BRB No. 92-1645

EARL F. KIDD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHWEST MARINE IRON WORKS	)	
	)	DATE ISSUED:
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Robert Wollheim (Welch, Bruun & Green), Portland, Oregon, for claimant.
Patric J. Doherty and Dennis R. VavRosky (VavRosky, MacCall, Olson, Doherty & Miller, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-2136) of Administrative Law Judge Henry B. Lasky 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 sheet metal worker for employer, alleged that he sustained a work-related neck injury on October 25, 1990, during an altercation with another worker regarding a welding lead.[1] Claimant asserted that on that date, the co-worker, Justin Calloway, threw a 50-foot long double welding lead weighing 50 to 75 pounds at him. Claimant maintains that the lead struck him in the

[1]Claimant had been working for less than two weeks at the time of the alleged injury after an absence of three years due to a 1986 neck injury with the same employer.

face, broke his glasses, caused a welt to develop on his forehead, and caused his neck to whiplash, forcing him down on one knee. Mr. Calloway testified, however, that the lead was a single lead no more than 10-15 feet long weighing approximately 8 to 9 pounds and that after a heated exchange he had handed claimant the lead "in his chest."

There were no witnesses to the incident itself, but several witnesses testified to events following the exchange. Mr. Gress, another sheet metal worker, indicated that when he saw claimant soon after the alleged incident he appeared "hot" or "excited," but not hurt, and that while his eyeglasses were "cockeyed," they were not broken. Tr. at 54. Mr. Weillert, the welding leadman of claimant's crew, who investigated the incident, testified that he found both men arguing in the engine room and that claimant, who appeared to be uninjured, indicated that "he was fine." Tr. at 111.

Claimant reported his complaints of neck pain to a company paramedic, who drove him to an occupational clinic where the clinical staff immobilized his neck and took him to a hospital emergency room. Dr. Guitteau, the emergency room physician, diagnosed a cervical strain, released claimant with a soft collar and a painkiller, and advised him to take the day off and return to the clinic the next day. Dr. Burns, who evaluated claimant at employer's request on November 2, 1990, diagnosed "acute cervical strain per history" but noted that it was "difficult to substantiate many of...[claimant's] subjective complaints with objective physical findings." Emp. Ex. A 7-5 at 14. On November 6, 1990, Dr. Frank, who examined claimant because his treating physician, Dr. Wayson, was unavailable, noted a significant limited range of motion and diagnosed a re-exacerbation of his previous neck injury. On November 26, 1990, Dr. Wayson diagnosed a musculoskeletal neck injury related to the October 1990 incident. Cl. Ex. 3. On May 21, 1991, Dr. Markham, the neurosurgeon who had treated claimant's previous neck injury, also diagnosed a cervical strain but noted that it did not appear that the October 25, 1990 incident caused "any objective neck injury." *Id*. On deposition, Dr. Markham explained that he diagnosed a cervical strain based only on claimant's history, that there were no objective signs of strain, and that the term "cervical strain" is a "catchall" diagnosis to characterize subjective complaints of pain with no objective signs. In July 1991, claimant tried unsuccessfully to return to work and has not worked since. Claimant sought continuing temporary total disability compensation under the Act, alleging injury to his neck and a hernia.[2] Employer did not pay any compensation or medical benefits.

The administrative law judge denied the claim, finding that claimant did not sustain a new or aggravating neck injury within the meaning of Section 2(2) of the Act, 33 U.S.C. §902(2), on October 25, 1990. The administrative law judge noted that the only objective evidence of physical harm was a mild muscle spasm in claimant's shoulder blade observed by Dr. Burns, which he dismissed based on Dr. Markham's testimony that this spasm was not relevant to claimant's claim of a neck injury.[3] Decision and Order at 11. While recognizing that complaints of subjective

[2]The denial of compensation for claimant's alleged hernia is not contested on appeal.

[3]Dr. Markham deposed that the spasm in the parathoracic area noted by Dr. Burns was unrelated to claimant's neck area and that, in his opinion, the loss of range of motion observed by Dr. Frank is also a very subjective symptom. Ex. 25 at 133, 134.

symptoms and pain alone will suffice to establish a physical harm provided they are credible, the administrative law judge determined that claimant's testimony was vague, evasive, equivocal, and contradicted by the record evidence as well as the testimony of every other witness at the hearing. Decision and Order at 11. Crediting Mr. Calloway's account of the alleged incident, as corroborated by the testimony of Mr. Gress, Mr. Weilert, and Mr. Hunolt, a company paramedic who was present when claimant was initially examined at employer's clinic,[4] the administrative law judge concluded that the claimant had given false testimony as to the details of the accident. Noting that claimant's complaints of neck pain were inconsistent and undermined by his widely ranging and exaggerated accounts of the alleged incident,[5] his past exaggeration of his symptoms, and his conflicting testimony regarding the onset of his neck pain and his recovery from the 1986 accident, the administrative law judge concluded that claimant was an unreliable witness. Noting that claimant had conceded that his neck was "not worse" as a result of "whatever happened" on October 25, 1990, and that this testimony was consistent with Dr. Markham's opinion that claimant's neck complaints were due solely to his pre-existing degenerative condition, the administrative law judge concluded that claimant had not met his burden of establishing a neck injury arising out of and in the course of his employment on October 25, 1990. Claimant appeals the denial of benefits. Employer responds, urging affirmance.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *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 shifts to employer to rebut the presumption 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).

After careful review of the record, we affirm the administrative law judge's denial of benefits because his finding that claimant failed to establish that he sustained an injury is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe, supra*. Contrary to claimant's assertions, the administrative law judge acted within his discretion in discrediting claimant's account of the incident based on his observation of his demeanor at the formal hearing and the myriad of contradictory evidence. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Claimant's assertion that administrative law judge erred in finding that he failed to establish a harm because the consensus of

[4]Mr. Hunolt testified that although claimant entered employer's clinic and indicated that his neck was sore and that he wanted to see a doctor, he did not appear to be in any distress and did not exhibit any limitation of movement.

[5]Claimant gave the physicians who examined him varying accounts of the weight of the lead and whether he had fallen forward or backward.

the medical evidence indicates that he suffered a cervical strain similarly must fail. The administrative law judge, as the trier-of-fact, is not bound by the opinion of any particular medical expert, but is free to accept or reject all or any part of the evidence as he sees fit. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990).

In the present case, the administrative law judge rationally rejected the diagnoses of a cervical strain in light of the lack of supporting objective findings, and rationally concluded based on Dr. Markham's opinion that claimant's neck complaints were due entirely to his pre-existing degenerative condition which was unrelated to the alleged October 25, 1990 incident. The lay testimony of Mr. Calloway, Mr. Weilert, Mr. Gress, and Mr. Hunolt, as corroborated by the medical opinion of Dr. Markham, provide substantial evidence to support the administrative law judge's finding that claimant did not sustain an injury on October 25, 1990. Inasmuch as claimant has failed to establish any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, we affirm the denial of benefits. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied* , 459 U.S. 1104 (1983).[6]

[6]Claimant's assertion that he is entitled to an attorney's fee is rejected, as counsel's services did not result in a successful prosecution of the claim. *See generally Tait v. Ingalls Shipbuilding Inc.*, 24 BRBS 59, 61 (1990); *American Stevedore, Inc. v. Salvano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976), *aff'g* 2 BRBS 178 (1975); 33 U.S.C. §928(a); 20 C.F.R. §802.203.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge