BRB No. 92-0703

GUISEPPE GRAFFAGNINO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A. G. SHIP MAINTENANCE CORPORATION	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Modification of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Henry A. Martuscello, New York, New York, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Modification (90-LHC-2558) of Administrative Law Judge Ralph A. Romano 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a lasher for employer and was injured on February 19, 1988, when a bar became disengaged and struck him on the right side of the body. He complained of pain in the right hip and right arm. Dr. Vaccarino, claimant's treating physician, diagnosed a hematoma at the right iliac crest. Cl. Ex. 1. Employer's physician, Dr. Fishman, evaluated claimant on March 24, 1988, and found no objective evidence of disability. On April 4, 1988, however, Dr. Vaccarino noted subsiding lumbosacral sprain. *Id.* On April 25, 1988, claimant was evaluated by Dr. Seslowe, an independent medical examiner, who diagnosed a lumbosacral sprain with right-sided sciatica and a contusion of the right side. Dr. Seslowe reported that claimant was temporarily totally disabled at that time but would be able to return to his regular work in one month. Cl. Ex. 3. Dr. Seslowe reevaluated claimant on September 19, 1988, and in light of his continuing back complaints

recommended further diagnostic testing to rule out a herniated disc, noting that a CT scan performed on July 28, 1988, showed posterior bulging at L4-5 and L5-S1, but no definite herniation. *Id.* Dr. Seslowe noted that until such time that the testing was completed, claimant should be considered temporarily totally disabled, and if no disc herniation is found, claimant should be encouraged to return to work. When Dr. Seslowe saw claimant again on April 3, 1989, he opined that because nothing in claimant's physical examination, his February 24, 1989, EMG, or prior CT scan was indicative of a herniated disc, claimant was partially disabled and should attempt to return to work. Emp. Ex. D. Claimant filed a claim under the Act for injury to his right leg and hip.

Claimant, who does not speak English, was initially represented by Michael and Vincent Conzo, lay representatives. Emp. Ex. 1. Michael Conzo spoke Italian and with his assistance, claimant and employer entered into stipulations which were submitted to the district director for entry of a compensation award on October 2, 1989. On October 11, 1989, the district director issued a Compensation Order awarding claimant compensation consistent with the stipulations of the parties. Emp. Ex. A. The award provided for temporary total disability payments from February 20, 1988, to April 14, 1989, and from April 15, 1989 to September 30, 1989, less 14 days, and for permanent partial disability compensation for a 12.5 percent loss of use of the right leg under Section 8(c)(2), 33 U.S.C. §908(c)(2). Emp. Ex. G. The total amount awarded was $54,551.39.

After the issuance of the district director's Compensation Order, an MRI of claimant's spine was performed on June 11, 1990, which revealed a small posterior herniated disc at L4-5.[1] Cl. Ex. 7. Claimant also consulted Dr. Ganea for depression. Cl. Ex. 2. Claimant accordingly retained an attorney and sought modification of the permanent partial disability award, seeking permanent total disability benefits on the ground of a mistake in a determination of fact, asserting that his injury was to his back, rather than to the hip and leg as originally claimed, and that in addition he sustained a work-related psychiatric injury.

The district director denied modification, stating that no basis for modification had been presented. Emp. Ex. I. A hearing was held before an administrative law judge, at which claimant testified through a translator. In his Decision and Order, the administrative law judge also denied modification, finding that inasmuch as the district director's order awarding benefits was based on the parties' stipulations, and not on the district director's evaluation of the evidence, his order could not contain a mistake in a determination of fact. The administrative law judge further noted that the existence of the herniated disc could have been detected at the time of the original order.[2] The administrative law judge also rejected claimant's implicit assertion that he was not fully aware that he was settling his claim, because of language problems and lack of education, and was somehow duped into the settlement agreement, finding claimant's testimony in this regard somewhat evasive and not creditable, and in addition, noted that the record did not support this assertion.

[1]Apparently this test had been previously recommended. *See* Cl. Ex. 1 (September 25, 1989).

[2]The administrative law judge noted that, in fact, the imaging testing which ultimately revealed the herniated disc was available prior to the entry of the order, but claimant refused to pay for the test. Decision and Order at 4 n.5; Cl. Ex. 1 (September 25, 1989).

Claimant appeals the denial of his petition for modification, arguing that the administrative law judge erred in finding that the district director's Compensation Order was not based on a mistake in a determination of fact because it was based on the parties' stipulations rather than on his evaluation of the evidence. Claimant asserts that the stipulation that he sustained a 12.5 impairment of the leg was premised on the mistaken assumption that his problems were due to a leg and hip injury, when in fact they are due to an injury to his back. Claimant points out that diagnostic tests performed on his back prior to the parties' stipulations indicated only bulging discs, and that it was not until the MRI was performed in June 1990, following the issuance of the district director's Order, that claimant became aware that he had a herniated disc. Moreover, claimant maintains that modification is warranted because his lay representative was unaware that claimant was undergoing psychiatric treatment. Employer responds, urging affirmance.

While Section 22 modification is unavailable to alter settlements approved pursuant to Section 8(i), 33 U.S.C. §908(i), *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36 (CRT)(5th Cir. 1986); *Lambert v. Atlantic & Gulf Stevedores*, 17 BRBS 68 (1985), an award based upon the agreements and stipulations of the parties is subject to Section 22 modification. *See Madrid v. Coast Marine Construction Co.*, 22 BRBS 148, 152 (1989); 20 C.F.R. §702.315. Inasmuch as the Compensation Order entered by the district director in this case was based on stipulations and did not discharge the liability of employer, the administrative law judge properly recognized that the award is subject to modification.

We agree with claimant, however, that the administrative law judge's determination that the district director's Compensation Order could not have been based on a mistaken determination of fact because it was based on the stipulations of the parties rather than on the district director's evaluation of evidence, is erroneous as a matter of law. In the present case, claimant alleged that the stipulations underlying the district director's Compensation Order were premised on his mistaken belief that his pain was caused by injury to his leg and hip when in fact he had actually injured his back. Claimant produced relevant evidence in support of this contention, most notably the MRI documenting a herniated disc, performed subsequent to the issuance of the district director's Compensation Order. In addition, claimant introduced the psychiatric reports of Dr. Ganea, generated subsequent to the district director's Order, which diagnosed claimant as suffering from a dysthymic disorder secondary to his physical condition and indicated that he is incapable of gainful employment. Cl. Ex. 2. This new evidence could establish that claimant's sustained work-related back and psychiatric injuries have rendered him permanently totally disabled. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). Contrary to the administrative law judge's determination, the fact that claimant's herniated disc could have been detected at the time of the original order is not determinative; Section 22 is intended to dispel traditional notions of *res judicata* and to allow the fact-finder broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon evidence initially submitted. *Banks v. Chicago Grain Trimmers Ass'n*, 391 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992)(Dolder, J., dissenting). Where, as here, new evidence is submitted in a modification proceeding, it is an abuse of discretion for the administrative

law judge to fail to consider it.[3] *See Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174, 176 (1988).

In summary, we agree with the claimant that the scope of modification premised on a mistake in a determination of fact is sufficiently broad to encompass the facts presented in this case.[4] The fact-finder's authority to reopen the proceedings under Section 22 extends to all mistaken determinations of fact, *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1991), *reh'g denied*, 404 U.S. 1053 (1992), including mistaken determinations of mixed law and fact, such as that presented by the parties' stipulations regarding claimant's scheduled impairment in the present case. *See generally Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 201 (1989). Because an award of benefits based on the agreements and stipulations of the parties may properly be subject to modification under Section 22, *see Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988), we vacate the administrative law judge's denial of modification in this case. On remand, should the administrative law judge find a mistake in a determination of fact in the original compensation order, he should determine whether allowing modification of the scheduled award in light of the factual errors would render justice under the Act.[5] *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1, 8 (1994); *Duran*, 27 BRBS at 13-15.

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[3]We note that in alleging total disability based on a back condition, claimant relies heavily on the post-hearing deposition of Dr. Vaccarino, which the administrative law judge did not allow into evidence. The hearing in this case was held on April 10, 1991. The administrative law judge allowed the parties 60 days for post-hearing depositions and 30 days thereafter for briefs. Tr. at 124. Dr. Vaccarino's deposition was scheduled for June 11, 1991, but he apparently got lost on the way and never arrived. His deposition was taken on September 10, 1991. That same day the administrative law judge issued an Order of Record Closure and for Submission of Closing Briefs where, having found that claimant failed to timely submit the deposition transcript of Dr. Vaccarino, he ordered the record closed and closing briefs submitted within 15 days. In his Decision and Order, the administrative law judge noted that Dr. Vaccarino's deposition was marked for identification only, and was not received into evidence, having been filed late. Decision and Order at 1 n.1.

[4]The administrative law judge discredited claimant's testimony that he was not aware that he was settling his claim because of language problems and lack of education. He did not consider claimant's testimony that he was totally disabled due to back and psychological problems, however, because of his conclusion that modification was unavailable. This evidence should be considered by the administrative law judge on remand when determining whether modification should be granted.

[5]The administrative law judge summarily stated in a footnote that although claimant's sole basis for seeking modification was a mistake in fact, there had not been any change in claimant's physical capacity between the time of the stipulations and the time of the modification proceedings. We note that even if claimant's physical limitations remained the same, however, modification still may be warranted based on a mistake in fact because the prior award was made under the schedule and claimant may be entitled to compensation for his back and psychiatric conditions under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Accordingly, the administrative law judge's Decision and Order - Denying Modification is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge