BRB No. 91-1085

JACK A. WAYNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DILLINGHAM SHIP REPAIR	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision on Remand of Vivian Schreter Murray, Administrative Law Judge, United States Department of Labor.

Kevin N. Keaney (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for the claimant.

Dennis R. VavRosky and Patric J. Doherty (VavRosky, MacColl, Olsen, Doherty & Miller), Portland, Oregon, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision on Remand (84-LHCA-672) of Administrative Law Judge Vivian Schreter Murray denying benefits 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 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 injured his lower back while working for employer as a junior foreman on February 10, 1977. Claimant has not been engaged in gainful employment since the work injury. He filed this claim under the Act, seeking permanent total disability benefits.

In her initial Decision and Order, the administrative law judge determined that there was no evidence claimant sustained any residual impairment that would prevent him from performing his pre-injury employment and that he therefore was not entitled to benefits. The administrative law judge stated that claimant had a "longstanding character disorder," and that he made substantially similar complaints of pain and allegations of an inability to

perform any kind of work after both a 1969 injury and the subject 1977 injury. The administrative law judge determined that the record lacked objective findings to support claimant's complaints of pain following the 1977 injury, and concluded that claimant's chronic back and leg complaints were related to the 1969 injury.

In addition, the administrative law judge stated that based on her observations of claimant, her review of the evidence, Dr. Perry's 1980 report that claimant continued to hunt and fish, and evidence that claimant had fired a rifle at a rifle range in November 1979, she found that claimant's complaints of pain and his testimony regarding his limitations were not credible. Lastly, the administrative law judge determined that as claimant's pain complaints did not prevent him from performing his usual job before the 1977 injury, those same complaints should not prevent him from performing that job at present. Thus, the administrative law judge denied benefits to claimant.[1] Claimant appealed this denial to the Board.

In its Decision and Order, *Wayne v. Dillingham Ship Repair*, BRB No. 85-730 (Sept. 30, 1988) (unpublished), the Board held that the administrative law judge irrationally determined that claimant had either no medical restrictions or only minor ones which did not prevent him from performing his usual work. The Board rejected the administrative law judge's finding that the record lacked objective evidence of a physical abnormality, stating that the administrative law judge overlooked or ignored ample evidence of record that claimant underwent surgery to remove a herniated disc. The Board also noted that nine doctors had diagnosed ailments with regard to claimant's low back pain. Moreover, the Board observed that the administrative law judge ignored the findings of two physicians that claimant could not return to heavy work due to his back condition. *Id.*, slip op. at 3.

The Board also stated that the administrative law judge erred in finding claimant did not have a psychological problem related to the injury. The Board stressed that the administrative law judge, in making this finding, failed to consider six different diagnoses of psychological conditions contained in the record. The Board also noted that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his psychological problems are related to the work injury. *Id.* Additionally, the Board held that the administrative law judge's discrediting of claimant's complaints of pain was not supported by substantial evidence. The Board stated that it was irrational for the administrative law judge to find that claimant was malingering

[1] The administrative law judge, therefore, did not address the issue of employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief.

given that none of the examiners concluded that claimant was malingering. Finally, the Board stated that the evidence did not support the administrative law judge's conclusion that claimant's complaints of pain after the 1977 injury were "of the same nature and at the same level" as they were after the 1969 injury. *Id.*, slip op. at 3-4.

The Board therefore vacated the administrative law judge's determination that claimant was able to return to his former job and remanded the case for the administrative law judge to reconsider the evidence regarding claimant's back condition and psychological problems, noting the applicability of the Section 20(a) presumption and the aggravation rule. The Board also instructed the administrative law judge on remand to compare the physical and psychological restrictions imposed by claimant's low back and leg pain against the requirements of claimant's former employment.

In her Decision on Remand, the administrative law judge again found that claimant could return to his former job and therefore was not entitled to benefits. The administrative law judge reviewed the record and reiterated her initial finding that there was no objective evidence to support claimant's complaints of pain. In addition, the administrative law judge rejected any notion that claimant might be suffering from a psychological disability. The administrative law judge stated that no claim for a psychological injury had been made, that the Section 20(a) presumption did not apply because there was no evidence linking any psychological condition to his work injury, and that if the presumption did apply, employer rebutted it. The administrative law judge also reiterated her finding that claimant's back and leg complaints after the 1977 injury were of the same nature and at the same level as those made following the 1969 injury. The administrative law judge discounted the examiners' reports of claimant's complaints following the 1977 injury, stating that they were based on claimant's "self-assessment" of pain and were outweighed by findings that he made little or no effort to improve his condition and return to work due to a secondary gain motive, and by finding that he engaged in deceptive and manipulative behavior. Further, the administrative law judge once again found that claimant was not a credible witness, citing inconsistencies in claimant's hearing testimony and in the histories he gave to various examiners.

Lastly, the administrative law judge found that claimant could perform his usual work, rejecting the opinions of Drs. Parsons and Perry. The administrative law judge stated that Dr. Parsons' opinion was speculative and without any reasoned basis and that Dr. Perry provided no rationale for his recommendation. The administrative law judge further stated that claimant's work was mostly of a supervisory nature, and did not involve a lot of

heavy work. Thus, the administrative law judge denied claimant compensation for the second time.

On appeal, claimant contends that the administrative law judge completely ignored the Board's instructions, and made the same erroneous, unsupported findings she did in her initial Decision and Order. Claimant specifically argues that the administrative law judge failed to apply the Section 20 presumption, contrary to the Board's instructions, and erred in relying upon evidence pertaining to the 1969 injury to rebut the presumption, noting that the crux of the issue is whether the 1977 work injury aggravated, accelerated, or combined with a pre-exiting condition to result in disability. Claimant also asserts the administrative law judge failed to follow the Board's instructions to compare the restrictions imposed by claimant's lower back and leg pain against the requirements of his former job, and that the administrative law judge's finding that claimant's failure return to work because he is a "malingerer" runs against the weight of the evidence. Employer responds, urging affirmance of the administrative law judge's Decision and Order on remand.

We hold that the administrative law judge erred in failing to adhere to the Board's instructions on remand. *See* 20 C.F.R. §802.405(a). Initially, we note that the administrative law judge erred by stating that claimant did not make a claim for any psychological injury. Claimant's counsel alleged at the hearing that claimant had a pre-existing psychological condition which was aggravated by the 1977 back injury. Tr. at 13-15. Claimant thus stated a claim based on a psychological injury, and he is entitled to the Section 20(a) presumption that his psychological condition is related to the work injury, as employer is liable for all sequelae of the work injury. *See Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984)(Ramsey, C.J., dissenting); *Whittington v. The National Bank of Washington*, 12 BRBS 439 (1980)(Smith, C.J., dissenting). The administrative law judge also found that claimant merely had a character disorder which manifested itself in his history of feigned complaints, exaggerated responses, and deceptive and manipulative behavior. Although there is evidence that claimant engaged in such behavior, there also is evidence in the same medical reports that claimant has a psychophysiological reaction and somatic preoccupation, and is depressed.[2] *See, e.g.,* Exs. A30, A41, A46, A75. Moreover, contrary to the administrative law judge's peremptory statement,

[2] Somatoform disorders are characterized by physical symptoms suggesting a physical disorder for which there are no demonstrable organic findings and for which there is positive evidence or a strong presumption that the symptoms are linked to psychological factors. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 3d ed. 1987, at 255. Moreover, certain character disorders constitute psychological conditions. *Id.* at 325 *et seq.*

there is no evidence that claimant's psychological problems are not aggravated by the work injury;[3] thus, there is no evidence of record sufficient to rebut the Section 20(a) presumption that claimant's psychological condition is work-related. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). In fact, in the most recent evidence of record, Michael Fleming, Ph.D., a clinical psychologist, stated in 1984 that it is his opinion that the problems which existed prior to the work injury constitute the majority of claimant's present psychological problems, but that the 1977 work injury materially contributed to the overall condition that presently exists. Ex. A134.

With regard to claimant's physical condition, the administrative law judge merely discussed the medical evidence and supplied her own characterizations and conclusions. For instance, the administrative law judge found that claimant did not suffer from any physical abnormality. The administrative law judge specifically rejected the Board's statement that the evidence reveals that claimant underwent surgery to remove a herniated disc. The administrative law judge conceded claimant had surgery in 1978, but asserted that the procedure was performed to remove a "protruded disc," which she apparently did not consider as severe as a herniated disc "within the medically defined meaning of that term." Decision and Order at 6. The administrative law judge also relied on the fact that Dr. Smith, the physician who performed the back surgery, did not explicitly describe claimant's condition as a "serious physical abnormality." Decision and Order at 6. This finding is patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1131, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). While the Board's prior decision was in error in referring to the disc as herniated, Dr. Smith's operative reports indicate that "a significant bulge" at L5-S1 on the left was identified as a protruded disc and was removed. Exs. A36, A38, A39. Thus, regardless of what term was used to describe claimant's condition, the evidence indicates that claimant had a serious physical abnormality in his spine in 1978, the removal of which required major surgery.

The administrative law judge further erred by refusing to consider six other diagnoses of maladies in claimant's back as evidence that claimant has a residual back impairment. The administrative law judge commented that the Board indiscriminately listed a number of diagnoses without regard to the qualifications or credibility of the particular physician, or to the weight these opinions should be accorded. In fact, the Board was merely citing medical evidence in the record bearing on claimant's physical

[3] The Board, in its first decision, erred in stating that the record does not contain evidence that claimant had pre-existing psychological problems.

condition, which the administrative law judge failed to cite in her 1984 decision. The Board deferred to the administrative law judge to assign the appropriate weight to these opinions. The administrative law judge, however, failed to avail herself of this opportunity, choosing instead to disregard all statements that claimant has continued back pain because of the negative objective evidence. Although no physician could find objective evidence of back pain, and although some physicians and psychologists believed there were some elements of feigning and secondary gain motives, no professional disbelieved that claimant was in some degree of pain. Thus, the administrative law judge erred in substituting her judgment for that of the professionals on the issue of whether claimant indeed suffers from back pain, either from physical or psychological causes. *See generally Scivally v. Sullivan*, 966 F.2d 1070 (7th Cir. 1992).

Finally, the administrative law judge rejected the uncontradicted opinions of Drs. Parsons and Perry that claimant was unable to perform his usual work. *See* Emp. Exs. A28, A78. The administrative law judge rejected Dr. Parsons' opinion because it was given before claimant's surgery and six years before the hearing. She rejected Dr. Perry's opinion because it was not borne out by objective medical data and because he did not state claimant's medical restrictions. The administrative law judge further stated that claimant's usual job mostly entailed work of a supervisory nature, and did not involve a lot of heavy work. This finding, which the administrative law judge did not make in her original Decision and Order, is not supported by the evidence of record. Claimant testified at the hearing that he injured his back while helping to load paint onto a truck, and that his usual job as lead man or junior foreman required that he enter and exit tanks and other closed-in areas on ships in order to supervise the work and check on the men. Tr. at 21, 24. Claimant further stated that his job required him to climb up and down steel ladders stretching for approximately one hundred feet of the ship. *Id.* at 24. This testimony, which was uncontroverted, indicates that claimant's usual job not only required him to do occasional lifting, but also to engage in bending and climbing for extended periods of time.

While the opinion of Dr. Parsons may be of lesser value because it was given before claimant's surgery, Dr. Perry, in fact, stated that claimant's back pain was probably due to scarring and that it was his recommendation that claimant not return to any heavy type of physical activity. Thereafter, on July 7, 1980, Dr. Freistat checked a box on a form that claimant is not released to work. Ex. A81. Finally, in May 1984, Dr. Fleming stated that in view of the recurring problems since 1977, it is unlikely that claimant will be employable in the future. Ex. A132. The administrative law judge on remand was instructed to compare the restrictions against claimant's usual work. Her

conclusion that claimant "chooses" not to return to work for reasons that are totally within his control does not correspond to the medical evidence in this case that claimant underwent back surgery for a work-related injury and as a result continues to suffer some amount of residual pain due to physical and/or psychological factors.[4]

In conclusion, in light of this demonstrated intransigence on the part of the administrative law judge to undertake the necessary analysis, we vacate the administrative law judge's findings and remand this case with instructions that it be reassigned to another administrative law judge. Although we acknowledge that reassignment to another administrative law judge is an extreme remedy, it is one which is warranted in the instant case given the administrative law judge's extreme recalcitrance in following the Board's instructions, and insistence on disregarding the medical evidence as a whole in favor of selectively analyzing the evidence. *See generally Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983).

In reviewing the actions of an administrative law judge on appeal, the Board stands in a similar position toward an administrative law judge as does a United States Court of Appeals toward a United States District Court. The decisions of the Courts of Appeals consistently recognize that an assignment to a different judge on remand is appropriate in certain instances. *See United States v. Torkington*, 874 F.2d 1441 (11th Cir. 1989); *United States v. Schwarz*, 500 F.2d 1350 (2d Cir. 1974); *United States v. Bryan*, 393 F.2d 90 (2d Cir. 1968). The United States Court of Appeals for the Eleventh Circuit has held that cases that have maintained a "stalemated posture" because of the district court judge's intransigence require reassignment to another judge. *Brooks v. Central Bank of Birmingham*, 717 F.2d 1340, 1343 (11th Cir. 1983). In the instant case, the administrative law judge's refusal to adhere to the Board's specific instructions as outlined in its 1988 Decision and Order has resulted in just such a "stalemated posture." Because the administrative law judge has not followed the Board's instructions, this case has not gone forward in accordance with the Board's mandate of appellate review. Thus, in order to effectuate the Board's instructions in its 1988 decision, we direct that this case be reassigned to another administrative law judge for consideration of the issues presented in this case in accordance with the instructions outlined in the 1988 decision and this decision.

[4] We do not discount the diagnoses indicating that claimant is feigning pain or motivated by secondary gain in reporting his symptoms to his examiners. However, the administrative law judge erred in isolating these findings from the larger context, which includes other physical and psychological diagnoses.

On remand, therefore, the new administrative law judge must determine whether claimant can perform his former job by comparing the physical and psychological restrictions imposed by claimant's injury against the requirements of claimant's former employment in order to determine if claimant has made out a *prima facie* case of total disability, and if so, whether employer has met its burden of establishing the availability of suitable alternate employment. *See generally Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Lastly, if the administrative law judge determines that claimant is entitled to permanent disability benefits, he must consider whether employer is entitled to relief pursuant to Section 8(f), 33 U.S.C. §908(f), as well as resolving any other contested issues.

Accordingly, the Decision and Order on Remand of the administrative law judge is vacated, and the case is remanded for reassignment to another administrative law judge for further proceedings consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge