BRB No. 02-0373

WILBUR S. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Feb. 19, 2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-3054, 01-LHC-1053) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on claims 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).

This appeal arises from the administrative law judge's denial of claimant's petition for modification, pursuant to Section 22 of the Act, 33 U.S.C. §922, of the prior award of permanent partial disability benefits for claimant's shoulder injury and of claimant's claim for occupational hearing loss. Claimant sustained a work-related shoulder injury in 1992. In a 1998 Decision and Order, the administrative law judge awarded claimant permanent partial disability benefits commencing January 9, 1996, and continuing.[1] Specifically, the parties stipulated that claimant was

[1]The administrative law judge also denied employer relief pursuant to Section 8(f), 33

unable to return to his usual employment as a cable puller, and the administrative law judge found that employer identified six jobs as being within claimant's work restrictions.

Claimant subsequently sought modification of this permanent partial disability award, contending his condition had deteriorated such that he is now totally disabled. In addition, claimant filed a claim for occupational hearing loss as evidenced by an audiogram administered by Jack Hardy on July 25, 2000. The two claims were consolidated for hearing and decision by the administrative law judge.

The administrative law judge found that claimant did not establish a change in his condition, and thus denied the claim for total disability benefits for the shoulder injury. The administrative law judge rejected the medical evidence claimant offered as proof of the deterioration of his condition. With regard to the hearing loss claim, the administrative law judge rejected the parties' stipulation that, "The audiograms submitted by both parties are proper under the Act," and he credited the opinion of Chris Zambas, an audiologist, that the 2000 audiogram is not valid and that claimant does not have a rateable work-related hearing impairment.

On appeal, claimant contends that the administrative law judge erred in finding that he is not totally disabled by his shoulder injury. Claimant also contends that the administrative law judge erred in rejecting the parties' stipulation regarding the propriety of the audiograms without giving notice to the parties that he would do so. Claimant thus contends that the 2000 audiogram is entitled to presumptive weight and that he is entitled to benefits for the hearing loss demonstrated on this audiogram. Employer responds, urging affirmance of the administrative law judge's decision.

We first address claimant's contention that the administrative law judge erred in finding the new medical evidence insufficient to establish a change in his condition. 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 of fact in the initial determination or a change in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well-established that the party seeking modification has the burden of proof of demonstrating the mistake in fact or change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT)(1997). In this case, claimant attempted to establish that his physical condition has changed such that he cannot perform any employment, or that, based on increased restrictions, the jobs the administrative law judge found to be suitable no longer are. *See* Claimant's post-hearing brief.

U.S.C. §908(f). Employer appealed this denial to the Board, which affirmed the administrative law judge's decision on this issue. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 98-1341 (July 2, 1999)(unpub.).

In his 1998 decision, the administrative law judge found that employer established the availability of suitable alternate employment.[2] In support of his contention that he is now totally disabled, claimant offered the November 1998 opinion of Dr. Parent, that claimant was "totally unemployable and disabled," CX 1 at 2, and the 2000 opinion of Dr. Tolson, that claimant is "totally and physically disabled." CX 5. The administrative law judge rationally found that Dr. Tolson's opinion is insufficient to establish that claimant is totally disabled as the opinion is conclusory and unsupported by any reasoning or facts. *See generally 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).

[2]On June 6, 1996, Dr. Walko assigned claimant restrictions, which were revised on August 22, 1997, and which included limited work above the shoulders and limited bending, kneeling, climbing, standing, sitting, walking, pushing or pulling, and lifting. In addition, to claimant's shoulder injury, the restrictions also relate to claimant's pre-existing back condition, which he alleged was aggravated by the 1992 work injury. EX 9. Based on the testimony of vocational consultant David Karmolinski, claimant's educational limitations and the approval of the jobs by Dr. Walko, the administrative law judge credited the following jobs as evidence of suitable alternate employment: security guard at Clemons Security, cashier at Salvation Army, two positions as greeters at Walmart, security job at Farm Fresh, and donation center attendant.

We cannot, however, affirm the administrative law judge's treatment of the opinions of Drs. Parent and Cohn.[3] In 1996, Dr. Parent approved claimant to work with restrictions, EX 1, and in 1997 he suspected claimant of malingering and symptom magnification. CX 1 at 14-15. After examinations in August and November 1998, Dr. Parent opined that claimant is unemployable and that claimant's range of motion and shoulder stiffness was "the same or worse as it was before." CX 1 at 8, 16. In rejecting Dr. Parent's opinion that claimant is totally disabled, the administrative law judge stated that Dr. Parent did not consider claimant's condition relative to the jobs found to be suitable in the previous decision. The fact that Dr. Parent did not address claimant's ability to perform the jobs previously found to be suitable does not detract from his opinion, as he has opined that claimant is unemployable. If claimant establishes that he cannot work at all, he is entitled to total disability benefits. *Lostanau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

The administrative law judge's finding that Dr. Parent's 1998 opinion was less persuasive because he had suspected symptom magnification cannot be affirmed, as Dr. Parent suspected symptom magnification in 1997, prior to the modification proceedings, [4] and explained his 1998 conclusion that claimant's symptoms were legitimate. Moreover, his 1998 opinion could be construed as explaining the worsening of claimant's condition. Dr. Parent stated that on testing claimant's grip strength, claimant "would have a brief maximal effort, and then it would be very weak again." CX 1 at 7. Dr. Parent did not attribute the weakness to lack of effort. In addition, Dr. Parent found atrophy in the measurement of claimant's right wrist, which he stated legitimized claimant's complaints as it demonstrated the lack of use of the arm due to shoulder pain. CX 1 at 7-8. Finally, Dr. Parent observed claimant when claimant was distracted, and Dr. Parent stated that claimant's pain behavior at this time was consistent with his clinical observations. CX 1 at 9-10. Thus, Dr. Parent explained the basis for his belief that claimant's symptoms were not feigned and provided a basis for finding that claimant's condition was in fact worse than he had believed at the time of his prior examination. As the administrative law judge did not fully consider Dr. Parent's opinion, we must remand this case for the administrative law judge to reconsider whether the opinion is sufficient to establish a change in claimant's condition.

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[3]The administrative law judge did rationally state that he is not required to give Dr. Parent any special consideration as a treating physician, as he last examined claimant in 1998. Decision and Order at 13; CX 1 at 13, 16.

[4]At his deposition, Dr. Parent explained the basis for his finding of symptom magnification during his 1997 examination of claimant. CX 1 at 14-15.

Furthermore, remand is required for the administrative law judge to reconsider the opinion of employer's expert, Dr. Cohn, an orthopedic specialist. Dr. Cohn opined in 2001 that claimant is only partially disabled in a physical sense. The administrative law judge stated that Dr. Cohn's work restrictions do not differ in "any significant degree" from the restrictions of Dr. Walko on which the prior award was based. Although the restrictions on the form filled out by Dr. Cohn are indeed similar to those imposed by Dr. Walko in 1996 and 1997, *see* EX 4; n. 2, *supra*, Dr. Cohn additionally restricted claimant, who is right-hand dominant, to "left handed sedentary work," and stated that claimant may perform work with his right arm in a sling or at his right side. EX 3. The administrative law judge did not address this additional restriction to one-handed work in addressing claimant's ability to perform the identified jobs. Consequently, we must remand the case for the administrative law judge to reevaluate the jobs found to be suitable in 1998 in light of Dr. Cohn's restrictions and determine whether they remain suitable for claimant.[5]

[5]Employer did not submit an updated labor market survey or vocational testimony in response to claimant's motion for modification.

With respect to claimant's hearing loss claim, the parties stipulated at the hearing that, "The audiograms submitted by both parties are proper under the [A]ct." Tr. at 14; Decision and Order at 3. This stipulation was not otherwise explained by the parties, but the administrative law judge interpreted it as meaning that the audiograms are "presumptive evidence" of the degree of claimant's hearing loss. *See* 33 U.S.C. §908(c)(13)(C); 20 C.F.R. §702.441.[6] In light of this interpretation, the administrative law judge stated he could accept the stipulation as to the audiograms submitted by employer,[7] but not as to the July 2000 audiogram submitted by claimant. Specifically, the administrative law judge found that, based on Mr. Zambas's deposition testimony, he could not find that the 2000 audiogram was administered by a licensed or certified audiologist or a physician certified in otolaryngology.[8] On appeal, claimant contends that the administrative law judge erred in rejecting the parties' stipulation without giving them notice that he would do so. Claimant thus requests that the Board hold that claimant's hearing loss is compensable based on the July 25, 2000, audiogram.

An administrative law judge may reject a stipulation agreed to by the parties, but he must give them notice that he will do so in order to afford them the opportunity to present evidence in lieu of the stipulation. *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225 (1985). The administrative law judge did not provide claimant with such notice in this case. Nevertheless, we hold that, on the facts of this case, the administrative law judge's rejection, without notice, of the

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[6]Section 8(c)(13)(C) states:

> An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

33 U.S.C. §908(c)(13)(C); *see also* 20 C.F.R. §702.441.

[7]Mr. Zambas, who administered the shipyard audiograms, is employer's chief audiologist, and has managed its audiology department for approximately 25 years. He holds a Master's degree in audiology from Pennsylvania State University and has been licensed by the Virginia Board of Audiology since 1974, which was the first year that audiology licenses were available in Virginia. EX 5.

[8]The administrative law judge found that there is no evidence that Mr. Hardy is an audiologist. Decision and Order at 11. The administrative law judge relied on Mr. Zambas's opinion that, based on his past experience with Carolina Hearing and Balance Labs, he did not believe Mr. Hardy was an audiologist. EX 5 at 30. Mr. Hardy is identified on his letterhead only as "Hearing Inst. Specialist N.C.897." CX 1.

parties' stipulation is harmless error.

Assuming, *arguendo*, that the administrative law judge had accepted the stipulation concerning the 2000 audiogram, that alone is insufficient to establish claimant's entitlement to an award of benefits. First, we note that claimant has not sought an appropriate remedy for rejection of the stipulation, which would be remand for the claimant to submit evidence establishing Mr. Hardy's credentials and the other requirements for presumptive weight to be accorded the audiogram. Claimant does not seek remand for this purpose, nor does he aver that Mr. Hardy is an audiologist; rather, he argues only that the parties' stipulation should be enforced to provide claimant with presumptive evidence of hearing loss. "Enforcing" the stipulation, however, would not provide claimant with the relief he seeks. Section 8(c)(13)(C) of the Act and Section 702.441 of the regulations provide that an audiogram administered in accordance with the Act and regulations is presumptive evidence of the *amount* of the claimant's hearing loss, *i.e.*, the degree of the hearing impairment. It does not establish that the demonstrated hearing loss is work-related. In this case, the administrative law judge found, based on Mr. Zambas's deposition testimony, that the hearing loss demonstrated on the 2000 audiogram is not work-related as the pattern of loss is not reflective of a noise-induced loss and is not consistent with the patterns of loss demonstrated on the audiograms administered by the shipyard before claimant left due to the shoulder injury. EX 5 at 24, 26. In addition, Mr. Hardy did not render an opinion as to the cause of claimant's hearing loss. Claimant does not challenge the finding that his hearing loss is not work-related, and thus the administrative law judge's finding that the hearing loss shown on this audiogram is not work-related is affirmed.[9]

Furthermore, as the administrative law judge rationally stated, he may find that the "presumptive" audiogram is invalid or inaccurate based on other evidence of record. Decision and Order at 11. Thus, "enforcing" the stipulation so that the audiogram is *presumptive* evidence does not make it *conclusive* as to the amount of hearing loss. This conclusion is not altered by language in the regulation implementing Section 8(c)(13)(C), which states that an audiogram is presumptive evidence of the amount of the hearing loss if "no one produces a contrary audiogram of equal probative value . . . within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue." 20 C.F.R. §702.441(b)(2). This provision does not circumscribe the administrative law judge's authority to determine the weight to be accorded a "presumptive" audiogram based on other relevant evidence of record. In this case, the administrative law rationally credited the testimony of Mr. Zambas that, if accurate, the 2000 audiogram demonstrates that claimant is profoundly deaf and would be unable to communicate face-to-face. Decision and Order at 11. Based on his observation of claimant at the hearing,

[9]Mr. Zambas testified that the audiograms administered at the shipyard showed a high frequency noise-induced loss that is not rateable under the American Medical Association *Guides to the Evaluation of Permanent Impairment.* EX 5 at 11.

wherein claimant did not wear hearing aids and was able to communicate with the administrative law judge and the attorneys, the administrative law judge found that the "presumption" that the 2000 audiogram accurately reflected claimant's hearing loss was rebutted. This finding is rational and supported by substantial evidence. Consequently, we affirm the administrative law judge's rejection of claimant's 2000 audiogram and the denial of claimant's hearing loss claim.

Accordingly, we affirm the administrative law judge's rejection of the opinion of Dr. Tolson, but we vacate the administrative law judge's finding that claimant has not established a change in his condition and we remand this case for further consideration of the opinions of Dr. Parent and Cohn consistent with this opinion. Additionally, we affirm the administrative law judge's denial of claimant's hearing loss claim.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge