

BRB Nos. 12-0586
and 12-0586A

RENE M. DARBY)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
HUNTINGTON INGALLS, INCORPORATED-INGALLS OPERATIONS)	DATE ISSUED: 08/13/2013
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeals of the Decision and Order and the Order on Employer's Motion for Reconsideration, Claimant's Motion to Amend, and Claimant's Motion to Supplement Exhibits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Blewett W. Thomas, Columbus, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and the Order on Employer's Motion for Reconsideration, Claimant's Motion to Amend, and Claimant's Motion to Supplement Exhibits (2010-LHC-1926, 2010-LHC-2275) of Administrative Law Judge Patrick M. Rosenow 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).

This case has a protracted procedural history. On September 24, 1987, claimant sustained left elbow and cervical spine injuries while working for employer. In a March 1992 decision, Administrative Law Judge Jennings awarded claimant permanent partial disability benefits for a 15 percent impairment to claimant's left arm under Section 8(c)(1) of the schedule, 33 U.S.C. §908(c)(1), but denied claimant benefits for his cervical injury under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), finding that claimant's post-injury work for employer was suitable and that claimant had not sustained any loss in his wage-earning capacity.

On claimant's appeal, the Board affirmed Judge Jennings's decision in its entirety. *Darby v. Ingalls Shipbuilding, Inc.*, BRB No. 92-1547 (Feb. 24, 1995). Claimant appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, which affirmed the finding that employer established the availability of suitable alternate employment by virtue of a light-duty job in its facility, but remanded the case for further findings concerning claimant's post-injury wage-earning capacity. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The case was assigned to Administrative Law Judge Mills, who consolidated the issue on remand from the circuit court with the claim claimant filed for a new injury.¹ In an April 1998 Decision and Order, Judge Mills found that claimant's actual post-injury earnings represented his wage-earning capacity, and that claimant had not sustained a loss in wage-earning capacity as a result of his first injury. Judge Mills further found that, while claimant was unable to return to his modified job in employer's facility following his May 1992 injury, employer established suitable alternate employment as of August 31, 1997, when claimant became self-employed. Consequently, Judge Mills awarded claimant temporary total, permanent total, and ongoing permanent partial disability benefits as a result of his May 1992 neck injury. 33 U.S.C. §908(a), (b),

¹Claimant alleged that he injured his neck in May 1992 while working at his modified job for employer.

(c)(21). Judge Mills denied claimant's motion for reconsideration. Claimant did not appeal these decisions.

Claimant subsequently filed several motions for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. In these motions, claimant asserted that his left arm impairment had worsened and that his disability had changed from partial to total. In his Decision and Order dated June 1, 2012, the Judge Rosenow (the administrative law judge) awarded claimant temporary total disability benefits for the period from September 19, 2002 through October 7, 2003, permanent partial disability benefits for the period from October 8, 2003 through August 28, 2005, and permanent total disability benefits from August 29, 2005 and continuing. 33 U.S.C. §908(a), (b), (c)(21). Both employer and claimant filed motions for reconsideration. In an Order on Reconsideration, the administrative law judge amended his decision to reflect the Special Fund's liability for claimant's benefits subsequent to October 8, 2003, pursuant to Section 8(f), 33 U.S.C. §908(f); in all other respects, the parties' motions were denied by the administrative law judge.

On appeal, employer challenges the administrative law judge's granting claimant's motion for modification. Claimant responds, urging affirmance of the award of permanent total disability compensation. BRB No. 12-0586. In his cross-appeal, claimant asserts the administrative law judge erred in failing to reopen the record for the receipt of additional evidence; in determining claimant's post-injury wage-earning capacity; and in denying his motion to modify the prior award of permanent partial disability for the impairment to claimant's left arm. Employer has submitted a brief in response. BRB No. 12-0586A.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). A motion for modification must be filed prior to one year after the last payment of compensation or the rejection of a claim, whichever occurs later. 33 U.S.C. §922; *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001).

Employer contends that claimant failed to establish sufficient grounds to justify the modification of Judge Mills's ongoing award of permanent partial disability compensation. Specifically, employer asserts the administrative law judge's finding that claimant was incapable of performing the duties of his self-employment as of August 29, 2005, is not supported by substantial evidence.

In his decision, the administrative law judge addressed the testimony of claimant and his wife, as well as the opinions of the doctors who treated or evaluated claimant, and found that claimant was no longer capable of performing the duties of the self-

employment position that Judge Mills found established suitable alternate employment. Although he found the medical evidence to be “somewhat inconsistent,” the administrative law judge nonetheless credited the deposition testimony of Dr. Danielson and the hearing testimony of claimant, as corroborated by that of his wife, in determining that claimant’s work-related injury had progressed to the point that, as of August 29, 2005, claimant’s self-employment no longer established suitable alternate employment. Dr. Danielson, a neurosurgeon who commenced treating claimant in 1990 and who performed claimant’s anterior cervical discectomy on March 7, 2003, opined on May 26, 2005, that claimant had experienced a substantial increase in his symptoms and that, until further notice, claimant was totally disabled. EX 26 at 12-13, 16. Claimant testified that, following his neck surgery in March 2003, he began having difficulties performing his self-employment duties due to his ongoing pain and inability to sleep. Claimant stated that he attempted to deal with his condition until 2005 when he was no longer able to continue his employment. Tr. at 192-194, 196, 204-205, 228, 231, 244-245. Claimant’s wife similarly testified that claimant’s symptoms worsened after his surgery with Dr. Danielson in 2003. Ultimately, claimant “couldn’t do much” and then “went down” and “couldn’t do anything” around the time of Hurricane Katrina in 2005. It was then that she took over the family business.² While acknowledging that claimant continued to give her advice regarding the business’s operation, claimant’s wife stated that claimant receives no compensation from the business. See EX 41 at 13, 17-19, 22-32, 46.

The administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw his own inferences therefrom. See *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). In this case, the administrative law judge rationally found the testimony of Dr. Danielson, claimant and his wife to be credible. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge’s finding that claimant, as of August 29, 2005, was no longer able to perform the self-employment duties which previously constituted suitable alternate employment is supported by this evidence. See *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Thus, as it is supported by substantial evidence, the administrative law judge’s finding that claimant was incapable of performing his self-employment duties as of August 29, 2005, is affirmed. *Id.*

²Regarding her assumption of claimant’s responsibilities running the family business in 2005, claimant’s wife testified that once claimant’s condition worsened she began answering the telephone, scheduling work and acquiring the necessary permits for mobile home work. EX 41 at 33-38, 40.

Employer next asserts that the administrative law judge erred in failing to exclude claimant's post-1997 non work-related medical conditions in determining claimant's disability status. While restrictions from conditions pre-existing the work injury are to be considered in addressing a claimant's ability to work in alternate employment, *see Fox v. West State, Inc.*, 31 BRBS 118 (1997), disability related to a subsequent non-covered injury is not compensable. *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951). Thus, if a condition is the result of an intervening cause and is severable from the work-related condition, any disability related to that intervening cause is not compensable. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Foundation/Case Foundation v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013); *Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon en banc.*, 31 BRBS 13 (1997). In this case, employer has not referenced any evidence of record that claimant's two non-work-related medical conditions, specifically right knee and heart symptoms, documented prior to the time claimant became incapable of performing his self-employment duties, contributed to the onset of his total disability on August 29, 2005. To the contrary, claimant testified that he has no restrictions due to heart or knee conditions. *See* Tr. at 202-203. We, therefore, reject employer's contention of error and affirm the administrative law judge's award of total disability benefits.

In his cross-appeal, claimant contends the administrative law judge erred in finding his claim for additional permanent partial disability compensation for the impairment to his left arm untimely filed. We disagree. Claimant was awarded permanent partial disability benefits for a 15 percent impairment to his left arm by Judge Jennings in his March 20, 1992 decision. *See* EX 5. Claimant sustained an aggravation to his work-related neck injury while working for employer on May 8, 1992. Claimant sought additional compensation for his cervical condition, and Judge Mills awarded claimant compensation benefits for various periods on April 15, 1998, as a result of the disability due to the cervical condition. *See* EX 13. Judge Mills's June 25, 1998, Order Denying Claimant's Motion for Reconsideration was filed in the Office of the District Director on July 17, 1998. *See* EX 14.

We reject claimant's assertion that his request to modify Judge Jennings's permanent partial disability award for the impairment to the left arm should be considered pursuant to Section 13 of the Act, 33 U.S.C. §913. Claimant filed a timely claim for the injuries sustained in September 1987 to his neck and left arm; an award of benefits for the impairment to his left arm was entered in 1992. Claimant's subsequent claim sought benefits for an aggravation of his neck condition; that claim was addressed by Judge Mills in decisions issued and filed in 1998. As claimant does not allege a new injury to his left arm, but rather bases his claim to additional benefits on an increased degree of impairment, CX 2 at 2; CX 3, the prior adjudication of his claim for an injury to his left arm results in application of the limitations period set forth in Section 22 of the

Act. *See Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002). Thus, claimant had until July 16, 1999, to file a Section 22 claim for increased impairment to his arm.

Alternatively, claimant averred that his request for modification of Judge Jennings's award of permanent partial disability benefits for the left arm impairment was timely filed. A written claim for modification must be filed with the Department of Labor. *See generally Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 544 (5th Cir. 1974). The administrative law judge found that claimant failed to produce any corroborating evidence that a request for modification was actually sent to the Department of Labor in May 1999, as alleged by claimant. Decision and Order at 35-36. Consequently, the administrative law judge found that the motion for modification actually filed in September 1999 was untimely filed. *Id.* As claimant does not cite any evidence supportive of a finding that his request for modification dated May 22, 1999, was either mailed to or received by the district director within one year of the last payment of benefits related to his 1987 left arm award, or with one year of the filing of Judge Mills's July 1998 Order Denying Reconsideration, we affirm the administrative law judge's finding that claimant's motion for modification regarding his 1987 arm injury was untimely filed. *See generally Alexander*, 36 BRBS 142.

Claimant next challenges the administrative law judge's denial of his request to reopen the record for the submission of additional evidence. Claimant alleged that he had a greater loss in wage-earning capacity during the period of October 8, 2003 through August 28, 2005. Following the formal hearing in this case on September 27, 2011, but prior to the issuance of the administrative law judge's decision, claimant filed a motion to supplement the record with additional evidence. In his June 2012 decision, the administrative law judge denied claimant's request to reopen the record, concluding that claimant had more than an adequate opportunity to build the record. Decision and Order at 2. In requesting reconsideration of the administrative law judge's decision, claimant again moved to reopen the record. The administrative law judge denied claimant's motion, finding that claimant and his wife had testified vaguely as to his earnings during the disputed period of time, that claimant had set forth various income figures during that period, and that claimant provided no explanation why his new submissions had not been offered previously. Order on Recon. at 4. The administrative law judge thus concluded that Judge Mills's prior determination that claimant retained a post-injury wage-earning capacity of \$250 prior to August 28, 2005 should remain unaltered.

Section 702.339 of the regulations permits an administrative law judge to investigate a case so as to best ascertain the rights of the parties, and Section 702.338 requires the administrative law judge to inquire fully into the matter and receive relevant testimony and evidence. 20 C.F.R. §§702.338, 702.339. These provisions afford administrative law judges considerable discretion in rendering determinations pertaining to the admission of evidence. *See Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40 (1991). The Board may overturn such determinations only if they are arbitrary,

capricious or an abuse of discretion. *See generally Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989). The administrative law judge rationally found that claimant had ample time before the record closed in which to offer evidence concerning his wage-earning capacity. *See Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). Thus, claimant has not established that the administrative law judge's evidentiary rulings constitute an abuse of discretion, and we affirm the administrative law judge's decision not to reopen the record.³ *Olsen*, 25 BRBS 40; 20 C.F.R. §§702.338, 702.339.

Accordingly, the administrative law judge's Decision and Order and Order on Employer's Motion for Reconsideration, Claimant's Motion to Amend, and Claimant's Motion to Supplement Exhibits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³The administrative law judge held employer liable for necessary medical benefits for his neck injury. Decision and Order at 44. Claimant avers that employer has refused medical treatment for his work-related left arm condition. Employer remains liable for necessary medical treatment for work-related injuries. 33 U.S.C. §907. As a claim for medical benefits is never time-barred, *Alexander*, 36 BRBS 142, claimant may pursue reimbursement and/or treatment for his work-related arm injury through the district director's office. 20 C.F.R. §702.407.