



BRB No. 15-0040

ERIC KIRLEW)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HUNTINGTON INGALLS,)	DATE ISSUED: <u>Apr. 24, 2015</u>
INCORPORATED (AVONDALE)	
OPERATIONS))	
)	
Self-Insured)	
Employer/Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Eric Kirlew, Avondale, Louisiana, *pro se*.

Richard S. Vale, Frank J. Towers, and Pamela Noya Molnar (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification (2014-LHC-00824) of Administrative Law Judge Patrick M. Rosenow 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 an appeal by a claimant without counsel, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, rational, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant slipped and fell at work on January 4, 2011, injuring his right middle finger and left knee. He subsequently underwent arthroscopic surgery on his left knee followed by physical rehabilitation. Despite frequent complaints of pain and cramping in

his right hand, and recommendations for a vascular evaluation of his hand, claimant did not have such an evaluation prior to the administrative law judge's initial decision on May 9, 2013. In that decision, the administrative law judge found that: claimant was temporarily totally disabled from January 5 to November 8, 2011; claimant's knee condition reached maximum medical improvement on November 8, 2011; and employer established the availability of suitable alternate employment as of November 8, 2011. The administrative law judge awarded claimant permanent partial disability benefits under the schedule for a 16 percent permanent impairment to his left knee. 33 U.S.C. §908(c)(2). The administrative law judge found that claimant's hand injury had not reached maximum medical improvement because claimant credibly testified that this injury prevented him from returning to his usual work and there remained diagnostic and treatment options that had not yet been pursued.¹ Thus, the administrative law judge also awarded claimant temporary partial disability benefits for the loss of wage-earning capacity due to his hand injury, from November 8, 2011 and continuing. 33 U.S.C. §908(e); Decision and Order at 21, 23.

On January 10, 2014, employer filed a motion to terminate claimant's temporary partial disability benefits on the ground that claimant's hand injury had improved such that claimant could return to his usual work. Section 22 of the Act provides that any party in interest may seek review of a compensation case on the ground of a change in conditions or mistake in fact at any time prior to one year after the date of the last payment of compensation or one year after the rejection of a claim. 33 U.S.C. §922.² As claimant was receiving compensation for a temporary partial disability to his hand as of the date employer sought modification based on a change in condition, employer's request for modification was timely filed. *Island Operating Co., Inc. v. Director, OWCP*

¹ Specifically, the administrative law judge observed that claimant's treating doctor recommended a vascular evaluation, and employer's examining physician recommended capsule injections.

² Section 22 of the Act states, in relevant part:

Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

[*Taylor*], 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013). A party requesting modification due to a change in condition has the burden of showing the change in condition. *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). The standards for determining the nature and extent of a claimant's disability in a modification proceeding are the same as in the initial proceeding. See *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

The administrative law judge had previously concluded that claimant could not return to his usual work because of his hand injury; employer established the availability of suitable alternate employment within claimant's restrictions; and claimant's hand condition had not reached maximum medical improvement because additional treatment and diagnostic services had been recommended by both claimant's treating physician and employer's physician. In support of its petition for modification, employer submitted into evidence the opinions of Drs. Torrance and Faust, a vascular surgeon and an orthopedic hand surgeon, respectively. Dr. Torrance evaluated claimant's hand on August 15, 2013, and stated that, from a vascular perspective, he could not identify any abnormality of claimant's right hand or any factor attributable to his complaints; however, he found some mild swelling, which he believed would benefit from an orthopedist's evaluation. EX 2 at 42. On February 7, 2014, after reviewing claimant's records and tests, Dr. Torrance concluded that, from a vascular perspective, claimant's hand condition was at maximum medical improvement and that claimant does not have any restrictions due to this condition. *Id.* at 43. Dr. Faust evaluated claimant's hand on April 4, 2014. He stated that, from an orthopedic perspective, he could not explain claimant's complaints, and he believed claimant had functional difficulty with the right hand without any specific anatomic deficit. He opined that claimant's hand condition was at maximum medical improvement and that, from an orthopedic perspective, claimant is capable of returning to his former job without restrictions. *Id.* at 46-47.

The administrative law judge found that the opinions of Drs. Torrance and Faust constitute evidence of a change in claimant's physical condition since the issuance of his compensation order in 2013. Specifically, the administrative law judge found that this evidence establishes that claimant's hand condition has reached maximum medical improvement, needs no further medical treatment, no longer prevents him from returning to his usual work, and that it was clear the doctors would likely have assessed no impairment to the hand, should a scheduled award have been considered. The administrative law judge thus modified the award of temporary partial disability benefits to terminate as of April 4, 2014, the date of Dr. Faust's evaluation. Further finding that the record indicates that claimant was satisfied with Dr. Torrance until he issued his diagnosis and that the weight of the evidence is that no additional medical treatment is necessary, the administrative law judge denied claimant's request for a change of

physician. Claimant, without counsel, challenges these findings, and employer responds, urging affirmance.³

Although claimant testified that he continues to suffer pain in his hand that prevents him from working, the administrative law judge rationally credited the opinions of Drs. Torrance and Faust to find that claimant's hand condition reached maximum medical improvement and does not prevent him from returning to his usual work. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Therefore, we affirm the administrative law judge's finding that employer established a change in claimant's condition as it is supported by substantial evidence of record. *Ramos*, 34 BRBS 83. As this evidence establishes that claimant is not prevented by his work injury from performing his usual work, we affirm the administrative law judge's decision to terminate claimant's temporary partial disability award.⁴ *See generally Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2^d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001); *see also Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

At the modification hearing, claimant's counsel sought to have the administrative law judge authorize a change in claimant's physician. *See* Tr. at 38-41. The administrative law judge informed claimant that he should make this request to the district director. *Id.* Claimant did so, seeking a change to Dr. Habitz on the ground that claimant had not had his choice of an orthopedic surgeon. CX 1. By letter dated July 10, 2014, the district director noted that, in February 2014, he had recommended that employer authorize an evaluation by Dr. Faust, who is an orthopedic surgeon. As discussed above, Dr. Faust examined claimant on April 4, 2014, and opined, *inter alia*, that claimant was not in need of further treatment for his hand injury. In the July 10 letter, the district director informed claimant that he must make his change in physician

³ Claimant was represented by counsel before the administrative law judge.

⁴ Because Drs. Torrance and Faust concluded that claimant's hand condition reached maximum medical improvement with no restrictions, the administrative law judge rationally concluded that their opinions do not support a permanent disability rating under the schedule. Decision and Order on Modification at 7 n.31. The administrative law judge's finding is also supported by Dr. Cashio's January 31, 2012 letter, stating that he assigned no permanent physical impairment for claimant's right middle finger. Decision and Order at 13; CX 6 at 27; *see Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

request to the administrative law judge, as the case was pending before him. Thus, claimant renewed his motion to the administrative law judge.

The administrative law judge denied claimant's motion to change physicians. The administrative law judge found that claimant had been satisfied with Dr. Torrance until he rendered an opinion "against" claimant. The administrative law judge further found that the medical evidence shows that no further treatment is necessary for claimant's hand injury. Decision and Order on Modification at 8.

We affirm the administrative law judge's finding that claimant is not entitled to a change in physician, although we do so on different grounds, as the administrative law judge mischaracterized claimant's relationship with Dr. Torrance.⁵ Claimant was treated by Dr. Cashio, claimant's choice of physician and an orthopedist, for his knee and hand injuries during all of 2011; Dr. Cashio saw claimant again in November 2012. EX 10; *see generally* *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd*, 61 F.3d 900 (4th Cir. 1995) (table). Dr. Cashio sought to have claimant examined by Dr. Batson, a vascular surgeon. Due to Dr. Batson's unavailability, Dr. Torrance examined claimant instead on August 15, 2013. EX 2 at 39-43. In February 2014, the district director recommended that employer authorize an examination by Dr. Faust, an orthopedic surgeon who is a hand specialist. Employer authorized the examination, which occurred on April 4, 2014. EX 2 at 44-47. Thus, claimant has had examinations by appropriate specialists. *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a). Dr. Torrance did not find any vascular abnormalities in claimant's hand. Dr. Faust did not find any orthopedic abnormalities in claimant's hand, and he specifically stated that claimant is not in need of any further medical treatment for his hand injury. EX 2 at 47. Under these circumstances, claimant has failed to establish his entitlement to a change in physicians for his hand injury as the credited evidence is that claimant is not in need of further treatment. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993) (a claimant need not be disabled in order to be entitled to medical benefits, but must establish that he needs treatment for his work injury).

⁵ Since the record reflects that Dr. Torrance saw claimant on only one occasion, it does not support a finding that claimant was "satisfied" with his treatment until Dr. Torrance rendered an unfavorable opinion.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge