

BRB Nos. 05-0493 and
05-0922

ADELINE COTTEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY)	DATE ISSUED: 02/21/2006
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order, Decision and Order Denying Claimant's Motion for Reconsideration, and Decision and Order Denying the Request for Modification Under Section 22 of the Act of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Adeline Cotton, Franklin, Virginia, *pro se*.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order, Decision and Order Denying Claimant's Motion for Reconsideration, and Decision and Order Denying the Request for Modification Under Section 22 of the Act (2004-LHC-01224) of Administrative Law Judge Richard K. Malamphy 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). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by substantial evidence, and in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the fourth time. To recapitulate the facts, claimant was injured during the course of her employment as a tank tester on July 27, 1977, when a metal plate fell two feet, striking her on her right shoulder and chest, and fracturing her sternum. Claimant attempted to return to work in September 1977 and January 1978, but was terminated for violating the rule requiring that she call employer once every five days when she is absent from work. Employer voluntarily paid claimant temporary total disability benefits from July 29 to September 7, 1977, and from September 29 to December 4, 1977. Claimant sought continuing disability benefits under the Act.

In the first Decision and Order, Administrative Law Judge Giesey found that claimant had no continuing physical or mental disability which arose out of her work injury and, therefore, that she was entitled to no further compensation under the Act. On appeal, the Board vacated the administrative law judge's finding and remanded the case to the administrative law judge to consider and discuss all of the medical evidence regarding claimant's alleged physical and psychological disabilities. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). On remand, the administrative law judge found that the physical effects from claimant's July 1977 work-injury had long since healed and any psychological disability which claimant had did not render her incapable of performing gainful employment. Thus, the administrative law judge denied compensation benefits. On appeal, the Board vacated the administrative law judge's finding that claimant sustained no impairment between December 4, 1977 and 1982 and remanded for further findings regarding this period of alleged disability. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 92-2333 (Nov. 29, 1995).

On second remand, Administrative Law Judge DiNardi found that claimant sustained no impairment between 1977 and 1982, and that, in any case, she is barred from receiving compensation as of November 8, 1985, pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4), for unreasonably refusing a physical examination. He also determined that claimant is not entitled to any additional medical benefits paid by employer for either physical or psychological problems. This decision was appealed, and the Board affirmed the administrative law judge's finding that the evidence did not establish claimant's inability to perform her work due to her injury after December 1977. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0420 (Jan. 24, 2002). In addition, the Board affirmed the administrative law judge's finding that claimant did not require further medical treatment for her work-related injury after December 1977 as it was supported by substantial evidence. *Id.* This decision was summarily affirmed by the

United States Court of Appeals for the Fourth Circuit. *Cotton v. Director, OWCP*, No. 02-1253 (Sept. 24, 2002).¹

Subsequently, on June 5, 2003, claimant filed a petition for modification before the Office of Administrative Law Judges. In support of her petition, claimant submitted documentation regarding numerous and varied medical conditions she suffered since the adjudication of her original claim. Administrative Law Judge Malamphy (the administrative law judge) found that there was no evidence that claimant's current conditions are causally related to her 1977 work injury, and thus denied the petition for modification. The administrative law judge summarily denied claimant's motion for reconsideration. Claimant appealed this decision without assistance of counsel, but submitted additional documentation with her notice of appeal. BRB No. 05-0493. The Board issued an Order on March 16, 2005, informing claimant that it cannot consider documents which were not received into evidence at the hearing before the administrative law judge and instructed claimant to seek modification if she wanted the evidence to be considered.

Claimant then filed an additional petition for modification with the administrative law judge and the Board dismissed her appeal without prejudice. The administrative law judge issued an order allowing the submission of new evidence and briefs. In his subsequent decision, the administrative law judge found that the evidence submitted into evidence by claimant to support her motion for modification had been previously submitted by employer and considered by the administrative law judge in the prior adjudication of her claim. Thus, as there was no new evidence to support a change in condition or a mistake in fact, the administrative law judge denied claimant's second request for modification.

Claimant, without assistance of counsel, appeals the administrative law judge's decision denying modification, BRB No. 05-0922, and also requested reinstatement of her appeal of the Decision and Order filed December 28, 2004, and the Decision and Order Denying Claimant's Motion for Reconsideration filed February 22, 2005. The Board granted claimant's request and consolidated the appeals for purpose of decision. Employer responds, urging affirmance of the administrative law judge's decisions as they are rational and supported by the evidence.

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

¹ The United States Supreme Court denied claimant's petition for writ of certiorari, *Cotten v. Director, OWCP*, 538 U.S. 964 (2003), and petition for rehearing, *Cotten v. Director, OWCP*, 538 U.S. 1054 (2003).

mistake of fact in the prior decision or a change in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party seeking modification has the burden of proof in demonstrating the mistake in fact or change in conditions. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In this case, claimant first attempted to establish that her physical condition had changed in that she now suffers from additional medical conditions that are causally related to her 1977 work injury.

In his 2004 Decision and Order, the administrative law judge found that none of the medical reports dated after the initial adjudication of this claim relates claimant's current medical conditions to her 1977 work injury. Moreover, the administrative law judge found that in 2004 claimant was examined by Dr. Ross, who opined that claimant's work injury had fully resolved without any permanent disability or impairment. Thus, the administrative law judge concluded that claimant did not establish that there was a change in her condition which warranted modification. Although claimant submitted a number of medical reports documenting different medical conditions, including mandibular problems, diabetes, mild changes in the cervical and lumbar spine, right ankle pain, and low back pain, none of these reports suggests that the conditions are related to claimant's work injury. *See* Cl. Exs. 118, 119, 128, 130, 158. Therefore, we affirm the administrative law judge's finding that the evidence claimant submitted in support of her 2003 petition for modification did not establish a change in condition since the 2001 adjudication of her claim, as it is supported by substantial evidence. *See Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983)(claimant did not establish that his back condition had worsened since the prior decision denying benefits and thus had no compensable disability as a result of his back injury); *see also Champion v. S & M Traylor Bros.*, 690 F.2d 285 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

With regard to the administrative law judge's last decision, claimant submitted to the Board, and then to the administrative law judge, exhibits employer had introduced into the record in prior proceedings. Claimant attempted to establish a mistake in fact as to the work-relatedness of various medical conditions previously diagnosed as well as the work-relatedness of more recently diagnosed conditions. The administrative law judge stated that he reviewed the material submitted by claimant and found that it does not establish a mistake in fact or change in condition. Decision and Order at 4 (July 27, 2005). Although the administrative law judge has the authority to modify a prior decision based only on "further reflection on the evidence initially submitted," *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), the administrative law judge did not err in this case in finding the evidence insufficient to establish the work-relatedness of any medical condition. *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000)(table). In sum, we affirm the administrative law judge's denial of modification as claimant did not establish a mistake

in fact with regard to the medical conditions that were the subject of the prior proceedings or a change in her condition due to any work-related medical problem. *Id.*

Accordingly, the administrative law judge's Decision and Order and Decision and Order Denying Claimant's Motion for Reconsideration (BRB No. 05-0493) and the Decision and Order Denying the Request for Modification Under Section 22 of the Act (BRB No. 05-0922) are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge