

MICHAEL J. GOINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J.J. FLANAGAN STEVEDORES	)	DATE ISSUED: <u>July 25, 2014</u>
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Michael J. Goins, Glenmora, Louisiana, *pro se*.

Michael D. Murphy (Sheehy, Ware & Pappas, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Reconsideration (2014-LHC-00040) of Administrative Law Judge Larry W. Price 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 legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine 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); 20 C.F.R. §802.211(e). If they are, they must be affirmed. *Id.*

Pending before the Board are claimant's *pro se* appeal of the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision and Order Denying Reconsideration, and the motion of J.J. Flanagan Stevedores to reform the caption to reflect that the proceedings before the administrative law judge and the Board involve only the claim against J.J. Flanagan Stevedores. For the reasons discussed below, we grant the motion to reform the caption and we affirm the administrative law judge's decisions.

This case has a lengthy procedural history. Claimant was involved in four separate accidents while in the course of his work as a longshoreman, the last of which occurred on April 25, 2005.<sup>1</sup> Claimant sought compensation under the Act for injuries to his back, right shoulder, and right hip, as well as for "mental unrest" which he alleged was due to all of the work incidents. He also alleged that the April 25, 2005 incident resulted in an aggravation of all of his prior injuries.

In his decision dated May 8, 2007, the administrative law judge found claimant entitled to temporary total disability benefits from January 17 through February 28, 2001, and from August 14, 2001 through December 10, 2002, payable by Lake Charles Stevedores; from July 6 through September 21, 2004, payable by J.J. Flanagan Stevedores; and from April 25, 2005 through July 5, 2006, payable by Lake Charles Stevedores. The administrative law judge also found Lake Charles Stevedores liable for reasonable medical treatment arising out of the April 25, 2005, work-related injuries.

Claimant sought modification of this decision pursuant to Section 22 of the Act, 33 U.S.C. §922. The administrative law judge, by Decision and Order on Modification dated July 29, 2008, denied claimant's request for modification and, furthermore, suspended payment of compensation pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4), based on claimant's unreasonable refusal to undergo an examination by Dr. Perry.

Claimant appealed these first two decisions. The Board reversed the administrative law judge's finding that claimant's psychological condition is not work-related, vacated his finding that claimant is not entitled to additional disability benefits as a result of the April 25, 2005 injury, and remanded the case for consideration of claimant's entitlement to disability and/or medical benefits for the period of claimant's

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<sup>1</sup> Claimant was employed by Lake Charles Stevedores at the time of the January 17 and August 14, 2001, and April 25, 2005 injuries, and by J.J. Flanagan Stevedores at the time of the July 6, 2004 injury.

physical disability following the most recent accident, in conjunction with any evidence of disability due to claimant's psychological condition. *M.G. [Goins] v. Lake Charles Stevedores, Inc.*, BRB Nos. 07-0891, 08-0803 (Aug. 14, 2009), *recon. denied* (Nov. 9, 2009) (Order). The Board also instructed the administrative law judge to determine the period during which claimant's benefits were to be suspended due to claimant's unreasonable refusal to see Dr. Perry. The Board affirmed the administrative law judge's award of benefits following each of the first three accidents, and his calculation of claimant's average weekly wage for each of the four injuries, pursuant to 33 U.S.C. §910(c).<sup>2</sup>

In the interim, claimant pursued claims against Lake Charles Stevedores and J.J. Flanagan Stevedores pursuant to Sections 31(c) and 49 of the Act, 33 U.S.C. §§931(c), 948a. The administrative law judge granted employers' motions for summary decision on the Section 31(c) claim. The administrative law judge dismissed the Section 49 claim against Lake Charles Stevedores. The administrative law judge addressed the merits of the Section 49 claim against J.J. Flanagan Stevedores, and found no evidence of discriminatory animus on the employer's part. Thus, the claims were denied.

Claimant appealed to the Board. The Board affirmed the administrative law judge's decisions in all respects. *Goins v. Lake Charles Stevedores, Inc.*, BRB Nos. 09-0733, 10-0321 (June 25, 2010). Claimant appealed this decision to the United States Court of Appeals for the Fifth Circuit, which denied his petition for review and affirmed the decisions of the administrative law judge and the Board. *Goins v. Director, OWCP*, 436 F. App'x 366 (5th Cir. 2011).

With regard to the merits of the disability claims, the administrative law judge held a hearing on remand from the Board. In his decision on remand, the administrative law judge admitted additional evidence into the record. He found that claimant's physical and pre-existing psychological problems combined to prevent him from performing any work as of the date of his last injury. The administrative law judge thus awarded claimant permanent total disability benefits from April 25, 2005 to July 7, 2008, and a continuing award of permanent total disability benefits from December 1, 2009, based on an average weekly wage of \$389.70, payable by Lake Charles Stevedores. The administrative law judge suspended the payment of permanent total disability benefits for the period during which claimant unreasonably refused to be examined by Dr. Perry, *i.e.*, July 8, 2008, through November 30, 2009. The administrative law judge also found that

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<sup>2</sup> The United States Court of Appeals for the Fifth Circuit dismissed the parties' appeals of this decision as the Board's decision was not final. 33 U.S.C. §921(c); *Lake Charles Stevedores, Inc. v. Director, OWCP*, No. 09-60747 (5th Cir. Mar. 30, 2010).

Lake Charles Stevedores is liable for additional medical benefits, but that, based on the new submitted evidence, claimant's psychological condition is not work-related.

Claimant and Lake Charles Stevedores appealed the administrative law judge's Decision and Order on Remand.<sup>3</sup> The Board declined to revisit the average weekly wage issues raised by claimant, pursuant to the law of the case doctrine. The Board affirmed the suspension of compensation during the period claimant refused to be examined by Dr. Perry, and the administrative law judge's finding that claimant's psychological condition is not work-related. The Board rejected Lake Charles Stevedores' challenge to the administrative law judge's decision to admit additional evidence on remand. The Board affirmed the finding that claimant is entitled to permanent total disability benefits as a result of his work injuries and his pre-existing psychological condition, and that Lake Charles Stevedores is liable for the treatment provided by Dr. Bernauer. *Goins v. Lake Charles Stevedores, Inc.*, BRB Nos. 11-0477/A (Mar. 21, 2012). Both claimant and Lake Charles Stevedores appealed to the Fifth Circuit. The court affirmed the Board's decision in all respects. *Goins v. Director, OWCP*, 519 F. App'x 834 (5th Cir. 2013). Thus, as of the conclusion of that proceeding, claimant established his entitlement to ongoing permanent total disability benefits commencing December 1, 2009, based on an average weekly wage of \$389.70, payable by Lake Charles Stevedoring.

Nevertheless, in 2013, claimant, who was not represented by counsel, instituted modification proceedings against J.J. Flanagan Stevedores (employer) in relation to the July 6, 2004 injury, for which this employer had paid benefits from July 6 through September 22, 2004, pursuant to the original decision and order.<sup>4</sup> Claimant apparently sought additional benefits at an increased average weekly wage for the period prior to the fourth injury on April 25, 2005. Following an informal conference, the claim was referred to the administrative law judge. Employer filed a motion for summary decision, contending that there were no genuine issues of material fact with respect to the claim for the July 6, 2004 injury and that it is entitled to a decision in its favor as a matter of law. Claimant filed a pleading in opposition to employer's motion.

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<sup>3</sup> Claimant also appealed to the Fifth Circuit at this juncture. The court dismissed claimant's appeal as it was not of a final order of the Board. *Goins v. Director, OWCP*, No. 11-60416 (5th Cir. Oct. 5, 2011).

<sup>4</sup> As the present appeal involves only the claim against J.J. Flanagan Stevedores, we grant the motion to reform the caption to reflect this entity as the employer in this appeal. Claimant's claims against Lake Charles Stevedoring were settled pursuant to Section 8(i) in a Decision and Order Approving Settlement dated June 6, 2014. 33 U.S.C. §908(i).

The administrative law judge granted employer's motion for summary decision. The administrative law judge stated that the Board and the Fifth Circuit had affirmed the limited award of benefits for the July 6, 2004 injury, and that claimant had not presented any new evidence or raised any issues not previously considered. Therefore, he denied the claim for modification. Claimant filed a motion for reconsideration. The administrative law judge denied the motion for reconsideration on the grounds that the issues raised had been fully adjudicated previously and that claimant had not offered any new evidence. Claimant appeals the administrative law judge's decisions. Employer responds, urging affirmance of the grant of summary decision and the denial of claimant's petition for modification.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §§18.40(c), 18.41(a). Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). 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). The intent of Section 22 is to render "justice under the Act." *See Island Operating Co., Inc. v. Director, OWCP [Taylor]*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

We affirm the administrative law judge's denial of claimant's motion for modification. An administrative law judge has the authority, pursuant to Section 22, to modify a prior decision if, upon "further reflection" of the evidence previously submitted, he determines there has been a mistake in a finding of fact. *See generally Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). However, the disability and average weekly wage issues arguably raised by this modification claim were previously the subject of modification proceedings. *See Goins*, BRB Nos. 07-0891, 08-0803. In its prior decisions in this case, the Board exhaustively reviewed all findings adverse to claimant under its substantial evidence standard of review; these issues included claimant's average weekly wage, any additional disability resulting from the July 6, 2004 injury, and claimant's claim of a work-related psychological injury. The Board and the

Fifth Circuit ultimately affirmed the award for which employer is liable. Moreover, the Board and the Fifth Circuit also rejected claimant's claims of fraud and misrepresentation, which claimant again alleged in response to employer's motion for summary decision. Based on the length and breadth of the litigation in this case, including a prior modification proceeding, and claimant's failure to submit additional evidence to support his modification claims, the administrative law judge did not err in refusing to exercise his discretion to reopen the claim, as the issues raised had previously been fully litigated and addressed. *See generally Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000). Without additional evidence, claimant could not sustain his burden of establishing that the prior award should be modified. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). We also determine that the administrative law judge properly granted employer's motion for summary decision because claimant failed to show facts in dispute. Furthermore, the administrative law judge did not abuse his discretion in denying claimant's motion for reconsideration. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

Accordingly, we affirm the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Reconsideration.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge