BRB Nos. 02-0566
and 02-0566A

RICHARD MCBRIDE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HALTER MARINE, INCORPORATED	)	DATE ISSUED: May 9, 2003
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE COMPANY in liquidation, by and through the MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order on Third Remand - Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Patricia F. Dunmore, Natchez, Mississippi, and Wanda Williams, Pascagoula, Mississippi, for claimant.

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:

Employer appeals and claimant cross-appeals the Decision and Order on Third Remand - Awarding Benefits (95-LHC-1175) of Administrative Law Judge David W. DiNardi 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 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).

This case is before the Board for the fourth time. To reiterate the facts and complicated procedural history relevant to the instant appeals, 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, the administrative law judge 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 was 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. 33 U.S.C. §908(b). Having determined that claimant's average weekly wage was $388.29, the administrative law judge awarded claimant temporary total disability compensation from April 14, 1994 through September 18, 1994, based on that average weekly wage.

Claimant, represented by counsel, 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 that alleged work-related condition. Claimant did not challenge the administrative law judge's

average weekly wage determination.[1] 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 determined that claimant's psychological condition would not prevent him from performing the modified duty position at employer's facility which the administrative law judge had previously found to constitute suitable alternate employment. Accordingly, the administrative law judge denied compensation benefits for claimant's psychological condition. On the basis of the Board's holding that claimant's psychological condition is related to his employment, the administrative law judge next found employer to be responsible for any reasonable and necessary future medical treatment of claimant's psychological condition. 33 U.S.C. §907. The administrative law judge denied claimant reimbursement, however, for medical expenses incurred by claimant for the prior treatment of his psychological condition.[2]

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[1]Employer also appealed the administrative law judge's initial decision to the Board, challenging the attorney's fees awarded to claimant by both the administrative law judge and the district director. The attorney's fee awards are not at issue in the appeals presently before the Board.

[2]In a Decision and Order on Reconsideration issued on April 26, 1999, the administrative law judge corrected his Decision and Order on Remand to delete the award of a Section 14(e) assessment, 33 U.S.C. §914(e), consistent with his previous Decision on Motion for Reconsideration issued on June 3, 1997, finding that, as employer timely filed its controversion, claimant is not entitled to a Section 14(e) assessment. The denial of a Section 14(e) assessment is not at issue in the present appeals.

Both claimant and employer again appealed to the Board, with claimant contesting the denial of compensation and past medical benefits, BRB No. 99-0852, and employer challenging the award of future medical benefits for claimant's psychological condition, BRB No. 99-0852A. Thereafter, claimant filed with the Board a request for modification accompanied by additional documents. Acting upon claimant's motion, the Board dismissed the appeals filed by both claimant and employer, and remanded the case for modification proceedings. 33 U.S.C. §922; 20 C.F.R. §§725.310, 802.301. In a Decision and Order Denying Motion for Modification issued on January 18, 2000, the administrative law judge denied modification on the basis that the medical evidence accompanying claimant's modification request had already been admitted into evidence and the other documents submitted by claimant are irrelevant.

Claimant, without representation by counsel, filed an appeal of the administrative law judge's denial of modification, BRB No. 00-0500, and additionally requested reinstatement of his prior appeal, BRB No. 99-0852.[3] Claimant subsequently filed an additional motion for modification with the administrative law judge, which was summarily denied on July 26, 2000; thereafter, claimant also appealed this decision to the Board, BRB No. 00-1092. The Board consolidated claimant's three appeals for purposes of decision, which it issued on January 10, 2001. In its decision, the Board vacated the administrative law judge's determination in his Decision and Order on Remand, that claimant's psychological condition is not disabling, and remanded the case for consideration of all of the evidence of record regarding 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. Next, 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.[4] Lastly, the Board vacated the

[3]Employer did not request reinstatement of its appeal in BRB No. 99-0852A, challenging the award of future medical benefits for claimant's psychological condition, and, thus, the Board did not consider that issue.

[4]The Board held, in this regard, that the administrative law judge erroneously found that the medical records submitted by claimant on modification had already been made part of the record; specifically, claimant introduced medical records from the Singing River Mental Health Center dating from 1997 to 1999 and Dr. Hearne's report dated October 21, 1999, which had not previously been admitted into evidence. The Board affirmed the administrative law judge's finding that the non-

administrative law judge's denial of Section 7 medical benefits for the past medical treatment of claimant's psychological condition and remanded the case for the administrative law judge to determine whether employer had previously refused authorization of claimant's mental health treatment, and, if so, whether such refusal released claimant from the obligation of continuing to seek approval for his subsequent mental health treatment. The Board further stated that if, on remand, claimant is found to have been released from the obligation to seek employer's approval for his subsequent treatment by Drs. Hearne and Gupta, the administrative law judge must reconsider whether this self-procured treatment was reasonable and necessary.[5]

On remand, the administrative law judge reopened the record to allow for the submission of additional evidence by both claimant and employer. Specifically, the administrative law judge received into evidence the August 20, 2001, report and deposition of claimant's treating orthopedist, Dr. Longnecker, as well as the December 13, 2001, report of the psychiatric re-evaluation of claimant conducted by employer's psychiatrist, Dr. Maggio. By Order dated January 17, 2002, the administrative law judge established a briefing schedule allowing the parties to submit supplemental briefs addressing any new evidence or issues that had arisen. Thereafter, employer filed its Supplemental Brief on Remand arguing, *inter alia,* that the administrative law judge should find that claimant's psychiatric condition is not work-related on the basis of Dr. Maggio's re-evaluation of claimant in which he 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 injuries.

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medical evidence submitted by claimant on modification does not support reopening the record on the ground that such evidence is not relevant or material to this proceeding.

[5]The Board affirmed the administrative law judge's finding that competent medical care was available to claimant locally, and his consequent determination that any medical expenses and travel costs awarded for the treatment provided by Drs. Hearne and Gupta are limited to those expenses and travel costs that would have been incurred had the treatment been provided locally.

The administrative law judge issued a Decision and Order on Third Remand - Awarding Benefits on April 11, 2002, in which he determined, first, 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; thus, the administrative law judge did not address the argument made in employer's Supplemental Brief on Remand that, on the basis of Dr. Maggio's re-evaluation of claimant, the administrative law judge should conclude that claimant's psychological condition is not work-related. *See* Decision and Order on Third Remand at 2-3. Next, the administrative law judge reconsidered the evidence which had originally been made part of the record, as well as evidence submitted post-remand, and determined that claimant is totally disabled.[6] In this regard, the administrative law judge accorded less weight to Dr. Maggio's February 12, 1997, opinion that claimant was able to return to work in view of evidence that five days after Dr. Maggio's examination, claimant was hospitalized for post-traumatic stress disorder and major depressive disorder with psychotic symptoms. The administrative law judge, observing that evidence submitted post-remand confirms the original evidence of record, stated that claimant's treating physicians opine that claimant is totally disabled by his psychological and orthopedic conditions, while Dr. Maggio holds the opinion that although claimant is totally disabled by his psychological condition, this condition is not work-related. Next, after stating that he could give greater weight to the opinions of the treating physicians than to a physician conducting an evaluation solely for litigation purposes, the administrative law judge concluded that claimant is totally disabled from all gainful employment. He therefore awarded claimant temporary total disability benefits from April 14, 1994, to the present and continuing. *See* Decision and Order on Third Remand at 63-64, 83. With respect to the issue of Section 7 medical benefits, the administrative law judge found that claimant requested that employer pay for his treatment at Singing River Mental Health Center procured upon referral from Dr. Longnecker, claimant's authorized treating physician, that employer refused authorization of such treatment that was reasonable and necessary, and that, accordingly, employer is liable for the reasonable value of the self-procured treatment of claimant's psychological

[6]The administrative law judge determined that medical records submitted on modification by claimant, specifically Singing River Mental Health Center records dating from 1997 to 1999 and Dr. Hearne's October 21, 1999 report, establish a change in claimant's physical condition and that such evidence supports reopening the record pursuant to Section 22 of the Act to reconsider the issue of disability. *See* Decision and Order on Third Remand at 19-23, 81-82.

condition, including the reasonable local value of the prior medical treatment provided by Drs. Hearne and Gupta. *See* Decision and Order on Third Remand at 74-75, 84.

Employer now appeals, BRB No. 02-0566, contending first that the administrative law judge should have reconsidered the issue of whether claimant's psychological condition is work-related and should have found that no causal relationship exists.[7] Employer further challenges the administrative law judge's determination that it is liable for both claimant's past and future medical treatment of his psychological condition. Lastly, employer avers that the administrative law judge erred on remand in granting Section 22 modification. Claimant, now represented by new counsel, filed a cross-appeal, BRB No. 02-0566A, challenging the administrative law judge's average weekly wage determination, and urging affirmance of the administrative law judge's Decision and Order on Third Remand in all other respects.[8] In response to claimant's cross-appeal, employer urges affirmance of the administrative law judge's average weekly wage determination.

We first address employer's challenge to the administrative law judge's failure to reconsider the issue of whether there is a causal relationship between claimant's psychological condition and his employment where additional evidence relevant to this issue was admitted during modification proceedings. We agree with employer that the "law of the case" doctrine does not preclude the administrative law judge from exercising his authority on modification to revisit the issue of whether claimant's psychological condition is related to his employment.[9] Section 22 of the

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[7]In a related argument, employer contends that claimant should not have been found to be totally disabled where the evidence establishes that his psychological condition is not related to his work injury.

[8]Although represented by counsel in the appeals currently before the Board, claimant has filed a *pro se* motion requesting that employer be ordered to pay claimant permanent total disability benefits in a lump sum payment. Employer has filed a response in opposition to claimant's motion, maintaining that there is no current statutory authority to support claimant's request. Employer is correct that the statute does not provide for the relief sought by claimant. *See Thompson v. Todd Pacific Shipyards Corp.,* 17 BRBS 246 (1985); *Smith v. Director, OWCP,* 17 BRBS 89 (1985). Claimant's motion is therefore denied.

[9]The "law of the case" doctrine provides that a tribunal will adhere to its initial decision when a case is on a subsequent appeal to that body unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See, e.g., Weber v.*

Act permits the modification of a final award if the party seeking modification demonstrates either a change in a claimant's condition or a mistake in a determination of fact, including mistaken determinations of mixed questions of law and fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Additionally, the authority to grant modification replaces the traditional notion of *res judicata,* and it gives the trier-of-fact broad discretion to reconsider the issues so as to best ascertain the rights of the parties. *O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1972); *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *Bath Iron Works Corp. v. Director, OWCP [Hutchins],* 244 F.3d 222, 227, 35 BRBS 35, 37-38(CRT) (1st Cir. 2001); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988); 20 C.F.R. §§702.338-702.339, 702.373. Applying these principles, the Board has held that the "law of the case" doctrine does not preclude an administrative law judge from reopening a previously decided issue where the case is before him pursuant to a request for Section 22 modification. *Coats v. Newport News Shipbuilding & Dry Dock Co.,* 21 BRBS 77, 80-81 (1988).

S.C. Loveland Co., 35 BRBS 75, 77 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

In the instant case, the administrative law judge reopened the record on modification and received into evidence the report of Dr. Maggio's December 13, 2001, re-evaluation of claimant which, as argued by employer in its Supplemental Brief on Remand, cast new light on the contested issue of the alleged causal relationship between claimant's psychological condition and his employment. The administrative law judge was mistaken in his belief that, under the "law of the case" doctrine, the Board's prior decision regarding the issue of whether claimant's psychological condition is causally related to his employment with employer precluded him from exercising his broad discretion on modification to reconsider this issue. *See Hutchins,* 244 F.3d at 227, 35 BRBS at 37-38(CRT); *Coats,* 21 BRBS at 80-81. Because, in the course of the modification proceedings, employer produced new evidence which could support a finding of a mistake in fact, the administrative law judge had the authority on to revisit the issue of the causal relationship between claimant's psychological condition and his employment with employer. Specifically, the Board held, in its June 5, 1998, decision that Dr. Maggio's February 12, 1997, evaluation of claimant was insufficient to rebut the section 20(a) presumption because, although Dr. Maggio diagnosed claimant with multiple psychological conditions, including anxiety and depression, his opinion was silent as to the effects of claimant's employment with employer on these conditions. *See McBride v. Halter Marine, Inc.*, BRB Nos. 97-1226/A (June 5, 1998), *slip op* at 5. The Board concluded that because Dr. Maggio did not state that claimant's psychological condition was not caused or aggravated by the work incidents which form the basis for this claim, his opinion was insufficient to rebut the Section 20(a) presumption. *Id.*[10] As there was no other evidence in the original record that could support a

[10]Employer also contends on appeal that the Board applied an erroneous legal standard in holding, in its June 5, 1998 decision, that Dr. Maggio's opinion did not rebut the Section 20(a) presumption. We disagree. As discussed, the Board's holding that Dr. Maggio's original opinion was insufficient to rebut the invoked presumption was based on his failure to discuss the effects of claimant's employment on the conditions he diagnosed. This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has articulated the standard for rebuttal of the Section 20(a) presumption as follows: To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 690, 33 BRBS 187, 191(CRT) (5th Cir. 1999)(internal citation omitted). The Board, in its first decision in this case, did not hold Dr. Maggio's 1997 opinion insufficient to rebut the Section 20(a) presumption on the basis that the opinion was not unequivocal or that it did not Arule out@ a causal relationship between claimant's condition and his employment. Rather, Dr. Maggio's opinion was held to be insufficient to establish rebuttal because it was

finding of rebuttal, the Board held as a matter of law that claimant's psychological condition was work-related. During modification proceedings, however, the administrative law judge admitted into evidence the report of Dr. Maggio's re-evaluation of claimant without addressing whether this new report demonstrates a mistake in a determination of fact regarding the causal relationship between claimant's psychological condition and his employment. *See Coats,* 21 BRBS at 80-81. We must therefore remand the case for the administrative law judge to consider whether Dr. Maggio's new report provides substantial credible 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. On remand, the administrative law judge must consider whether Dr. Maggio's 2001 report meets employer's rebuttal burden; if so, the presumption drops from the case and the administrative law judge must then decide the causation issue based on the evidence considered as a whole, with claimant bearing the ultimate burden of persuasion. *See Conoco, Inc. v. Director, OWCP [Prewitt],* 194 F.3d 684, 690, 33 BRBS 187, 191(CRT)(5th Cir. 1999); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994). If the administrative law judge finds the presumption rebutted by Dr. Maggio's 2001 opinion, he should consider reopening the record to provide claimant, who was not represented by counsel during the prior modification proceedings before the administrative law judge, with an opportunity to submit new evidence regarding the issue of the causal relationship between his psychological condition and his employment with employer. *See Coats,* 21 BRBS at 81.

Next, employer argues on appeal that the administrative law judge erred in finding that claimant is unable, from a psychological standpoint, to perform the suitable alternate employment position identified within employer's facility. We disagree. It is well-established that an administrative law judge is entitled to evaluate and weigh the medical evidence and to arrive at an independent judgment in light of the medical and other evidence. *See James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). 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. *See Gallagher,* 219

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silent as to the effects of claimant's employment on the psychological conditions diagnosed by Dr. Maggio. Thus, we reject employer's assertion that the Board's June 5, 1998 decision is inconsistent with the Fifth Circuit's decision in *Prewitt.*

F.3d at 430, 34 BRBS at 37(CRT); *Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In the instant case, the administrative law judge rationally determined that the probative value of Dr. Maggio's 1997 opinion that claimant was capable of employment is diminished by the record evidence that five days after that opinion was rendered, claimant was hospitalized for post-traumatic stress disorder and major depressive disorder with psychotic symptoms. *See* Decision and Order on Third Remand at 63-64; *Gallagher,* 219 F.3d at 430, 34 BRBS at 37(CRT). Moreover, the administrative law judge acted within his discretion in according greater weight to claimant's treating physicians' opinions that claimant is unable to work, than to the opinion of Dr. Maggio, whose evaluation of claimant was conducted solely for litigation purposes. *See* Decision and Order on Third Remand at 64; *Prewitt,* 194 F.3d at 690-91, 33 BRBS at 191-92(CRT); *Director, OWCP v. Vessel Repair, Inc. [Vina],* 118 F.3d 190, 194, 33 BRBS 65, 68 (5th Cir. 1999). Thus, if the administrative law judge concludes on remand that claimant's psychological condition is related to his employment, he may reaffirm his previous determination that

claimant is totally disabled.[11]

[11]Employer also contends that the administrative law judge erred in finding that the medical records discussing claimant's continuing psychological problems which were submitted by claimant with his modification request, namely, Singing River Mental Health Center records dating from 1997 to 1999 and Dr. Hearne's October 21, 1999 report, support reopening the record under Section 22 to reconsider the issue of disability. We disagree. It is well established that Section 22 affords the administrative law judge broad discretion to consider newly submitted evidence and to further reflect on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Bath Iron Works Corp. v. Director, OWCP [Hutchins],* 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001). On modification, the administrative law judge gave further reflection to the medical evidence initially submitted and determined, on the basis of that evidence, that claimant is totally disabled. *See* Decision and Order on Third Remand at 63-64. Moreover, the administrative law judge found that the new evidence submitted on modification confirms prior record evidence that claimant is unable to work. *See* Decision and Order on Third Remand at 64, 81-82. The administrative law judge's determination that the evidence demonstrates a basis for modification is rational and supported by substantial evidence and is, therefore, affirmed.

Next, we consider employer's argument that the administrative law judge erred in finding employer liable for claimant's past medical treatment; employer avers that there is no credible evidence that claimant requested authorization from employer for his psychological treatment.[12] As set forth in the Board's January 10, 2001, decision in this case, Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Ezell v. Direct Labor, Inc.,* 33 BRBS 19, 28 (1999); *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds,* 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was reasonable and necessary in order to be entitled to such treatment at employer's expense. *See Ezell,* 33 BRBS at 28; *Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). An employer may be required to consent to a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. *See Ezell,* 33 BRBS at 28; *see generally Armfield v. Shell Offshore, Inc.,* 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.,* 21 BRBS 8 (1988); 20 C.F.R. §702.406(a).

The administrative law judge in the instant case found, on the basis of claimant's uncontradicted testimony, that claimant requested that employer pay for his treatment at Singing River Hospital and Singing River Mental Health Center and for his medications and that employer refused these requests. *See* Decision and Order on Third Remand at 74; Tr. at 130, 135, 180. As the administrative law judge's determination that claimant requested and was refused authorization for this treatment is rational and supported by substantial evidence, we reject employer's

[12]In addition, employer contends that it should not be found liable for claimant's *future* medical care. As recognized by employer, this argument is contingent on a finding that claimant's psychological condition is unrelated to his employment. If, on remand, the administrative law judge finds that claimant's psychological condition is work-related, he should reaffirm his award of Section 7(a), 33 U.S.C. §907(a), benefits for future medical care reasonable and necessary for the treatment of the condition. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

argument that the administrative law judge erred in finding employer liable for that medical care. Moreover, we reject employer's further contention that the administrative law judge erred in finding employer liable for the reasonable value of medical treatment provided by Drs. Hearne and Gupta, which was self-procured by claimant after employer had refused to authorize mental health treatment. Contrary to employer's contention on appeal, the administrative law judge correctly found that once employer refused to authorize treatment at Singing River Mental Health Center, claimant was not obligated to seek employer's approval for his subsequent treatment by Drs. Hearne and Gupta; as the administrative law judge rationally found, once claimant's procured treatment was deemed to be reasonable and necessary, employer was liable for its reimbursement. *See Schoen,* 30 BRBS at 113; *Anderson,* 22 BRBS at 23.[13]

Lastly, we consider claimant's argument, on cross-appeal, that the administrative law judge erred in awarding compensation based on an average weekly wage of $388.29. *See* Decision and Order on Third Remand at 83. Employer, in its response brief, correctly asserts that this average weekly wage determination is based on the average weekly wage determination made in the original Decision and Order in this case, *see* April 17, 1997, Decision and Order at 29-30, which was not challenged by claimant in his previous appeals to the Board. We agree with employer that claimant's failure to raise this issue in his first appeal to the Board precludes him from raising the issue in the present appeal. *See Verderane v. Jacksonville Shipyards, Inc.,* 14 BRBS 220.15 (1981), *modified,* BRB No. 76-244 (Oct. 16, 1984), *aff'd on other grounds,* 772 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985). Therefore, the administrative law judge's average

[13]We reaffirm the Board's previous holding that the administrative law judge properly limited any medical and travel costs for the treatment provided by Drs. Hearne and Gupta to those costs that would have been incurred had the treatment been provided locally. *See McBride v. Halter Marine, Inc.,* BRB Nos. 99-0852, 00-0500 and 00-1092 (Jan. 10, 2001), *slip op.* at 10-11. Moreover, the administrative law judge properly found on remand that it is claimant's burden to establish the reasonable value of that treatment had it been provided locally. *See* Decision and Order on Third Remand at 74; *Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112, 114 (1996).

weekly wage determination is affirmed.

Accordingly, the administrative law judge's Decision and Order on Third Remand is vacated in part and the case is remanded for the administrative law judge to consider whether, on modification, employer presented sufficient evidence to rebut the Section 20(a) presumption that claimant's psychological condition is causally related to his employment; if, on remand, the administrative law judge finds that employer met its burden on rebuttal, he must resolve the issue of causation on the basis of the record as a whole. The administrative law judge's determinations holding employer liable for claimant's past medical expenses and his calculation of claimant's average weekly wage for compensation purposes and his determination granting Section 22 modification in his Decision and Order on Third Remand are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge