BRB No. 93-683

CULLEN E. PLOUSHA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:_____
	)	
H & H SHIP SERVICE COMPANY	)	
	)	
	)	
Employer-Respondent	)	DECISION and ORDER

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

Cullen E. Plousha, Felton, California, *pro se*.[1]

B. James Finnegan (Finnegan, Marks & Hampton, P.C.), San Francisco, California, for employer.[2]

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

PER CURIAM:

Claimant, without the aid of counsel, appeals the Decision and Order on Remand (87-LHC-1543) of Administrative Law Judge Edward C. Burch 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board, and a synopsis of the facts is warranted. Claimant was first injured on January 13, 1979, when he fell during the course of his

[1]Originally, claimant was represented by counsel who filed a brief on claimant's behalf. Thereafter, claimant informed the Board he had dismissed his attorney, and the Board acknowledged him as a *pro se* petitioner. Order dated Feb. 4, 1994.

[2]Pacific Marine Insurance Company was formerly a party to this case. During the course of these proceedings, Pacific Marine was declared insolvent and liquidated by the Insurance Commissioner of California; therefore, employer filed a brief with the Board on its own behalf.

employment and fractured both heels and his left hip. His employer at the time voluntarily paid temporary total disability benefits until the parties settled the claim for $103,000. In the approved agreement, the parties set forth claimant's work-related physical and psychological problems as the cause of his loss of wage-earning capacity. Moreover, they stipulated that claimant could thereafter perform "[l]ight work at best" but that he is "[p]otentially disabled from any type of gainful employment." Emp. Ex. 1 at 121, 136-137.

Claimant did not work after this injury until November 1982, when he returned to work as a ship scaler with the employer herein. Tr. at 53, 60-61, 65. After only one full day of work, claimant was injured when he slipped and fell on a gangway, sustaining a lumbosacral sprain. Cl. Ex. 3; Tr. at 66-68. He filed a claim for benefits, alleging that his inability to return to work is due to the combined effects of his back injury and the aggravation of his pre-existing psychological condition.

This claim was originally heard by Judge Brissenden on October 4, 1988. In his decision, Judge Brissenden found that: claimant established a *prima facie* case of a work-related back injury from a fall on November 23, 1982; employer failed to establish rebuttal; claimant's condition reached maximum medical improvement on February 3, 1983; and claimant suffered no permanent physical disability as a result of this injury. Decision and Order on Rem. at 2. Claimant appealed the decision to the Board, arguing that Judge Brissenden erred in failing to find that claimant's work injury aggravated his pre-existing psychological problems. The Board vacated the decision insofar as it denied compensation for an alleged psychological disability and remanded the case for consideration of this issue. *Plousha v. H & H Shipping Co.*, BRB No. 89-1834 (March 29, 1991), *aff'd on recon.*, BRB No. 89-1834 (Oct. 1, 1991). The Board ordered the administrative law judge to determine whether claimant demonstrated a *prima facie* case of work-related psychological injury, and, if so, whether employer presented sufficient evidence to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. *Plousha*, slip op. at 3.

Because Judge Brissenden was no longer with the Office of Administrative Law Judges, the case was assigned to Judge Burch with notification to the parties that a decision would be based on the record. The parties were given 30 days from the date of the Order to object and to submit briefs. In response, claimant sent a letter stating that he did not object to the transfer to a new administrative law judge, but did object to a decision on the record; the letter further states that over three years had elapsed since the case was heard and the record contained no evidence of any developments in claimant's condition during that time. Employer did not object.

Judge Burch decided the case based only on the previous record. Decision and Order on Rem. at 2-5. He found that claimant established a *prima facie* case of a work-related psychological injury, and he invoked the Section 20(a) presumption. Further, he determined that employer presented substantial evidence to rebut the presumption of a causal relationship, and he held that claimant's psychological condition was caused by his 1979 work injury and that the 1982 work injury did not aggravate the pre-existing condition. *Id.* at 6-8. Consequently, he denied benefits. *Id.* at 9.

On appeal, claimant contends that Judge Burch erred in failing to hold a hearing before rendering his decision on remand. Specifically, claimant argues that while he did not object to the transfer of the case to another administrative law judge, he did object to a decision made on the existing record. He contends that well-established law requires a *de novo* hearing where credibility determinations are at issue and the original administrative law judge is no longer available. Employer responds that claimant waived this argument by not raising it in the response to the Order transferring the case to Judge Burch.[3] Employer also contends that claimant's response to the Order does not address the issues for which the case was remanded.

Under the Administrative Procedure Act, 5 U.S.C. §554(d), if an administrative law judge is no longer available to preside over a case and a witness's credibility is at issue by virtue of his demeanor, the parties have the right to demand a *de novo* hearing before the substitute administrative law judge. *See generally Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d 106 (8th Cir. 1954). However, this right may be waived and the case may proceed on the record alone. *Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981) (*en banc*); *Creasy v. J. W. Bateson, Co.*, 14 BRBS 434 (1981). Claimant's response to the transfer order in this case is subject to interpretation, and Judge Burch did not explicitly address the response or whether claimant waived his right to a *de novo* hearing. Specifically, claimant's response states:

> Claimant does not object to transferring this matter to another Administrative Law Judge. He does object to having that Administrative Law Judge make a decision on the record.
>
> * * *
>
> While there is evidence that would support a finding that claimant suffered a psychological disability, there is little evidence as to the extent of that disability, particularly in the three and one-half years that have elapsed since the hearing in this matter. Consequently, if it is determined that claimant established an unrebutted presumption of disability, a further hearing would be required to determine the continuation of that disability and extent of that disability.
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> For the above reasons, Claimant requests that the record be reopened for further evidence on the issue of disability and the extent of disability up to the present time.

Emp. Brief at Exh. A.

[3]Employer also argues that claimant's brief was not filed in a timely manner and should be rejected. This argument is moot as the Board accepted the late filing in an Order dated February 9, 1993.

The first paragraph above clearly states an objection to a decision on the record. While the second paragraph can be interpreted as indicating that claimant requested permission to submit additional evidence only if the presumption of a work-related psychological injury was not refuted, the objection in the first paragraph is explicit. At best, this response to the transfer order is ambiguous. As a party must affirmatively waive his right to a *de novo* proceeding, *see generally Van Teslaar v. Bender*, 365 F.Supp. 1007 (D.Md. 1973); *Creasy*, 14 BRBS at 435, we conclude that claimant's letter does not waive his right to a new hearing. As the matter before Judge Burch involved the credibility of witnesses,[4] we vacate Judge Burch's decision on the record, and we remand the case for a *de novo* hearing on the issues discussed in the Board's first decision.[5] *See Plousha*, slip op. at 3.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[4]We note, specifically, that based on the existing record, the administrative law judge found that claimant is not a credible witness. Decision and Order on Rem. at 7-8.

[5]In light of our decision to remand the case for a *de novo* hearing, we need not address claimant's contention that Judge Burch erred in denying benefits for a psychological impairment.