BRB No. 01-0888

DALE A. PENNIE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MID-COAST MARINE OREGON CORPORATION	)	DATE ISSUED: August 5, 2002
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-1939) of Administrative Law Judge Robert L. Hillyard denying modification 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, working as a marine electrician for employer, sustained an injury to his lower back as a result of a fall on September 5, 1989. Dr. Lindsay diagnosed a contusion of the interscapular area of the back with possible strain of the cervical dorsal spine and he prescribed medication and physiotherapy through September 1989. Claimant also received treatment for his back injury from Drs. Becker, Townsend, and Bernstein, all of whom released claimant to return to light duty work. Dr. Dewey, a clinical psychologist, diagnosed a single episode of major depression, probably a result of his work-related injury. In contrast, Dr. Holland stated that he found no evidence of a psychiatric

condition causally related to claimant's employment and opined that claimant was not psychologically impaired from resuming his former employment as a marine electrician or in filling the light duty job of tool crib attendant. Claimant thereafter filed a claim seeking benefits under the Act based on his back injury and alleged psychiatric injury.

In a decision dated December 2, 1992, Administrative Law Judge Donald B. Jarvis concluded that claimant was entitled to periods of temporary total and temporary partial disability benefits, as well as medical benefits for his work-related spinal injury and the psychological examinations rendered by Drs. Dewey and Holland in 1991. Judge Jarvis also determined that claimant sustained no work-related psychological injury and further found that claimant fully recovered from his spinal injury and was therefore capable of performing his usual pre-injury employment as a marine electrician as of March 20, 1990. Carrier, SAIF Corporation, paid benefits for the low back strain, with the final payment of compensation occurring on April 16, 1993.

Claimant thereafter revisited Dr. Remy in June 1993, at which time an MRI was interpreted as showing a disc herniation at the L-4/5 level. Claimant testified that he made calls to the Department of Labor (DOL) on three occasions in June 1993, stating that he had proof of the cause of his pain and that he wanted his claim to be reopened. Hearing Transcript (HT) at 45. The record contains notations made by the district director's office confirming these telephone calls. CX 5. Claimant also contacted the office of United States Congressman DeFazio with respect to his claim and was told that the Congressman spoke with DOL on his behalf. In late 1993, claimant began working full-time for a Chevron refinery in California as an electrical technician. He stated that he worked in this capacity for five months but then asked to be laid-off due to back pain.

In a letter dated August 17, 1993, Dr. Holbert, an orthopedic surgeon, noted that claimant did not suffer any lower back problems prior to the September 5, 1989, accident, that he had consistent problems since that time, and thus, that it appeared that his current problems were related to that accident. In particular, Dr. Holbert interpreted the June 18, 1993, MRI as showing dessication, bulging, and some nerve impingement at the L-3, L-4, and L-5 discs. In May 1994, however, Dr. Holbert opined that there was nothing more significant in the lumbar spine than wear and tear changes of a 43 year old. He also recommended that claimant resume "light electrical work." Sometime thereafter claimant began working as an electrician for the Coquilee Indian Housing Authority in California, a position he held for about six months. He stated that in this position his work was limited due to his back condition and that his son, in actuality, performed most of the work. Claimant stated that following this job he has not held any gainful employment as a result of his back condition.

Claimant alleged that he sought modification of Judge Jarvis's 1992 decision via his

telephone calls to DOL and to Congressman DeFazio's office following Dr. Remy's diagnosis of a herniated disc in June 1993. Employer controverted on the ground that claimant's request for modification is not timely as none of the aforementioned telephone calls is sufficient to constitute a valid request for modification.

In his decision, Administrative Law Judge Robert L. Hillyard (the administrative law judge) concluded that claimant did not file a valid, timely claim for modification. Specifically, he determined that none of the telephone calls made by or on behalf of claimant constituted a valid request for modification as they failed to make a claim for a specific type of benefits for a specific time period. The administrative law judge nevertheless reviewed the record to determine whether the evidence supported modification, and concluded that claimant did not establish a causal connection between his disc herniation and the 1989 work accident. Accordingly, claimant's request for modification was denied.

On appeal, claimant challenges the administrative law judge's denial of his request for modification. The Board has not received a response brief from employer.

Claimant initially argues that the administrative law judge erred in concluding that his telephone call to DOL on June 28, 1993, was not a claim for modification. Claimant asserts that contrary to the administrative law judge's finding, this telephone call, in which he discussed the existence of "HNP,"*i.e.*, herniated nucleus pulposus, or herniated disc, did, in fact, raise information different from that which existed in the case before Judge Jarvis.

Section 22 of the Act permits the modification of a final award if the party seeking modification demonstrates either a change in claimant's physical or economic condition or a mistake in a determination of fact. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). A motion for modification pursuant to Section 22 must be filed within one year of the denial of the claim or of the last payment of benefits. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). It is well-settled that an application for modification under Section 22 need not be formal in nature or on any particular form; rather, such a request need only be a writing, filed within the one-year period, which indicates an intention to seek further compensation. *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

In discussing the timeliness of claimant's request for modification, the administrative law judge initially found that all three of the telephone calls by claimant to DOL were made within one year of carrier's last payment of benefits. He concluded, however, that none of the calls specified the benefits sought by claimant or the time period for which the benefits were sought and thus were insufficient to serve as valid requests for modification. In particular, the administrative law judge found that the district director's note memorializing the June 28, 1993, phone call, simply states that claimant was told that he suffered from an

"HNP" as shown on "scan" and that he seeks compensation "from 1989."[1]

Claimant's contention has merit. In *Bergeron*, 493 F.2d 545, a memorandum written by the district director, recording a telephone message from the claimant's attorney asserting that the claimant was permanently totally disabled and would file for review under Section 22 of the Act, was found sufficient to constitute a timely application for modification under Section 22, even though no formal written request for modification was filed until more than 22 months following the date of last payment of compensation. In *Madrid*, the Board held that three phone calls made by claimant, as memorialized by the district director's staff, were sufficient to constitute a modification request under Section 22 because they indicated that claimant believed he had suffered a change in condition and was seeking additional compensation. *Madrid*, 22 BRBS at 151. Similarly, in *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975), the Board held that a district director's written memorandum summarizing his telephone conversation with claimant was sufficient to constitute a modification request under Section 22 because the memorandum indicated that claimant was dissatisfied with his compensation. The memorandum in that case included language that "the conference lasted for 75 minutes during which time the claimant persisted in bringing up numerous issues which were not relevant to the medical expense claim - issues involving the nature, degree and duration of disability and entitlement to compensation - all of which have already been adjudicated." 2 BRBS at 138.

[1]Claimant's arguments on appeal are limited to the viability of the June 28, 1993, phone call as evidence of a valid request for modification.

The report documenting claimant's telephone call on June 28, 1993, states "MD says he has a HND - it shows on scan - he is due compensation from 1989 when e/c controverted - sigh!" CX 5. The remainder of the report, and in particular the "Remarks or Reply" section of that document, is illegible. Nonetheless, this written memorandum summarizing claimant's telephone conversation is sufficient to constitute a modification request under Section 22 because it indicates that claimant believed he had suffered a change in condition and was seeking additional compensation.[2] *See Bergeron*, 494 F.2d 545; *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001); *Madrid*, 22 BRBS 148; *Cobb*, 2 BRBS 132. As claimant notes, the objective evidence submitted before Judge Jarvis, most notably a lumbar CT Scan dated February 14, 1990, and MRIs performed on March 6, 1990, and November 26, 1991, was negative as to the presence of a herniated disc. Thus, the MRI of June 18, 1993, showing that claimant has a herniated disc, is indicative of a change in condition since the time of the last payment of compensation and therefore supports the position that claimant's phone conversation with DOL on June 28, 1993, constitutes a request for modification. In light of this, we hold that the memorandum documenting claimant's telephone call of June 28, 1993, to DOL constitutes a valid modification request under Section 22, and we therefore reverse the administrative law judge's finding to the contrary. We therefore now consider the administrative law judge's alternate findings that claimant's current back condition is not work-related.

Claimant argues that the administrative law judge erred in finding that his herniated disc is not work-related. First, claimant asserts that contrary to the administrative law

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[2]In support of his decision, the administrative law judge relied, in part, on the Board's decision in *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000), *aff'd mem.*, 238 F.3d 413 (4th Cir. 2000), wherein it affirmed the administrative law judge's finding that claimant's letter to the district director seeking "additional" benefits in modification of the previous award, and requesting that he not schedule an informal conference, was merely a protective filing which does not constitute a valid claim for modification. *See also Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998) (medical reports submitted by employer to district director are not valid requests for modification as they did not facially indicate an intent on claimant's behalf to request modification of the original order); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996) (letters submitted by claimant are not valid requests for modification as they failed to indicate any actual intention on claimant's part to seek compensation for a particular loss). In contrast to these cases, the memorialization of claimant's telephone call herein exhibits an intent on his part to further pursue his specific claim based upon the new evidence uncovered by the June 18, 1993, MRI. *See Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001).

judge's finding, the opinions of Drs. Gallo and Neumann are insufficient to establish rebuttal of the Section 20(a) presumption. Claimant further maintains that the administrative law judge erred in finding no causation based on the record as a whole since there is no support for his decision to credit the opinions of Drs. Gallo and Neumann over the contrary opinions of Drs. Bert, Pasternak and Holbert.

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or contributed to by his employment. *See Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge determined that employer established rebuttal of the Section 20(a) presumption based on the opinions of Drs. Neumann and Gallo. Specifically, he found that Dr. Neumann concluded that claimant's original injury, a contusion and a possible lumbar strain, had resolved and that claimant's current complaints of back pain are a product of degenerative changes. Dr. Neumann added, after an extensive discussion of the natural progression of degenerative changes of the spine, that the 1989 work injury did not cause or accelerate a pre-existing degenerative process in claimant's lower back but rather that claimant's present condition is a product of the normal aging process.[3] HT at 112-124;

[3]Thus, contrary to claimant's contention, Dr. Neumann's opinion did address whether claimant's work accident aggravated or accelerated his pain. On cross-examination, Dr. Neumann admitted that he could not rule out the fact that claimant may have damaged his disc, a little bit, as a result of his work-related fall. HT at 145-146. However, on redirect, Dr. Neumann clarified that his opinion that the work accident did not aggravate or accelerate claimant's back condition is based upon his competent analysis of the medical evidence, and that based on this there is only a small possibility, as opposed to any probability, of a connection between the work accident and claimant's herniated disc. HT at 148. It is not necessary for employer to "rule out" any possibility of a causal connection in order to rebut the Section 20(a) presumption. *See generally Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

129. Moreover, Dr. Neumann stated that he based his opinion, in part, on the fact that had the 1989 trauma caused the disc herniation it would have appeared earlier on objective testing. HT at 118-119, 157. The administrative law judge found that Dr. Gallo similarly opined that claimant's present condition was most likely degenerative and not a result of his occupational accident. The administrative law judge, however, also acknowledged that Dr. Gallo suggested that a myelogram and CT Scan would confirm her opinion, and that while she interpreted those tests as showing disc protrusion and nerve impingement, she did not address the cause of claimant's condition at that time, prompting the administrative law judge to find that Dr. Gallo did not relate the condition to the 1989 work accident. Thus, while Dr. Gallo's opinion is not as detailed as the one provided by Dr. Neumann, it nevertheless is supported by underlying documentation and contains a rationale for her finding. *See* EX 37. Moreover, it supports the opinion of Dr. Neumann, and in turn, the administrative law judge's finding that employer rebutted the Section 20(a) presumption. We therefore affirm the administrative law judge's finding that employer presented substantial evidence to rebut the Section 20(a) presumption. *See O'Kelly v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Rochester v. George Washington University*, 30 BRBS 233 (1997); *see also generally Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

In weighing the evidence on causation as a whole, the administrative law judge considered each of the relevant medical opinions. Initially, he determined that Dr. Holbert's opinion is inconsistent and equivocal and thus insufficient to support a causal relationship between claimant's herniated disc and the occupational accident. In particular, the administrative law judge found relevant the facts that: Dr. Holbert initially opined following his consideration of the June 18, 1993, MRI, that there was nothing more significant in the lumbar spine than normal wear and tear changes; that two months later he stated that since claimant did not suffer any lower back problems prior to his September 1989 accident, "it would appear that his current problems are related to that injury;" and that in May 1994, the doctor again opined that claimant suffers from "significant wear changes in his low back," without relating this condition to the work accident. CX 10. Similarly, the administrative law judge accorded less weight to Dr. Bert's opinion as, after an extensive discussion of Dr. Bert's records, he found that the "history" of consistent low back complaints as noted by Dr. Bert is inaccurate, and that Dr. Bert's opinions are based, in part, on Dr. Holbert's interpretations. The administrative law judge further found that Dr. Pasternak's opinion, that based upon a review of claimant's records and conversations with claimant the doctor thought that the initial injury was work-related, is insufficient to support a causal nexus because it is equivocal and unsupported by the evidence of record. In particular, the administrative law judge found that Dr. Pasternak's opinion does not define claimant's "initial injury" and since Dr. Pasternak noted that the earlier objective studies failed to show disc herniation, claimant's herniated disc would not constitute the "initial injury." Moreover, the administrative law judge found relevant the fact that Dr. Pasternak's opinion on causation

was based on the unreliable records and history related to him by claimant.[4] Lastly, the administrative law judge determined that Dr. Remy's opinion also fails to weigh for or against the existence of a causal relationship. The administrative law judge observed that in a letter dated November 1, 2000, Dr. Remy concurred with the opinions of Drs. Neumann and Gallo, but stated that he was uncertain as to the origin of claimant's current condition because of inconsistencies in the record.

The administrative law judge found that the opinions of Drs. Neumann and Gallo outweigh those of Drs. Bert, Holbert, and Pasternak, and thus, he concluded that claimant did not establish a causal connection, based on the record as a whole, between the disc herniation and the September 5, 1989, work accident. As the administrative law judge acted within his discretion in weighing the relevant evidence, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and as his finding is supported by substantial evidence, the administrative law judge's determination, based on the record as a whole, that claimant's disc herniation is not causally related to his work accident is affirmed. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999); *see generally Coffey v. Marine Terminals Corp*., 34 BRBS 85 (2000). We thus affirm the administrative law judge's denial of benefits.

[4]The administrative law judge found that the record shows that claimant's history of consistent low back pain complaints is inaccurate. Specifically, while claimant complained of low back pain to Dr. Lindsay in September 1989, he did not complain to Dr. Becker of pain in that region on October 25, 1989. EXs 3, 4, 7. In addition, claimant complained to Dr. Adams on January 10, 1990, of pain in the mid-back and left buttocks, and on January 31, 1990, of pain between the shoulder blades. EXs 9, 11. Absent from these reports is any complaint of low back pain. *Id.*

Accordingly, the administrative law judge's finding that claimant's Section 22 petition for modification was not valid is reversed. In all other respects, his Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge