BRB No. 96-0285

KENNETH E. GRIZZLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Kenneth E. Grizzle, Algood, Tennesee, *pro se*.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order denying benefits (95-LHC-27) of Administrative Law Judge E. Earl Thomas 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). In an appeal by a *pro se* claimant, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are 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 pipefitter, who had previously obtained a $180,000 judgment for injuries to his back and shoulder resulting from a May 21, 1987, automobile accident, and a $12,000 settlement for a work-related foot injury, alleged that he sustained an injury to his back while working for employer on November 8, 1993, when he was assigned to tie in a piece of 10-inch drain pipe which would join the upper and lower penetration sleeves of a machinery drain system. Employer voluntarily paid claimant temporary total disability compensation from November 10 to November 14, 1993, from December 1 to December 7, 1993, and from January 11, 1994 until May 12, 1994.

Claimant sought compensation under the Act for various periods of work he missed from November 9-14, 1993, December 1-7, 1993, January 11 to October 4, 1994, and from October 24, 1994, and continuing, contending that the alleged November 1993 work injury aggravated his pre-existing small focal herniation diagnosed in 1989 and congenital stenosis at L3-4 and L4-5, rendering him permanently totally disabled. In his Decision and Order, the administrative law judge found that the alleged work incident on November 8, 1993, did not occur, and denied the claim accordingly. Claimant, without the assistance of counsel, appeals the denial of benefits. Employer responds, urging affirmance.

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 for invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). *Obert v. John T. Clark & 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).

After consideration of the Decision and Order in light of the record evidence, we affirm the administrative law judge's denial of benefits because his finding that claimant failed to establish that the November 8, 1993, accident occurred is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. In making this determination, the administrative law judge noted initially that no one witnessed the alleged incident and that claimant's testimony was the only evidence that he had hurt his back during his employment. The administrative law judge then found that claimant's testimony was not credible and described his ability to misrepresent as breathtaking. In support of this negative credibility assessment, the administrative law judge noted that claimant had lied to each of his physicians, denying any prior back injuries or health problems, when in fact he had been involved in an accident with a bus in May 1987 which caused him to experience back and shoulder problems, to undergo arthroscopic surgery in March 1988, and to undergo regular chiropractic treatment[1] for continuing back problems diagnosed as stemming from a herniation in the L5-S1 disc in 1989. Although claimant attempted to explain his failure to provide this information to his physicians on the basis that he misunderstood what they were asking, the administrative law judge characterized claimant's excuse as limp and absurd given the consistency with which claimant had withheld information.[2] The administrative

---

[1]In his discussion of the evidence, the administrative law judge noted that claimant had seen Dr. Bosarge 15 times between September 22, 1993 and October 29, 1993, for pain in his back and neck which claimant related to the May 1987 automobile accident.

[2]In his discussion of the evidence the administrative law judge also noted that when claimant had applied for a position with employer on July 26, 1993, he had made numerous misstatements in his employment application and that he had provided inconsistent and contradictory accounts of the weight and length of the pipe he was allegedly lifting when injured to his physicians. Decision and Order at 3-5. The administrative law judge also recognized that in a recorded statement provided to employer's adjuster on November 10, 1993, claimant denied having any prior back injuries or back x-rays, denied being involved in a prior automobile accident or prior workmen's compensation claim, and denied having any previous surgery. In addition while claimant admitted in this statement that he received treatment from Dr. Bosarge, a chiropractor, several weeks prior to the

law judge further found that although claimant was adept at concealing the truth, he had failed miserably to appear as a candid witness. In so concluding, the administrative law judge noted that claimant had anticipated adverse questions and either debated with counsel or avoided giving a direct response and had answered questions with questions and observed that, fortunately for claimant, the transcript did not convey his true demeanor. On the basis of the record before us, the administrative law judge's decision to discredit the testimony of claimant for the reasons given is neither inherently incredible nor patently unreasonable. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Accordingly, we affirm his determination that claimant failed to establish the existence of a work-related incident occurring on November 8, 1993, which could have caused his present condition. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As claimant failed to establish an essential element of his *prima facie* case, the claim for benefits was properly denied. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

---

alleged work injury, he indicated that the treatment was being provided to open up his sinus passages, when in fact claimant was having neck and back pain related to the 1987 auto accident for which he received regular chiropractic treatments from 1989 until 9 days before the alleged November 1993 work injury. Decision and Order at 5, 7.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge