BRB Nos. 87-2979
and 89-1909

CHARLES J. GRIGSBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE SHIPYARDS, INCORPORATED	)	DATE ISSUED
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits and Order Denying Relief of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Charles J. Grigsby, Marrero, Louisiana, *pro se*.

Bruce J. Toppin (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order Denying Benefits and Order Denying Relief (85-LHC-2351) of Administrative Law Judge C. Richard Avery 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).[1] In reviewing this *pro se* appeal, we must review the administrative law judge's findings of fact and conclusions of law to determine whether 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); 20 C.F.R. §§802.211(e), 802.220.

[1] By Order dated March 12, 1990, the Board reinstated claimant's appeal of the administrative law judge's Decision and Order Denying Benefits, BRB No. 87-2979, and consolidated it for purposes of decision with claimant's appeal of the administrative law judge's Order Denying Relief, BRB No. 89-1909.

Claimant, on December 15, 1980, allegedly sustained an injury to his back while moving a blower with five other men on employer's Dock Number 3. Claimant took two weeks off from work and subsequently returned to his usual duties until May 3, 1981, at which time he left employer's employment. On October 26, 1981, claimant filed a claim for benefits under the Act and, on September 22, 1982, underwent surgery for a bulging disc. In his Decision and Order, the administrative law judge found that claimant's credibility has been impeached and his that testimony alone, without supporting evidence, failed to establish that an accident occurred on December 15, 1980. Accordingly, as claimant failed to establish his *prima facie* case, the administrative law judge denied claimant's request for benefits. Claimant thereafter appealed the administrative law judge's decision to the Board. BRB No. 87-2979. While his appeal was pending, claimant informed the Board that he was seeking modification of the administrative law judge's Decision and Order; pursuant to this communication, the Board, in an Order dated February 28, 1989, dismissed claimant's appeal without prejudice and remanded the case to the administrative law judge for modification proceeedings. In an Order Denying Relief dated April 25, 1989, the administrative law judge concluded that claimant had not filed a petition for modification before the Office of Administrative Law Judges and that any request for such relief would now be untimely; thus, the administrative law judge denied the relief sought by claimant.

Claimant thereafter appealed the administrative law judge's Order Denying Relief to the Board. BRB No. 89-1909.

On appeal, claimant, appearing *pro se*, challenges the administrative law judge denial of his claim for benefits as well as the administrative law judge's failure to grant his request for modification. Employer responds, urging affirmance.

In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which applies to the issue of whether an injury is casually related to his employment. *See Swinton v. J.Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C.

Cir.), *cert. denied*, 429 U.S. 820 (1976). Before Section 20(a) is applicable, however, claimant bears the burden of establishing his *prima facie* case, *i.e.*, that he sustained some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Young & Co. v. Shea*, 397 F.2d 185, 188 (5th Cir. 1968), *cert. denied* 395 U.S. 920 (1969); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

We first address BRB No. 87-2979, in which claimant appeals the administrative law judge's Decision and Oredr Denying Benefits. Claimant asserts that he injured his back on December 15, 1980, while lifting a blower along with five other men. In support of his assertion, claimant relies solely on his testimony that he the alleged accident was witnessed by his co-workers and that he reported the accident to his supervisor, a timekeeper, and all of the physicians with whom he subsequently sought treatment.

In his Decision and Order, the administrative law judge's initially determined that the evidence of record fails to support claimant's testimony regarding the occurrence of an accident on December 15, 1980. The administrative law judge specifically noted that although claimant testified as to the identity of the five employees who witnessed the alleged accident, and that he immediately reported the accident to both his supervisor and a timekeeper, none of these individuals were called to testify at the formal hearing. Moreover, the administrative law judge noted that the testimony of the physicians subsequently seen by claimant contradict claimant's assertions that he informed those physicians that a work-related accident had occurred on December 15, 1980. Specifically, Dr. Kossover noted a patient history which included only a car accident with no mention of a work accident. *See* CX-9. Dr. Soboloff, an orthopedic surgeon who examined claimant at Dr. Kossover's request, noted that the only injury reported by claimant occurred eleven months prior to his examination of June 16, 1981. *See* CX-10. The insurance form signed by claimant on June 29, 1981, noted that claimant's condition was neither due to an injury nor the result of claimant's occupation. *See* EX-10. Dr. Cashio, who treated claimant from August 6, 1981 through March 15,

1982, for persistent lower back pain, reported that claimant denied any recent trauma. *See* CX-11. Lastly, Dr. Brown's April 29, 1982 letter to Dr. Cashio indicates that claimant told him he had fallen off a dry dock three years before he had to quit work. *See* CX-3. Based upon the testimony of these physicians, the administrative law judge determined that claimant, contrary to his assertions, made no mention of a December 1980 work injury to any physician until July 1982, when he was examined by Dr. Billings. *See* CX-1.

Additionally, the administrative law judge found that, although claimant denied having sustained prior back injuries, medical records submitted into evidence established that claimant had sustained prior back injuries as a result of both his employment and an automobile accident. *See* EX-12, 21, 60. Thereafter, based upon his evaluation of the evidence before him, the administrative law judge found that claimant's credibility had been impeached and that, as a result, claimant had failed to establish that an accident occurred on December 15, 1980. An administrative law judge may discredit a claimant's testimony to find that an accident at work did not occur where there are numerous inconsistencies with claimant's testimony. *See Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981)(Miller, J., dissenting), *aff'd* 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982). In this case, we hold that the administrative law judge extensively explained his reasons for finding claimant's testimony incredible; specifically, the administrative law judge found determinative the absence of corroborating testimony and the inconsistencies between claimant's testimony and the contemporaneous medical reports and testimony of record. *See Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). The Board will respect a reasonable decision of the factfinder regarding the credibility of a witness. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge's finding is supported by substantial evidence and is neither inherently incredible or patently unreasonable; we, therefore, affirm the administrative law judge's determination that claimant's testimony is incredible, and his consequent finding that claimant has failed to establish that a work-related accident occurred

on December 15, 1980. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

In BRB No. 89-1909, claimant appeals the administrative law judge's denial of his motion for modification. 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 based on a mistake of fact or change in claimant's condition. *See Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In order to reopen the record under Section 22, the moving party must allege a mistake of fact or change of condition and assert that evidence to be produced or of record would bring the case within the scope of Section 22. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Moore v. WMTA*, 23 BRBS 49 (1989).

In his Order Denying Relief, the administrative law judge determined that no motion for modification had in fact been filed by claimant and that any such relief would now be time barred pursuant to Section 22 of the Act; thus, the administrative law judge denied the relief sought by claimant. *See* Order at 2. We hold that the administrative law judge erred in failing to address claimant's request for modification, and we therefore vacate the administrative law judge's order. A request for modification need not be formal in nature, rather such a request may simply be a writing which indicates an intention to seek further compensation. *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); *Fireman's Fund Insurance Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974). Thus, claimant's response to the administrative law judge's order to show cause, in which claimant indicated an intention to seek modification on the basis of new evidence not discovered before the hearing, was sufficient to constitute a modification request under Section 22. *See generally Madrid*, 22 BRBS at 148. Additionally, as the one year time period within which modification of a denial of a claim must be sought begins to run on the date the decision denying the claim becomes final, *i.e.*, within one year after the conclusion of the appellate process, claimant's request for modification in the instant case was timely. *See generally Hudson v. Southwestern*

Barge Fleet Services, Inc., 16 BRBS 367 (1984). We therefore remand the case to the administrative law judge, who shall reopen the record pursuant to Section 22 to allow the parties to submit evidence; thereafter, in rendering his decision, he administrative law judge should consider both the old evidence and the newly submitted evidence. *See Duran,* 27 BRBS at 7.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed. The administrative law judge's Order Denying Relief is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge