BRB No. 11-0341

ALVIN MOFFIT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
METRO MACHINE OF PENNSYLVANIA	)	DATE ISSUED: 11/14/2011
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Brian R. Steiner (Steiner, Segal, Muller & Donan), Philadelphia, Pennsylvania, for claimant.

Michael D. Schaff (Schaff & Young, PC), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification (2010-LHC-00437; 2010-LHC-00438) of Administrative Law Judge Janice K. Bullard 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.33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim for benefits under the Act alleging that, on October 3, 2000, he sustained a work-related injury to his left wrist when he was struck on the hand by a sandblasting hose, and that, on October 13, 2000, he sustained work-related injuries to his right shoulder, cervical spine and back when he fell backwards after striking his head on a bulkhead. Claimant returned to work for employer after each incident and continued to be employed until he voluntarily left his position on November 22, 2000. In a Decision and Order dated December 19, 2007, Administrative Law Judge Romano determined that while claimant's claim was not barred by Section 3(c) of the Act, 33 U.S.C. §903(c), claimant failed to establish that his wrist and shoulder conditions were related to his employment with employer. The administrative law judge also found that while claimant established that his cervical spine and back conditions were work-related, those conditions did not prevent claimant from performing his usual employment duties with employer from October 13, 2000, until claimant resigned his position on November 22, 2000. Consequently, the administrative law judge denied claimant's claim for benefits.

Claimant appealed, and employer cross-appealed, Judge Romano's decision to the Board. In a Decision and Order dated November 26, 2008, the Board, *inter alia*, affirmed the administrative law judge's finding that claimant's claim was not barred by Section 3(c) of the Act, vacated the administrative law judge's findings regarding the lack of a causal relationship between claimant's wrist and shoulder conditions and his employment with employer, and remanded the case for further findings. *A.M. [Moffit] v. Metro Machine of Pennsylvania*, BRB Nos. 08-0312/A (Nov. 26, 2008) (unpub.).

In his Decision and Order on Remand dated May 14, 2009, Judge Romano specifically addressed the issues identified in the Board's decision and once again determined that neither claimant's wrist nor right shoulder condition was work-related. He further found that claimant was entitled to medical benefits as a result of his work-related cervical spine and back conditions. Claimant appealed the Decision and Order on Remand to the Board. BRB No. 09-0631. On August 13, 2009, the Board dismissed claimant's appeal after being notified that claimant had filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that claimant had obtained new evidence in support of his claim for temporary partial disability benefits during the period of November 22, 2000 through November 17, 2006.

Claimant's case was subsequently assigned to Administrative Law Judge Bullard (the administrative law judge). In her Decision and Order on Modification, the administrative law judge found that claimant did not establish either a mistake in a determination of fact in Judge Romano's prior decisions or a change in his condition. Accordingly, the administrative law judge denied claimant's claim for modification.

On appeal, claimant challenges the administrative law judge's denial of his request for modification. Employer responds, urging affirmance.

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 mistake of fact in the initial 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 United States Supreme Court has stated that, under Section 22, 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 submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

We initially address claimant's challenge to the administrative law judge's finding that claimant did not establish a mistake in fact with respect to Judge Romano's determination that claimant's wrist condition is not work-related. Judge Romano determined that employer had established rebuttal of the Section 20(a) presumption with respect to claimant's wrist injury based on the opinion of Dr. Schmidt, who opined that claimant "has a degenerative condition of his left wrist, which I cannot correlate to his work injury," and that he could not "correlate [claimant's] ongoing treatment to his work history." EX 8 at 4. Judge Romano further noted that claimant had stated to Dr. Schmidt that his left wrist was symptomatic before his October 3, 2000, work injury, that Dr. Schmidt additionally opined that claimant's wrist condition had required surgery before the work injury, and that Dr. Schmidt had not stated that claimant's employment even slightly exacerbated his pre-existing condition. Judge Romano found this evidence sufficient to establish the lack of a direct causal relationship between claimant's wrist injury and the work incident, as well as a lack of aggravation. Consequently, Judge Romano concluded that employer presented evidence sufficient to rebut the Section 20(a) presumption. Upon weighing the evidence as a whole, Judge Romano found that claimant did not establish that his wrist condition his work-related.[1]

On modification, the administrative law judge found that claimant did not establish a mistake in fact with respect to these findings. Decision and Order on Modification at 12–13. The administrative law judge weighed the relevant medical evidence, *see O'Keeffe*, 404 U.S. at 256, and rationally found that Judge Romano's determinations regarding rebuttal of the Section 20(a) presumption and the etiology of claimant's wrist condition and surgery were based on well-documented and well-reasoned medical opinions. In addition, the administrative law judge found that claimant's new evidence, a report by Dr. Lee dated May 14, 2001, did not establish that

[1]In addition to Dr. Schmidt's opinion, Judge Romano relied on the opinions of Drs. Burnett, Zurbach, Mendez and Culp, none of whom affirmatively related claimant's wrist condition to the hose incident at work.

claimant's post-injury wrist surgery was related to his October 3, 2000, work injury, and that Drs. Gaffney, Dworkin and Carrigan did not address this issue. *See* CXs 2, 4; EX 6. The administrative law judge's finding that claimant did not establish a mistake in fact regarding rebuttal of the Section 20(a) presumption or with respect to the work-relatedness of his wrist condition on the evidence as a whole is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's denial of modification on this issue. *See Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000) (table).

Claimant next asserts that the administrative law judge erred in failing to award disability benefits during the period from November 22, 2000 through November 17, 2006. Specifically, claimant avers that the May 14, 2001, report of Dr. Lee, wherein that physician opined that claimant was restricted from repetitive bending and lifting greater than ten pounds, *see* CX 2, and claimant's testimony regarding his ongoing symptoms of back and neck pain from the October 13, 2000 work injury, establish that he was incapable of performing the light-duty work offered to him by employer. In her decision, the administrative law judge cited, *inter alia*, Dr. Lee's uncertainty regarding the etiology of claimant's back and neck pain in declining to credit Dr. Lee's opinion regarding claimant's post-injury physical limitations. Assuming, *arguendo*, Dr. Lee's opinion was creditable, the administrative law judge found that claimant did not establish his entitlement to disability benefits subsequent to November 22, 2000. The administrative law judge found that, after claimant returned to his usual work and complained that it was too strenuous, employer, in writing, made available to claimant light-duty work at its facility. The administrative law judge found that this work was within the restrictions given by Dr. Lee because claimant testified before Judge Romano in July 2007 that he had been capable of performing light-duty work between November 2000 and September 2006. *See* Decision and Order on Modification at 17–18; EX 27; July 19, 2007 Tr. at 86. As claimant left this suitable work on November 22, 2000, for reasons unrelated to his work injury, the administrative law judge found that claimant is not entitled to disability compensation.

We affirm the administrative law judge's finding that claimant did not establish a mistake in fact concerning his ability to work and the suitability of the employment offered by employer. The standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Moreover, in adjudicating a claim, it is well-established that the administrative law judge may draw her own inferences from the evidence of record, *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and it is impermissible for the Board to substitute its own views for those of the administrative law judge. *See Newport News Shipbuilding & Dry Dock Corp. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). The administrative law judge found that employer

offered claimant light-duty work following his work injuries in October 2000 in order to accommodate his subjective complaints, that claimant worked in both his regular and in light-duty positions post-injury until he voluntarily terminated his employment with employer on November 22, 2000, for reasons unrelated to his work injuries, and that claimant testified before Judge Romano that he was capable of light-duty employment until September 2006. The administrative law judge thus was not persuaded by claimant's testimony before her that the light-duty work exceeded his restrictions. *See* Decision and Order on Modification at 18. These findings are rational and supported by substantial evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Moreover, any loss of wage-earning capacity due to claimant's resignation from his job with employer is not compensable as it is not related to the work injury. *See generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Therefore, we affirm the finding that claimant did not establish a basis for modification of the denial of benefits subsequent to November 22, 2000.

Accordingly, the administrative law judge's Decision and Order on Modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGIINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge