



BRB No. 14-0399

IRENE C. GONZALES)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>Aug. 10, 2015</u>
)	
AIR FORCE INSURANCE FUND)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Irene C. Gonzales, San Antonio, Texas, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2014-LHC-00212) of Administrative Law Judge Lee J. Romero, Jr., 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without legal representation, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a back injury during the course of her employment as a guest services representative on September 13, 2010. After obtaining medical treatment, claimant returned to modified work for employer on September 15, 2010. She continued in this employment until June 1, 2011, when her employment was terminated because she violated several work rules. Claimant sought benefits under the Act, and employer controverted claimant's entitlement to compensation and medical benefits.

In a Decision and Order dated June 4, 2013, the administrative law judge found that claimant suffered a compensable work-related back injury on September 13, 2010. He further found that claimant had not reached maximum medical improvement, that the modified work claimant performed for employer following her injury constituted suitable alternate employment, and that her earnings during that period reasonably and fairly represented her post-injury wage-earning capacity. Having found that claimant's post-injury weekly earnings were lower than her stipulated pre-injury average weekly wage, the administrative law judge found claimant entitled to temporary partial disability benefits from September 13, 2010 through May 31, 2011. 33 U.S.C. §908(e), (h). The administrative law judge further determined that claimant's termination was due to her own misfeasance and that, therefore, any increased loss in wage-earning capacity following her termination is not compensable. He found, however, that claimant remained entitled to the temporary partial disability benefits to which she was entitled prior to her termination; thus, he awarded claimant continuing temporary partial disability benefits at the prior compensation rate. Lastly, the administrative law judge found that employer is liable for reasonable and necessary medical expenses under Section 7(a), 33 U.S.C. §907(a), related to claimant's compensable back condition.

Employer subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, based on a change in claimant's condition. A formal hearing was held before the administrative law judge on May 8, 2014. In support of its assertion that claimant had fully recovered from her work injury, employer submitted the reports and deposition testimony of Dr. Kalisky, a Board-certified physical medicine and rehabilitation specialist, who examined claimant on two occasions. Employer also submitted two labor market surveys which, it asserted, established the availability of suitable alternate employment. In response, claimant submitted documentation regarding medical treatment she has received from various providers since the initial adjudication of her claim. During the modification proceedings, the parties stipulated that claimant's work-related back injury reached maximum medical improvement on November 13, 2010.

In his Decision and Order dated August 12, 2014, the administrative law judge found that employer established a change in claimant's physical and economic conditions. He found, based on the parties' stipulation, that claimant reached maximum medical improvement on November 13, 2010. He further found that claimant has fully recovered, and has no residual restrictions, from her September 13, 2010 work injury. The administrative law judge found, assuming, *arguendo*, that claimant established a prima facie case of total disability, that employer established the availability of suitable alternate employment with its April 25, 2014 labor market survey, and that, based on these positions, claimant's post-injury wage-earning capacity exceeds her average weekly wage at the time of injury. The administrative law judge further found that claimant's present medical complaints are unrelated to her work injury, from which she has fully recovered, and, thus, she is not entitled to additional medical benefits. The administrative

law judge consequently granted employer's modification request, and found that claimant's entitlement to disability benefits was limited to a period of temporary partial disability from September 13, to November 13, 2010, and a period of permanent partial disability from November 14, 2010 through April 24, 2014, the date that employer established the availability of suitable alternate employment that paid more than claimant's pre-injury average weekly wage. 33 U.S.C. §§908(c)(21), (e), (h).

Claimant, without the assistance of counsel, appeals the administrative law judge's decision on modification. Employer has not filed a response brief.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake in a determination of 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); *Island Operating Co., Inc. v. Director, OWCP [Taylor]*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003). The party requesting modification has the burden of showing the change in condition or mistake in fact. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In this case, the change in condition alleged by employer related to both the existence of ongoing disability due to claimant's September 13, 2010 work-related back injury and her continued entitlement to Section 7 medical benefits for that work injury. The administrative law judge's decision on modification contains an accurate summary of the medical evidence previously admitted in this case and a thorough and accurate review of the hearing testimony and documentary evidence presented during the modification proceeding. *See* Aug. 12, 2014 Decision and Order at 3-12. Moreover, on modification, the administrative law judge evaluated claimant's credibility, finding her hearing testimony to be ambiguous and inconsistent; thus, he concluded that claimant lacks credibility, which detracts from the weight to be accorded her testimony and her claim in general. *Id.* at 13-15.

We affirm the administrative law judge's finding that employer presented credible evidence sufficient to establish a change in claimant's physical condition subsequent to the administrative law judge's initial decision in this case. The administrative law judge's resulting conclusions that claimant has no residual disability as a result of her work injury and does not require further medical care for that injury are supported by substantial evidence. *See Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *see generally Mendoza v. Marine Personnel Co., Inc.* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this regard, the opinion of Dr. Kalisky, whose credentials were expressly discussed by the administrative law judge, is probative with respect to the issues of whether claimant remains disabled by and requires medical care for her work injury. *See* Aug. 12, 2014 Decision and Order at 8-11; EXs 3, 4, 12 (May 8,

2014 hearing). Dr. Kalisky, who examined claimant on February 27, 2013 and January 22, 2014, stated that the sprain/contusion of the lumbar and thoracic spine that claimant sustained as a result of September 13, 2010 work incident has fully resolved, that her subjective complaints are not supported by any objective findings, that she is not precluded from performing her usual work as a result of her work injury, and that she needs no further medical treatment for her work injury. *See id.*

Although claimant sought to counter Dr. Kalisky's opinion that she has fully recovered from her September 13, 2010 work injury with various medical records, the administrative law judge reasonably determined that none of them demonstrates that claimant remains disabled due to her work injury. *See* Aug. 12, 2014 Decision and Order at 6-8, 17, 19-20; *see also* CXs 1-20; *Ramos*, 34 BRBS at 84. Furthermore, having rationally found that claimant is not a credible witness, the administrative law judge declined to base a finding of disability solely on her subjective complaints of pain. *See* Aug. 12, 2014 Decision and Order at 20; *Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant has fully recovered from her work injury and his consequent determination that claimant is not entitled to further disability benefits.¹

Based on his finding that claimant has fully recovered from her work injury, the administrative law judge determined that additional medical treatment for that injury is not necessary. *See* Aug. 12, 2014 Decision and Order at 20-23. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). It is claimant's burden to prove the elements of her claim for medical benefits. *See Ingalls Shipbuilding, Inc., v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). In this case, the administrative law judge's finding that further treatment for the work injury is unnecessary is supported by Dr. Kalisky's opinion that claimant fully recovered from her September 13, 2010 work-related injury, that further medical treatment for that injury is unnecessary, and that any current treatment claimant is receiving is unrelated to the work injury. *See* Aug. 12, 2014 Decision and Order at 9-11; *see also* EXs 3, 10, 12 (May 8, 2014 hearing). Therefore, we affirm the administrative law judge's denial of additional medical benefits for claimant's September 13, 2010 work injury as supported by substantial evidence. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F.App'x 126 (5th Cir. 2002); *Brooks v. Newport*

¹ In view of our affirmance of the administrative law judge's finding that claimant's work injury does not preclude her from performing her usual work, we need not address the administrative law judge's alternative finding that, assuming *arguendo* claimant was disabled employer established the availability of suitable alternate employment.

News Shipbuilding & Dry Dock Co., 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order on modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge