BRB Nos. 97-461, 00-445
and 00-445A

JOSEPH KISH	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
GATX CORPORATION	)	DATE ISSUED: Jan 18, 2001
	)	
and	)	
	)	
CIGNA PROPERTY & CASUALTY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Decision and Order Denying Petition for Modification by Employer of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Francis M. Womack III (Weber, Goldstein, Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Petition for Modification by Employer and claimant cross-appeals the Decision and Order Denying Petition for Modification by Employer (95-LHC-1664) of Administrative Law Judge Ainsworth H. Brown 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).

Claimant was employed as a pumpman. On October 28, 1992, claimant was injured when he fell through a loose grating on a catwalk and landed on his back 10 feet below. He was treated the next day at "Medicenter," where he was given Ibuprofen and told to take a week off from work. Claimant sought treatment with physicians in his home state of West Virginia. He was treated for cervical and lumbar pain. Upon his physician's recommendation he also underwent treatment for psychiatric problems. Claimant has not returned to his former work and sought temporary total disability benefits under the Act.

In his original Decision and Order Awarding Benefits, the administrative law judge found that claimant suffers from physical and psychological disabilities which render him unable to return to his former employment, and thus awarded continuing temporary total disability benefits. Employer appealed this decision, but subsequently filed a motion for modification of this decision pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging both a change in claimant's condition and a mistake in fact.

In his Decision and Order Denying Petition for Modification by Employer, the administrative law judge conditioned claimant's continued receipt of benefits upon submission of a sworn statement that he has renounced all threatening behavior, has removed all firearms and ammunition from his home, and has no access to the weapons of his family and friends. In addition, the administrative law judge required claimant to cooperate with employer by arranging a 30-day stay in an East Coast facility to address issues regarding substance dependence, pain medication, and psychiatric problems, and to furnish documentation requested by physicians. The administrative law judge then stated that employer's motion for modification is denied, and that the earlier award of temporary total disability benefits remains in effect. Both employer and claimant appeal this decision.

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[1]Employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, BRB No. 00-445S, was dismissed on September 28, 2000, pursuant to employer's request. 20 C.F.R. §802.401.

[2]Employer filed an appeal of this decision with the Benefits Review Board, BRB No. 97-461. This appeal was dismissed without prejudice by Order dated February 6, 1997, as employer filed a petition for modification with the administrative law judge. On February 4, 2000, the Board reinstated this appeal and consolidated it with BRB Nos. 00-445/A for purposes of review.

In its appeal of the administrative law judge's initial decision, employer contends that the administrative law judge erred in failing to admit a surveillance videotape as post-hearing evidence. BRB No. 97-461. In its appeal of the administrative law judge's decision on modification, employer contends that the administrative law judge erred in failing to address, pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), the evidence relevant to whether claimant suffers from disabling physical pain resulting in a work-related psychiatric condition. BRB No. 00-445. In his cross-appeal, claimant contends that the administrative law judge erred in conditioning his receipt of benefits on his removal of firearms from his own home and on denial of his access to those of family and friends. In addition, claimant contends that the administrative law judge improperly required a "sworn statement that he has renounced all threatening behavior, and that he understands that if he violates his oath he can be subject to criminal prosecution." Claimant also contends that the administrative law judge did not resolve the evidence regarding the necessity of inpatient psychiatric and substance abuse treatment. BRB No. 00-445A.

Initially, employer contends that the administrative law judge erred in refusing to admit into the record surveillance videotapes taken after the initial hearing, but before the record was closed. The administrative law judge has great discretion concerning the admission of evidence, and any decisions regarding the admission or exclusion of evidence are reversible only if they are shown to be arbitrary, capricious, or an abuse of discretion. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Moreover, although the administrative law judge may hold the record open after the hearing for the receipt of additional evidence, the party seeking to admit evidence must exercise diligence in developing the claim prior to the hearing. *See Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989).

In the instant case, the administrative law judge left the record open for 90 days after the January 18, 1996, hearing for the parties to submit depositions from several physicians, and for no other reason. *See* Tr. at 107. Employer filed a motion to admit new evidence in the form of surveillance videotapes taken in late May and early June 1996. The administrative law judge denied the motion to admit this evidence as he found that the tapes were outside the scope of the authorized post-hearing submissions. *See* Order Denying Motion to Admit New Evidence (Aug. 1, 1996).

We reject employer's contention that the administrative law judge erred in rejecting its post-hearing submission. Employer's assertion that this was relevant evidence intended to attack claimant's credibility misses the mark, as claimant's credibility was not placed at issue for the first time at the hearing. Thus, employer could have developed evidence to address this issue prior to the hearing. Moreover, the administrative law judge rationally denied the motion to admit the evidence as being outside the scope for which the record was held open. Therefore, we affirm the

administrative law judge's refusal to admit the surveillance videotapes into evidence prior to issuing his original decision. *See Everson*, 33 BRBS 149. Inasmuch as employer does not raise any other issues concerning the administrative law judge's initial decision awarding benefits, the administrative law judge's award of temporary total disability benefits in that decision is affirmed.

Employer petitioned for modification of the award of benefits based on a change in claimant's condition and on a mistake in fact. Section 22 provides the only means for changing otherwise final decisions. Modification may be granted where claimant's physical or economic condition has improved or deteriorated following an initial decision, *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), or based on any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied,* 391 U.S. 929 (1968). The administrative law judge's disposition of a petition for modification must comport with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

In the instant case, the administrative law judge discussed the medical and surveillance evidence at length, but made no findings regarding whether employer established either a change in claimant's physical or economic condition or a mistake in fact sufficient to warrant modification pursuant to Section 22. Moreover, he did not make specific findings regarding the relevance or weight accorded to the new evidence submitted by employer, including the surveillance tapes and medical opinions. Therefore, we must vacate the denial of modification and remand the case to the administrative law

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[3]Employer also contends that as the administrative law judge improperly rejected its post-hearing evidence, the burden of proof was shifted to employer on modification which caused it prejudice. This contention lacks merit, as once the party seeking modification demonstrates a change in condition or mistake in fact, the burdens of proof are the same as in the initial hearing. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In any event, the administrative law judge admitted the surveillance tapes into the record on modification, but stated he was not persuaded that the video depicted "more than occasional activity that may not be representative of the totality of his physical and emotional status." Decision and Order at 12. He also noted that a question was raised as to whether claimant's pain was as severe as he claimed, but ultimately did not resolve this issue. *See infra*.

judge for findings regarding employer's motion for modification. *See generally Dobson*, 21 BRBS 174. The administrative law judge must fully explain his resolution of the conflicting evidence with regard to the extent of claimant's physical and psychological conditions. *See generally Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Employer also contends on appeal that the administrative law judge erred in finding that claimant has a work-related psychiatric condition. Section 20(a), 33 U.S.C. §920(a), which the administrative law judge did not apply in this case, provides claimant with a presumption that his injury is causally related to his employment, if claimant establishes that he has a harm, and that an accident occurred or working conditions existed that could have caused the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Once invoked, employer may rebut the presumption by producing substantial evidence that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). When employer produces such substantial evidence, the presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, and render a decision supported by the record, with claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *see generally* *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer does not assign specific error to the administrative law judge's finding in the original decision that claimant suffers from a disabling work-related psychological condition but raises causation in challenging the denial of modification. As Section 22 applies to an alleged mistake in an ultimate finding or a mixed question of law and fact, *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 226 (4th Cir. 1993), the question of whether claimant's psychological condition is related to his work injury is an issue within the scope of the modification proceeding. *See also O'Keeffe*, 404 U.S. at 256. Employer

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[4]The administrative law judge's resolution of this issue is limited to the following statements: "The medical opinions are in dramatic conflict . . . The current record presents a striking contrast in psychiatric opinion . . . While the modification proceedings raise some doubt about the extent of the professed pain with the ostensibly credible presentation by Dr. Dar, to a lesser extent by Dr. Klingon, and the opinion of Dr. Steinway, it is not plausible to rely primarily or substantially on the opinion of Drs. Bursztajn, Zahir, Koja, Vigman, and Smelson." Decision and Order Denying Petition for Modification by Employer at 12. On remand, the administrative law judge must assign weight to the varying opinions and render specific findings of fact consistent with the opinions he credits.

contends on appeal of the decision denying modification that the evidence is insufficient to invoke the Section 20(a) presumption, that Dr. Bursztajn's opinion, offered in support of employer's motion for modification, is sufficient to establish rebuttal of the Section 20(a) presumption, and that, in weighing the evidence as a whole, the administrative law judge should give less weight to those medical opinions relating claimant's psychiatric problems to his physical pain, inasmuch as employer contends that claimant does not have the physical pain he alleges. Inasmuch as the administrative law judge in the instant case did not address causation or analyze the evidence pursuant to Section 20(a), we must remand this case for consideration of this issue consistent with law. *See generally Cotton v. Newport New Shipbuilding & Dry Dock Co.,* 23 BRBS 380 (1990).

Claimant contends on cross-appeal that the administrative law judge erred in ordering him to participate in a 30-day inpatient treatment program, as the administrative law judge failed to resolve the conflicting evidence regarding the necessity of such treatment. In order for medical treatment to be compensable pursuant to Section 7, 33 U.S.C. §907, it must be appropriate for the injury. 20 C.F.R. §702.402. A claim that raises disputed factual issues such as the need for specific care or treatment for a work-related injury requires the administrative law judge to resolve the disputed factual issues. *See Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997)(Brown, J., concurring); *Schoen v. U.S. Chamber of* Commerce, 30 BRBS 112 (1996); *see generally* 33 U.S.C. §919(d); 5 U.S.C. §557 (c)(3)(A).

In the instant case, the administrative law judge found that claimant must cooperate with employer in:

> arranging at least a 30-day stay in an East Coast facility to address the issues of substance dependence, pain medication, and psychiatric investigation and care. It will be particularly important to secure the documentation described by Dr. Bursztajn at the top of page 10, to wit, school records, service records, and policeman records as well as other work records. The Claimant must cooperate in furnishing any required authorizations, and, one that will allow the Social Security Administration to provide a statement of his earnings describing the employers with whom he has worked. This document will show if he has a solid work record. This may impact on consideration of his premorbid state.

Decision and Order Denying Petition for Modification by Employer at 13. Specifically, Dr. Burszatjn stated that there was a need for claimant to be placed in an inpatient treatment facility to assist claimant in dealing with the problems described by the doctor in his reports. In addition to the opinion of Dr. Burszatjn, however, the record includes the reports and testimony of Dr. Dar, claimant's treating psychiatrist. She testified that she believed claimant is taking the medications as prescribed and that she has not seen addictive behavior, such as more frequent requests for refills, nor observed the smell of

alcohol on his breath. Dr. Dar dep. at 18. She also opined that claimant does not need inpatient care. *Id.* at 41.

Section 557(c)(3)(A) of the Administrative Procedure Act (APA), 5 U.S.C. §557, requires decisions rendered under the APA to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented in the record." In the present case, there is conflicting evidence of record which the administrative law judge did not resolve. We, therefore, vacate the administrative law judge's order that claimant submit to a 30-day inpatient treatment regimen. On remand, the administrative law judge must resolve the conflicts in the record regarding the necessity of an inpatient program for claimant and explain the weight assigned to the varying opinions. *See Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring).

Claimant also contends that imposing the requirement that he remove firearms from his possession as a condition to his receiving benefits is beyond the scope of the administrative law judge's authority. Under the Act, administrative law judges have the authority to conduct hearings "in respect of" claims, *see* 33 U. S. C. §919(a), (d); 20 C.F.R. §§702.331-702.351, and to approve agreed settlements and withdrawal of claims. *See generally Stevens v. Matson Terminals, Inc.*, 32 BRBS 197 (1998)(Board held administrative law judge exceeded his authority in mandating how claimant must file a second longshore claim as this procedure is covered by the Act). Although Section 27(a), 33 U.S.C. §927(a), grants the administrative law judge the authority to issue subpoenas, administer oaths, compel attendance and testimony of witnesses, production of documents, and "all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office," the behavior the administrative law judge is attempting to curtail in the instant case does not involve conduct in the hearing held before him.

Moreover, relevant to the case at bar, compensation benefits under the Act may be suspended only if an employee unreasonably refuses to submit to a medical examination or treatment, 33 U.S.C. §907(d)(4), (f), as claimant correctly notes. There is no provision of the Act under which the administrative law judge may condition claimant's entitlement to benefits upon his relinquishing his firearms. Therefore, we agree with claimant that the administrative law judge exceeded the scope of his authority, *Stevens*, 32 BRBS 197, and we vacate the requirement that claimant's continued receipt of benefits is conditioned on the removal of the firearms from his own home. Moreover, we

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[5]These findings should be consistent with his overall weighing of the evidence. *See* note 4, *supra*. In addition, if the administrative law judge finds that claimant's psychiatric condition is not work-related, employer is not liable for the cost of treatment for this condition. *See generally Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

similarly vacate the administrative law judge's requirement that claimant certify that the arms and ammunition are separate and secure and that claimant must supply a sworn statement that he has renounced all threatening behavior.

Accordingly, the administrative law judge's Order Denying Motion to Admit New Evidence and Decision and Order Awarding Benefits are affirmed. The administrative law judge's Decision and Order Denying Petition for Modification by Employer is vacated in its entirety, and the case is remanded for further consideration consistent with this opinion. Inasmuch as the initial award of benefits has been affirmed, and modification has not been granted, that award remains in effect pending the outcome of the modification proceedings.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge