

BRB No. 09-0136

JERRY UTTERBACK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MID-COAST MARINE)	DATE ISSUED: 01/25/2010
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	ORDER on
Party-in-Interest)	RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's Decision and Order in *J.U. [Utterback] v. Mid-Coast Marine*, BRB No. 09-0136 (Aug. 21, 2009) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has filed a response brief urging rejection of employer's motion.¹

In his October 1986 decision, Administrative Law Judge Heyer awarded claimant permanent partial disability benefits for a work-related back injury as of June 28, 1984. On February 16, 2006, claimant filed a motion for modification of Judge Heyer's decision asserting entitlement to compensation for permanent total disability. 33 U.S.C. §922. On December 18, 2006, employer filed a cross-motion for modification contending that Judge Heyer erred in finding that claimant sustained any permanent disability related to his February 1980 work injury.

¹ We accept claimant's motion to accept his brief out of time. 20 C.F.R. §802.217.

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 his 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. Employer appealed the award.

The Board rejected employer's contention that Dr. Bert's opinion cannot support the finding that the 1980 fall at work for which claimant filed his original claim resulted in a permanent disability. *Utterback*, slip op. at 5-6. The Board held that substantial evidence supported the administrative law judge's finding that Dr. Bert opined in the proceeding before Judge Heyer that the 1980 incident resulted in permanent disability. The Board also held that the administrative law judge rationally credited the opinion of claimant's 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. Therefore, the Board affirmed the administrative law judge's finding that employer did not establish a mistake of fact in Judge Heyer's decision and her denial of employer's motion for modification. As employer did not challenge the administrative law judge's finding that claimant established he is now totally disabled, the Board also affirmed the award of permanent total disability benefits. *Id.* at 7.

In its motion for reconsideration, employer contends that the administrative law judge and the Board failed to address Dr. Bert's March 19, 2007 deposition testimony that claimant's current condition would be the same if the work incident had not occurred and avers that the interpretation given to Dr. Bert's June 18, 2007 hearing testimony is incorrect. Specifically, employer asserts that Dr. Bert was unaware of claimant's 1980 work injury at the modification hearing such that his opinion cannot be credited. The administrative law judge addressed employer's specific contentions regarding Dr. Bert's 2007 hearing testimony in her order denying reconsideration. Order at 3-5. The administrative law judge found that Dr. Bert repeatedly opined in his testimony on modification that the 1980 fall and subsequent work-related exacerbations caused claimant's disabling back condition. The administrative law judge also found that, even if Dr. Bert was no longer independently aware of the 1980 work injury at the June 2007 hearing, employer did not demonstrate how this would establish a mistake of fact in Judge Heyer's decision. The administrative law judge found that, in view of the exhibits dating from the 1980s in which Dr. Bert attributed claimant's condition to the 1980 fall, employer did not establish a mistake of fact. In its decision, the Board stated that the administrative law judge rationally credited Dr. Bert's statements from the 1980s in

which he linked claimant's disabling back condition to the 1980 fall, and thus that substantial evidence supported the administrative law judge's finding that the 1980 incident resulted in claimant's permanent disability, such that employer did not establish a mistake in fact in Judge Heyer's decision. *Utterback*, slip op. at 5.

We reject employer's contention that Dr. Bert's 2007 deposition testimony establishes a basis for granting reconsideration of the Board's decision. Based on this record, the administrative law judge was not required to credit this aspect of Dr. Bert's opinion rendered over 25 years after the 1980 work injury to find a mistake of fact in Judge Heyer's decision. The administrative law judge is afforded discretion in determining whether to modify a decision based on a mistake in fact, *see Sharpe v. Director, OWCP*, 495 F.3d 125, 131-134 (4th Cir. 2007), and the administrative law judge's crediting of the more contemporaneous evidence was not irrational on the facts of this case. As the administrative law judge addressed employer's contentions regarding Dr. Bert's 2007 deposition testimony and rationally credited Dr. Bert's opinion generated closer in time to the 1980 injury, in conjunction with his 2007 hearing testimony, we deny employer's motion for reconsideration on this point.

Employer next contends that the Board erred in stating that employer contended in its 2006 motion for modification that claimant failed to assert a claim for disability related to overhead welding activities in 1981. *See Utterback*, slip op. at 6-7. We agree that the Board erred in so stating. *See EX 73*. However, this is without legal consequence, as employer did make such an assertion in its motion for reconsideration of the administrative law judge's decision on modification. *See Emp. Motion for Recon.* at 2, 4-5; *see also ALJX 6* (Employer's Reply Brief at 2). The administrative law judge addressed employer's contention and found that Judge Heyer considered the 1981 overhead welding claim as being before him. The Board stated that the record was somewhat unclear on this point, but that, as employer raised the issue before the administrative law judge on modification, the administrative law judge was within her authority to address such a claim given the broad scope of modification. *Utterback*, slip op. at 7. This statement is not in error as employer did raise the issue albeit its motion for reconsideration rather than the original modification request. Accordingly, either way, employer cannot claim surprise or lack of due process since it raised the issue. We clarify our decision to state that employer contended in its motion for reconsideration of the administrative law judge's decision on modification that claimant failed to assert a claim for disability related to overhead welding activities in 1981. However, we reject employer's contention that the administrative law judge erred by awarding claimant compensation for aggravation caused by overhead welding for the reasons stated in our prior decision. *Id.*

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's decision is clarified as stated herein, but is affirmed in all other respects.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge