BRB No. 97-1211

JOHN ATKINS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
BRASWELL SERVICES	)	
	)	
and	)	
	)	
ARM INSURANCE SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Edith Barnett, Administrative Law Judge, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Garfinkel, P.A.), Titusville, Florida, for claimant.

Bert G. Utsey (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-1938) of Administrative Law Judge Edith Barnett 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).

On October 25, 1991, claimant sustained a work-related injury during the course of his employment with employer when he fell and struck his right knee. Claimant's treating physician, Dr. Carter, determined that claimant suffered from traumatic degenerative arthritis resulting from a tibial plateau fracture with anterior crutiate ligament instability as a result of a 1980 motorcycle accident, which was aggravated by claimant's work injury. Dr. Carter placed claimant on anti-inflammatories and pain medication, with recommended physical therapy.

Thereafter, claimant filed a claim for temporary total disability compensation under the Act. In a Decision and Order issued on December 9, 1993, Administrative Law Judge G. Marvin Bober awarded claimant temporary total disability compensation from October 25, 1991 through January 31, 1993, *see* 33 U.S.C. §908(b), at which time claimant secured a light duty position with another employer, and temporary partial disability compensation commencing on February 1, 1993 and continuing for the duration of claimant's impairment, not to exceed five years.[1] 33 U.S.C. §908(e).

[1]Judge Bober found that commencing on February 1, 1993, claimant's post-injury wage-earning capacity was $150 per week.

On January 6, 1994, claimant underwent an MRI, which revealed no indication of injury other than the tibial plateau fracture from his motorcycle accident. After two months of unsuccessful physical therapy, Dr. Carter recommended that claimant undergo arthroscopic surgery to determine if anything was missed by the MRI. Requesting a second opinion, claimant declined to undergo this procedure. On February 7, 1994, employer terminated claimant's benefits based on the negative MRI; thereafter, on February 9, 1994, employer filed a motion for modification with the district director, who referred the case to the Office of Administrative Law Judges.[2] Claimant filed for a default judgment in the United States district court, and on July 13, 1994, employer reinstated claimant's benefits with all back payments due, plus a penalty. On August 4, 1994, employer terminated benefits a second time, citing as its reason claimant's refusal to undergo surgery. After another default judgment was obtained in district court, employer reinstated claimant's benefits on January 10, 1995. On March 29, 1995, claimant filed a motion for modification, claiming that he now suffers from a psychological condition as a result of his work-related knee injury, which has rendered him totally disabled; claimant requested authorization for treatment for this condition. Additionally, claimant requested authorization to obtain a second opinion with respect to whether knee surgery was necessary, and furthermore, sought modification of Judge Bober's decision with respect to the extent of claimant's knee disability, contending he is now permanently totally disabled.

In her Decision and Order addressing the parties' motions for modification, Administrative Law Judge Edith Barnett (the administrative law judge), relying on the opinion of Dr. Carter, found that claimant's knee condition reached maximum medical improvement in October 1992. Thus, the administrative law judge modified Judge Bober's award to reflect that claimant is entitled to temporary total benefits from October 25, 1991 until October 25, 1992; thereafter, based on Dr. Seig's 20 percent impairment rating to claimant's lower extremity, the administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), to be offset by the compensation payments employer previously made pursuant to Judge Bober's award. *See* 33 U.S.C. §914(j). Lastly, the administrative law judge determined that claimant's psychological condition resulted from anger that his benefits had been terminated by employer, not from the knee injury itself, and thus denied claimant's request for modification based on a psychological injury.

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[2]Employer initially asserted in its motion for modification that the October 25, 1991, incident caused no damage to claimant's right knee. At the hearing, employer amended its position on modification, contending that claimant's knee condition had reached maximum medical improvement. Tr. at 6.

On appeal, claimant contends that the administrative law judge committed error in failing to award temporary total disability benefits for his psychological injury, and by finding that his knee condition had reached maximum medical improvement in October 1992. Additionally, claimant asserts that the administrative law judge erred by not fully addressing the issue of the extent of claimant's disability due to his knee injury. Employer responds, urging affirmance of the administrative law judge's decision.

Section 22 of the Act, 33 U.S.C. §922, 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*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995). 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 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). When considering a motion for modification, the administrative law judge is permitted to have before her the record from the prior hearing. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In order to obtain modification for a mistake of fact, however, the modification must render justice under the Act. *See McCord v. Cephas,* 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). *See also Rambo*, 515 U.S. at 291, 30 BRBS at 1 (CRT). Moreover, the applicable legal standards are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *See Rambo,* 515 U.S. at 296, 30 BRBS at 3 (CRT); *Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197 (1998); *Vasquez*, 23 BRBS at 431.

We first address claimant's contentions regarding the administrative law judge's denial of his request for modification based on a work-related psychological injury. In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's condition to his employment, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). The Section 20(a) presumption is applicable in psychological injury cases. *Cotton v. Newport News Shipbuilding & Dry*

Dock Co., 23 BRBS 380, 384 n.2 (1990). Claimant's psychological injury need only be due in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.*, 25 BRBS 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor, OWCP*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). Once claimant has established his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Stevens,* 23 BRBS at 191. Upon invocation of the presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.,* 17 BRBS 153 (1985); *see also Director, OWCP v. Greenwich Collieries;* 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

The administrative law judge, in analyzing causation herein, did not apply the Section 20(a) presumption. In the instant case, it is undisputed that claimant sustained an injury to his knee on October 25, 1991, during the course of his employment with employer. In her Decision and Order, the administrative law judge acknowledged that the record contains complaints of psychological difficulties on the part of claimant, which include feelings of anger and depression.[3] Thus , claimant established the two elements of his *prima facie* case with regard to his psychological condition and met the initial burden of demonstrating a change in condition under Section 22. Since the same statutory standards apply on modification, he is entitled to the presumption that his psychological condition is causally related to his employment. Furthermore, our review of the record indicates that employer presented no evidence that claimant's psychological condition is unrelated to his work injury. In fact, the record contains only one opinion with regard to claimant's psychological condition, the deposition of Dr. Podnos, as well as Dr. Podnos' January 30, 1995, report. That report, which was based on Dr. Podnos' examination of claimant, states that claimant has had lingering difficulty with his knee, that claimant is extremely focused on his knee condition, that claimant's emotional and physical conditions are interrelated, and that claimant suffers from depression and pain disorder associated with psychological factors and his knee disorder. *See* Podnos Dep. Ex. 2; *see also* Podnos Dep. at 9, 15.

In her decision on modification, the administrative law judge discounted this

[3]We note that these complaints are documented by Dr. Podnos, claimant's treating physician.

opinion, stating that as Dr. Podnos examined claimant only once, a year and half before the modification hearing, his opinion has little bearing on claimant's current condition. Rather, the administrative law judge found, based on claimant's testimony, that claimant's psychological problems are related to his anger at employer for terminating his benefits. However, while claimant testified that he believed his psychological condition was largely caused by employer's termination of his benefits on two occasions, he also testified that he felt anger that his knee problem was not taken care of. *See* Tr. at 42. Therefore, claimant's testimony cannot rebut Section 20(a). As there is no medical evidence in the record which establishes that claimant's psychological condition is not related to his knee injury, the administrative law judge's finding of no causation must be reversed, as claimant's psychological condition is work-related as a matter of law. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *see generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989). As claimant has established that his psychological condition is work-related, the instant case must be remanded for the administrative law judge to address the remaining issues concerning that condition.

Claimant next alleges that the administrative law judge erred by finding that his knee condition reached maximum medical improvement in October 1992. Specifically, claimant argues that Dr. Carter's March 1, 1996, opinion that claimant reached maximum medical improvement in October 1992 conflicts with his previous opinion on April 14, 1994, that claimant had not reached maximum medical improvement, and his recommendations in 1994 that claimant undergo physical therapy and surgery. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Thus, a finding of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

In the instant case, claimant underwent physical therapy in 1994 in accordance with Dr. Carter's recommendation; however, this therapy proved to be unsuccessful. Thereafter, Dr. Carter scheduled diagnostic arthroscopic surgery to see if there was any problem undetected by claimant's prior MRI, but claimant declined to undergo this procedure. In a March 1, 1996 report, Dr. Carter opined that claimant reached maximum medical improvement one year after his work accident. Emp. Ex. 6. The administrative law judge acknowledged that Dr. Carter's opinion appears to be inconsistent, but gave little weight to his April 14, 1994, opinion as it was only represented by a check mark on a questionnaire. *See* Cl. Ex. 3. The administrative law judge additionally found that Dr. Carter's opinion that claimant reached maximum medical improvement one year after the work-accident was supported by Dr. Seig's January 22, 1996, opinion that claimant had long since reached maximum medical improvement, and that claimant had sustained a 20 percent impairment to his lower extremity. *See* Emp. Ex. 7. As the record thus contains substantial evidence to support the administrative law judge's finding that claimant reached maximum medical improvement in October 1992, we affirm that finding, as well as the administrative law judge's termination of claimant's temporary total disability compensation on October 25, 1992.[4] *See Delay,* 31 BRBS at 197; *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

Lastly, claimant asserts that the administrative law judge erred by failing to fully address the issue of the extent of his disability due to his knee injury. We agree. In the initial Decision and Order in this matter, Judge Bober found that claimant's entitlement to temporary total disability compensation ended on January 31, 1993, at which time claimant secured an income from another employer; thus, Judge Bober awarded claimant temporary partial disability benefits commencing on February 1, 1993. However, at the modification hearing, claimant testified that since the time of the first hearing, he has been unable to secure steady gainful

[4]Claimant additionally asserts that a finding of maximum medical improvement cannot be made, as Dr. Podnos opined that claimant had not reached maximum medical improvement with respect to his psychological injury. We reject this assertion, as the administrative law judge's finding of permanency involves claimant's knee, not his psychological condition.

employment, Tr. at 34-36, and asserted that he is now permanently totally disabled as a result of the October 25, 1991, work-incident. If claimant is permanent total disabled as a result of his knee injury, he is not limited to a schedule award. *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 277 n.17, 14 BRBS 363, 366-367 n.17 (1980). Resolution of this issue requires findings as to whether claimant is able to return to his usual work due to his knee injury, psychological condition, or a combination of the two, and if he is not able to do so, whether employer demonstrated the availability of suitable alternate employment. The administrative law judge did not address these issues. As the extent of claimant's disability was at issue on modification, we vacate the administrative law judge's award of permanent partial disability benefits and remand this case for the administrative law judge to make the necessary findings. *See, e.g., Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Accordingly, the administrative law judge's determination that claimant did not sustain a work-related psychological injury is reversed, and the case is remanded for consideration of the remaining issues regarding that injury. The administrative law judge's award of permanent partial disability compensation pursuant to Section 8(c)(2) of the Act is vacated, and the case is remand for the administrative law judge to reconsider the extent of claimant's disability. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge