BRB No. 04-0273

ALBERT L. MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 11/12/2004
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Section 22 Modification of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Section 22 Modification (2003-LHC-0100; 2003-LHC-0101) of Administrative Law Judge Richard D. Mills 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).

Claimant, a tac and weld electrician, sustained an injury to his back at work on November 8, 1993.[1] Claimant underwent three surgeries connected with this injury. On March 9, 1999, Administrative Law Judge Larry Price issued a Decision and Order based on the parties' stipulations, finding claimant entitled to compensation for temporary total disability from November 23, 1993 until January 30, 1995, temporary partial disability from January 31, 1995 to June 5, 1996 and from July 18, 1996 to September 11, 1996, permanent partial disability from January 30, 1997 until the date of his surgery,[2] and continuing temporary total disability thereafter until he reached maximum medical improvement.[3] Employer ceased paying temporary total disability to claimant on April 11, 2000, the date the parties agree claimant reached maximum medical improvement. JX 1. Claimant filed a new claim and/or sought modification of Judge Price's Decision and Order, contending he is entitled to permanent partial disability benefits following the date of maximum medical improvement or, alternatively, a *de minimis* award. HT at 10-11.

In his decision, the administrative law judge found that claimant had no residual physical impairment that prevents his performing his usual job nor is there a reasonable expectation that claimant will suffer a future loss in wage-earning capacity arising out of this work injury which would merit a *de minimis* award. Accordingly, he modified the original March 9, 1999, decision to reflect that claimant's entitlement to disability benefits terminated as of April 11, 2000. The administrative law judge found that employer remains liable for medical benefits.

Claimant appeals, arguing that the administrative law judge erred in not finding he has a continuing partial disability. In the alternative, claimant contends the administrative law judge erred in not finding him entitled to a *de minimis* award. Employer responds, urging affirmance.

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[1] Claimant suffered a prior back injury on September 4, 1991 for which he received compensation for temporary total disability on October 1, 1991, and from November 4 to December 1, 1991. Stip. 7.

[2] Dr. Brent performed neck surgery on October 6, 1999, and back surgery on January 17, 2000. RX 39.

[3] After his release, claimant chose not to return to work with employer but secured light-duty work as a security guard. HT at 38-39. Following a move to Pensacola, Florida, in January 2001, claimant performed maintenance work at the U.S. Naval Air Station until March 2003. HT at 40-45. Claimant currently performs maintenance work at Pall Life Sciences. HT at 46-47.

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. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well established that the party requesting modification has the burden of showing the change in condition or mistake in fact. *See, e.g., 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). Once this burden is met, the applicable legal standards are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *Id.*

In the instant case, the administrative law judge found a change in claimant's physical condition. Although claimant was initially restricted from performing his usual work duties by his former physicians, the administrative law judge determined that, following his recovery from surgery, claimant no longer had any physical impairment preventing his return to his usual work. He based this conclusion on the opinion of Dr. Brent, who performed claimant's cervical and lumbar surgeries in 1999 and 2000. Dr. Brent released claimant without work restrictions and opined that claimant could return to his normal activities despite rating claimant with a 21 percent whole body impairment. RX 39. The administrative law judge observed that Dr. Brent's was the only post-surgical opinion submitted, and the administrative law judge therefore found that claimant failed to establish he has a continuing disability. Decision and Order at 18.

Claimant argues that the administrative law judge erred in not crediting the opinions of Drs. Cannella, Bernado, Manolakas, and Smith; each of these physicians placed restrictions on claimant's work activities.[4] Claimant's contention that the opinions of these physicians given two to five years prior to his last two surgeries should be given greater weight than that of Dr. Brent who performed the surgeries and most recently examined and evaluated claimant is without merit. The administrative law judge

[4] Dr. Cannella, who performed claimant's first back surgery, an L3-4 laminotomy and discectomy, on February 17, 1994, assigned permanent restrictions of no heavy lifting or strenuous labor or activity. RX 26. Dr. Bernado, who assumed care of claimant after Dr. Cannella's retirement, also assigned permanent light duty restrictions on October 16, 1995. RX 30. Dr. Manolakas, who is board-certified in physical medicine and rehabilitation, assigned permanent restrictions on claimant's lifting, climbing, bending and stooping on May 2, 1996. CX 5. Finally, claimant came under the care of Dr. Smith, a neurosurgeon, who assigned restrictions on claimant's lifting, crouching, crawling and climbing ladders on October 2, 1997; Dr. Smith indicated that claimant needed additional surgery but he felt that claimant would probably have some permanent restrictions. CX 7.

properly placed the burden upon claimant to establish he has an ongoing inability to perform his usual work. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). He found that claimant does not have any current disability and rejected his reliance on out-of-date evaluations. Decision and Order at 18. Without current medical opinions to counter Dr. Brent's opinion or a basis upon which to question Dr. Brent's conclusions, the administrative law judge declined to reject it.

Claimant's disagreement with the administrative law judge's weighing of the evidence is not a sufficient reason for the Board to overturn it, as it is axiomatic that the Board is not permitted to reweigh the evidence but may only ascertain whether substantial evidence supports the administrative law judge's decision. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *see also Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). As the opinion of Dr. Brent constitutes substantial evidence supporting the finding that claimant is no longer disabled, we affirm the administrative law judge's denial of compensation for partial disability. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Claimant further argues that the administrative law judge erred in failing to enter a *de minimis* award. A nominal award is appropriate where claimant has not established a present loss in wage-earning capacity, but has established that there is a significant possibility of future economic harm as a result of the injury. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In the instant case, the administrative law judge determined that claimant failed to demonstrate that there is a significant possibility that his physical condition will deteriorate resulting in a diminished wage-earning capacity in the future. Specifically, the administrative law judge observed the absence of medical evidence addressing the likelihood of future physical deterioration, again noting Dr. Brent's opinion that claimant does not have restrictions. As the administrative law judge's finding that the credible evidence of record does not support a finding that there is a significant possibility that claimant will sustain future economic harms as a result of his injury is rational, supported by substantial evidence and in accordance with law, it is affirmed. *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

Accordingly, the administrative law judge's Decision and Order Granting Section 22 Modification 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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JUDITH S. BOGGS
Administrative Appeals Judge