BRB No. 97-0431

ANIBAL PERALTA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
M.P. HOWLETT, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Richard M. Winograd (Genarte O'Dwyer Winograd & Laraciente, Esqs.), Newark, New Jersey, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2678) of Administrative Law Judge Frank D. Marden 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, a longshoreman, was injured on July 11, 1989, when he was struck by a cable during the course of his employment with employer; he has not worked since that date. Employer paid claimant temporary total disability compensation from the date of this incident until September 29, 1994. 33 U.S.C. §908(b). Claimant thereafter sought permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge found that claimant failed to establish a harm to his cervical spine, that claimant's right shoulder condition neither arose out of nor was aggravated by his work accident, and that claimant's lumbosacral spinal condition had fully resolved within one year of the work incident. Accordingly, he denied claimant's request for further compensation.

Claimant now appeals,[1] challenging the administrative law judge's denial of his claim. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant initially challenges the administrative law judge's findings regarding his alleged cervical and shoulder injuries. 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. *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). 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). Upon invocation of 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).

In the instant case, the administrative law judge, relying upon the opinions of Drs. Seslowe, Koval, and Greifinger, as well two negative cervical spine MRI reports, initially determined that claimant failed to demonstrate a harm to his cervical spine. In addressing this issue, Dr. Seslowe opined that claimant exhibited no evidence of cervical radiculopathy; Dr. Koval similarly reported that he found claimant suffering from no cervical condition. *See* EXS-9, 33. Dr. Greifinger additionally determined that claimant had no injury to his cervical spine. *See* EX-1. 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);

[1]Although claimant alludes to his seeking continuing medical benefits he fails to brief this issue, thus precluding further Board review. *See* 33 U.S.C. §921(b)(3); *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990).

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). On the basis of the record before us, the administrative law judge's decision to credit the testimony of Drs. Seslowe, Koval, and Greifinger is neither inherently incredible nor patently unreasonable. Accordingly, as substantial evidence supports his ultimate finding, we affirm the administrative law judge's determination that claimant failed to establish the existence of a cervical spine injury. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Next, the administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a right shoulder impingement and that an accident occurred which could have caused that condition. *See generally Merrill*, 25 BRBS at 140. Thereafter, the administrative law judge determined that the opinions of Drs. Greifinger and Koval were sufficient to rebut the presumption and that, accordingly, claimant's right shoulder condition did not constitute a compensable injury. *See* Decision and Order at 15-16. Once the presumption is rebutted, however, the administrative law judge is required to weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.,* 23 BRBS 279 (1990). As the administrative law judge did not weigh all the evidence, pro and con, and the record contains evidence which, if credited, would support claimant's contention that his present shoulder condition is causally related to his employment with employer, we vacate the administrative law judge's finding on this issue. The case is remanded for the administrative law judge to weigh all of the evidence and determine whether claimant's shoulder condition is work-related based on the record as a whole.

Claimant next contends that the administrative law judge erred in finding that he was capable of resuming his usual employment duties with employer. We disagree. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Const. Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge concluded that any impairment to his lumbosacral spine sustained by claimant as a result of the July 11, 1989, work incident fully resolved within one year of that incident. In so finding, he credited the opinion of Dr. Greifinger, as supported by the opinions of Drs. Koval and Colon and the negative test results of record, over the opinions of Drs. Braaf, Leonhardt, Magliato, Jacobson, Zaretsky, Seslowe, Citronenbaum and Rosenblum.

We hold that the administrative law judge committed no error in crediting the opinions of Drs. Greifinger, Koval and Colon, in concluding that claimant's impairment to his lumbosacral spine resolved within one year of his work accident. In declining to credit the physicians relied upon by claimant, the administrative law judge specifically found that those physicians were unaware of claimant's pre-existing spinal pathology and, thus, their opinions were based upon an incomplete medical history. *See* Decision and Order at 17. Additionally, the administrative law judge declined to credit claimant's subjective complaints of pain. In contrast, the administrative law judge specifically relied upon the opinion of Dr.

Greifinger, a Board-certified orthopedic surgeon, who opined that claimant's spinal condition resolved within one year of his July 11, 1989, work incident. *Id., see also* EX-1 at 8; Tr. at 312-319. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp.*, 300 F.2d at 741. Thus, as the administrative law judge's credibility determinations are rational and within his authority as a factfinder, and as these credited opinions constitute substantial evidence to support the administrative law judge's ultimate findings, we affirm the administrative law judge's determination that claimant sustained only a temporary strain to his lumbosacral spine which resolved no later than one year following his work accident. *See generally Cordero*, 580 F.2d at 1331, 8 BRBS at 744.

Lastly, claimant alleges that the administrative law judge demonstrated bias in his conduct of this case by finding employer's witnesses credible and claimant himself not credible. Claimant sets forth no instances of bias other than the administrative law judge's findings which are contrary to claimant's interests. Adverse decisions are insufficient to show bias. *Olsen v. Triple A Machine Shop*, 25 BRBS 40 (1988). Moreover, claimant failed to raise the issue of alleged bias and prejudice until after the adverse decision was issued, thereby failing to preserve this issue for appeal. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). Accordingly, we reject claimant's assertion of bias by the administrative law judge in this case.

Accordingly, the administrative law judge's finding that claimant's shoulder condition is not work-related is vacated, and the case is remanded to the administrative law judge for further consideration of this issue consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge