

BRB Nos. 02-0801  
and 03-0451

PETER M. REAUX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLUMBIA GULF TRANSMISSION	)	DATE ISSUED: <u>MAR 22, 2004</u>
COMPANY	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeals of the Decision and Order on Remand Denying Benefits, the Decision and Order Denying Petition for Reconsideration, and the Decision and Order Denying Petition for Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Peter M. Reaux, Abbeville, Louisiana, *pro se*.

John Nickerson Chappuis (Voorhies & Labbe), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Denying Benefits, the Decision and Order Denying Petition for Reconsideration, and the Decision and Order Denying Petition for Modification (1997-LHC-2878) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). In an appeal filed by a claimant without representation, we will review the

administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a utility man, slipped and fell at work on September 29, 1994, and injured his neck, back, and left knee. Employer voluntarily paid claimant temporary total disability benefits from September 30 through October 19, 1994, and certain medical bills totaling \$3,853.47. Dr. Budden released claimant to return to his usual work on October 19, 1994, but claimant has never returned to work. Employer terminated claimant from its employment in July 1995. In his initial decision, the administrative law judge denied additional disability and medical benefits for claimant's physical and psychological injuries. The administrative law judge found that claimant sustained a work-related thoracolumbar strain and that claimant was capable of returning to his usual work on October 19, 1994. The administrative law judge also found that claimant's psychological condition was not caused or aggravated by his employment. The administrative law judge further found that claimant chose Drs. Budden and Bernard to treat his physical injuries and that claimant was not entitled to additional treatment for these injuries after December 19, 1994, as none was necessary and as claimant failed to request authorization from employer to change physicians. Decision and Order dated October 16, 2000.

Upon claimant's appeal, without the assistance of counsel, the Board affirmed the administrative law judge's denial of disability and medical benefits for claimant's physical injuries. *Reaux v. Columbia Gulf Transmission Co.*, BRB No. 01-0267 (Nov. 19, 2001)(unpub.). The Board, however, was unable to affirm the administrative law judge's finding that claimant's psychological condition was not work-related because the administrative law judge did not apply the Section 20(a) presumption or the aggravation rule. *Id.* Thus, the Board remanded the case to the administrative law judge to reconsider whether claimant's psychological condition is work-related, pursuant to Section 20(a) and the aggravation rule.

On remand, the administrative law judge denied disability and medical benefits for claimant's psychological injuries. The administrative law judge found that claimant invoked the Section 20(a) presumption, but that employer rebutted it, and that upon the weighing of the evidence, claimant did not establish that his psychological injuries were caused or aggravated by his work injury. Alternatively, the administrative law judge held that, if claimant's psychological injuries were work-related, claimant is psychologically able to return to his usual work and is not entitled to medical benefits for his psychological injuries. Decision and Order dated June 20, 2002. The administrative law judge denied claimant's motion for reconsideration and reaffirmed his prior findings. Decision and Order dated July 31, 2002. Claimant appealed these decisions to the Board. BRB No. 02-0801.

On December 12, 2002, claimant requested modification of the administrative law judge's denial of disability and medical benefits for his physical injuries. The Board subsequently dismissed claimant's appeal in BRB No. 02-0801, and remanded the case to the Office of Administrative Law Judges for modification proceedings. The Board advised claimant of his right to request reinstatement of his appeal of the administrative law judge's denial of benefits for his psychological injuries. The administrative law judge denied claimant's motion for modification on February 24, 2003. Subsequently, claimant requested reinstatement of his appeal of the administrative law judge's denial of benefits for his psychological injuries. BRB No. 02-0801. Claimant also appeals the administrative law judge's denial of the modification request on claimant's physical injuries claim. BRB No. 03-0451. The cases have been consolidated for decision. *See Reaux v. Columbia Gulf Transmission Co.*, BRB Nos. 02-0801, 03-0451 (May 1, 2003)(unpub. Order). Employer responds in support of the administrative law judge's decisions.

### ***BRB No. 02-0801 – Denial of Psychological Injuries Claim***

In his 2002 decisions, the administrative law judge found that claimant's psychological injuries are not work-related. The administrative law judge alternatively held that, if claimant's psychological injuries are work-related, claimant is not disabled by such injuries and is not entitled to treatment for his psychological condition. Section 20(a), 33 U.S.C. §920(a), provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered an injury and that a work accident occurred which could have caused the injury or aggravated a pre-existing condition. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT)(5<sup>th</sup> Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7<sup>th</sup> Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000). The Section 20(a) presumption is applicable in psychological injury cases. *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). Once claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT)(5<sup>th</sup> Cir. 2003), *cert. denied*, 124 S.Ct. 825 (2003). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT)(5<sup>th</sup> Cir. 2000); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994). Claimant is entitled to medical benefits for his psychological injuries if they are work-related and medical treatment is reasonable and necessary. *See* 33 U.S.C. §907; *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989).

We affirm the administrative law judge's finding that Dr. Aurich's opinion constitutes substantial evidence that claimant's psychological condition is not work-

related. Thus, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Ortco Contractors, Inc.*, 332 F.3d 283, 37 BRBS 35(CRT); 2002 Decision and Order at 9-10; 2002 Decision and Order Denying Petition for Reconsideration at 2-3; Dr. Aurich's September 6, 2000, report at 7; Cl. Ex. 1 at 41, 61-63; April 25, 2002 Tr. at 10-11, 15, 24, 70, 99. The administrative law judge discussed Dr. Aurich's opinion in detail and rationally found that Dr. Aurich clearly explained his conclusion that claimant's work accident did not aggravate his underlying psychological disorder. 2002 Decision and Order at 10. The administrative law judge quoted from Dr. Aurich's hearing testimony wherein he stated that it was very unlikely that the work accident had anything to do with exacerbating claimant's pre-existing characteristics. April 25, 2002, Tr. at 15, 24. Dr. Aurich also responded negatively to the questions asked at the 2002 hearing as to whether the somatoform disorder came into effect after the work accident, and whether there is any causal connection between claimant's psychological condition and the work accident. April 25, 2002, Tr. at 70, 99. Dr. Aurich's opinion therefore constitutes substantial evidence in support of the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *See Ortco Contractors, Inc.*, 332 F.3d 283, 37 BRBS 35(CRT). Moreover, the administrative law judge's finding that claimant's psychological condition is not work-related is rational and supported by Dr. Aurich's opinion, which is the only relevant opinion of record. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43; 2002 Decision and Order at 10-11; 2002 Decision and Order Denying Petition for Reconsideration at 2-3; April 25, 2002, Tr. at 15, 24, 70, 99.

#### ***BRB No. 03-0451 – Denial of Modification for Physical Injuries Claim***

In his initial 2000 decision, the administrative law judge denied additional disability and medical benefits for claimant's physical injuries. The administrative law judge found that claimant sustained only a work-related thoracolumbar strain and that claimant was capable of returning to his usual work on October 19, 1994. The administrative law judge also found that claimant's 1994 work-related physical injuries did not require ongoing medical treatment after December 19, 1994, and that claimant did not seek authorization for any subsequent treatment. The Board subsequently affirmed these determinations.

Claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that he suffered a continuing disability as a result of his work-related physical injuries. The administrative law judge considered claimant's motion for modification as asserting a mistake in fact regarding his physical condition, specifically that claimant was entitled to continuing disability and medical benefits. The administrative law judge denied claimant's modification request, finding that claimant's evidence submitted on modification was of minimal probative value as it was mostly based on claimant's assertions and not based on the remaining documentary medical evidence of record.

Section 22 provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. See *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT)(1995). It is well established that the party requesting modification bears the burden of proof. See, e.g., *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT)(1997); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4<sup>th</sup> Cir. 2000)(table). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256, *reh'g denied*, 404 U.S. 1053 (1971); see *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT)(7<sup>th</sup> Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 22 BLR 2-1 (4<sup>th</sup> Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4<sup>th</sup> Cir. 1993). The decision to reopen a case due to a mistake in fact must render justice under the Act. See *O'Keeffe*, 404 U.S. at 256; *Banks*, 390 U.S. at 464; *Old Ben Coal Co.*, 292 F.3d at 546-547, 36 BRBS at 44-45(CRT). The quality of the evidence submitted on modification is a relevant factor in determining whether reopening a claim renders justice under the Act. *Old Ben Coal Co.*, 292 F.3d at 546-547, 36 BRBS at 44-45(CRT).

We affirm the administrative law judge's denial of claimant's motion for modification as it is rational, supported by substantial evidence, and in accordance with law. See *O'Keeffe*, 404 U.S. 254; *Banks*, 390 U.S. 459; *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT); 2003 Decision and Order at 3-4; Cl. Ex. 9 at 8, 12-19. The administrative law judge discussed and weighed the evidence submitted with claimant's motion for modification and concluded that it was of limited probative value. He therefore found that reopening the claim for reconsideration of claimant's physical injuries would not render justice under the Act. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). The administrative law judge found that the 2002 opinions of Drs. Heitkamp and St. Cyr, that claimant is disabled and in need of treatment for his 1994 injury, are not based upon a review of the entire medical record but appear to be based largely upon claimant's assertions which are not supported by the record. The administrative law judge therefore found the opinions insufficient to establish that claimant suffers from a continuing disability from his work-related physical injuries. Moreover, the administrative law judge found that the reports of Ms. Landry and Ms. Dickie, vocational experts, were of minimal probative value because they do not establish a connection between claimant's current physical injuries and his 1994 work accident. Thus, the administrative law judge found that the evidence claimant submitted on modification is insufficient to establish that claimant was disabled after Dr. Budden stated that claimant could return to his usual work on October 19, 1994. Furthermore, the

administrative law judge rationally found that the additional evidence submitted on modification is insufficient to establish that claimant needed additional medical treatment after December 19, 1994, as a result of his 1994 work accident.<sup>1</sup> The administrative law judge's finding that claimant did not establish a mistake in fact warranting modification of the prior decision is rational and supported by substantial evidence. *See generally Kinlaw*, 33 BRBS 68. Thus, the administrative law judge's denial of claimant's modification request is affirmed.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>1</sup> The administrative law judge did not determine whether claimant established a change in his physical or economic condition. Any error in this regard is harmless, however, as the administrative law judge fully discussed and weighed all of the evidence submitted with claimant's motion for modification, and rationally found that the evidence was of minimal probative value. *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT). Thus, the new evidence on modification is insufficient as a matter of law to establish a change in claimant's physical or economic condition.