

P.P.)	
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Claimant-Petitioner)	
)	
v.)	
)	
UNIVERSAL MARITIME SERVICE)	DATE ISSUED:
CORPORATION)	11/21/2007 <u>2007</u>
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	

DECISION and ORDER

Appeal of the Decision and Order Denying Claimant’s Motion for Modification of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Robert J. DeGroot, Newark, New Jersey, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claimant’s Motion for Modification (2001-LHC-01125) of Administrative Law Judge Paul H. Teitler 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 case has been before the Board previously. Claimant, a checker, injured his left knee and back at work in 1993 and 1996. On appeal, the Board affirmed the administrative law judge's 1999 award of compensation for temporary total disability and scheduled permanent partial disability. [*P.P.*] v. *Universal Maritime Serv. Corp.*, BRB Nos. 99-0769/A (Apr. 6, 2000).

Claimant requested modification on January 17, 2001, alleging a worsening in his condition. 33 U.S.C. §922. Claimant did not respond to employer's subsequent request for the production of documents. Upon employer's filing a motion to compel and a motion for sanctions, the administrative law judge twice ordered claimant to produce the documents. Due to claimant's failure to respond to employer's document request and the administrative law judge's orders compelling the production of the documents, as well as a general failure to prosecute, the administrative law judge dismissed claimant's claim for modification. Claimant appealed, and the Board vacated the administrative law judge's dismissal of the claim. The Board remanded the case to the administrative law judge to determine whether certification of facts to the district court concerning claimant's noncompliance with the orders to compel, pursuant to Section 27(b) of the Act, 33 U.S.C. §927(b), was appropriate. [*P.P.*] v. *Universal Maritime Serv. Corp.*, BRB No. 02-0746 (June 30, 2003). The Board also vacated the dismissal of the modification claim under Federal Rule of Civil Procedure 41(b) and remanded the case for a determination of the factors relevant to the appropriateness of a dismissal pursuant to Rule 41(b).

On remand, the administrative law judge again dismissed claimant's claim pursuant to Rule 41(b). The administrative law judge issued a separate order in which he certified to the district court pursuant to Section 27(b) the facts concerning claimant's failure to respond timely to employer's document requests and the administrative law judge's orders compelling production of the documents.

Claimant appealed and the Board stated it lacks jurisdiction to address the administrative law judge's certification of facts to the district court pursuant to Section 27(b). [*P.P.*] v. *Universal Maritime Serv. Corp.*, BRB No. 04-0620 (Apr. 29, 2005). The Board held, however, that the administrative law judge erred in dismissing claimant's modification claim due to claimant's dilatory response to employer's discovery requests and the administrative law judge's motions to compel, as such are not grounds for dismissal in view of the remedy provided by Section 27(b) of the Act. The Board remanded the case to the administrative law judge to address the merits of claimant's Section 22 claim.

The administrative law judge held a hearing on claimant's modification claim. In his Decision and Order, the administrative law judge found that claimant did not establish a mistake in fact as to the duties of a checker, claimant's pre-injury job to which the

administrative law judge previously found claimant capable of returning. At the modification hearing, claimant testified more extensively about the duties of his pre-injury job as a checker. Tr. at 16-22. The administrative law judge found that this issue was previously litigated and that this evidence concerning claimant's job duties was available at the time of the initial proceeding, but not offered by claimant. The administrative law judge found that claimant established an objective worsening of his back condition based on MRI results since the original decision was entered. The administrative law judge found, however, that claimant did not establish that he is disabled from his pre-injury employment. The administrative law judge discredited claimant's subjective complaints and Dr. Charko's opinion based on them due to a surveillance videotape showing claimant engaged in activities inconsistent with his assertion of disability. The administrative law judge instead credited Dr. Greifinger's opinion that claimant could return to work as a checker without restrictions. Therefore, the administrative law judge denied claimant's claim for additional disability benefits as claimant did not establish a change in his ability to work.

On appeal, claimant challenges the administrative law judge's denial of his modification claim for permanent total disability benefits. Employer responds, urging affirmance of the administrative law judge's denial of claimant's petition for modification.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing an otherwise final decision; modification pursuant to this section is permitted based upon a mistake in 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 bears the burden of proof. See, e.g., *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Claimant correctly argues that the administrative law judge used the wrong legal standard in determining whether he established a mistake in fact as to the duties of a checker. The administrative law judge erred in stating that the moving party must show a mistake in fact based on evidence previously submitted to the administrative law judge in the initial proceedings or unavailable to him and that new information about claimant's job duties cannot establish a mistake of fact. The moving party is not required to show that the evidence was unavailable previously in order to rely on it to obtain modification. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003). Rather, as the Supreme Court has stated, "[The fact-finder has] broad discretion to correct mistakes of fact, whether demonstrated by *wholly new evidence*, cumulative evidence or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); see also *Banks v. Chicago Grain*

Trimmers Ass'n, Inc., 390 U.S. 459 (1968). In *Rambo I*, the Court stated, “On two occasions we have construed the phrase ‘mistake in a determination of fact’ and observed that nothing in the statutory language supports attempts to limit it to particular kinds of factual errors or to cases involving new evidence or changed circumstances.” *Rambo I*, 515 U.S. at 296, 30 BRBS at 2, 3(CRT), citing *O’Keeffe*, 404 U.S. at 255-256, and *Banks*, 390 U.S. at 465. Thus, claimant was entitled to seek modification of factual findings concerning the duties required of a checker. See generally *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

Nevertheless, the administrative law judge’s error in the present case is harmless, as he rationally found that claimant did not establish his inability to return to work. Claimant testified that his disability is due to his inability to walk for sufficient distances or to sit for extended periods due to his pain and need for a cane. Tr. at 21-22, 27-28, 35, 37. The administrative law judge discredited claimant’s testimony concerning his medical restrictions in light of surveillance videotapes belying claimant’s assertion that he needs a cane and has difficulty walking and standing. Decision and Order at 15. Similarly, the administrative law judge rejected the opinion of Dr. Charko that claimant is limited in his ability to walk and sit, as his opinion was based on claimant’s subjective complaints. *Id.* at 16. The administrative law judge instead credited Dr. Greifinger’s opinion that claimant has no restrictions on his ability to perform these aspects of his job, as it was based on a more recent examination and on the videotapes. *Id.*; EX 5 at 40-43. Thus, the administrative law judge found that claimant did not establish his entitlement to additional disability benefits.

Regarding these findings, claimant contends only that the administrative law judge should have credited claimant’s testimony that the videotapes showed him on “good days” and that more often he has “bad days” when his pain prevents him from working. To the extent that claimant seeks a re-weighing of the evidence, such is beyond the Board’s scope of review. See *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge gave rational reasons for rejecting claimant’s testimony and Dr. Charko’s opinion, see *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and claimant has raised no reversible error in the administrative law judge’s denial of his petition for modification based on the opinion of Dr. Greifinger. See *Manente v. Sea-Land Serv., Inc.*, 39 BRBS 1 (2004); see also *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). Therefore, we affirm the denial of benefits as it is supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order Denying Claimant's Motion for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge