BRB No. 00-0147

CULLEN E. PLOUSHA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
H & H SHIPPING COMPANY	)	DATE ISSUED: Oct. 5, 2000
	)	
	)	
and	)	
	)	
PACIFIC MARINE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Cullen E. Plousha, Felton, California, *pro se.*

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand and Order Denying Motion for Reconsideration of Administrative Law Judge Edward C. Burch (1987-LHC-1543) 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). In reviewing an appeal by a claimant without representation, the Board will assess 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. If they are, they must be affirmed.

This case is before the Board for the third time. Claimant fractured both heels and his left hip in a 1979 work accident. A settlement agreement on this claim was approved by the district director in 1981. Claimant returned to work, and allegedly injured his back on November 23, 1982, in a work-related fall down a gang-plank of a ship. In a Decision and Order dated April 18, 1989, Administrative Law Judge Brissenden found that claimant presented sufficient evidence to invoke the Section 20(a) presumption based on his physical injury, 33 U.S.C. §920(a), and ultimately awarded claimant temporary total disability benefits from November 23, 1982, to February 7, 1983, for a lumbosacral sprain. 33 U.S.C. §908(b). The administrative law judge concluded that claimant had not established any other harm or pain resulting from the 1982 work injury. Claimant appealed to the Board, contending that the administrative law judge erred in finding that his 1982 work injury did not aggravate a pre-existing psychological impairment. The Board remanded the case to the administrative law judge for consideration of whether claimant produced sufficient evidence to invoke the Section 20(a) presumption on the alleged psychological claim, and if so, whether employer established rebuttal thereof. *Plousha v. H & H Shipping Co.*, BRB No. 89-1834 (March 29,1991). The Board denied employer's motion for reconsideration. BRB No. 89-1834 (Oct.1, 1991).

On remand, the case was assigned to Administrative Law Judge Burch (the administrative law judge) due to Judge Brissenden's unavailability. The parties were given notice of the reassignment, and the opportunity to object and/or to submit briefs. Claimant did not object to the case's reassignment, but objected to the issuance of a decision on the record then in existence.

In his Decision and Order issued on October 30, 1992, the administrative law judge found, based on the existing record, that claimant established a *prima facie* case for invocation of the Section 20(a) presumption that his pre-existing psychological problem was aggravated by the 1982 work injury. He found, however, that employer introduced sufficient evidence to rebut the Section 20(a) presumption, and he denied benefits upon finding, based on the record as a whole, that claimant's psychological condition was not caused or aggravated by the work injury.

Claimant appealed to the Board, without counsel. The Board held that claimant's letter objecting to the new administrative law judge's issuing a decision on the existing record was insufficient to establish that claimant waived his right to a *de novo* hearing, in view of the fact that the credibility of witnesses was at issue in the case. Thus, the Board vacated the denial of benefits, and remanded the case to the administrative law judge for a *de*

novo hearing on the issues discussed in the Board's initial decision. BRB No. 93-0683 (March 28, 1996). The Board denied claimant's motion for reconsideration, stating that claimant may submit to the administrative law judge any evidence he has in support of his claim. BRB No. 93-0683 (June 6, 1996).

After holding a *de novo* hearing, the administrative law judge issued a decision denying benefits.[1] He found, based on the evidence from the prior hearing as well as that introduced at the 1999 hearing, that the 1982 work accident did not aggravate a pre-existing psychological injury; the administrative law judge specifically noted claimant's testimony that he does not have a disabling psychological impairment, but that it is his work-related physical injuries which preclude him from working. The administrative law judge further stated, based on the evidence as whole, both old and new, that the 1982 injury did not aggravate a pre-existing psychological condition. Claimant filed a motion for reconsideration, requesting additional time to retain counsel and to obtain a psychological examination. The administrative law judge denied claimant's motion, stating that he had ample opportunity to obtain counsel and an examination prior to the 1999 hearing. He further found that claimant did not identify any error in the decision.

On appeal, claimant challenges the administrative law judge's decisions. The Director has not responded to this appeal.

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[1]Pacific Marine Insurance Company was declared insolvent and liquidated by the Insurance Commissioner of California. Employer represented itself, but then filed for bankruptcy on March 14, 1997, which required the administrative law judge to postpone the second hearing, originally scheduled for June 18, 1997, until July 13, 1999. Employer was not represented at this hearing. A representative of the Director, Office of Workers' Compensation Programs, appeared at the hearing for the limited purpose of advising the administrative law judge that neither employer nor the carrier was a viable legal entity, that claimant's case lacked merit, and that the Special Fund was not obligated to pay an award, but could choose to do so.

We affirm the administrative law judge's denial of benefits, as it is rational and supported by substantial evidence. It is uncontested that claimant is entitled to the Section 20(a) presumption that his pre-existing psychological condition was aggravated by the 1982 work injury. The hospital records following this injury state claimant's need for a psychological evaluation in view of the minor nature of claimant's injury and his inability or refusal to move from his bed. *See, e.g.*, CX 4. Dr. Moorehead stated in June 1983 that he believed claimant's psychiatric problems must be addressed before claimant's condition will improve. CX 6. Moreover, that claimant testified at the hearing on July 13, 1999, that he does not believe he is psychologically disabled begs the question of the existence of a work-related psychological condition in view of claimant's continuing physical complaints for which physicians have found no organic basis.[2] Nevertheless, Dr. Harrington's 1986 opinion is sufficient to satisfy employer's burden of producing substantial evidence to rebut the Section 20(a) presumption.[3] The administrative law judge reasonably interpreted this

[2]*See, e.g., Sinnott v. Pinkerton's Inc.*, 14 BRBS 959 (1982), discussing conversion reactions.

[3]We hold, however, that Dr. Stark's opinion is not sufficient to rebut the Section 20(a) presumption, as he specifically testified that claimant either has a psychological condition or is feigning his symptoms, and that he is not qualified to determine which is the case, as he is not a psychiatrist. Dr. Stark specifically stated that he does not know what was motivating claimant's behavior. Oct. 1988 Tr. at 245, 247-248; *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000) (equivocal opinion or opinion that does not state the absence of a causal connection is insufficient to rebut the Section 20(a) presumption).

opinion as severing the connection between claimant's 1982 injury and any psychological condition, as Dr. Harrington stated that any disability claimant may have cannot be attributed to the 1982 accident. EX 17; *see*, *e.g.*, *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). As the record does not contain any evidence affirmatively attributing a psychological condition, even in part, to the 1982 accident, we affirm the administrative law judge's denial of benefits.[4] *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[4]The administrative law judge's finding that the documentary evidence submitted by claimant at the 1999 hearing does not assist claimant in establishing the existence of a work-related psychological condition is affirmed, as it is rational and supported by substantial evidence.

We review the administrative law judge's denial of claimant's motion for reconsideration under the abuse of discretion standard. The administrative law judge found, within his discretion, that claimant had ample opportunity to retain counsel and to obtain a psychological evaluation prior to the hearing on July 13, 1999, in view of the fact that the case had been remanded by the Board three years earlier. *See generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). Moreover, the administrative law judge rationally determined that claimant did not identify any errors in his consideration of the evidence submitted at the 1999 hearing. Consequently, we affirm the administrative law judge's denial of claimant's motion, as claimant has not established that the administrative law judge abused his discretion in so doing.[5]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]We note that should claimant obtain a psychological evaluation, he may move for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, within one year of the final denial of his claim.