BRB No. 04-0508

RICHARD McBRIDE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HALTER MARINE, INCORPORATED	)	DATE ISSUED: FEB 3, 2005
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE COMPANY in liquidation, by and through the MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Decision and Order Denying Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Richard McBride, Moss Point, Mississippi, *pro se*.

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand and the Decision and Order Denying Claimant's Motion for Reconsideration (95-LHC-1175) of Administrative Law Judge C. Richard Avery 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 claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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); 20 C.F.R. §§802.211(e), 802.220.

This case is before the Board for the fifth time. To reiterate the facts and extensive procedural history relevant to the instant appeal, claimant sustained neck and back injuries as a result of two work-related incidents occurring on March 3, 1994, and April 13, 1994, respectively; claimant further alleged that he suffered a psychological injury as a result of these two work-related incidents. Claimant returned to work in a modified duty position at employer's facility on September 19, 1994, but, following a positive drug test, he was terminated on September 22, 1994, for violation of a company rule.

In his initial Decision and Order issued on April 17, 1997, Administrative Law Judge David W. DiNardi found that claimant's physical injuries were related to his employment with employer, but that any psychological condition from which claimant may suffer was not related to the 1994 incidents. Accordingly, the administrative law judge found claimant entitled to temporary total disability compensation for disability due to his physical injuries from April 14, 1994, to September 18, 1994, at which time the administrative law judge determined that employer had established the availability of suitable alternate employment within its own facility.

Claimant appealed this decision to the Board, challenging the administrative law judge's finding that his current psychological condition is unrelated to the two work incidents which he experienced while working for employer and the administrative law judge's consequent denial of medical treatment and compensation under the Act for this alleged work-related condition. In its decision issued on June 5, 1998, the Board held that the administrative law judge erred in finding that the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's psychological condition to his employment with employer was rebutted by the opinion of Dr. Maggio. As employer offered no other evidence on rebuttal, the Board reversed the administrative law judge's finding that claimant's psychological condition is not work-related and remanded the case for consideration of the remaining issues. *McBride v. Halter Marine, Inc.*, BRB Nos. 97-1226/A (June 5, 1998)(unpublished).

In his Decision and Order on Remand issued on April 5, 1999, the administrative law judge denied compensation benefits for claimant's psychological condition on the basis of his finding that claimant's psychological condition would not prevent him from performing the modified duty position at employer's facility. On the basis of the Board's holding that claimant's psychological condition is related to his employment, the administrative law judge found employer to be responsible for any reasonable and necessary future medical treatment of claimant's psychological condition, but denied claimant reimbursement for medical expenses incurred by claimant for the prior treatment of his psychological condition.

Following the filing of appeals to the Board by claimant and employer, claimant filed a modification request with the Board; accordingly, the Board dismissed both appeals and

remanded the case for modification proceedings. 33 U.S.C. §922. On January 18, 2000, the administrative law judge denied modification; a subsequent modification request filed by claimant was summarily denied by the administrative law judge on July 26, 2000. Claimant appealed both of the decisions denying modification and requested reinstatement of his prior appeal. In a consolidated decision on claimant's three appeals issued on January 10, 2001, the Board remanded the case for the administrative law judge to further consider whether employer met its burden of establishing that claimant, in light of his work-related psychological condition, is capable of performing the restricted duty position in employer's facility and whether claimant is entitled to Section 7 medical benefits for the past medical treatment of his psychological condition. In addition, the Board vacated the administrative law judge's denial of modification, stating that if, on remand, the administrative law judge again denies disability benefits on the basis of the existing record, he must reconsider whether the newly submitted medical evidence supports reopening the record pursuant to Section 22. *McBride v. Halter Marine, Inc.*, BRB Nos. 99-0852, 00-0500, 00-1092 (Jan. 10, 2001)(unpublished).

On remand, the administrative law judge reopened the record and received additional evidence submitted by both claimant and employer. Additionally, the administrative law judge allowed briefing by the parties to address any new evidence or issues that had arisen; employer filed a brief asserting that, on the basis of the new medical report of Dr. Maggio, the administrative law judge should find that claimant's psychiatric condition is not work-related. In his Decision and Order on Third Remand – Awarding Benefits issued on April 11, 2002, the administrative law judge found that he was constrained to accept the Board's previous holding as a matter of law that claimant's psychological condition is related to his employment. Having concluded that the original evidence and the evidence submitted post-remand established that claimant is totally disabled from all gainful employment, the administrative law judge awarded claimant temporary total disability benefits from April 14, 1994, to the present and continuing. Lastly, the administrative law judge found that employer is liable for the reasonable value of the self-procured treatment of claimant's psychological condition.

Employer again appealed to the Board, assigning error to the administrative law judge's decision to grant Section 22 modification, to the administrative law judge's conclusion that he was foreclosed from reconsidering the issue of whether claimant's psychological condition is work-related, and to the administrative law judge's finding that employer is liable for the past and future medical treatment of claimant's psychological condition. Claimant cross-appealed, challenging the administrative law judge's average weekly wage determination. In its decision issued May 9, 2003, the Board upheld the administrative law judge's determination that the evidence demonstrates a basis for Section 22 modification. Next, the Board held that the administrative law judge was not precluded by the "law of the case" doctrine from considering whether the report of Dr. Maggio's 2001 re-evaluation of claimant, received into evidence during the modification proceedings, demonstrates a mistake in a determination of fact regarding the causal relationship between

claimant's psychological condition and his employment. The Board accordingly remanded the case for the administrative law judge to consider whether Dr. Maggio's new report provides substantial evidence that claimant's psychological condition was not caused or aggravated by his employment and thus, supports modification of the Board's prior holding that employer had not rebutted the Section 20(a) presumption.[1] *McBride v. Halter Marine, Inc.*, BRB Nos. 02-0566/A (May 9, 2003)(unpublished).

On remand, the case was assigned to Administrative Law Judge C. Richard Avery,[2] who reopened the record to allow claimant the opportunity to submit new evidence with respect to the issue of the causal relationship between his psychological condition and his employment with employer. Both parties thereafter filed briefs and claimant submitted into evidence Dr. Hearne's September 18, 2003 report, affidavits and other records. In his Decision and Order on Remand issued on January 8, 2004, the administrative law judge determined that the new evidence submitted by employer supports modification of the Board's prior holding that employer had not rebutted the Section 20(a) presumption that claimant's psychological condition is causally related to his employment. Specifically, the administrative law judge first found that Dr. Maggio's 2001 report was sufficient to rebut the invoked Section 20(a) presumption; he then considered the evidence as a whole and concluded that claimant's psychological condition was not caused or aggravated by the work-related events of March 3, 1994 and April 13, 1994. Accordingly, the administrative law judge denied claimant disability compensation and medical benefits for his psychological condition. Thereafter, in a Decision and Order Denying Claimant's Motion for Reconsideration, the administrative law judge reaffirmed his conclusion, based on his weighing of the evidence as a whole, that claimant's work injury did not aggravate, exacerbate or contribute to claimant's psychological condition.

In the appeal presently before the Board, claimant, representing himself, challenges the administrative law judge's denial of compensation and medical benefits for claimant's psychological condition. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.[3]

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[1] The Board further held that if the administrative law judge were to conclude on remand that claimant's psychological condition is related to his employment, he could reaffirm his previous findings that claimant is totally disabled, that employer is liable for the reasonable and necessary medical treatment of claimant's psychological condition, and that claimant's compensation rate should be based on average weekly wage of $388.29.

[2] Judge DiNardi had retired while this case was on appeal to the Board for the fourth time.

[3] Claimant has additionally filed motions requesting that the Board strike Dr. Maggio's reports and employer's response brief. We deny claimant's motion to strike Dr. Maggio's reports as they were properly received into evidence and considered by the administrative law judge. 20 C.F.R. §§702.338, 802.219. Claimant's motion to strike

In the instant case, we initially hold that the administrative law judge properly exercised his broad discretion under Section 22 in finding that Dr. Maggio's additional report, which cast new light on the issue of the alleged causal relationship between claimant's psychological condition and his employment, supports modification of the Board's prior holding that the Section 20(a) presumption had not been rebutted by employer. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1972); *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

We will now consider, in accordance with the same standards for determining whether a causal relationship exists between claimant's disabling condition and his employment that are used in an initial proceeding under the Act, whether the administrative law judge's finding that claimant's psychological condition is unrelated to his employment is supported by substantial evidence. Where, as in the present case, claimant has established entitlement to invocation of the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)(5th Cir.), *cert. denied*, 124 S.Ct. 825 (2003); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT)(5th Cir. 2000)*; Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the presumption drops from the case and the administrative law judge must decide the causation issue based on the evidence considered as a whole, with claimant bearing the ultimate burden of persuasion. *Id.; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

In the instant case, the administrative law judge rationally determined that employer rebutted the Section 20(a) presumption based on the 2001 report of Dr. Maggio. Dr. Maggio, who is Board-certified in psychiatry and neurology, examined claimant on February 7, 1997

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employer's response brief also is denied; employer's brief was timely filed pursuant to the Board's Order dated April 6, 2004. 20 C.F.R. §§802.212, 802.219. Lastly, the medical evidence submitted with claimant's motion will not be considered by the Board in its review of claimant's appeal. 20 C.F.R. §802.301(b).

Claimant has also filed a motion requesting that the Board direct employer to pay for claimant's September 30, 2004 physical examination and to authorize his medical visits with Drs. Stewart and Orleans. Employer filed a motion to strike claimant's motion and an opposition to claimant's motion. Claimant's motion is denied as it is outside of the scope of the Board's review authority. 20 C.F.R. §§702.407, 802.219, 802.301. Employer's motion to strike claimant's motion is denied as moot. 20 C.F.R. §802.219.

and again on December 12, 2001, and reviewed claimant's extensive medical records, as well as the accounts of the workplace incidents of March 3, 1994 and April 13, 1994. Following his 2001 re-evaluation of claimant, Dr. Maggio opined that claimant actually suffers from chronic paranoid schizophrenia, which manifested itself during the five-year period following Dr. Maggio's initial evaluation of claimant. Dr. Maggio stated that this condition was neither caused nor aggravated by claimant's work-related incidents occurring on March 3, 1994 and April 13, 1994. EX "T" at 9-11. As this opinion constitutes substantial evidence that claimant's psychological condition is unrelated to his employment, the administrative law judge's finding that Dr. Maggio's 2001 report rebuts the presumption is affirmed. *See Ortco Contractors, Inc.*, 332 F.3d 283, 37 BRBS 35(CRT).

Having found the Section 20(a) presumption rebutted, the administrative law judge proceeded to consider the causation issue based on the evidence as a whole. After considering the relevant medical evidence, as well as the accounts of the work-related incidents occurring on March 3, 1994 and April 13, 1994, the administrative law judge accorded determinative weight to the opinion expressed in Dr. Maggio's 2001 report. The administrative law judge found that Dr. Maggio's opinion that claimant suffers from paranoid schizophrenia which was neither caused nor aggravated by work conditions, was well-reasoned and consistent with the facts regarding claimant's March 3, 1994, and April 13, 1994, workplace incidents. The administrative law judge accorded little weight to the contrary opinions of Drs. Gupta and Hearne, which he found were based on inaccurate information regarding the events that occurred on the aforementioned dates. Moreover, the administrative law judge observed that Dr. Maggio conducted a review both of claimant's medical records and the accounts of the work-related incidents whereas Drs. Gupta and Hearne did not review those records. Thereafter, in his Decision and Order Denying Claimant's Motion for Reconsideration, the administrative law judge reiterated his finding that Dr. Hearne's diagnosis of a work-related post-traumatic stress disorder was based on an exaggerated version of the events that transpired on March 3, 1994 and April 13, 1994. Additionally, the administrative law judge explained that, in electing to credit the opinion of Dr. Maggio over that of Dr. Hearne, he took into consideration Dr. Maggio's superior professional credentials; in this regard, the administrative law judge observed that Dr. Maggio is Board-certified in psychiatry and neurology and that Dr. Hearne has a doctorate in psychology.

It is well-established that the Board does not have the authority to engage in a *de novo* review of the evidence or to substitute its views for those of the administrative law judge. *See Port Cooper/T. Smith Stevedoring Co.*, 227 F.3d at 287, 34 BRBS at 97(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80(CRT) (5th Cir. 1991). The administrative law judge is entitled to weigh the evidence and has the discretion to accept any part of a medical expert's testimony or reject it completely. *See Ortco Contractors, Inc.*, 332 F.3d at 292, 37 BRBS at 41(CRT); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995). Moreover, the

administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *Id.* In the case at bar, the administrative law judge set forth and evaluated all of the evidence of record, and his inferences drawn from the record evidence are reasonable. The administrative law judge acted within his discretion in according determinative weight to Dr. Maggio's December 2001 opinion that claimant's psychological condition is not causally related to his employment; specifically, the administrative law judge rationally accorded greater weight to Dr. Maggio's superior professional credentials and to the fact that his opinion regarding causation was based, in part, on his thorough review of claimant's medical records and the accounts of the work-related events of March 3, 1994 and April 13, 1994. We therefore affirm the administrative law judge's determination, based upon his consideration of the record as a whole, that claimant's disabling psychological condition is not causally related to his employment with employer. *See Ortco Contractors, Inc.*, 332 F.3d at 283, 37 BRBS at 35(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). In light of our affirmance of the administrative law judge's determination that no causal relationship exists between claimant's employment and his psychological condition, we additionally affirm the administrative law judge's findings that employer is not liable for the payment of compensation or medical benefits related to the treatment of claimant's psychological condition.

Accordingly, the administrative law judge's Decision and Order on Remand and his Decision and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge