BRB No. 04-0526

GEANETT A. TYLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED: 01/31/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification and Dismissing Complaint of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Geanett A. Tyler, Ft. Washington, Maryland, *pro se*.

Alan D. Sundburg (Friedlander, Misler, Sloan, Kletzkin & Ochsman, P.L.L.C.), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Request for Modification and Dismissing Complaint (2002-DCW-5) of Administrative Law Judge Linda S. Chapman 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (the Act). In an appeal filed by a claimant without legal representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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). If they are, they must be affirmed.

This case is on appeal to the Board for the sixth time, and it has a protracted history. Briefly, claimant was a bus driver who was injured in two work accidents in

1975 and 1976. Claimant originally was awarded permanent total disability benefits but that award was later modified to one for permanent partial disability benefits pursuant to 33 U.S.C. §922. *See Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 00-1076 (Feb. 7, 2001), *appeals dismissed sub nom. Tyler v. Director, OWCP*, No. 01-1080 (D.C. Cir. Aug. 6, 2001), *pets. for reh'g denied*, Nov. 19, 2001 and Feb. 6, 2002, *and Tyler v. Washington Metropolitan Area Transit Authority*, Civ. Action No. 01-2331 (D.D.C. Nov. 7, 2001); *Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 96-1464 (June 30, 1997), *appeal dismissed sub nom. Tyler v. Director, OWCP*, No. 98-1038 (D.C. Cir. May 1, 1998), *pets. for reh'g denied*, July 10, 1998, and October 2, 1998; *Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 93-1646 (Nov. 26, 1993); *Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 87-288 (Dec. 30, 1988), *vacated*, No. 89-1309 (D.C. Cir. Oct. 16, 1990). Thereafter, an issue arose regarding the credit due employer for overpayment of benefits resulting from the modification of the award.[1] Additionally, claimant alleged she was again disabled; however, she refused to participate in an informal conference, as well as in discovery, so the administrative law judge issued a Show Cause Order. Claimant did not respond; accordingly, the administrative law judge dismissed claimant's modification claim. Claimant appealed to the Board, and the Board, in response to a motion from the Director, Office of Workers' Compensation Programs (the Director), vacated the dismissal and remanded the case to the administrative law judge for consideration of whether it is appropriate to certify the facts regarding claimant's non-compliance with valid orders to the district court in accordance with Section 27(b) of the Act, 33 U.S.C. §927(b). *Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 03-0330 (April 29, 2003).

On remand, the administrative law judge issued a Status Order and Order to Show Cause. In response, employer advised the administrative law judge that claimant still had not responded to its discovery requests. In December 2003, claimant responded to the Show Cause Order, taking issue with the previous decisions in this claim. Following that response, claimant's counsel responded and attached claimant's answers to employer's interrogatories. The administrative law judge found that the answers were deficient in that they were not signed or attested to by claimant and that, even if they were, they established no grounds on which she could modify the award of partial disability benefits. As claimant identified no evidence to support her allegation of a change in her condition, the administrative law judge denied the motion for modification. Additionally, the administrative law judge found that claimant failed to state a claim upon which relief could be granted and, in accordance with 29 C.F.R. §18.1(a) and Fed.R.Civ.P. 12(b)(6), she dismissed claimant's claim. Decision and Order at 4-5. Claimant, without the

[1]Claimant asked that the credit be recouped over a longer period of time so that she could continue to receive some benefits.

assistance of counsel, appeals the decision, and employer responds, urging affirmance.[2]

Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions 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 based on a change in conditions has the burden of establishing the change. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In this case, claimant filed "answers to interrogatories" to support her request for modification of her award from permanent partial disability benefits to permanent total disability benefits. The administrative law judge found that the answers to some of the questions contradicted each other and that, overall, the responses offered no support for an award of permanent total disability benefits. For example, the administrative law judge noted that to one question claimant answered that her treating physician was Dr. Azar; however, the next question asked her to identify the period of time when her physician rendered treatment, and to this she answered, "none." When asked what records or evidence she would produce to support her claim, she identified some medical records from 1976 and the transcripts from all her previous hearings. *See* Decision and Order at 1-2; Cl's Response (Dec. 15, 2003). Further, the administrative law judge noted that it is pursuant to claimant's motion for modification that this proceeding was taking place, yet claimant refused to participate in the process by disobeying the administrative law judge's orders, hanging up before a conference call was completed, and refusing to cooperate in the discovery process or produce any evidence supportive of her allegation of a change in condition. Decision and Order at 4-5.

As the proponent of the motion for modification, claimant has the burden of establishing grounds for modifying the prior award. Consequently, she must not only produce evidence that could support her allegation of a change in her condition since the last award, but she also must persuade the administrative law judge that such change has occurred since the last award. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988); *Rizzi v. The Four Boro Contracting Corp.*, 1 BRBS 130 (1974). In this case, it is clear that claimant has not satisfied this burden. The administrative law judge found that she has not produced any evidence to support her claim, and, therefore, she has not persuaded the administrative law judge that her condition has changed. As the Board previously affirmed the award of permanent partial disability benefits, *Tyler*, BRB No. 00-1076, and as claimant has not established a change in condition necessary for modification of that

[2]Pursuant to a letter dated April 19, 2004, employer's counsel informed the Board that he forwarded the Board's order acknowledging claimant's appeal to her counsel of record, Norman T. Robinson, III. Although Mr. Robinson assisted claimant in her case before the administrative law judge, he has not filed a notice of appearance or participated on claimant's behalf in this proceeding. 20 C.F.R. §802.202(c). Consequently, we consider claimant to be acting *pro se*.

award, we affirm the administrative law judge's decision to deny claimant's motion for modification.[3] *See Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984); *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[3]As we have affirmed the denial of the motion for modification, we need not address the propriety of the administrative law judge's dismissal of the claim pursuant to 29 C.F.R. §18.1(a) and Fed.R.Civ.P. 12(b)(6).