

EMERSON DINSMORE )  
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 Claimant-Petitioner )  
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 v. )  
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 BATH IRON WORKS CORPORATION ) DATE ISSUED: 02/22/2006  
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 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order Denying Modification and Order Denying Reconsideration and Motion to Reopen Record of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker, LLC), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification and Order Denying Reconsideration and Motion to Reopen Record (2004-LHC-1145) of Administrative Law Judge Jeffrey Tureck 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).

Claimant sustained a work-related "overuse" injury to his left shoulder on July 13, 1999. Claimant continued to work for employer with restrictions which included no overtime. Employer voluntarily paid claimant temporary partial disability compensation from August 1, 1999 through August 28, 2000. On November 2, 2000, claimant filed a

claim for additional temporary partial disability benefits. On February 27, 2003, Administrative Law Judge Sutton issued a Decision and Order based on the parties' stipulations, awarding claimant temporary partial disability compensation at a rate of \$34.62 weekly commencing October 25, 2002.

Claimant subsequently filed a petition for modification, alleging that his condition had become permanent and seeking an ongoing award of permanent partial disability benefits at the weekly rate of \$34.62. Claimant conceded that he is able to work 40 hours per week in his current position with employer, albeit with restrictions, Tr. at 10, but averred that the residuals from his 1999 shoulder injury preclude him from working overtime, Tr. at 7. Employer responded that claimant's 1999 condition had fully resolved, and that he can work full-time at his usual employment without restrictions. Alternatively, employer argued that, assuming claimant has restrictions, the evidence shows that any current loss of overtime is for personal reasons unrelated to his 1999 shoulder condition.

In his Decision and Order, Judge Tureck (the administrative law judge) credited Dr. Kalvoda's opinion and found that claimant's shoulder condition reached maximum medical improvement on December 9, 2003. Nonetheless, the administrative law judge accorded more weight to Dr. Herzog's February 2004 opinion that claimant's injury had fully resolved and that claimant could work without restrictions. The administrative law judge found that Dr. Kalvoda's opinion is entitled to less weight because the doctor relied on claimant's subjective complaints of pain, which the administrative law judge found to be exaggerated. Thus, the administrative law judge terminated claimant's award of temporary partial disability benefits as of December 9, 2003, and denied additional benefits. On claimant's motion for reconsideration, the administrative law judge rejected claimant's contention that he had given undue weight to Dr. Herzog's opinion. The administrative law judge also denied claimant's alternative motion to reopen the record for the submission of Dr. Kalvoda's December 27, 2004 treatment note.<sup>1</sup>

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision.

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<sup>1</sup> The administrative law judge denied this request, stating that claimant could again seek modification if he wished to have this evidence addressed. Claimant does not raise any error in the administrative law judge's denial of his motion. Claimant does, however, cite to this chart note in his brief. We will disregard any reference to the note as it was not admitted into evidence by the administrative law judge. *See* 20 C.F.R. §802.301(b).

Section 22 of the Act provides the only means for changing an otherwise final compensation order. Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or a change in condition. Modification based on a change in condition may be predicated on an improvement or deterioration in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); 20 C.F.R. §702.373. The party requesting modification based on a change in condition has the burden of showing the change. See, e.g., *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Claimant contends that the administrative law judge erred in giving determinative weight to Dr. Herzog's opinion that claimant has no residual impairment from his 1999 shoulder injury. Dr. Herzog stated that claimant's "left shoulder impingement resolved," EX 13 at 74, but claimant observes that he was not diagnosed with impingement of the left shoulder as confirmed by the MRI study dated on January 3, 2001. Claimant also contends that Dr. Herzog's diagnosis of "myofascial discomfort at left trapezes/non-occupational postural strain," *id.*, essentially acknowledges claimant's ongoing left shoulder symptomatology. Claimant further alleges that the administrative law judge erred in finding that his complaints of pain are entirely subjective.

We affirm the administrative law judge's crediting of Dr. Herzog's opinion. Dr. Herzog stated on February 25, 2004, that claimant's 1999 strain injury had resolved and that he does not have any work restrictions related to that incident.<sup>2</sup> EX 13. In so finding Dr. Herzog acknowledged claimant's subjective discomfort, but did not find it disabling. The administrative law judge gave less weight to Dr. Kalvoda's opinion that claimant cannot work overtime, CX 2, because it was based on claimant's subjective complaints of pain, which the administrative law judge found suspect. In this regard, the administrative law judge found that claimant did not seek medical treatment for over two and one-half years prior to December 2003 despite his testimony that he was suffering, and he testified at the hearing to suffering greater pain than he had related to Dr. Herzog and Dr. Kalvoda. Decision and Order at 6.

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<sup>2</sup> On October 4, 1999, claimant was evaluated by Dr. Bamberger, a rehabilitative specialist, who diagnosed claimant with myofascial pain syndrome and questionable impingement. Dr. Moeller, an orthopedist, evaluated claimant on July 24, 2000 and diagnosed an impingement syndrome in his left shoulder. Claimant underwent an MRI study on January 3, 2001, which showed some evidence of minor degenerative changes and tendonitis, but no shoulder impingement was seen. Dr. Herzog reviewed the MRI report. Whether claimant had impingement syndrome is not material in view of Dr. Herzog's opinion that claimant's injury had resolved.

The administrative law judge is entitled to weigh the medical evidence and to draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961). Moreover, it is solely within the administrative law judge's discretion to accept or reject all or part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, the Board may not reweigh the evidence or interfere with the administrative law judge's credibility determinations unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). We cannot say on the record before us that the administrative law judge erred in finding that claimant's testimony and subjective complaints of pain are exaggerated and that therefore, Dr. Kalvoda's opinion is entitled to less weight than that of Dr. Herzog. As the administrative law judge's finding that claimant 1999 shoulder condition fully resolved and that claimant can return to his usual employment without restrictions is supported by substantial evidence, is rational, and in accordance with law, we affirm the administrative law judge's finding. *See generally Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

Claimant also contends that the administrative law judge erred in denying permanent partial disability benefits for his loss of post-injury overtime merely because claimant has no permanent physical impairment. Claimant contends this standard is relevant only in a scheduled injury case. We reject this contention. In this case, the administrative law judge credited Dr. Herzog's opinion that claimant has no work restrictions, and therefore the administrative law judge rationally concluded that any lost overtime cannot be due to the work injury. *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9<sup>th</sup> Cir. 1990)(table). As claimant has not raised any reversible error on the part of the administrative law judge, we affirm the administrative law judge's termination of his partial disability benefits subsequent to December 9, 2003, and the denial of claimant's claim for ongoing permanent partial disability benefits.

Accordingly, we affirm the administrative law judge's Decision and Order on Modification and Order Denying Reconsideration and Motion to Reopen the Record.

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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JUDITH S. BOGGS  
Administrative Appeals Judge