffe*, 380 U.S. at 359. 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 *Darnell v. Bell Helicopter, Inc.*, 16 BRBS 98 (1984) *aff'd sub nom. Bell Helicopter, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984); *Jones v. J.F. Shea Co.*, 14 BRBS 207 (1981). Any error is harmless, however, as the administrative law judge weighed the relevant evidence. As claimant failed to establish either the accident claimed, an essential element of his *prima facie* case, or any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, the administrative law judge's denial of benefits is affirmed.

²Claimant's co-workers to whom he alleges he reported the accident at the time it occurred allegedly could not be located due to the dispersion of the work force following the facility's closing. HT at 43-44; Dukes Dep. at 14-15.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge