BRB Nos. 09-0872
and 10-0435

RONNIE W. ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	DATE ISSUED: 01/19/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Order Denying Claimant's Request for Modification of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Ronnie W. Adams, Mount Croghan, South Carolina, *pro se*.

Grover E. Asmus (Asmus & Gaddy, LLC), Mobile, Alabama, for employer/carrier.

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 and the Order Denying Claimant's Request for Modification (2008-LDA-00323) of Administrative Law Judge Kenneth A. Krantz 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). In an appeal by a claimant without representation by counsel, 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In December 2004, claimant, who had previously been diagnosed with degenerative disc disease, commenced employment for employer as a truck driver in Iraq. On October 26, 2005, the truck which claimant was driving was struck from behind by another motor vehicle. Claimant experienced neck pain and thereafter received treatment from military and employer's paramedics at a nearby military hospital for three or four days. Upon returning to his basecamp, claimant underwent therapy. When his condition did not improve, he was returned to the United States on November 12, 2005. Claimant sought medical treatment for neck and back pain, as well as numbness in his left leg and arm; he subsequently treated with several physicians and has received epidural steroid injections, undergone surgeries on his lower back and cervical spine, and been prescribed medication, including narcotics, for his ongoing back and neck pain.

In his Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's post-December 2005 back and neck conditions are related to the work accident, found that employer established rebuttal of the Section 20(a) presumption, and determined that, on the record as a whole, claimant's post-December 11, 2005, symptoms are not causally related to his employment with employer. The administrative law judge found that claimant was unable to resume his usual employment duties with employer during the period that his symptoms were work-related, and that employer did not establish the availability of suitable alternate employment during that time. The administrative law judge calculated claimant's average weekly wage as $1,850.22, based solely on the wages he earned while deployed in Iraq. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from October 27 through December 11, 2005, at a rate of $1,073.64 per week, as well as medical benefits related to his cervical strain. 33 U.S.C. §§908(b), 907.

Claimant, without the assistance of counsel, appealed this decision to the Board. BRB No. 09-0872. In an Order dated February 26, 2010, the Board dismissed this appeal and remanded the case to the administrative law judge for modification proceedings. On March 30, 2010, the administrative law judge denied claimant's request for modification, finding that claimant's new evidence did not warrant a finding that there was a mistake in fact in the initial evaluation of the medical evidence of record. Claimant appealed this decision to the Board, BRB No. 10-0435, and the Board, in an Order dated April 29, 2010, reinstated claimant's prior appeal, BRB No. 09-0872, and consolidated claimant's two appeals for purposes of decision.

We first address the findings in the administrative law judge's first decision that are adverse to claimant.[1] In his initial Decision and Order, the administrative law judge properly invoked the Section 20(a) presumption based on findings that claimant suffered a harm, specifically neck pain, lower back pain, and numbness in his left leg and arm, and a work incident, specifically claimant's October 26, 2005, motor vehicle accident, which could have caused or aggravated those conditions. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). The burden then shifts to employer to rebut the presumed causal connection with substantial evidence that claimant's injury was not caused or aggravated by his employment accident. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990);[2] *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Where aggravation of a pre-existing condition is at issue, employer must submit substantial evidence that the work accident did not aggravate the pre-existing condition. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that employer established rebuttal of the Section 20(a) presumption based on the reports of Dr. Richmond. The administrative law judge found that Dr. Richmond opined that claimant's October 26, 2005, motor vehicle accident neither caused claimant's spinal symptoms nor exacerbated claimant's pre-existing spinal condition, and that while this incident may have caused a muscle strain, such a strain would have resolved within several weeks or months of the incident. Decision and Order at 28 – 30. As this opinion constitutes substantial evidence of the

[1] We note that the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), is supported by substantial evidence and accords with law. *K.S. [Simons] v. Serv. Employees Int'l, Inc.*, 43 BRBS 18, *recon. denied*, 43 BRBS 136 (2009) (*en banc*); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006).

[2] Pursuant to 20 C.F.R. §704.101, this claim was filed in OWCP District 2 in New York. The case was then transferred to OWCP District 6 in Jacksonville, Florida. As the Jacksonville district director filed and served the administrative law judge's decisions, Eleventh Circuit law applies in this case. 42 U.S.C. §1651(b); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979).

absence of a causal link between claimant's current complaints of pain and his employment with employer, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *O'Kelley*, 34 BRBS 39.

The administrative law judge next weighed the relevant evidence in the record and, relying upon the opinion of Dr. Richmond over the contrary opinions of Drs. Jaffe, Lehman and Goldberger, concluded that claimant's October 26, 2005, motor vehicle accident resulted in a cervical strain which did not cause claimant's current symptoms or exacerbate or aggravate claimant's pre-existing spinal pathology. In rendering this finding, the administrative law judge specifically found that Drs. Jaffe, Lehman, and Goldberger were not aware of claimant's pre-injury neck and back symptoms, and that, consequently, only Dr. Richmond offered an opinion that took into consideration claimant's pre-accident symptoms and treatment. Decision and Order at 29. Dr. Richmond, a Board-certified orthopedic surgeon, opined that while claimant's work accident may have caused a temporary onset of muscular low back and neck pain, his examination of claimant and his review of claimant's medical records revealed no evidence that the accident caused claimant's present condition or worsened claimant's pre-existing spinal pathology.[3] In contrast, Drs. Jaffe,[4] Goldberger,[5] and Lehman[6] each

[3] Following his review of claimant's medical records, including claimant's pre- and post-injury MRI results, Dr. Richmond prepared a peer review report dated November 8, 2008. EX 22A. On January 16, 2009, following his medical examination of claimant, Dr. Richmond authored a second report in which he reiterated his prior opinion that no objective evidence connected claimant's spinal pathology to his October 26, 2005, motor vehicle accident. EX 22B.

[4] Dr. Jaffe first evaluated claimant on December 12, 2005, diagnosed claimant with, *inter alia*, a degenerative bulging disc at L4-5 and degenerative disc disease at C5-6 and C6-7, administered trigger point injections to claimant's neck, and prescribed physical therapy and rehabilitation. CX 1 at 21-22. Dr. Jaffe performed a lumbar discectomy on September 26, 2006, and a cervical disc decompression on December 1, 2006.

[5] Dr. Goldberger initially examined claimant on January 25, 2006, diagnosed claimant with, *inter alia*, cervical and lumbar degenerative disc disease, and gave claimant a cervical epidural injection. Dr. Goldberger subsequently administered trigger point injections, a left occipital nerve block, and, on September 28, 2006, he performed a lumbar discogram. CX 1 at 35, 39, 60-62, 72, 81-82.

[6] Dr. Lehman examined claimant on May 22, 2006, and opined that while claimant's cervical and lumbar disc abnormalities pre-dated his work-injury, claimant's complaints of ongoing pain are related to the work incident. CX 1 at 67.

diagnosed claimant with underlying cervical and lumbar degenerative disc disease, treated claimant for his ongoing complaints of pain, and opined that claimant's symptoms were related to his work injury. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge provided a rational reason for crediting Dr. Richmond's opinion, and this credited evidence is substantial and sufficient to establish that claimant's condition is not due to, nor was his pre-existing degenerative disc disease aggravated by, his work-related motor vehicle accident. Thus, we affirm the administrative law judge's determination that claimant's October 26, 2005, work incident resulted in only a temporary cervical strain.

The administrative law judge next addressed the extent of claimant's disability due to the work-related cervical strain. The administrative law judge found that claimant was restricted from driving immediately following the incident and therefore was temporarily totally disabled. In finding that claimant's work-related disability ended on December 12, 2005, the administrative law judge relied on the opinion of Dr. Richmond and the diagnosis of claimant's condition on December 12, 2005 by Dr. Jaffe.

We affirm the administrative law judge's decision as he rationally weighed the medical evidence and concluded that claimant's cervical strain resolved as of December 12, 2005. As the administrative law judge found in his discussion of the causation issue in this case, Dr. Richmond opined that while claimant's motor vehicle accident could have caused a cervical strain or whiplash, such a condition would have been temporary in nature and would have resolved within weeks to months of the October 2005 accident. EX 22A at 3-4; EX 22B at 3-4. Dr. Richmond also stated that claimant had no work restrictions due to the work injury. On December 12, 2005, Dr. Jaffe evaluated claimant and, while noting claimant's complaints of, *inter alia*, neck pain, diagnosed claimant as having cervical degenerative disc disease at C5-6 and C6-7. CX 1 at 20-22. As Dr. Jaffe's December 12, 2005, report makes no mention of claimant's having a cervical strain or whiplash at the time of his evaluation on that date, this evidence also supports the administrative law judge's finding that claimant's work-related cervical strain resolved as of December 12, 2005. Therefore, as the administrative law judge's finding is supported by substantial evidence, we affirm the denial of disability benefits to claimant subsequent to that date.[7] *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *Donovan*, 300 F.2d 741.

[7] In light of our affirmance of the administrative law judge's determination that claimant's work injury resulted in only a temporary cervical strain, we affirm his finding that employer is liable for only those medical expenses related to that condition. *See* 33 U.S.C. §907(a); *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); 20 C.F.R. §702.402.

We next address the administrative law judge's denial of claimant's petition for modification. In seeking modification of the administrative law judge's decision, claimant submitted two exhibits: a November 4, 2009, report authored by Dr. Goldberger and a January 6, 2010, report authored by Dr. Jaffe, wherein each physician opined, after reviewing claimant's pre-injury medical records, that claimant's present medical conditions are related to the work incident in Iraq. In his March 30, 2010, order addressing claimant's request for modification, the administrative law judge, citing *McCord v. Cephas,* 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), and *Kinlaw v. Stevens Shipping & Terminal Co.,* 33 BRBS 68 (1999), *aff'd mem.,* 238 F.3d 414 (4th Cir. 2000)(table), found that while claimant provided his pre-injury medical history to Drs. Goldberger and Jaffe following the administrative law judge's initial decision, their resulting opinions did not change, and that the delay by claimant in providing his records to those physicians did not warrant a finding that the administrative law judge's decision was based on a mistake in fact. Consequently, the administrative law judge denied claimant's request for modification. Order at 3.

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 decision 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). The party requesting modification bears the burden of showing that the claim comes within the scope of Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The United States Supreme Court has stated that under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B. Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999). In order to obtain modification for a mistake of fact, the modification must render justice under the Act, and case precedent post-dating *McCord* and *Kinlaw* emphasizes the Act's preference for accuracy over finality. *See, e.g., Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT); *R.V. [Vina] v. Friede Goldman Halter,* 43 BRBS 22 (2009).

In this case, the administrative law judge erred in denying claimant's request for modification based solely upon his finding that claimant's delay in providing his pre-injury medical history to Drs. Goldberger and Jaffe did not warrant a finding that the administrative law judge's crediting of Dr. Richmond was mistaken. In seeking benefits under the Act for his October 26, 2005, work injury, claimant alleged that his continuing

back and neck symptoms are causally related to his motor vehicle accident in Iraq. In his initial decision, the administrative law judge found Drs. Goldberger and Jaffe's lack of awareness of claimant's pre-existing degenerative neck and back conditions to be significant in his determination to give greater weight to Dr. Richmond's opinion that those conditions had not been exacerbated by claimant's October 26, 2005, motor vehicle accident. *See* Decision and Order at 29. The evidence presented by claimant in support of his request for modification purports to address the predominate reason given by the administrative law judge to accord the opinions of Drs. Goldberger and Jaffe less weight in his initial decision. If the administrative law judge were to credit their opinions on modification, this would demonstrate a mistake in fact in his decision. *See Vina*, 43 BRBS 22. As modification proceedings under the Act provide claimant with an opportunity to present new evidence and correct mistakes of fact, regardless of whether the evidence was available prior to the initial hearing, we vacate the administrative law judge's denial of claimant's request for modification. *See G.K. [Kunihiro] v. Matson Terminals, Inc.* 42 BRBS 15 (2008). We remand this case for the administrative law judge's to address claimant's new evidence on the merits and to determine if it establishes a mistake in fact in the initial decision.

Accordingly, the administrative law judge's Decision and Order is affirmed. BRB No. 09-0872. The administrative law judge's Order Denying Claimant's Request for Modification is vacated, and the case is remanded for reconsideration consistent with this opinion. BRB No. 10-0435.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge