BRB No. 03-0415

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| JOSEPH AMBROSE | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| BETHLEHEM STEEL CORPORATION | ) | DATE ISSUED: Feb. 25, 2004 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Michael C. Eisenstein, Baltimore, Maryland, for claimant.

Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2001-LHC-0211) of Administrative Law Judge Alice M. Craft 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the third time claimant has come before the Board regarding this injury. Claimant worked as a ship fitter for employer, and he was injured on April 4, 1996, when some staging boards weighing approximately 75 or 80 pounds fell from above him. One board hit his head and shoulder and knocked him to the ground. Tr. at 28-29. Claimant was taken to the dispensary and then to the hospital and has not worked since that date. Tr. at 29-30. Although employer offered claimant restricted work, claimant did not report for duty. Initially, claimant filed a claim for temporary total disability and medical

benefits, and Administrative Law Judge Schreter-Murray heard the case. Judge Schreter-Murray discredited both claimant's testimony and the opinion of his treating physician, Dr. Friedler. She relied on the opinions of claimant's initial physician, Dr. Bailey, and employer's expert, Dr. Apostolo, and determined that the accident caused a soft tissue injury or sprain and contusions to his neck and shoulder, all of which have resolved, and that any knee problems are not work-related. Decision and Order (Nov. 17, 1997) at 5, 12, 14-15 (Decision and Order I). Having found that claimant's injuries healed with no residual impairment, that claimant was offered and refused light duty work, and that Dr. Friedler's treatment was unauthorized and unnecessary, Judge Schreter-Murray denied all disability benefits and denied all medical benefits except expenses related to Dr. Bailey's evaluation and/or treatment. *Id.* at 15-16. Claimant appealed the decision to the Board, and the Board affirmed Judge Schreter-Murray's findings but vacated the denial of compensation, and remanded the case only on the narrow question of whether the alternate job offered by employer was suitable for claimant. *Ambrose v. Bethlehem Steel Corp.*, BRB No. 98-469 (Nov. 27, 1998).

On remand, the case was assigned to Administrative Law Judge Holmes, as Judge Schreter-Murray was no longer with the Office of Administrative Law Judges. Judge Holmes defined the question before him as including a discussion of whether claimant can perform light duty work and whether he is entitled to temporary total disability benefits for the period between May 1, 1996, when claimant was released to light duty work, and October 30, 1996, when Dr. Apostolo said that claimant could return to his usual work. Decision and Order on Remand at 1-2 (Decision and Order II). Judge Holmes found that claimant could perform the work offered by employer and was not entitled to any benefits. *Id.* at 2-3. Claimant also appealed this decision to the Board, and the Board rejected claimant's arguments and affirmed the availability of suitable alternate employment as of April 5, 1996. Thus, the Board affirmed the denial of temporary total disability benefits. *Ambrose v. Bethlehem Steel Corp.*, BRB No. 99-1006 (June 23, 2000).

In September 2000, claimant filed a claim for permanent total and/or permanent partial disability benefits related to the same 1996 accident. Employer disputed the claim, and Administrative Law Judge Craft heard the case. She rejected employer's assertion that the law of the case doctrine applies to preclude claimant from seeking additional benefits for the same injury; however, she also rejected claimant's assertion that this claim should not be treated as a motion for modification of the previous denial of benefits. Decision and Order (Jan. 30, 2003) at 5 (Decision and Order III). Consequently, she determined that, as there was no evidence of a change in condition, claimant sought a motion for modification based on a mistake in the determination of a fact. *Id.* Based upon a review of all the evidence that was before the previous judges, as well as some additional evidence, Judge Craft found that claimant did not establish a continuing disability from his work-related accident. Thus, she agreed with Judge

Schreter-Murray's finding that claimant suffered a soft tissue injury to his neck and shoulder which had fully resolved as of October 30, 1996, and that claimant's knee problems were not work-related. Decision and Order III at 16. She credited the opinion of Dr. Apostolo, rejected that of Dr. Friedler, and found there is no residual impairment related to the work injury that affects claimant's ability to work. Consequently, she found there was no basis for modifying Judge Schreter-Murray's decision, and she denied the claim for permanent disability benefits. *Id.* at 17. Claimant appeals the decision, and employer responds, urging affirmance of the denial of benefits.

Initially, to the extent claimant's remarks in his brief are indicative of such a request, we decline to reconsider the findings made by either Judge Schreter-Murray or Judge Holmes. The decisions issued by those judges were appealed, considered by the Board, and ultimately affirmed. Specifically, Judge Schreter-Murray's findings that claimant's work injury resulted in a soft tissue injury to his neck and shoulder, which has resolved, and that his knee injury is not work-related, and her conclusion that claimant's entitlement to medical benefits is limited are final and are not, directly, the subject of the current appeal. *Ambrose*, BRB No. 98-469, slip op. at 2-3; Decision and Order I at 15. Similarly, Judge Holmes's findings that employer established the availability of suitable alternate employment and that claimant is not entitled to temporary total disability benefits are also final and are not at issue. *Ambrose*, BRB No. 99-1006, slip op. at 5; Decision and Order II at 2-3.

With regard to the case before us, claimant first contends Judge Craft erred by interpreting his claim for permanent disability benefits as a motion for modification of the previous denial of benefits instead of treating it as a separate and distinct claim, and as a result she denied him due process of law. We disagree. Judge Craft stated that although Judge Schreter-Murray's finding of no residual impairment was central to her denial of benefits and could be considered the law of the case,

> in the context of this claim, application of the doctrine is problematical both because of the fluid nature of the concept of disability in workers' compensation law, and because the current claim was filed less than one year after final rejection of [claimant's] initial claim by the BRB.

Decision and Order III at 4. She also stated that claimant was mistaken in his view that a "claim" refers to a category of benefits instead of its relationship to a particular injury. *Id.* at 5. Her interpretation is correct. A claim is filed based on an injury, which in this case occurred in 1996. *See* 33 U.S.C. §§902(3), 912, 913, 919. Once adjudicated, a decision as to the degree of resulting disability becomes final, and it may be reopened only under Section 22, 33 U.S.C. §922. Section 22 displaces doctrines of finality such as *res judicata* and the law of the case doctrine. *See Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 390 U.S. 459 (1968); *Consolidation Coal Co. v.*

*Borda*, 171 F.3d 175 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). Thus, Judge Craft properly rejected employer's position that the law of the case doctrine precluded her from revisiting the disability issue. As claimant has not alleged a new injury but merely a new type of disability related to the same 1996 injury addressed in the prior adjudications, his "claim" falls within the scope of Section 22. *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142, 145 (2002). As the claim was timely filed pursuant to Section 22, Judge Craft properly treated it as a motion for modification. *Id.*

Section 22 of the Act permits the modification of a final award or denial if the party seeking to alter the award or denial can establish either a change in conditions or a mistake in the determination of a fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). If the challenging party asserts an error in the determination of a fact, the administrative law judge has great discretion to correct any mistakes of fact, *see Banks*, 390 U.S. 459, and may consider wholly new evidence, cumulative evidence, or may further reflect on evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). If the challenging party asserts a change in condition, the award or denial may be modified if there is a change in either an employee's wage-earning capacity or a change in his physical condition. *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT). The party making such an assertion has the burden of establishing the change. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The standard for determining disability is the same in a modification proceeding as it is in an initial hearing.[1] *Id.*; *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

According to Judge Craft, claimant alleged that Judge Schreter-Murray erred in crediting Dr. Apostolo's opinion over that of Dr. Friedler but he did not allege a change in his conditions. Therefore, she addressed the issue of whether claimant established there was a "mistake" made in the determination that he had no residual impairment. Decision and Order III at 5. She thoroughly examined all evidence before her, and she concluded that modification is not warranted. *Id.* at 16. As claimant does not contend there was a change in his conditions, we confine our inquiry to the question of whether substantial evidence supports Judge Craft's decision that claimant is not permanently disabled. In arguing she erred, claimant contends that Judge Craft, like Judges Schreter-Murray and Holmes, failed to find the existence of a disabling condition because she failed to give due consideration and credit to the testimonies of claimant and of Dr. Friedler.

[1]For this reason, we reject claimant's argument that Judge Craft reviewed the evidence using an improper standard.

Claimant testified that he worked full-time with no restrictions and only minor discomfort in his neck from a previous surgery, but that he has not been released, nor been able, to return to his usual work as a result of the head, neck, shoulder and knee injuries sustained at work in April 1996. Tr. at 23, 26, 28-29. Dr. Friedler determined that claimant's injury required surgery on his shoulder for a torn rotator cuff and that his knee injury prevents him from returning to work. Emp. Exs. 19-23. Drs. Bailey, Dollete, Wenzlaff, Folgueras and Apostolo, all diagnosed nothing more serious than contusions, and they suggested light duty work for a period of time. Emp. Exs. 8, 12, 14, 16, 17. Dr. Apostolo concluded that, as of October 30, 1996, the contusions had resolved, the pre-existing degenerative knee condition was not work-related, and claimant could return to work with no restrictions and no further treatment. Emp. Ex. 8; *see also* Emp. Exs. 7, 24.

Judge Craft credited the opinion of Dr. Apostolo, stating it is well reasoned, is consistent with the objective evidence, and is supported by the opinions of Drs. Bailey, Dollete, Folgueras and Wenzlaff. She also credited Dr. Apostolo's assessment that claimant's complaints were "embellished." Decision and Order III at 17. She rejected Dr. Friedler's opinion, stating he offered only conclusory statements with no supporting objective evidence. Additionally, she noted that some of his diagnoses and conclusions were contradictory and he later admitted they were wrong. *Id.*; Emp. Exs. 19, 22-23. It is within the administrative law judge's discretionary powers to determine how to credit and weigh the evidence of record, including the opinions of medical experts. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Judge Craft's decision here to give greater weight to Dr. Apostolo's opinion is rational. Thus, her conclusion that claimant has no residual impairment from his April 4, 1996, injury is supported by substantial evidence and must be affirmed. As she found no mistake in fact in the prior decisions, Judge Craft correctly found modification unwarranted. 33 U.S.C. §922. Consequently, we affirm the denial of permanent disability benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge