

ROBERT W. JOHNSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TACOMA BOATBUILDING COMPANY)	DATE ISSUED:
)	
and)	
)	
MARINE OFFICE OF AMERICA)	
CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION AND ORDER

Appeal of the Decision and Order on Remand and Denial of Claimant's Motion to Reopen the Record or for Modification Pursuant to Section 22 of the Act of Vivian Schreter Murray, Administrative Law Judge, United States Department of Labor.

William C. Decker and Mark C. Wagner, Tacoma, Washington, for claimant.

Raymond H. Warns, Jr. (Witherspoon, Kelley, Davenport & Toole), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and Denial of Claimant's Motion to Reopen the Record or for Modification Pursuant to Section 22 of the Act (82-LHC-2767) of Administrative Law Judge Vivian Schreter Murray denying benefits 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. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b) (3).

Claimant, a shipfitter, was lifting a one-quarter inch steel bulkhead on May 30, 1979 when he felt an electrical shock-like sensation through his back. He has not returned to work since the day of his injury. Employer paid temporary total disability

benefits from May 30, 1979 to January 26, 1982, and temporary partial disability compensation from April 7, 1982 through March 31, 1983, which included an offset for a \$6,000 permanent partial disability advancement. Once this advancement was offset, employer resumed payment of temporary partial disability compensation. Claimant sought permanent total disability compensation.

This case is before the Board for a second time. In her original Decision and Order, the administrative law judge found that claimant was fully recovered from his back strain with no residual impairment, and thus she denied benefits. The Board vacated the administrative law judge's finding that claimant had no residual impairment as a result of his work-related back injury after January 19, 1982, and remanded the case for the administrative law judge to consider whether the limitations imposed by Drs. Bridgeford and Nichols precluded claimant from returning to his former employment. See Johnson v. Tacoma Boatbuilding Co., BRB No. 84-1648 (March 31, 1988) (unpublished). The Board noted that there is no medical evidence which states that claimant is not disabled, indicates that he has no restrictions on his work abilities, or attributes his disability solely to obesity or other non work-related causes. Id., slip op. at 5. The Board also instructed the administrative law judge on remand to reconsider claimant's credibility.

On remand, the administrative law judge found that there was no evidentiary basis for finding that claimant has a work-related disability and thus again denied benefits. In a subsequent decision, the administrative law judge denied claimant's motion to reopen the record or for modification based on new evidence. The administrative law judge found that the evidence sought to be admitted could have been discovered prior to the hearing and that it would not render justice to allow claimant to relitigate his case.

On appeal, claimant contends that the administrative law judge erred in finding that claimant does not suffer from a residual impairment due to the work-related back injury. Further, claimant contends that the administrative law judge erred in failing to modify her original decision based on evidence that allegedly substantiates his claim. Employer responds, urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence, and employer alleges that claimant did not adequately brief the issues in this case.

Initially, we reject claimant's contention that since the Board vacated the administrative law judge's finding that claimant has no residual impairment, the only alternative finding is that he is so impaired, and that therefore benefits should be awarded. In vacating the administrative law judge's decision, the Board did not find that claimant has a residual impairment, but remanded the case for full consideration of the evidence under the proper standards by the administrative law judge. See generally Randolph

v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 443 (1989).

Further, we reject claimant's contention that the administrative law judge erred in failing to modify her original decision based on evidence that allegedly substantiates his claim.¹

In order to obtain modification for a mistake in fact, the modification must render justice under the Act. McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); Wynn v. Clevenger Corp., 21 BRBS 290 (1988). The administrative law judge has great discretion concerning the admission of evidence and the Board has held that a party seeking to admit evidence must exercise diligence in developing its claim prior to the hearing. See 33 U.S.C. §923(a); 20 C.F.R. §702.339; see generally Sam v. Loffland Brothers Co., 19 BRBS 228 (1987).

In the present case, the administrative law judge reviewed the medical reports submitted by claimant and found that this was not "new evidence" that was unavailable at the time of the initial trial and that it could have been generated prior to the hearing. In addition, the administrative law judge noted that Drs. Hoover and Finkleman, whose "new" reports claimant sought to admit, express the same opinion as they did at the hearing, and that their diagnostic test results support the clinical findings made by Dr. Nichols rather than Drs. Finkleman and Hoover. Therefore, the administrative law judge concluded that justice would not be served by reopening the record or modifying her decision based on a mistake of fact.

As claimant has made no specific allegations of error and the administrative law judge's decision is not arbitrary, capricious or an abuse of discretion, we affirm the administrative law judge's denial of claimant's motion to reopen the record or for modification. See generally McCord, 532 F.2d at 1377, 3 BRBS at 371; Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc., 22 BRBS 46 (1989).

Claimant also contends that the administrative law judge erred in finding that claimant has no residual impairment when Drs. Nichols and Bridgeford conclude that claimant suffers such an impairment. We agree. The administrative law judge was instructed on remand to reconsider the opinions of Drs. Nichols and Bridgeford as her reasons for rejecting them were unsupported by the record.² Dr. Nichols diagnosed a lower back strain with a

¹Although claimant did not make specific arguments in his petition for review and brief, the original motion was made a part of the brief. Therefore, we reject employer's contention that this issue was not adequately briefed.

² The opinions of Drs. Finkleman and Hoover were discredited by administrative law judge in her original Decision and Order.

history suggesting a nerve root irritation possibly due to a bulging disc and imposed restrictions of no lifting in excess of thirty to forty pounds and no repetitive bending or crawling. See Cl. Ex. 4. On June 13, 1983, Dr. Bridgeford reported that while claimant's myofascial sprain was largely healed, there is a residual myofascitis that continues to irritate the low back or be irritated by the lumbosacral disc. Dr. Bridgeford imposed limitations which included no repeated bending and or twisting of the low back and no heavy lifting over ten pounds. See Cl. Ex. 5.

On remand, the administrative law judge found that as there were no abnormal medical findings and claimant's complaints of pain were not credible, the physical limitations imposed by Dr. Nichols based on the disc derangement were not rational as they are unsupported by the "normal" clinical findings. However, Dr. Nichols also based the limitations on a diagnosis of a lower back strain with a history suggesting nerve root irritation, and on claimant's current problems which stem from his marked obesity which puts a tremendous strain on his back. Therefore, we again hold that the administrative law judge improperly substituted her opinion for that of Dr. Nichols by concluding that claimant has no residual impairment because no disc derangement was established and because claimant would have a zero percent impairment rating under the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides).³ We note that the diagnosis of a minor physical impairment may lead to work restrictions resulting in total disability if it prevents claimant from engaging in his usual work. Elliott v. C & P Telephone Co., 16 BRBS 89, 92 n. 4 (1984). Moreover, a physician need not base his opinion as to a claimant's impairment solely on the factors enumerated in the AMA Guides. See generally Ortega v. Bethlehem Steel Corp., 7 BRBS 639 (1978).

This finding was affirmed on appeal and is now the law of the case. See Wayland v. Moore Dry Dock, 25 BRBS 53 (1991); Brocklehurst v. Giant Food, Inc., 22 BRBS 256 (1989).

³The administrative law judge found that claimant's weight problem, which all doctors noted was the primary physical problem, occurred post-injury and thus the work injury cannot be said to have aggravated a "pre-existing disability." However, there is no medical basis in the record for the administrative law judge's conclusion that claimant's weight gain from the pre-injury weight of 250 pounds to a post-injury weight of 296 pounds was a significant factor affecting his disability due to obesity. Moreover, as the Board noted in its first decision, there is no medical evidence attributing claimant's disability solely to obesity. Johnson, BRB No. 84-1648, slip op. at 5.

In addition, the administrative law judge failed to address relevant evidence on remand in spite of specific instructions. See 20 C.F.R. §802.405(a). Without specifically addressing Dr. Bridgeford's opinion, the administrative law judge noted that the opinions of the other physicians were rejected for the reasons stated in her first decision. Dr. Bridgeford diagnosed residual myofasciitis and concluded that claimant cannot return to work as a shipfitter or any other strenuous physical activity with or without further treatment, but did not ascribe this conclusion to claimant's obesity. Therefore, as Drs. Nichols and Bridgeford state that claimant has restrictions due to his back condition, and as there is no medical evidence which states that claimant is not disabled, indicates that he has no restrictions on his work abilities or attributes his disability solely to obesity or other non work-related causes, we reverse the administrative law judge's finding that the medical evidence is insufficient to establish that claimant suffers from a residual impairment from the work-related injury on May 30, 1979. We therefore vacate the denial of benefits.

To establish a prima facie case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. In order to determine whether claimant has shown total disability, the administrative law judge must compare the medical restrictions with the specific physical requirements of his usual employment. See Carroll v. Hanover Bridge Marina, 17 BRBS 176 (1985). Thus, on remand the administrative law judge must consider whether the physical limitations imposed by Drs. Nichols and Bridgeford, which are due at least in part to claimant's work injury preclude, claimant from performing his usual work. If claimant establishes a prima facie case of total disability, the administrative law judge must determine whether employer has established the availability of suitable alternate employment, and resolve any other outstanding issues. See generally Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988).

Accordingly, the Decision and Order on Remand of the administrative law judge is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The Denial of Claimant's Motion to Reopen the Record or for Modification Pursuant to Section 22 of the Act is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge