BRB Nos. 07-0891
and 08-0803

M.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAKE CHARLES STEVEDORES, INCORPORATED	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	DATE ISSUED: 08/14/2009
	)	
Employer/Carrier-Respondents	)	
	)	
J.J. FLANAGAN STEVEDORES	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits, Decision and Order on Reconsideration, and Decision and Order on Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

M.G., Glenmora, Louisiana, *pro se*.

Alan G. Brackett, Jon B. Robinson, and Robert N. Popich (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for Lake Charles Stevedores, Incorporated and PORTS Insurance Company.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order Granting Benefits, Decision and Order on Reconsideration, and Decision and Order on Modification (2006-LHC-1976, 1977, 1978, and 1979) of Administrative Law Judge Clement J. Kennington rendered on claims 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 an appeal by a claimant without legal representation, we will review the findings of fact and conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. *Id.*

Claimant was involved in four separate accidents in the course of his work as a longshoreman; three while he was employed by Lake Charles Stevedores (LCS), and a fourth while he was employed by J.J. Flanagan Stevedores (JJF). Specifically, claimant sustained injuries to his right shoulder and lower mid-back as a result of an accident on January 17, 2001. As a result of these injuries, claimant was off work from January 18, 2001, to March 4, 2001.[1] Upon returning to work, claimant resumed his normal activities, and continued to work in this capacity until August 14, 2001, when he reinjured his right shoulder and back. As a result of this second injury, claimant had right shoulder surgery which took place on October 10, 2002.[2]

Claimant returned to work in Eastern Texas on December 10, 2002. On July 6, 2004, claimant took a job with JJF in Lake Charles, Louisiana. While working that day, claimant stated that he injured his lower mid-back forcing him to miss work until September 22, 2004, when he stated he resumed working intermittently.[3]

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[1] LCS voluntarily paid claimant temporary total disability benefits totaling $2,008.38 for the period from January 8, 2001, through February 28, 2001, at the rate of $334.73 per week. LCS X 11.

[2] LCS paid claimant $19,348.77 in temporary total disability benefits for the August 14, 2001, injury to cover the period between September 12, 2001, through December 11, 2002, based on the weekly rate of $297.02. LCS X 22

[3] JFF paid claimant temporary total disability benefits totaling $2,355.05 for the period spanning July 22, 2004, through September 22, 2004, at a weekly rate of $259.45. JJF X 1.

On April 25, 2005, claimant, while working for LCS, stated that he began to experience severe shoulder and back pain and weakness, in addition to mental fatigue, which prevented him from working. Claimant denied being "injured" and referred to this incident as an aggravation causing his back and shoulder to go out. Nonetheless, claimant stated, and Dr. Bernauer agreed, that as of April 25, 2005, he was no longer able to work due to pain. Claimant, thereafter, sought, without assistance of counsel, additional compensation under the Act for injuries to his low mid back, right shoulder, and right hip, as well as for "mental unrest" which he alleged was due to the work incidents on January 17, 2001, August 14, 2001, July 6, 2004, and April 25, 2005. He also alleged that the April 25, 2005, incident resulted in an aggravation of all of his prior work-related injuries.[4]

In his initial decision dated May 8, 2007, the administrative law judge found that claimant established invocation of the Section 20(a) presumption with regard to his back injury, his right shoulder injury, and present psychological condition, and that employer established rebuttal only with regard to the psychological condition. Having found that claimant's back and right shoulder injuries are work-related, the administrative law judge then found, based on the record as a whole, that claimant's four work accidents did not cause or aggravate his long standing psychological condition, *i.e.*, affective disorders and/or paranoid schizophrenia. He thus awarded claimant temporary total disability benefits, based on his work-related back and right shoulder injuries, for the periods of January 17 through February 28, 2001, August 14, 2001 through December 10, 2002, July 6 through September 21, 2004, and from April 25, 2005 through July 5, 2006, finding that claimant was able to return to work after each injury except for the last, at which time he found that claimant's inability to work is due solely to his non-work-related psychological impairment. The administrative law judge denied claimant's motion for reconsideration.

Claimant, without the assistance of counsel, appealed the administrative law judge's decision to the Board. BRB No. 07-0891. Claimant then requested modification of the administrative law judge's decision, and the Board dismissed claimant's appeal and remanded the case for further proceedings pursuant to Section 22 of the Act, 33 U.S.C. §922. In response to claimant's petition, employer filed a motion to compel an updated medical examination of claimant by Dr. Perry. In his Decision and Order on Modification on July 29, 2008, the administrative law judge found that claimant did not show either a change in his economic or physical condition or that there had been a mistake in fact in the prior decision. The administrative law judge therefore denied claimant's request for modification. The administrative law judge also suspended further

[4] LCS did not pay voluntary benefits relating to claimant's April 25, 2005, work injury.

payment of compensation pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), based on claimant's unreasonable refusal to undergo an examination by Dr. Perry.

Claimant appealed the administrative law judge's Decision and Order on Modification, BRB No. 08-0803,[5] and the Board, by Order dated September 9, 2008, reinstated claimant's prior appeal, BRB No. 07-0891, and consolidated it with BRB No. 08-0803. LCS responds, urging affirmance of the administrative law judge's decisions. JJF has not responded to this appeal.

Claimant contends that his four claims should have been addressed separately and that the administrative law judge violated his due process rights and otherwise showed bias toward him. Since claimant's pursuit of total disability and medical benefits in all four claims involved the same body parts and the development and presentation of similar evidence, the administrative law judge did not err in addressing all four claims at one time, as this is specifically permitted by the applicable regulation. 29 C.F.R. §18.11;[6] *see also* 20 C.F.R. §702.339. Second, contrary to claimant's assertions, a review of the large record in this case, including the extensive submissions by claimant, reveals that the administrative law judge assured that claimant was treated fairly and provided with every possible opportunity to present evidence and to respond to employer's evidence. *Richardson v. Perales*, 402 U.S. 389, 401-402 (1971). Moreover, we reject claimant's allegation that the administrative law judge was biased against him, as unfavorable

[5] Claimant also filed a complaint in federal court against employers seeking enforcement of the administrative law judge's May 8, 2007, Decision and Order awarding him benefits. Granting employer's motion for summary judgment, the United States District Court for the Western District of Louisiana dismissed claimant's complaint with prejudice stating that it lacked jurisdiction to handle claimant's complaint. *Goins v. P & O Ports Lake Charles*, No. 08-01154, 2009 WL 909577 (W.D. La. April 3, 2009).

[6] 29 C.F.R. §18.11 states:

> When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge or the administrative law judge assigned may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made, at the discretion of the administrative law judge as appropriate.

rulings alone are insufficient to show bias. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

We next address the administrative law judge's finding in his initial decision that claimant's psychological condition is not work-related and specifically the finding that employer rebutted the Section 20(a) presumption. The administrative law judge found that employer rebutted "any assertion by claimant that his four accidents either caused or aggravated claimant's mental problems," Decision and Order dated May 8, 2007 at 15, as the reports of Drs. Culver and Quillin provide no evidence of any work connection to claimant's long-standing psychological problems.

Once the Section 20(a) presumption is invoked, as in this case, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition is not related to his employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Where aggravation of a pre-existing condition is at issue, such as here where claimant has an existing psychological condition, the employer must present substantial evidence that the work accidents neither directly caused claimant's injury nor aggravated the pre-existing condition.[7] *Id.*

Dr. Quillin found that claimant had an extensive psychiatric history of outpatient treatment with evidence of alcohol and poly-drug abuse, poor social functioning, poor insight, considerable irritability, depression, and bipolar disorder. Dr. Quillin added that claimant's condition is poor and prognosis is "poor," that it presents a substantial barrier to functional behavior, and thus, he recommended that claimant undergo more aggressive treatment of his affective disorder. JJX 17. On July 18, 2006, Dr. Culver diagnosed claimant with paranoid schizophrenia, personality disorder not otherwise specified, and osteoporosis, sarcoidosis, essential hypertension, degenerative disc disease and status/post acromioplasty.[8] CCX 114. As the administrative law judge found, the reports of Drs. Quillin or Culver do not state that there is a causal link between claimant's

[7] The "aggravation rule" states that when an employment injury aggravates, accelerates, contributes to, or combines with, a pre-existing condition, employer is liable for the entire resultant disability. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

[8] As claimant has not put forth any valid reason or provided any evidence to support his motion to have Dr. Culver's psychiatric evaluation stricken from the record, and as the administrative law judge found Dr. Culver's opinion relevant and credible, we affirm the administrative law judge's denial of claimant's motion.

psychological condition and his work accidents. However, the physicians also do not state that the work accidents did not cause or aggravate claimant's existing psychological condition. As neither psychiatrist gave an opinion to a reasonable degree of medical probability that claimant's psychological condition was not caused or aggravated by his work-related injuries, their opinions do not constitute substantial evidence sufficient to rebut the Section 20(a) presumption. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). As employer did not present substantial evidence that claimant's psychological conditions were not aggravated by his four work accidents, we, therefore, reverse the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to claimant's psychiatric condition. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). A causal relationship between claimant's employment and his psychological condition is established as a matter of law, and the case must be remanded for further consideration of claimant's entitlement to disability and medical benefits related to his psychological condition.

Turning next to the administrative law judge's disability findings, it is undisputed that immediately following each of his four work-related physical injuries, claimant was temporarily incapable of returning to his usual employment. Moreover, with the exception of the most recent work injury sustained on April 25, 2005, the administrative law judge rationally found that claimant, following his recovery period, returned to longshore work essentially involving his usual duties, which claimant stated primarily involved two types of jobs: stuffing containers and hook-on jobs. HT at 54-59, 63, 68-69, 70-71, 73-74, 79-80. In addition, the administrative law judge rationally declined to credit claimant's complaints of pain following his return to work. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's finding that claimant is not entitled to additional disability benefits after the January 17, 2001, August 14, 2001, and July 6, 2004, work accidents. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

As for claimant's work status subsequent to his April 25, 2005, physical work injury, the administrative law judge credited Dr. Yanicko's July 5, 2006, assessment to find that claimant was capable of returning to his usual work as of that date, absent his non-work-related psychological condition. Although Dr. Yanicko stated that he found "nothing that should limit [claimant's] return to work," he also stated that "I feel the patient would do better as [*sic*] this point by being sent back to a physical therapy program for work hardening treatment of at least six weeks culminating in a functional capacity evaluation in an attempt to ascertain his current ability to return to work." LCS X 115. Dr. Yanicko also stated that he would limit claimant to 30 hours of work per

week. *Id.* As the administrative law judge did not fully address Dr. Yanicko's opinion and as his qualification may establish that claimant could not have returned to his usual work on July 5, 2006, we must vacate the administrative law judge's finding that claimant's entitlement to temporary total disability benefits for the April 25, 2005, injury ceased as of July 5, 2006. We remand the case for further consideration of the period of claimant's physical disability in view of the entirety of Dr. Yanicko's opinion, in conjunction with any evidence of disability due to claimant's psychological condition.

We next address the administrative law judge's finding regarding claimant's average weekly wage. After properly finding Section 10(a) inapplicable because claimant was a 7-day per week worker, and Section 10(b) inapplicable because the record contains no wage information about comparable employees,[9] the administrative law judge applied Section 10(c) to calculate claimant's average weekly wage for each period of total disability. The administrative law judge took claimant's total earnings, including amounts he received in royalty payments, vacation pay, and Bureau of Census pay, for the one-year period immediately preceding the date of each injury, and divided those earnings by 52. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Proffitt v. Serv. Employers Int'l*, 40 BRBS 41 (2006). The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT) (5th Cir. 1991). As the results reached by the administrative law judge in this case are reasonable and supported by substantial evidence,[10] we affirm the

[9] Section 10(a) is inapplicable in this case because the record establishes that claimant was not employed for substantially the whole of the year prior to each injury and because he worked seven days per week. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Moreover, while claimant requested, on reconsideration, that the administrative law judge calculate his average weekly wage under Section 10(b), he did not present sufficient evidence of the wages of similarly situated co-workers to enable the administrative law judge to make a finding under that provision. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998).

[10] Claimant argued that his actual hours did not accurately reflect his availability to work since a number of circumstances, *e.g.*, his wife's complicated pregnancy and a suspension from the hiring hall, limited his ability to work. The administrative law judge, however, reasonably rejected claimant's requests to have these hours included in his average weekly wage because it would require the administrative law judge to "engage in mere speculation for there is no showing when claimant, absent these circumstances, would have worked." Decision on Reconsideration at 3.

administrative law judge's determinations regarding claimant's average weekly wage figures for each of his four injuries.[11] *Id.* In addition, the administrative law judge's finding in his decision on modification that claimant did not establish a mistake in fact in the average weekly wage calculation is affirmed. *Sutton v. Genco, Inc.*, 15 BRBS 25 (1982).

We next address claimant's contention that he has been denied the right to choose his own psychiatrist. The administrative law judge found, in his decision on reconsideration, that claimant had not raised this issue before him prior to or at the hearing, but that claimant was raising the issue for the first time in a motion for reconsideration. Decision on Reconsideration at 3. Additionally, the administrative law judge found that claimant's lack of cooperation with employer's psychiatrist, Dr. Culver, negatively affects his request for his own psychiatrist. Moreover, the administrative law judge found "it appears that claimant had no apparent need for such services inasmuch as he based his claim for TTD solely upon physical restrictions."[12] Decision on Reconsideration at 3.

We cannot affirm this finding. Claimant's claim is based on both physical and psychological conditions. *See* Decision and Order at 11. Moreover, we have held that claimant's psychological condition is work-related as a matter of law. Claimant therefore is entitled to necessary medical treatment for his work injury even if it is not disabling. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). In addition, claimant is entitled to choose an attending physician for his work-related psychological condition. 33 U.S.C. §907(b). However, in order for employer to be liable for such medical expenses, claimant must first request employer's authorization to treat with a physician for his psychological condition. *See* 33 U.S.C. §907(d); *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 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). If claimant's request for authorization is refused by employer, claimant may establish employer's liability for his medical treatment if he establishes that the treatment he subsequently procured on his

[11] The administrative law judge found that claimant's average weekly wage was $405.54 at the time of the January 17, 2001, accident, $446.64 at the time of the August 14, 2001, accident, $389.17 at the time of the July 6, 2004, accident, and $389.70 at the time of the April 25, 2005, accident.

[12] We note that this alternative rationale is inconsistent with the administrative law judge's prior acknowledgment, consideration, and rejection of claimant's claim of "mental unrest" associated with his work-related accidents. Decision and Order at 11, 15.

own initiative was necessary for treatment of a work-related injury. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

In his decision on claimant's petition for modification, the administrative law judge outlined the contentions raised in claimant's petition, and concluded that there was "no basis" for granting claimant's requests, *i.e.*, no mistake in fact or change in condition. As we have vacated the denial of benefits for claimant's psychological and physical conditions following the April 25, 2005, work injury, we must also vacate the administrative law judge's denial of claimant's petition for modification as it pertains to these injuries. Moreover, we address the administrative law judge's finding that it is appropriate to suspend further payment of compensation under Section 7(d)(4) because of claimant's refusal to undergo an examination by Dr. Perry, as scheduled by employer.

Section 7(d)(4) provides that if the employee unreasonably refuses to submit to a medical examination by a physician of employer's choosing, the administrative law judge may suspend claimant's compensation during the period which the refusal continues, unless the circumstances justify the refusal. 33 U.S.C. §907(d)(4). The administrative law judge found that, in light of claimant's allegation of a change in his physical condition, employer is entitled to have claimant examined by an orthopedist, Dr. Perry. Claimant refused to be examined by Dr. Perry because claimant had no confidence in Dr. Perry's objectivity, and because claimant believed employer was using such an examination for discovery purposes and to lessen claimant's medical disabilities. At a telephone conference on July 8, 2008, the administrative law judge directed claimant to see Dr. Perry or to risk sanctions. In his decision on modification, the administrative law judge addressed claimant's refusal, noting that "in this case a reasonable person under the circumstances would or should agree to the examination because otherwise employer would have only dated medical records from June 2006 and no way to properly weigh and evaluate new MRIs." Decision and Order on Modification at 2. The administrative law judge thus found that employer established that claimant's refusal to undergo Dr. Perry's examination was unreasonable, and that claimant's assertion of ill will on the part of Dr. Perry does not justify his refusal to be examined. He, therefore, found it appropriate to suspend further payment of compensation.

We hold that the administrative law judge did not abuse his discretion by finding that claimant's refusal to undergo the examination scheduled by employer was unreasonable and unjustified given the circumstances of this case. In this regard, we note that claimant is not entitled to control the circumstances under which he will be examined, *B.C. v. Int'l Marine Terminals*, 41 BRBS 101 (2007), and cannot reasonably refuse to be examined by a physician of employer's choosing on the ground that he lacks confidence in that physician. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594

F.2d 404, 10 BRBS 1 (4th Cir. 1979). Thus, we affirm the finding that claimant's compensation benefits should be suspended during the period he refuses to be examined by Dr. Perry. *See* 20 C.F.R. §702.410(b); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002). We note, however, that compensation cannot be suspended retroactively, but only from the date of refusal and only for the continuance of the refusal. *See B.C.*, 41 BRBS 101. Accordingly, we vacate the administrative law judge's suspension of payments for all disability compensation due claimant and instruct the administrative law judge that if, on remand, he finds claimant entitled to additional disability benefits following the April 25, 2005, work injury,[13] he must then make a finding as to the date on which claimant refused to undergo the examination. Compensation may be suspended from the date of such refusal until claimant complies with the administrative law judge's order to be examined by Dr. Perry.

[13] We note that no compensation has been awarded thus far after July 2006.

Accordingly, the administrative law judge's finding that claimant's psychological condition is not work-related is reversed. The administrative law judge's finding that claimant is not entitled to disability benefits as a result of his April 25, 2005, injury is vacated, and the case is remanded for further consideration consistent with this opinion.[14] In all other respects, the administrative law judge's Decision and Order Granting Benefits, Decision and Order on Reconsideration, and Decision and Order on Modification are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[14] We reject claimant's contention that employer must compensate him for representing himself. Employer cannot be held liable for work performed by a lay representative. 33 U.S.C. §928(a), (b); *Todd Shipyards v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *see also Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom., Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).