BRB No. 89-1949

NADINE BOONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Motion for Reconsideration of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

P. Scott De Bruin (Patten, Wornom & Watkins), Newport News, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

BROWN, Administrative Appeals Judge:

Employer appeals the Decision and Order and Order on Motion for Reconsideration (80-LHC-1281) of Administrative Law Judge Michael P. Lesniak denying modification 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 if they 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 involves a request for modification of an administrative law judge's decision. Claimant was employed by employer as a grinder in a submarine from December 1975 until September 1979, during which time she was exposed to dust, powder and smoke. In July 1978, she was first seen by Dr. Graham, a cardiovascular and thoracic surgeon, with complaints of cough, intermittent hoarseness and an episode of chest pain. Dr. Graham stated she most likely had sarcoidosis, a disease of unknown etiology, but said that without further tests, he could not rule out other conditions. Claimant testified that after 3 weeks of welding on a submarine beginning in July 1979, she began experiencing shortness of breath and dizziness. 1981 Tr. at 137. Claimant returned to Dr. Graham in September 1979, complaining of shortness of breath, cough, choking and mucous

condition. Dr. Graham found a restrictive lung impairment and advised claimant to move to a cleaner environment because the pollutants she was exposed to on the job might worsen her pulmonary condition. Claimant was unable to find a job in a cleaner environment with employer and was therefore terminated by employer for personal medical reasons on September 20, 1979. In April 1980, claimant found employment as a nuclear medical technician at a hospital, receiving a lower salary than she earned with employer. Claimant last saw Dr. Graham in April 1980, at which time she was symptom-free.

Claimant sought compensation under the Act. During an April 1981 hearing, claimant testified that she was feeling fine and that her symptoms had gone away. In January 1982, at a subsequent hearing, claimant submitted two x-rays that showed the continued presence of the disease; however, claimant stated that she still felt well and had not seen a doctor for pulmonary problems since April 1980. *See* 1982 Decision and Order at 6. In his decision, Administrative Law Judge Chao initially invoked the Section 20(a) presumption, found it was not rebutted and thus held claimant's sarcoidosis was related to her employment. He denied benefits, however, on the basis of Dr. Graham's testimony that claimant had not suffered from her earlier symptoms since April 1980; thus, the administrative law judge held that claimant failed to prove that she was disabled due to her work-related disease. Claimant appealed the denial of benefits; employer initially cross-appealed, but withdrew its appeal. The sole issue presented on appeal thus involved the extent of disability. The Board vacated the administrative law judge's finding that claimant is not disabled and remanded the case for the administrative law judge to consider the extent of claimant's disability. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 1 (1988). On June 21, 1988, Judge Chao issued a Supplemental Decision and Order Upon Remand consistent with the parties' stipulations, awarding claimant temporary total disability compensation from September 21, 1979, to August 28, 1980; permanent partial disability compensation with a weekly compensation rate of $50.98 from August 29, 1980, until October 30, 1980; and, thereafter, permanent partial disability at a weekly rate of $36.64. Employer was found to be entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). This decision was not appealed.

On April 26, 1988, employer filed a petition for modification, asserting a mistake of fact regarding the administrative law judge's findings of causation and disability, and a change of condition regarding claimant's disability and wage-earning capacity. In support of its petition, employer submitted the June 29, 1988, medical report of Dr. Shaw, along with that physician's subsequent correspondence, in which Dr. Shaw opined that claimant's sarcoidosis is not work-related, that claimant may return to her former employment without any work restrictions regarding exposure to dust, fumes or activity and that, if necessary, claimant may wear a respirator to protect her lungs from significant dust exposure. Emp. Exs. 6, 8.

In his Decision and Order on modification, Administrative Law Judge Lesniak determined that employer had not rebutted the presumption at Section 20(a) with regard to the work-relatedness of claimant's sarcoidosis. Alternatively, the administrative law judge credited the opinions of Drs. Graham and Ross and found that claimant's work exposure to inhalation hazards would constitute a work-related injury, as it would add another irritant to an abnormal lung and thus aggravate claimant's lung symptomatology. Next, the administrative law judge found insufficient change in

claimant's lung condition to warrant terminating her benefits. The administrative law judge rejected Dr. Shaw's opinion and found that a return to work and exposure to inhalation hazards would aggravate claimant's pulmonary condition. Finally, the administrative law judge determined that employer did not establish a change in claimant's wage-earning capacity. Accordingly, employer's petition for modification was denied. Employer's subsequent motion for reconsideration was granted, but the relief requested was denied.

On appeal, employer challenges the administrative law judge's findings regarding causation and the extent of claimant's disability, as well as the administrative law judge's denial of the relief requested in its motion for reconsideration. Claimant responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification of a prior decision is permitted at any time prior to one year after the last payment of compensation or the rejection of the claim, based on a mistake of fact in the initial decision or a change in claimant's condition.[1] *See Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 63 U.S.L.W. 4548 (U.S. June 12, 1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). A party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). Additionally, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

We first address employer's contention that it established a mistake of fact in the causation finding. Employer asserts that Administrative Law Judge Lesniak erred in discrediting Dr. Shaw's June 1988 opinion that claimant's sarcoidosis is not work-related and that claimant's pulmonary condition would not be aggravated by her exposure to dust and fumes at employer's facility. In establishing that an injury arises out of her employment, a claimant is aided by the Section 20(a) presumption which applies to the issue of whether an injury is causally related to employment activities. 33 U.S.C. §920(a); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by her employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Employer alleges that the opinion of Dr. Shaw is sufficient to establish that claimant's pulmonary condition would not be aggravated by her exposure to dust and fumes at employer's

[1]In this case, employer raises a change in claimant's physical, as well as economic, condition and a mistake of fact regarding causation and claimant's disability.

facility, and that claimant's sarcoidosis is not work-related. In addressing the issue of causation, however, the administrative law judge credited the opinions of Drs. Graham and Ross from the initial proceedings in this case and concluded that claimant's pulmonary condition would be aggravated by her exposure to dust and fumes at employer's facility. Claimant initially experienced symptomatology relating to a lung condition while employed at the shipyard; her symptoms ceased when she left the shipyard after Dr. Graham advised her to seek employment in a cleaner environment. Decision and Order at 6. Dr. Graham recommended in 1979 that claimant be placed in an environment where she would not be exposed to inhalation hazards. Dr. Graham testified in the initial proceedings that exposure to inhalation hazards would not necessarily advance claimant's sarcoidosis but would add another irritant to an otherwise abnormal lung. The administrative law judge credited this opinion, finding that Dr. Ross was essentially in agreement with Dr. Graham regarding the deleterious effects of continued exposure in creating additional impairments which could increase symptomatology. *See* Decision and Order at 7-8. The administrative law judge acknowledged that Dr. Shaw's 1988 opinion was sent to Dr. Graham in 1989, that Dr. Graham initially refused to comment because he had not seen claimant since 1980 and that he wrote a letter dated March 3, 1989, stating he did not feel the need to see claimant as she had been seen by Dr. Shaw, a reputable pulmonologist, on whose opinion the employer's counsel could rely. EMX 9. The administrative law judge gave no weight to this letter, finding it was a "product of Employer's aggressive defense as opposed to reliance upon Dr. Graham's independent judgment." Decision and Order at 9.

The administrative law judge concluded that even if claimant's underlying lung condition was not work-related, the opinions of Drs. Graham and Ross were most reasonable and "thus, the aggravation of claimant's symptomatology would be her compensable injury." Decision and Order at 10. The administrative law judge could properly credit these opinions. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Any error committed by the administrative law judge in finding the opinion of Dr. Shaw insufficient to rebut the Section 20(a) presumption is harmless, inasmuch as the administrative law judge's finding that causation is established by the credible evidence of aggravation of claimant's pulmonary condition in the record as a whole is rational and supported by substantial evidence.[2] *See Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). The finding of a causal relationship based on aggravation of symptomatology is also consistent with law. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984). We, therefore, affirm the administrative law judge's finding of a causal relationship between claimant's pulmonary symptomatology and her employment at employer's facility.

Employer next contends the administrative law judge erred by finding that claimant remains permanently partially disabled, and thus entitled to benefits based on a loss of wage-earning capacity. *See* 33 U.S.C. §908(c)(21), (h). Specifically, employer, relying on the opinion of Dr. Shaw, contends that claimant is capable of returning to her former employment duties without work

[2]We thus need not address whether employer established a basis for modifying the prior finding that claimant's underlying condition of sarcoidosis was caused by the work environment.

restrictions. Alternatively, employer relies on Dr. Shaw's opinion that claimant's lung impairment does not prevent her from wearing a respirator at work. Lastly, employer asserts that claimant's testimony of expected future wages as a real estate agent establish that she no longer has a loss of wage-earning capacity.

The Board has held that the standard for determining disability is the same during Section 22 modification proceedings as it is during initial adjudicatory proceedings under the Act. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428, 431 (1990). In the instant case, employer submitted the report of Dr. Shaw, who opined that claimant could return to work without restrictions in support of its petition for modification. The administrative law judge considered this opinion but found insufficient evidence of change in claimant's physical condition to warrant terminating benefits. The administrative law judge first found that claimant's condition had improved by the time of her testimony in the initial hearings in 1981 and 1982, when she revealed that her symptoms had ceased after she left the shipyard, a fact which she confirmed in her subsequent testimony in 1989. Thus, the administrative law judge concluded there had been no change in how claimant felt since leaving the shipyard. The administrative law judge further found Dr. Shaw's opinion to be insufficient to rebut the Section 20(a) presumption, noting the doctor had found the disease still present, describing it as "inactive and *slightly* improving." Decision and Order at 9 (quoting EMX 6, p.2, emphasis in Decision and Order). The administrative law judge then relied upon the prior testimony of Drs. Graham and Ross to conclude that the greater weight of the evidence indicated that exposure to hazardous inhalants would irritate claimant's abnormal lung condition. The administrative law judge stated that he was unimpressed with Dr. Graham's most recent remarks, as previously discussed. We hold that the administrative law judge committed no reversible error in weighing the evidence regarding the alleged change in claimant's physical condition. Therefore, his rejection of Dr. Shaw's opinion that claimant could return to work without restrictions is affirmed. Moreover, the administrative law judge's decision to deny termination of benefits is consistent with law; the Act does not require an employee to remain in a hazardous environment risking more severe pulmonary problems. *Crum*, 738 F.2d at 479, 16 BRBS at 125 (CRT); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574, 8 BRBS 818, 823 (1st Cir. 1978).

Employer, however, also argued that claimant could return to work without danger of hazardous exposure if she wore a respirator. In its petition for reconsideration, employer specifically requested that the administrative law judge address the evidence which supported this contention. The administrative law judge summarily denied employer's motion "for the reasons set forth in claimant's response." *See* Order on Motion for Reconsideration. The administrative law judge's reliance on claimant's response brief, and his failure to independently analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion violates the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(C)(3)(A); *see Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In the instant case, the record contains evidence which, if credited by the administrative law judge, may support a finding that claimant is capable of resuming her employment duties with employer if she wears a respirator. Specifically, Dr. Shaw opined that

claimant's pulmonary condition does not prevent her from wearing a respirator, and claimant's co-worker, Mr. Berry, testified that, after claimant stopped working for employer, her former co-workers were fitted for respirators and that some employees are required to wear respirators during the course of their employment. Moreover, the administrative law judge noted claimant's testimony that she feels well, she has no present medical restrictions due to her pulmonary conditions, and she is not taking any medication. The administrative law judge's failure to consider the evidence that claimant may be able to return to work without further injurious exposure makes it impossible for the Board to apply its standard of review. We therefore vacate the administrative law judge's determination that claimant is incapable of resuming her usual employment duties with employer, and we remand this case for the administrative law judge to consider and discuss all of the evidence relevant to this issue.

Lastly, employer contends that the administrative law judge erred in finding that claimant continues to have a loss of wage-earning capacity due to her work injury because the administrative law judge failed to rely upon claimant's testimony that she hopes to earn $18,000 a year in the future as a real estate agent. We disagree. In the instant case, the administrative law judge reasonably declined to utilize the amount of income which claimant stated she hoped to earn in the future when he discussed claimant's post-injury wage-earning capacity; rather, the administrative law judge credited evidence that claimant presently earns $2,000 a year, to support his finding that claimant's wage-earning capacity had not improved. We affirm the administrative law judge's decision to credit claimant's present earnings, as it is rational and is in accordance with law. *See Seidel v. General Dynamics Corp.*, 22 BRBS 403, 405-406 (1989). Accordingly, the administrative law judge's conclusion that employer failed to establish an increased earning capacity based on claimant's anticipated future earnings as a real estate agent is affirmed.

Accordingly, the administrative law judge's determination regarding the extent of claimant's disability is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues' decision to affirm the administrative law judge's findings that claimant sustained a work-related injury and that employer failed to establish a change in claimant's loss of wage-earning capacity based upon claimant's anticipated future earnings as a real estate agent. I must respectfully dissent, however, from their decision to vacate and remand this case for the administrative law judge to address whether claimant could return to work if she wore a respirator. The administrative law judge, as is within his discretionary authority as trier of fact, rationally credited the opinions of Drs. Graham and Ross over the opinion of Dr. Shaw when deciding the issue of the extent of claimant's disability. As the administrative law judge could permissibly accord Dr. Shaw's opinion, including his assessment that claimant could wear a respirator at work, less weight, I would affirm the administrative law judge's opinion in all respects, including the determination that claimant is incapable of resuming her welding duties with employer, as that finding is supported by substantial evidence.

NANCY S. DOLDER
Administrative Appeals Judge