



BRB No. 18-0169

THEODORE R. LESTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TRIPLE CANOPY)	
)	DATE ISSUED: <u>Aug. 14, 2018</u>
and)	
)	
CONTINENTAL CASUALTY COMPANY)	
c/o CNA INTERNATIONAL)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Granting Motion for Summary Decision of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Gary B. Pitts and Joel S. Mills (Pitts & Mills), Houston, Texas, for claimant.

Collin D. Seipel and Maya G. Hamouie (Brown Sims), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Granting Motion for Summary Decision (2018-LDA-00016) 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 Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of

law if they are rational, supported by substantial evidence, and 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 was hired by Blackwater in 2008 to provide security services for the United States Embassy in Baghdad, Iraq. Thereafter, employer assumed the contract from Blackwater and claimant remained in the same position.

On January 18, 2010, claimant injured his left foot when he ran to a bunker during a mortar attack. He underwent an x-ray of his foot, which revealed he had fractured it in three places. He returned to the United States to see a podiatrist and then returned to Iraq three to four months later.

On September 3, 2010, claimant injured his back during a rocket attack when he slid down from the top of a vehicle and landed on his buttocks. Claimant was placed on bed rest for two days but when his pain had not improved a week later, he was sent to the United States for medical care. He was initially treated by Dr. Head and then referred to Dr. Tipton, an orthopedic surgeon, who performed spinal surgery at the L4-5 and L5-S1 levels. Claimant has also undergone ten epidural steroid injections, nerve root blocks, and physical therapy, among other treatments, all of which provided only temporary relief from his symptoms.

Claimant filed a claim for benefits for his left foot and lower back injuries, as well as for depression, anxiety, adjustment disorder, and post-traumatic stress disorder, alleging that his psychological disorders were caused or aggravated by his lower back injury and conditions of his employment. The parties stipulated that claimant injured his left foot on January 18, 2010, his lower back on September 3, 2010, and suffered a “psychological condition.” Decision and Order at 104 (Sept. 16, 2016).

The administrative law judge found, based on the parties’ stipulations, that claimant established a prima facie case that he suffered a left foot injury, lower back injury, and psychological condition, and that working conditions or activities could have caused the injuries. Decision and Order at 137. He concluded that employer rebutted the Section 20(a) presumption with respect to claimant’s psychological conditions, and that claimant failed to establish that these conditions are work-related. *Id.* at 138-141. The administrative law judge found that employer did not rebut the Section 20(a) presumption with respect to claimant’s left foot fracture and his lower back injury, making them compensable. *Id.* at 141-142.

The administrative law judge found claimant entitled to temporary total disability benefits for his left foot injury from January 22, 2010 through May 10, 2010, when Dr.

Hudson opined that claimant could return to full duty with no restrictions. Decision and Order at 154. With regard to claimant's back injury, the administrative law judge noted that in 2005, prior to claimant's beginning his employment with employer, he was diagnosed with degenerative changes at the L4-5 and L5-S1 levels, lumbar strain, and lower lumbar radiculopathy and that these diagnoses remained unchanged through December 2011. *Id.* at 161. He concluded that there was no credible evidence that claimant's September 2010 low back contusion aggravated his pre-existing lower back condition or led to his 2012 back surgery. *Id.* The administrative law judge found that claimant's low back contusion fully resolved on March 4, 2011 when Dr. Head and Mr. Farris released him to fully duty with no restrictions. *Id.* at 162. Accordingly, he found claimant was entitled to temporary total disability benefits beginning on September 6, 2010, the date he returned for treatment of his low back injury, and ending on March 4, 2011, the date he was released to full duty. *Id.*

Claimant did not appeal the administrative law judge's Decision and Order, but submitted a timely petition for modification based on a change in condition of his lumbar spine. Claimant submitted an MRI dated June 7, 2017, showing right disc protrusions at the L4-5 and L5-S1 levels and an opinion by Dr. Craig Kuhns, who stated that claimant's back pain is due to his disc problems at levels L4-5 and L5-S1 and that he requires fusion surgery. Employer filed a motion for summary decision on the grounds that the administrative law judge had found claimant's L4-5 and L5-S1 changes were neither caused nor aggravated by his September 2010 work accident and that claimant had not shown a change in condition related to his compensable injury, which was merely a contusion. Claimant opposed employer's motion for summary decision.

The administrative law judge denied claimant's request for modification because the evidence claimant submitted concerned the worsening of his L4-5 and L5-S1 conditions, which he had found were not work-related. Order Granting Motion for Summary Decision at 11. He concluded that there are no genuine issues of material fact over whether a change in claimant's compensable condition has occurred and therefore granted employer's motion for summary decision. *Id.*

Claimant appeals the administrative law judge's Order granting employer's motion for summary decision, arguing that he is entitled to a hearing on his modification request and that the new evidence supports a finding that there has been a change in his condition since the administrative law judge's prior Decision and Order, as well as a mistake in a determination of fact in that decision. Employer filed a response brief, urging affirmance.

In determining whether to grant a motion for summary decision, the fact-finder must determine, after reviewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party

is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); 29 C.F.R. §18.72. If the fact-finder could find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Walker v. Todd Pacific Shipyards*, 47 BRBS 11 (2013), *vacating in part on recon.*, 46 BRBS 57 (2012).

Section 22 of the Act permits the modification of an award if the party seeking to alter the award establishes a change in condition or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party seeking modification bears the burden of proof. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). On appeal, claimant contends that because the parties disagree as to whether there has been a change in condition sufficient to justify modifying the administrative law judge's original decision, there is a question of material fact that should have precluded the granting of employer's motion for summary decision. We reject claimant's contention, as we agree with the administrative law judge that claimant's new evidence did not raise a genuine issue of material fact as to whether there was a change in condition with respect to claimant's compensable lumbar spine injury.

The administrative law judge stated that, in his original decision, he concluded that claimant's lumbar spine conditions at L4-5 and L5-S1 were not caused or aggravated by his September 2010 work-related lower back contusion. Order Granting Motion for Summary Decision at 8-11. As the evidence claimant offered to support his modification request addressed only this non-compensable spine condition, the administrative law judge properly concluded that there were no genuine issues of material fact presented as to the compensable condition. Thus, we reject claimant's contention that he was entitled to a hearing on this issue.¹ *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003).

¹ The Board's decision in *Jukic v. American Stevedoring, Inc.*, 39 BRBS 95 (2005), does not compel the conclusion that claimant is entitled to a hearing in this case. *Jukic* did not involve the question of whether a genuine issue of material fact existed so as to preclude the granting of a motion for summary decision. Rather, the claimant moved for modification and, on the deadline for submitting evidence, also requested that he be permitted via deposition or formal hearing to testify as to his claim that there was a mistake in fact regarding his disability status. The administrative law judge denied the request for a hearing and, having reviewed the old and newly-submitted evidence, denied the motion for modification. On claimant's appeal, the Board held that claimant was entitled to a hearing because he timely requested one, in accordance with, *inter alia*, 33 U.S.C. §919(c) and 20 C.F.R. §702.373. The Board thus remanded the case for a hearing.

Claimant also contends that he is entitled to modification based on a mistake in a determination of fact, i.e., whether his lumbar spine injury is work-related. Claimant's argument is unavailing, however, because he did not raise this issue before the administrative law judge. Claimant sought modification of the administrative law judge's decision "based on a change in condition," focusing on the new MRI results and Dr. Kuhns's recommendation that claimant undergo spinal fusion surgery. *See* Emp. Motion for Summary Decision Ex. 1 (Cl. LS-18). Claimant's response to employer's motion for summary decision similarly alleged that the evidence supports modification based on a change in claimant's physical condition because claimant's doctors had not previously recommended that claimant undergo a spinal fusion. *See* Cl. Response to Motion for Summary Decision at 4. Because claimant did not raise the issue of whether the administrative law judge's initial Decision and Order should be modified due to a mistake in fact as to whether his spinal condition is related to his work accident, we decline to address it for the first time on appeal. *See Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008). Consequently, as claimant has failed to demonstrate error in the administrative law judge's conclusions that there were no genuine issues of fact for trial and that employer is entitled to a decision in its favor as a matter of law, we affirm the administrative law judge's order granting employer's motion for summary decision and denying claimant's motion for modification.

This case, however, involves a motion for summary decision. The administrative law judge properly found the absence of any genuine issue of material fact, the presence of which is necessary for the case to proceed to a review of the merits, including a hearing if requested. Because the administrative law judge properly denied the claim on the pleadings, claimant was not entitled to a hearing on his modification request. 29 C.F.R. §18.72.

Accordingly, the administrative law judge's Order Granting Motion for Summary Decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge