

EARL A. DUSENBURY)	BRB No. 96-0517
)	
Claimant-Petitioner)	
)	
v.)	
)	
KEVIN HILL'S MARINE SERVICE,)	
FRED WAHL MARINE)	
CONSTRUCTION, INCORPORATED)	
FAIRLINE MARINE, INCORPORATED)	
)	
and)	
)	
SAIF CORPORATION)	
)	
Employers/Carrier-)	
Respondents)	
)	
)	
DAVID C. LOUIS)	BRB No. 96-0518
)	
Claimant-Petitioner)	
)	
KEVIN HILL'S MARINE SERVICE,)	DATE ISSUED:
FRED WAHL MARINE)	
CONSTRUCTION, INCORPORATED)	
FAIRLINE MARINE, INCORPORATED)	
)	
and)	
)	
SAIF CORPORATION)	
)	
Employers/Carrier-)	
Respondents)	DECISION and ORDER

Appeals of the Decisions and Orders - Denying Benefits of Daniel L. Stewart,
Administrative Law Judge, United States Department of Labor.

Earl A. Dusenbury, Newport, Oregon, *pro se*.

David C. Louis, Toledo, Oregon, *pro se*.

John R. Dudrey (Williams, Fredrickson and Stark, P.C.), Portland, Oregon, for Kevin Hill's Marine Service and SAIF Corporation.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for Fred Wahl Marine Construction, Inc. and SAIF Corporation.

Carrol J. Smith (SAIF Corporation), Salem, Oregon, for Fairline Marine, Inc. and SAIF Corporation.

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

PER CURIAM:

Claimants Dusenbury and Louis, without the assistance of counsel, appeal the Decisions and Orders - Denying Benefits (95-LHC-717, 718, and 777) of Administrative Law Judge Daniel L. Stewart rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, (the Act).¹ In reviewing these *pro se* appeals, the Board will review the findings of fact and the conclusions of law of the administrative law judge in order to determine whether they are rational, supported by substantial evidence, and in accordance with law; if so, they must be affirmed. *See O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant Louis began working for Kevin Hill's Marine Service (Kevin Hill's Marine) as a welder and mechanic in March 1991. Louis EX-11; Tr. at 470. From March 18 to May 15, 1991, Louis was employed as a welder and painter for Fred Wahl's Marine Construction (Fred Wahl). Louis EX-12; Tr. at 470-471. On May 15, 1991, claimant returned to employment with Kevin Hill's Marine. Louis EX-11. During this stint of employment, Louis worked as a welder and painter in the fish hold area of the fishing boat *Marathon*. Claimant Louis testified that ventilation in the fish hold area was initially very poor, consisting of one household fan and particle mask, but that after a week or two, conditions improved as supplied air was provided. Tr. at 472 - 475. In August 1991, claimant left Kevin Hill's Marine and obtained employment with Fairline Marine (Fairline). Louis EX-11.

Claimant Dusenbury was initially employed by Fred Wahl as a welder on March 25, 1991; he testified he worked a majority of the time outside in this employment. Dusenbury EX-15; Tr. at 335. After this job was terminated, he began working for Kevin Hill's Marine on June 28, 1991, as a welder and painter on the *Marathon*, where he alleged that he worked two to three days in the fish hold area before being transferred to welding in the voids on the side of the ship, where he remained until July 14, 1991. Dusenbury EX-16; Tr. at 337 - 339. Dusenbury subsequently obtained a position with Fairline as a painter in July 1991. Dusenbury EX-17.

¹These appeals are consolidated for purposes of our decision. 20 C.F.R. §802.104(a).

Both claimants asserted that subsequent to their working in the fish hold area at Kevin Hill's Marine, they began to experience a variety of symptoms, including difficulty focusing their eyes, confusion, balance problems, loss of sexual desire, back pain, problems with depth perception, numbness in the hands and feet, a lump in the arms and throat, a stinging sensation on the nose, tingling in his throat, difficulty urinating, skin discoloration, seizures, and personality changes.² Attributing their symptoms to aggravation or activation of latent pre-existing porphyria caused by exposure to metallic gases while working for Kevin Hill's Marine, both claimants sought permanent total disability benefits under the Act.

Although the claims currently before us were consolidated below for purposes of the formal hearing, the administrative law judge issued separate Decisions and Orders. In both cases, the administrative law judge found that claimant failed to establish by a preponderance of the evidence that he suffers from porphyria, the harm on which the claim for disability and medical benefits was based, and accordingly denied benefits. Both claimant Dusenbury, BRB No. 96-0517, and claimant Louis, BRB No. 96-0518, appeal the administrative law judge's denial of benefits, without the assistance of counsel. In both cases, Kevin Hill's Marine responds, urging affirmance of the administrative law judge's Decision and Order and employers Fred Wahl and Fairline respond, expressing agreement with the brief of Kevin Hill's Marine.

Claimant has the burden of proving the existence of an injury, *i.e.*, physical 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). After review of the administrative law judge's Decision and Order in light of the evidence of record, we affirm his denial of benefits to both claimants. In the cases before us, the administrative law judge initially discredited the testimony of both claimants. The administrative law judge found that claimant Dusenbury's description of his physical capabilities was contradicted by other record evidence. Dusenbury EX-38; Tr. at 347-350. In addition, he noted that Drs. Brown, Loriaux, and Burton had concluded that Dusenbury was most likely malingering or faking his symptoms. Dusenbury EX-46 at 530. Finally, the administrative law judge questioned whether Dusenbury had ever actually worked in the fish hold of the *Marathon* at any time. He noted that Kevin Hill, the owner of Kevin Hill's Marine, testified that Dusenbury had been hired temporarily to work the voids alongside the ship. He further noted that Dusenbury's testimony regarding the absence of adequate ventilation when he began working there on June 28, 1991, was directly contradicted by the testimony of both claimant Louis and Mark Herzog, who indicated that adequate respiratory equipment, including air pumps with breathing masks, was provided in the fish hold at the latest by the middle of June. Tr. at 45-51, 337-339, 473-474, 606-607.

²The claimants asserted that they became more argumentative and aggressive.

The administrative law judge found that claimant Louis was not a credible witness because of contradictions between his testimony regarding the nature and extent of his drug and alcohol use and other record evidence. Louis EX-40; Tr. at 506. The administrative law judge also questioned claimant Louis's truthfulness in describing his subjective complaints, noting that numerous examining physicians, including Drs. Binder, Burton, and Brown, had indicated that he is most likely malingering or faking his symptoms, and that despite his complaints of debilitating symptoms he had been involved in a violent fight with three police officers in November 1994. Louis EXS-37, 46, 48; Tr. at 214-222.

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. *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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Inasmuch as the administrative law judge's decision to discredit the testimony of both claimants for the reasons on the record before us was neither inherently incredible nor patently unreasonable, we affirm this negative credibility assessment. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

After finding that each claimant's testimony was not credible, the administrative law judge stated that he would base his analysis of the issues before him chiefly on the objective medical evidence before him. He then proceeded to determine whether causation was established in each case in light of the Section 20(a), 33 U.S.C. §920(a), presumption. In establishing causation under the Act, claimant is aided by the Section 20(a) presumption. In order to be entitled to the Section 20(a) presumption, claimant bears the burden of establishing that he suffered an "injury" and that an accident occurred or working conditions existed that could have caused the harm. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Once claimant establishes the two elements of his *prima facie* case, the Section 20(a) presumption operates to link the harm or pain with claimant's employment. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 295-96, 24 BRBS 75, 80 (CRT)(D.C. Cir. 1990). 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*, U.S. , 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994).

In the cases before us, the administrative law judge found that claimant Louis was entitled to the Section 20(a) presumption as he at least alleged that he suffered some harm as evidenced by his medical reports and subjective complaints, and working conditions existed which could have caused the harm. With regard to claimant Dusenbury, the administrative law judge found that his allegations as evidenced by his medical reports and subjective complaints were sufficient to establish the first or harm element of his *prima facie* case. He questioned, however, whether claimant Dusenbury had established the second, or working conditions, element of his *prima facie* case, noting that it was unclear whether he had ever worked in the fish hold as he claimed. He ultimately assumed, however, for the purposes of his decision that claimant Dusenbury did in fact work in the fish hold and accordingly found he established a *prima facie* case under Section 20(a). The administrative law judge then determined that there was substantial evidence in each case to rebut the presumption, relying on the testimony and reports of Drs. Brown and Burton, as well as the

affidavit of Dr. Kushner, which indicated that neither claimant suffered from, nor presented symptoms attributable to, porphyria. *See* Louis EXS-48, 57; Dusenbury EXS-46, 52.

After considering the evidence in both cases as a whole, the administrative law judge found that the medical opinion of Dr. Morton, Louis EXS-43, 44, Dusenbury EXS-42, 43, who diagnosed porphyria based primarily on enzyme test results, was less persuasive than the contrary medical opinions of Drs. Burton and Kushner, Louis EXS-48, 57, Dusenbury EXS-46, 52. In so concluding, the administrative law judge credited the testimony of Drs. Burton and Kushner that the blood enzyme tests which formed the basis of Dr. Morton's diagnoses were not generally accepted as diagnostic of porphyria in the medical community because the testing methods are not standardized or based on the scientific method which includes the peer review process. The administrative law judge then determined that absent the results of these enzyme tests, there was no objective data to support a diagnosis of porphyria, a conclusion supported by both Drs. Burton and Kushner. Inasmuch as Dr. Morton's opinion as to a causal connection between claimants' employment and their current symptoms was premised on his belief that working conditions in the fish hold at Kevin Hill had precipitated latent porphyria, a condition which the administrative law judge found not to exist, the administrative law judge determined that both claimants failed to show by a preponderance of the evidence that their alleged symptoms are in any way causally related to their employment.³

After review of the record, we affirm the administrative law judge's denial of benefits based on his finding that neither claimant suffered from porphyria. Initially, since the condition of porphyria is the "injury" alleged as the basis for the claim, the evidence as to whether the claimants exhibited symptoms of porphyria should have been weighed in determining whether claimant established a *prima facie* case prior to invoking the Section 20(a) presumption. *See U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *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). Any error committed by the administrative law judge in this regard, however, is harmless on the facts presented; he weighed the relevant evidence and his ultimate conclusion that neither claimant suffered from porphyria is rational and supported by the medical opinions of Drs. Burton and Kushner. *Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). As the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but is free to accept or reject all or any part of any testimony as he sees fit, *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), his decision to credit the medical opinions of Drs. Burton and Kushner over Dr. Morton's contrary opinion based on their criticism of his diagnostic enzyme testing was a proper exercise of his discretionary authority. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). As both claimants failed to establish the harm claimed, an essential element of their *prima facie* cases, we affirm the administrative law judge's denial of benefits in both cases. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1988); *Bolden v. G.A.T.X. Terminals*

³ Although two other physicians, Drs. Fox and O'Meara, also diagnosed porphyria, the administrative law judge's failure to explicitly consider this evidence in his weighing of the record evidence is harmless on the facts presented, as these doctors based their diagnosis on Dr. Morton's medical opinion which the administrative law judge discredited. Louis EX-51, Dusenbury EX-49; Louis EX-45, Dusenbury EX-44 at 27, 61.

Corp., 30 BRBS 71 (1996).⁴

Accordingly, the administrative law judge's Decision and Order Denying Benefits to claimant Dusenbury, BRB No. 96-0517, and the Decision and Order Denying Benefits to claimant Louis, BRB No. 96-0518, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

⁴Additionally, claimant Louis argues in his *pro se* brief that he was not provided with a full and fair hearing, that the administrative law judge exhibited evidence of bias, and that testimony was unfairly suppressed. We reject these assertions, however, as our review of the hearing transcript does not reveal support for these assertions.