BRB No. 98-743

LOUIS SPITALIERI	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: Feb. 23, 1999
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification -- Denying Benefits and the Decision and Order on Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification -- Denying Benefits and the Decision and Order on Reconsideration (93-LHC-710) 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).

Claimant sustained work-related injuries to his neck, head, back and left knee in an accident on April 10, 1992. After a hearing on the merits, Administrative Law Judge Avery found that claimant was temporarily totally disabled due to the work injuries, and he awarded claimant benefits in November 1993. Emp. Ex. 7. On July 10, 1996, employer filed a motion for modification of Judge Avery's award pursuant to Section 22 of the Act, 33 U.S.C. §922, on the grounds that claimant's condition had changed and that he was no longer disabled. Emp. Ex. 9. After the modification proceedings, Administrative Law Judge Teitler found that claimant's condition had changed so that he was no longer temporarily disabled based on Dr. Musacchio's determination that claimant is permanently totally disabled and his condition reached maximum medical improvement on August 31, 1994. Decision and Order on Modif. at 15. Nevertheless, after placing the burden on claimant to establish his inability to return to his usual work, the administrative law judge relied on the lack of objective evidence of disability to find that claimant was no longer disabled and could return to his usual work. Consequently, he terminated claimant's entitlement to continuing benefits as of August 31, 1994.[1] *Id.* at 17-18. Further, he found that claimant sustained a work-related hearing loss of 6.9 percent caused by the 1992 injury and is entitled to a hearing aid at employer's expense; he did not, however, address claimant's entitlement to these benefits in his order.

Claimant filed a motion for reconsideration. The administrative law judge found that Section 22 provides for a credit for an overpayment of benefits, that claimant is entitled to disability benefits in the amount of $7,465.66 for his 6.9 percent hearing loss, but that those benefits are subsumed by employer's overpayment of temporary total disability benefits since August 31, 1994. Decision and Order on Recon. at 1-2. Claimant appeals these decisions, and employer responds, urging affirmance.

Claimant contends there has been no change in his condition and that the administrative law judge erred in so finding; therefore, he argues that employer's motion for modification should have been denied. In the alternative, claimant asserts that, if there has been a change in condition and he is no longer disabled, then the

[1]Because he found there was a change of claimant's condition, he stated he need not address the issue of mistake in fact, but he noted that had he addressed such issue, he would have reached the same conclusion. Decision and Order on Modif. at 18 n.3.

administrative law judge erred in granting employer a credit retroactive to the date of maximum medical improvement, thereby denying claimant the additional benefits for his hearing loss.

Section 22 of the Act permits the modification of a final award if the proponent of the modification can establish either a change in a claimant's condition or a mistake in a determination of fact. In the event an award of benefits is modified, Section 22 mandates that prior payments of compensation shall not be affected by the modification except in two circumstances -- where there has been either an increase or a decrease in the compensation rate awarded. 33 U.S.C. §922; *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992); *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993). If a change in condition is asserted as the reason for the modification, the party making such assertion has the burden of establishing the change. However, the standard for determining disability is the same in a modification proceeding as it is in an initial hearing. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). In a case involving a mistake of fact, the administrative law judge has broad discretion to correct the mistake, demonstrated by new or cumulative evidence, or merely upon further reflection of the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In this case, the administrative law judge considered the opinions of four doctors in assessing whether claimant remained disabled. Dr. Musacchio, claimant's treating physician, stated that claimant's condition had not changed and had reached maximum medical improvement on August 31, 1994, and that claimant is now permanently totally disabled. Cl. Ex. 1; Emp. Exs. 47, 55 at 107. Dr. Conciatori, claimant's treating psychiatrist opined that claimant is totally disabled due to chronic-type major depression related to his 1992 injury. Emp. Ex. 56 at 56-57. These opinions are refuted by the opinions of Drs. Swearingren and Head. On February 21, 1996, Dr. Swearingren, a Board-certified orthopedic surgeon concluded there is no objective evidence of physical disability and that claimant can return to his usual work. Emp. Exs. 29, 31. On April 30, 1996, Dr. Head, a Board-certified psychiatrist and neurologist, stated that claimant has no psychiatric condition related to his work injury and there is no reason why he cannot return to work. Emp. Exs. 28, 37, 65 at 15, 23, 35-38. After considering the evidence, the administrative law judge credited the opinions of Drs. Head and Swearingren to conclude that claimant is no longer disabled and can return to his usual work, as is within his discretion. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *see generally Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998) (administrative law judge must consider new evidence); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174

(1988) (administrative law judge must consider all evidence).

Based on the evidence of record, we reject claimant's contention that employer has not established a change of condition. Although we agree that the administrative law judge erred in using the date of maximum medical improvement established by Dr. Musacchio to establish the date claimant was no longer disabled, such error is harmless as the record contains substantial evidence to support the determination that there has, indeed, been a change in claimant's condition. Specifically, the administrative law judge should have used the date on which Dr. Swearingren found there was no disability to establish the date of a change in claimant's condition, as the administrative law judge credited his opinion rather than Dr. Musacchio's conclusion that claimant remained disabled. Nonetheless, we affirm the administrative law judge's determination that claimant is no longer disabled, as that finding is supported by substantial evidence. *See Parks*, 26 BRBS at 172; *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

We agree with claimant's alternate argument, however, that the administrative law judge erred in granting employer a credit for benefits due for his hearing loss against those allegedly overpaid for his back injury. Section 22, in pertinent part, specifically states:

> [The administrative law judge may] issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation. . . .

33 U.S.C. §922. In this case, the administrative law judge improperly granted employer a credit retroactive to the date the administrative law judge determined that maximum medical improvement occurred. Thus, he found that employer overpaid benefits between August 31, 1994, and the date of his decision on modification, January 15, 1998. As a result, he effectively denied claimant's entitlement to disability benefits for his work-related hearing loss, stating that such benefits are to be credited against those overpaid since August 31, 1994.

Initially, the first opinion to state that claimant was not disabled is that of Dr. Swearingren on February 21, 1996, and this date is thus the earliest date which could be used. Moreover, Section 22 allows a credit against unpaid compensation where the compensation rate has been decreased; otherwise, it provides that the order on modification shall not affect the compensation previously paid. In this case, there has been no decrease in claimant's compensation rate, but rather claimant's continuing disability benefits for his back injury have been terminated altogether. Thus, the exception permitting a retroactive decrease which may be reflected in a credit under Section 22 does not apply, and the termination of compensation cannot be effective prior to the date of the decision. *Eggert*, 953 F.2d at 552, 25 BRBS at 92 (CRT); *Parks*, 26 BRBS at 172. Therefore, we vacate the administrative law judge's determination that employer overpaid compensation and is entitled to a credit for benefits paid for total disability for claimant's back injury against its liability for benefits under the schedule for claimant's hearing loss. We hold that claimant is entitled to temporary total disability benefits until the date they were terminated by the administrative law judge in his decision on modification. Additionally, as the administrative law judge found that claimant has a work-related hearing loss, claimant is entitled to compensation pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), for his 6.9 percent hearing loss.

Accordingly, the administrative law judge's decisions are modified to reflect claimant's entitlement to disability benefits for his hearing loss consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN

Administrative Appeals Judge