BRB No. 93-1041

VINCENT P. TOBIAS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
MARINE CORPS EXCHANGE	)	
	)	
and	)	
	)	
ALEXSIS RISK MANAGEMENT, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Edward A. Villalobos (Law Offices of Villalobos & Straus), Long Beach, California, for claimant.

Eugene L. Chrzanowski (Littler, Mendelson, Fastiff & Tichy), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-1560) 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.*, as extended 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 allegedly sustained orthopedic and psychological injuries[1] when, on August 30, 1990, a fellow employee, George Cheney, greeted claimant by grabbing the back of his neck while

[1]The record establishes that claimant has an extensive history of psychological problems.

they were standing in line at employer's finance office. Prior to this date, a number of encounters between the co-workers allegedly led claimant to fear and feel intimidated by Mr. Cheney.

After the incident, claimant continued to work that day and the next day[2] and did not report the incident to his supervisor or seek medical treatment until he returned to work the following Tuesday after a three-day weekend. Claimant was off work during September and October, alleging that he suffered neck and arm pain due to the August 30, 1990, incident. Claimant returned to work on November 1, 1990. Upon his return to work, he had co-workers lift ledgers and wrote with a felt pen because it eased his pain by requiring less pressure. On March 13, 1991, claimant left work, stating he was again in pain and felt harassed in that his supervisors did not believe he was injured. Claimant returned to work in April and then left again in August 1991, allegedly due to the same "harassment and pain." At this time, Dr. Curtis rated claimant as disabled. Claimant never returned to work and was terminated by employer on September 2, 1992.

In his Decision and Order, the administrative law judge found that claimant invoked and employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption. Upon consideration of the evidence as a whole, the administrative law judge determined that neither the work incident nor any other events at work caused or aggravated claimant's psychiatric condition or physical symptoms of a psychiatric origin.[3] Consequently, the administrative law judge determined that claimant is not entitled to benefits under the Act. The administrative law judge additionally found that claimant is not entitled to any medical benefits. Lastly, the administrative law judge concluded that employer's actions in terminating claimant did not violate Section 49, 33 U.S.C. §948a, of the Act.

On appeal, claimant contests the administrative law judge's consideration of the evidence under Sections 20(a) and 49. Employer responds, urging affirmance.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. In considering the evidence as it relates to Section 20(a), the administrative law judge bifurcated the potential problems confronted by claimant due to the August 30, 1990, work incident: a physical condition and/or a psychiatric condition with some resulting physical complaints. In discussing the physical condition, the administrative law judge first determined that claimant's testimony regarding any injuries was not credible due to the substantive contradictions between his deposition and hearing testimony. The administrative law judge then determined that the medical opinions of Drs. Gopinath and Balachandran were unreliable because they were primarily based upon claimant's subjective complaints and thus, were not supported by any objective evidence. In contrast, the administrative

[2]Claimant returned to his office after the incident and did not tell anyone about it.

[3]The administrative law judge also determined that claimant did not suffer any orthopedic impairment and thus concluded that claimant was not entitled to the Section 20(a) presumption as to that aspect of his claim.

law judge credited the medical opinion of Dr. London, who opined that claimant did not have any orthopedic impairment whatsoever, because it is well-reasoned and supported by the evidence. The administrative law judge is entitled to evaluate the credibility of all witnesses, and may draw his own inferences and conclusions from the evidence. *See, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In the instant case the credibility determinations made by the administrative law judge in resolving this issue are rational and within his authority as factfinder. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). We therefore affirm the administrative law judge's determination that since claimant has no neck, back, shoulder, or arm impairments of a physical, orthopedic nature, he has not suffered a physical harm. Consequently, the administrative law judge's conclusion that the Section 20(a) presumption is inapplicable with regard to any potential physical condition arising out of the August 30, 1990 work incident is affirmed. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley)*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals, Corp.*, 30 BRBS 71 (1996); *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated on other grounds on recon.*, 24 BRBS 63 (1990).

As for claimant's other potential harm, the administrative law judge determined that the events in the workplace could have aggravated his psychiatric condition and any physical symptoms resulting from that condition, and thus, concluded that claimant invoked the Section 20(a) presumption. *See generally Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). However, based upon Dr. Swann's well-reasoned and supported opinion that claimant's problems were not caused or aggravated by the events in employer's workplace, the administrative law judge determined that employer established rebuttal of the Section 20(a) presumption. *See generally Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

In resolving the evidence as a whole under Section 20(a), the administrative law judge credited Dr. Swann's opinion over the contrary opinion of Dr. Curtis that claimant has post-traumatic stress disorder arising from the work incident, because her opinion was better

reasoned and supported by the other evidence of record.[4] The administrative law judge thus concluded that neither the work incident nor any other events at work caused or aggravated his psychiatric condition or physical symptoms of a psychiatric origin. Inasmuch as the administrative law judge's credibility determinations are rational and are within his discretionary authority, we affirm the administrative law judge's determination that claimant is not entitled to compensation under the Act.

Claimant also contends that the administrative law judge erred in finding that claimant's termination by employer was not in violation of Section 49. Section 49 provides in pertinent part that:

> It shall be unlawful for any employer ... to discharge or in any manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation ....

33 U.S.C. §948a (1988). In order to establish a *prima facie* case of a Section 49 violation, claimant must establish that employer committed a discriminatory act motivated by discriminatory animus or intent. *See Holliman v. Newport News Shipbuilding and Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124 (CRT) (4th Cir. 1988), *aff'g* 20 BRBS 114 (1987); *Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103 (CRT) (D.C. Cir. 1988), *aff'g* 19 BRBS 261 (1987). The administrative law judge may infer animus from circumstances demonstrated by the record. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 3 (1992), *aff'd on other grounds sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

Relying on the credible testimony of Beverly Becker, a labor relations specialist for employer, the administrative law judge determined that claimant had been terminated pursuant to a Department of Defense regulation because he had been absent from work on leave without pay for more than one year, and that such action was not taken in retaliation for claimant's filing of a compensation claim. Decision and Order at 28. The administrative law judge also noted that claimant produced no evidence to the contrary. From this evidence the administrative law judge rationally determined that claimant's termination was not motivated by discriminatory animus. *See generally Brooks*, 26 BRBS at 3. We therefore affirm the administrative law judge's conclusion that employer did not violate Section 49. *See Holliman*, 852 F.2d at 759, 21 BRBS at 124 (CRT); *Geddes*, 851 F.2d at 440, 21 BRBS at 103 (CRT); *Leon v. Todd Shipyards Corp.*, 21 BRBS 190 (1988).

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

SO ORDERED.

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[4]The administrative law judge found that Dr. Curtis' opinion was based on inaccurate and inadequate information. Specifically, the administrative law judge determined that Dr. Curtis primarily relied upon claimant's questionable statements regarding his condition and that unlike Dr. Swann, Dr. Curtis did not have the benefit of reviewing claimant's prior medical records.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge