BRB No. 09-0136

J.U.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MID-COAST MARINE	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	DATE ISSUED: 08/21/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Motion for Modification and Denying Employer's Motion for Modification and the Order Denying Employer's Motion for Reconsideration of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather Byerly & Holloway LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Claimant's Motion for Modification and Denying Employer's Motion for Modification and the Order Denying Employer's Motion for Reconsideration (2006-LHC-01931) of Administrative Law

Judge Anne Beytin Torkington 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 had a pre-existing lower back condition resulting from March 1974 and January 1975 injuries. Claimant received a compensation award for these injuries and was offered training as a welder so that he could find employment in a less physically demanding occupation. Claimant started working for employer in May 1978 as a welder, but had to stop working in November 1978 as his job duties, particularly overhead welding, were too strenuous for his back. The prior employer was ordered to pay compensation until claimant was able to return to his work duties for employer. On February 4, 1980, claimant fell down a flight of stairs during the course of his employment and struck his back, left elbow, left hip and right knee. Employer paid claimant compensation for various periods of temporary total disability. Claimant stopped working in June 1982 due to the lack of light-duty welding work that he could perform.[1] Claimant filed a claim under the Act for disability related to the February 1980 work injury.

In his October 1986 decision, Administrative Law Judge Heyer found that claimant is permanently disabled due to his back condition and unable to return to work as a welder. Judge Heyer rejected employer's contention that claimant's condition was due solely to the prior injuries. Judge Heyer found that employer established the availability of suitable alternate employment that paid less than claimant's wages for employer. Claimant was awarded continuing benefits for permanent partial disability as of June 28, 1984, based on two-thirds of the difference between his average weekly wage of $373.79 and his residual wage-earning capacity of $160 per week. *See* 33 U.S.C. §908(c)(21), (h). Employer obtained Section 8(f) relief, 33 U.S.C. §908(f), from its continuing compensation liability.

On February 16, 2006, claimant filed a motion for modification of Judge Heyer's decision, 33 U.S.C. §922, asserting entitlement to compensation for permanent total disability. On December 18, 2006, employer filed a cross-motion for modification contending that Judge Heyer erred in finding that claimant sustained any permanent

[1] Claimant had back pain while welding in July 1981 that resulted in his inability to work for a while. Claimant slipped off a curb in January 1982 at a convenience store, which caused increased pain. *See* discussion, *infra.*

disability related to his February 1980 work injury. 33 U.S.C. §§908(f)(2)(B), 922. Thus, employer contended that claimant's award should have been terminated as of June 1984.

In her Decision and Order, Administrative Law Judge Torkington (the administrative law judge) found that Judge Heyer's decision did not contain a mistake of fact regarding the relationship between claimant's permanent back disability and the 1980 work injury. Thus, the administrative law judge denied employer's motion for modification. The administrative law judge found that claimant's back condition has worsened since Judge Heyer's award, and she awarded claimant permanent total disability benefits commencing September 27, 2004. 33 U.S.C. §908(a). The administrative law judge denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's denial of its motion for modification. Claimant responds, urging affirmance of the compensation award for permanent total disability.

Employer contends that the administrative law judge erred in finding that Judge Heyer's decision is not based on a mistake of fact such that the award should be terminated as of June 1984. Employer contends that Dr. Bert's opinion does not support the finding that the 1980 fall at work for which claimant filed his original claim resulted in any permanent disability. Employer also contends that to the extent the disability award is based on claimant's injuring his back while welding in 1981, it cannot stand as claimant did not file a claim for such an injury.

Section 22 of the Act 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.[2]

[2] Section 22 of the Act provides, in pertinent part:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under Section 908(f) of this title), on the grounds of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to Section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in Section 919 of this title, . . .

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 showing that the claim comes within the scope of Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997)*; Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990). In order to obtain modification based on a mistake of fact, the modification must render justice under the Act. *O'Keeffe v. Aerojet-General Shipyards, Inc.* 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). Recent decisions have emphasized the broad scope of modification. *See, e.g., Jensen*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003). The modification process is flexible, easily invoked, and intended to secure accuracy; finality of the prior decision is not an overarching consideration.[3] *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002), *citing Banks*, 390 U.S. at 464-465. Nonetheless, the moving party must establish that reopening a claim based on a mistake in fact will render justice under the Act.[4] *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007) (administrative law judge must consider the accuracy of the previous decision as well as the requesting party's diligence and motive in moving for modification); *Old Ben Coal Co.*, 292 F.3d at 543-548, 36 BRBS at 41-45(CRT) (administrative law judge may weigh many factors in determining whether justice under the Act will be served by reopening).

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33 U.S.C. §922.

[3] Thus, the administrative law judge erred in stating that, "absent egregious circumstances, I am not required to grant modification when new arguments or even new evidence either could have or should have been submitted at the original hearing," Order on Recon. at 3, and that she could not substitute her judgment for that of Judge Heyer. *Id.* The party seeking modification need not establish the unavailability of the evidence on which it now relies, *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003), and the administrative law judge may modify the prior decision merely "upon further reflection" on the prior evidence. *O'Keeffe v. Aerojet-General Shipyards, Inc.* 404 U.S. 254 (1971).

[4] The administrative law judge noted that employer did not seek modification based on a mistake in fact until over 20 years after Judge Heyer's decision was issued. A party's diligence and motive in seeking modification are factors in assessing whether modifying the decision will render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-134 (4th Cir. 2007).

The administrative law judge discussed Dr. Bert's opinion, which formed the basis for Judge Heyer's finding that the 1980 work injury resulted in permanent disability. Judge Heyer had noted that Dr. Bert's opinion was not expressed "with the greatest clarity or consistency," but Judge Heyer nonetheless found that Dr. Bert opined that the 1980 injury contributed to claimant's permanent disability. 1986 Decision and Order at 3. In her two decisions, the administrative law judge rejected at length employer's contention that Dr. Bert had never attributed claimant's disability to the 1980 work injury. Decision and Order at 9-10; Order at Recon. at 2-6. The administrative law judge noted that Dr. Bert's testimony in 2007 also was not a "model of clarity" but she found that he maintained his position that the 1980 work injury had resulted in some permanent disability. The administrative law judge declined to credit the contrary opinions of Drs. Matteri and Neumann, given for the modification proceeding, that claimant's 1980 fall did not result in any permanent disability, finding that the opinion of Dr. Bert, as the treating physician for over 30 years, is entitled to greater weight.

Substantial evidence supports the administrative law judge's finding that Dr. Bert opined in the proceeding before Judge Heyer that the 1980 incident resulted in claimant's permanent disability. While Dr. Bert initially opined on May 8, 1980, that claimant's February 1980 injury had resolved, EX 22, on February 2, 1982, Dr. Bert wrote that claimant's current back condition is related mostly to the non work-related incident on January 27, 1982, but that "there is (sic) some contributing factors from the injury of February 4, 1980." CX 8. On December 29, 1982, Dr. Bert wrote, "I feel that the February 2 (sic), 1980 injury and the July 15, 1981 aggravation plus his work activities are material contributing factors to his worsened condition and his need for continuing medical care." CX 9. On March 15, 1985, Dr. Bert gave claimant permanent work restrictions due to the injury of February 1980 and the aggravations of July 1981 and January 1982.[5] He stated that these permanent limitations were in effect as of February 1980. CX 11. Moreover, in the opinion he provided for the modification proceeding, Dr. Bert stated that "the injuries and work exposure" claimant had in 1980 to 1982 probably did accelerate the degeneration of claimant's lumbar spine. Tr. at 11 (June 18, 2007).

As this evidence, on which the administrative law judge relied, establishes that the 1980 injury resulted in claimant's disability, the administrative law judge did not err in finding that employer did not establish a mistake in fact in Judge Heyer's decision. Order on Recon. at 5. Claimant's disability need only be in part related to a work injury in order to be compensable; it need not be the sole cause. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). Moreover, employer does

[5] The limitations were: (1) no prolonged standing (over two to three hours); (2) no lifting over 25 to 30 pounds; (3) no frequent bending or stooping; and (4) no overhead work. CX 11.

not challenge the administrative law judge's finding that it did not establish that the 1982 incident at the convenience store was an intervening cause of claimant's disability that would relieve employer of liability. Order on Recon. at 5; *see generally Cyr v. Crescent Wharf & Warehouse Co*., 211 F.2d 454 (9th Cir. 1954). In addition, the administrative law judge rationally credited the opinion of the treating physician, Dr. Bert, over those of Drs. Matteri and Neumann, based on her finding that the treating physician was in a better position to determine claimant's disability at the time in question, whereas Drs. Matteri and Neumann merely reviewed claimant's medical records and first examined claimant in 2006 and 2007, respectively.[6] Decision and Order at 10, 12; Order on Recon. at 4. It is well established that an administrative law judge may draw her own inferences and conclusions from the evidence and is not bound to accept the opinion of any particular physician. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge provided a rational basis for giving greater weight to the opinion of the treating physician. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

In view of the administrative law judge's rational conclusion that there is no mistake in Judge Heyer's finding that claimant's 1980 injury resulted in permanent disability, the issue of whether claimant's 1981 welding work was part of the disability claim addressed by Judge Heyer is largely immaterial. The administrative law judge found that such a claim was addressed by Judge Heyer. There is evidence of record that such a claim was made by claimant, though it is less clear that Judge Heyer addressed it.[7] *See* Tr. at 149;[8] CX 9. Nonetheless, it was within the administrative law judge's

[6] The administrative law judge noted that Dr. Neumann recognized the advantage possessed by a treating physician in evaluating the patient contemporaneously. Order on Recon. at 4, *citing* Tr. at 155 (June 19, 2007).

[7] The administrative law judge found that Judge Heyer's references to a "second injury" indicate he addressed the July 1981 welding incident. It appears that the second injury is actually the 1980 injury and that the prior injury is the one claimant sustained in the mid 1970s. Oct. 2, 1986 Decision and Order at 3.

[8] In this portion of the testimony of Dr. Neumann at the 2007 hearing, claimant's counsel read to Dr. Neumann part of the 1986 deposition of Dr. Bert wherein claimant's then counsel, Mr. Hytowitz, asserted that the claim included the harm resulting from the 1981 welding work and the 1982 convenience store fall. Tr. at 149. The 1986 deposition itself was not admitted into the record in the modification proceedings. Employer objects in its reply brief to claimant's reliance on this statement, Cl. Resp. Br. at 4-5, as Mr. Hytowitz was not a witness and employer did not acquiesce to the truth of the matter

authority on modification to address whether claimant's disability was in fact related to his 1981 welding activities for employer based on employer's contention in its 2006 motion that claimant failed to assert such a claim originally. *Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001). The administrative law judge is afforded broad discretion to correct any mistakes of fact, and as employer raised the issue, it cannot claim surprise or lack of due process.[9] *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999). The evidence that claimant asserted a right to compensation for the 1981 aggravation is sufficient to bring claimant's welding activities within the scope of the claim. *See Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989). *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982) ("considerable liberality" is allowed in amending claims). Moreover, as discussed above, substantial evidence supports the administrative law judge's finding that, in part, claimant's disability is due to his welding employment in 1981 as well as to the 1980 injury. *See* CXs 9, 11; Tr. at 11.

Thus, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that employer did not establish a mistake of fact in Judge Heyer's decision and her consequent denial of employer's motion for modification. As employer does not challenge the administrative law judge's finding that claimant established he is now totally disabled, we affirm the award of permanent total disability benefits.

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asserted. Nonetheless, employer does not dispute that the statement was made or assert the existence of any statements or evidence explicitly limiting the claim to the 1980 fall.

[9] Contrary to the administrative law judge alternative finding, employer was not required to have appealed Judge Heyer's decision in order to raise this issue. The issue falls squarely within the context of a mistake in fact regarding the scope of the claim made by claimant. *See generally G.K. v. Matson Terminals, Inc.*, 42 BRBS 15 (2008); *S.K. v. Service Employers Int'l*, 41 BRBS 123 (2007).

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Motion for Modification and Denying Employer's Motion for Modification and the Order Denying Employer's Motion for Reconsideration are 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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BETTY JEAN HALL
Administrative Appeals Judge