BRB Nos. 03-0167
and 03-0709

HENRY C. SYMONETTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GOLD COAST STAFFING, INCORPORATED	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE COMPANY	)	DATE ISSUED: July 16, 2004
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Modification of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Henry C. Symonette, Palm Beach Gardens, Florida, *pro se*.

John D. Hoffman and Alex Suarez (Law Offices of Hoffman & Hoffman, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order and the Decision and Order on Modification (2001-LHC-2481) of Administrative Law Judge Stuart A. Levin 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.* (the Act). In an appeal by a *pro se* claimant, 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; if they are, they must be affirmed.

33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 20 C.F.R. §§802.211(e), 802.220.

Claimant asserts that while on a temporary assignment by employer to PCL Civil Constructors (PCL) from August 11, 1997, through September 22, 1997, he sustained an injury to his left foot and two separate injuries to his low back. In particular, claimant stated that on or about September 5, 1997, he dropped a large pry bar on the big toe of his left foot; however, he did not seek any treatment for this injury until after September 22, 1997. On September 19, 1997, a rough tide forced claimant to jump from the barge where he was working on to the bridge fender system, and in the process, he hit the fender with his stomach causing him to experience pain in his stomach, chest and lower back. Claimant did not seek any immediate medical attention for these injuries, and he reported to work as usual on the following Monday, September 22, 1997. Claimant continued to perform his regular job on that day until he picked up a heavy core drill and instantly began to experience a sharp pain and "great spasms" in his lower back and legs. Claimant alleged that at this point he began to realize just how badly he had been injured on the previous Friday.

Claimant, at employer's behest, sought treatment at the Pompano Beach Workers' Compensation Medical Center, where Dr. Dacus diagnosed a low back sprain, prescribed medication and physical therapy, and released claimant to work as of September 25, 1997, with restrictions of light lifting, pulling and pushing up to ten pounds, no bending from the waist, and alternate sitting and standing as tolerated. Dr. Berkowitz, an orthopedic surgeon, diagnosed mechanical back pain and opined that claimant's condition as a result of his September 1997, work incidents, involved a temporary exacerbation of pre-existing changes to his lumbar spine such that as of April 2, 1998, claimant had returned to his pre-September 1997 physical state, and was thereafter capable of performing work at the light to medium level of exertion, *i.e.*, claimant was able to lift 25 to 35 pounds on a frequent to occasional basis. Dr. Gieseke similarly opined that as a result of the 1997 work incidents, claimant sustained only a temporary exacerbation of a pre-existing low back condition; the doctor further indicated that claimant did not suffer any additional permanent impairment as a result of the September 1997 incidents, and could return to some form of light to medium work. On August 23, 2001, Dr. Stropp performed a four-level provocative analgesic discography at L2-L3, L3-L4, L4-L5, and L5-S1.

The record establishes that prior to September 1997, claimant sustained three lower back injuries. The first, which occurred around 1970, involved a bus accident wherein claimant injured his low back, was hospitalized for 1-2 weeks in traction and recovered 3-4 months later. Claimant sustained a second injury to his lower back, specifically at the L4-L5 region, while working on a drawbridge retrofitting project in Delaware in 1985. As a result of this incident, claimant sought treatment for low back pain, including sciatic spasms, sharp leg and back pain and numbness, from 1985 through 1991, at which time he stated that he had manageable pain, meaning he was able to live

and work professionally as before the injury. In 1993, claimant sustained a third injury to his lower back as a result of an automobile accident, and was diagnosed with a disc herniation at the L4-L5 level. Claimant further indicated that this accident incapacitated him for about 18 months after which he was able to resume normal work to the "fullest capacity" that he could. The record indicates that claimant experienced consistent lower back pain from 1993 to 1997, and visited his chiropractor frequently during this period.

Claimant received $9,045 in temporary total disability and impairment benefits, and $22,092.20 in medical benefits under the Florida Workers' Compensation Act. He thereafter filed the instant claim under the Longshore Act alleging that he sustained low back injuries while on assignment with PCL, and has been unable to work steadily since that point in time.

In his decision, the administrative law judge found that claimant, appearing without counsel, is entitled to invocation of the Section 20(a) presumption with regard to his back injuries, 33 U.S.C. §920(a), and that employer established rebuttal thereof. Evaluating the causation evidence as a whole, the administrative law judge determined that claimant, in September 1997, suffered a temporary exacerbation of his pre-existing back condition, and reached maximum medical improvement on April 2, 1998, with no residual permanent impairments beyond those which he suffered as a result of his pre-existing condition. Alternatively, the administrative law judge determined that even if claimant's present physical limitations are attributable to the September 1997, incidents, employer established the availability of suitable alternate employment which demonstrates a post-injury wage-earning capacity in excess of his pre-injury average weekly wage. Accordingly, benefits were denied.

Claimant, without counsel, appealed the administrative law judge's denial of benefits to the Board; however while the appeal (BRB No. 03-0167) was pending, claimant advised the Board that he wanted to seek modification. By Order dated March 25, 2003, the Board dismissed claimant's appeal of the administrative law judge's decision and remanded the case to the Office of Administrative Law Judges for consideration of claimant's motion for modification. Claimant was also informed that the Board would consider his appeal, BRB No. 03-0167, only if he requested that it be reinstated.

In his Decision and Order on Modification, the administrative law judge initially considered and rejected claimant's request that he disqualify or recuse himself from

rendering a decision on modification.[1] The administrative law judge then reviewed both the original and modification records and found that they revealed no mistake in any determination of fact. The administrative law judge further reviewed the new evidence submitted by claimant in conjunction with the existing record and found that it is not indicative of any change in the etiology of claimant's condition. The administrative law judge therefore denied claimant's motion for modification.

Claimant thereafter appealed, again appearing without counsel, the administrative law judge's decision on modification, BRB No. 03-0709, and requested reinstatement of his appeal of the administrative law judge's original decision, BRB No. 03-0167. On appeal, claimant, without the assistance of counsel, challenges the administrative law judge's denial of his claim. Employer responds, urging affirmance.

Section 20(a) Causation

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which is invoked after claimant establishes that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain or aggravated a pre-existing condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut the presumption with substantial evidence demonstrating that the claimant's condition was not caused or aggravated by his employment. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000), *petition for review denied*, No. 02-12758 (11th Cir. Feb. 5, 2003). Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. *O'Kelley*, 34 BRBS at 41; *see also Cairns v. Matson Terminals*, 21 BRBS 262 (1988). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *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).

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[1] By Order dated April 29, 2003, Associate Chief Administrative Law Judge Augustus Simpson denied claimant's request for reassignment, concluding that "[t]here is no reason in the record which would suggest that there is any reason why Judge Levin can not and should not act on claimant's request for modification." Nevertheless, the administrative law judge addressed claimant's concerns on this issue, viewing claimant's request as a request for disqualification or recusal.

The administrative law judge initially found claimant established invocation of the Section 20(a) presumption as an MRI dated January 16, 1998, revealed a bulging disc or an annular tear and Drs. Brown, Watson, LaRuffa, Arrandt, Baustein, Alshon and Bissoon each attributed claimant's current back problems to the September 1997, work incidents. With regard to rebuttal, the administrative law judge initially determined that the evidence is insufficient to rebut the presumption for the period from September 22, 1997, to April 2, 1998. He thus concluded that claimant sustained a work-related aggravation of a pre-existing low back condition during that period of time. Nevertheless, the administrative law judge concluded, based on the medical opinions of Drs. Berkowitz, Gieseke, Wender, and Haimes, that claimant's present condition and symptoms are entirely related to his pre-existing back condition, and that employer established that claimant's present back condition, post-April 2, 1998, is neither caused nor aggravated by his September 1997, work incidents. Employer's Exhibits (EXs) 3-5, 20. The administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption is affirmed as it is rational, supported by substantial evidence and in accordance with law. *O'Kelley*, 34 BRBS at 41.

After consideration of all of the relevant evidence on causation, the administrative law judge concluded that claimant, in September 1997, suffered a temporary exacerbation of his pre-existing injuries, and reached maximum medical improvement, with no residual permanent impairments beyond those suffered as a result of his pre-existing conditions, as of April 2, 1998. In arriving at this conclusion, the administrative law judge accorded greatest weight to the opinions of Drs. Berkowitz, Gieseke, Wender, and Haimes, all of whom agreed that the September 1997, work incidents resulted in a temporary exacerbation of claimant's pre-existing low back condition, and attributed claimant's present condition and symptoms entirely to that pre-existing condition. EXs 3-5, 20. In this regard, the administrative law judge found that these physicians have, to a more comprehensive degree than the other medical experts, specifically and carefully compared the pre-existing clinical data with claimant's post-September 1997 clinical data.

In contrast, the administrative law judge accorded diminished weight to the reports of Drs. Brown, Gelblum and Bissoon, who each opined that claimant's current condition is causally related to the 1997 incidents and they negated any connection between claimant's present condition and his pre-existing injuries. Claimant's Exhibit (CX) D. Specifically, the administrative law judge determined that Dr. Brown's opinion is not well-reasoned as he did not provide a rationale for his conclusion that claimant's present condition is a direct result of his most recent incident, and he failed to discuss his etiology assessment in the context of his numerous negative clinical and examination findings. *Id*. The administrative law judge rejected the opinions of Drs. Gelblum and Bissoon because both physicians premised their causation findings on the erroneous belief that claimant was asymptomatic of lumbar complaints prior to his 1997 work accidents. CX D. The administrative law judge also rejected the opinions of Drs. Sassoon, Reinberg, Drourr, and Stropp because they did not provide any specific

information regarding the etiology of claimant's current condition, CX D; EX 2, and additionally determined that although Dr. Robinson was unable to provide a clear cut opinion on etiology, he nevertheless indicated that he believed that the relevant medical history suggests that claimant's condition could be linked to his prior injuries.

The administrative law judge further found that claimant's testimony that he constantly experiences back pain at level 5 or above out of 10 is exaggerated to a significant degree and lacks credibility based on the descriptions by Drs. Wender, Haimes, Bissoon and Berkowitz of claimant as a man in no apparent distress, CX D; EX 3-4, and based as well on his own observations during the hearing that claimant exhibited no outward signs of discomfort, let alone pain at the level 5-9 intensity.[2] As such, the administrative law judge accorded diminished weight to the opinions of Drs. Reinberg, Brown, Watson, Gelblum, Sassoon, Drourr, LaRuffa, Glener, Arrandt, Sancette, Baustein, Alshon, Masson, and Stropp, because each relied extensively on claimant's subjective complaints in formulating their opinions. Lastly, in considering causation, and in particular aggravation, the administrative law judge found that claimant reached maximum medical improvement with regard to his September 1997, work injury on April 2, 1998, with a six percent permanent impairment. EX 4. Comparing this to the post-1993 injury permanent impairment rating of Dr. Nakache of seven to eight percent, EX 18, the administrative law judge concluded that claimant had no residual permanent impairments beyond those which he suffered as a result of his pre-existing conditions.

In arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 360 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). As the administrative law judge's credibility determinations and weighing of the medical evidence in resolving the causation issues are rational and supported by substantial evidence, they are affirmed. Accordingly, we affirm the administrative law judge's findings that claimant sustained a work-related back injury from September 22, 1997, to April 2, 1998, that the work-related injury thereafter completely resolved, that claimant's condition from that point forward was in not caused, aggravated or accelerated

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[2] Specifically, the administrative law judge observed that claimant was quite capable, despite his subjective complaints of pain, to sit, stand, reach, bend, and ambulate over an extended period of time, *i.e.*, a 7.5 hour hearing, without manifesting signs of pain or discomfort. In contrast, the administrative law judge found that claimant was focused on the proceedings and, from a physical standpoint, appeared fairly relaxed and comfortable in all of his movements at the hearing. Decision and Order at 60-61.

by the work injuries sustained in September 1997, and thus that claimant's lower back condition, as of April 2, 1998, is not work-related.

We, however, must address claimant's entitlement to benefits for the period that the administrative law judge has determined that his low back injury is work-related, *i.e.*, September 22, 1997, and April 2, 1998. The record establishes, and it is not disputed, that claimant was unable to return to his usual employment as a carpenter following his September 22, 1997, work-related injury and the administrative law judge, in his alternative findings, determined that employer established the availability of suitable alternate employment as of April 2, 1998, with no loss in wage-earning capacity. Consequently, we must modify the administrative law judge's decision to reflect claimant's entitlement to temporary total disability benefits due to the September 22, 1997, work-related injury, for the period between September 22, 1997, and April 2, 1998. Employer is entitled to a credit for the state workers' compensation payments claimant received for his disability during this period of time. 33 U.S.C. §903(e); *see generally D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993).

Recusal of the Administrative Law Judge

Prior to proceeding to the merits of claimant's modification request, the administrative law judge addressed claimant's request, previously considered and rejected by Associate Chief Administrative Law Judge Simpson, that the administrative law judge should recuse himself from this case rather than act on claimant's request for modification. The administrative law judge found no contention of personal bias or personal knowledge, and observed that claimant's sole objections to his continuing as the adjudicatory officer concern information and impressions which he acquired in a judicial capacity. As such, the administrative law judge concluded that disqualification or recusal in this instance would be improper. We agree.

Section 556(b) of the Administrative Procedure Act provides in pertinent part:

> The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. §556(b); *see also* 29 C.F.R. §18.31. Adverse rulings alone are an insufficient basis on which to establish that the administrative law judge is not impartial or is biased. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724 (6th Cir. 1986). In this case, claimant's motion for recusal is ostensibly based on the administrative law judge's determination that claimant's testimony regarding his low back pain and symptoms is not credible, as well as the consequent denial of benefits. As these adverse rulings cannot

support a finding that the administrative law judge was required to recuse himself, we reject claimant's contention of error, and thus affirm the administrative law judge's decision that he need not recuse himself.

Modification

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. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well-established that the party requesting modification bears the burden of proof. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000)(table). The administrative law judge is afforded broad discretion in reviewing new or cumulative evidence, or further reflecting upon evidence initially submitted. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *see also Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

With regard to a mistake of fact, the administrative law judge extensively reviewed his prior decision, as well as both the original and modification records, [3] and determined that there is no mistake in any determination of fact. In particular, the administrative law judge revisited each of his prior determinations, and after considering the documents adduced on modification, he concluded that no mistake in fact had been made in making any of his prior determinations. The administrative law judge's finding that there is no mistake in a determination of fact is thus affirmed as claimant has not shown any abuse of discretion in this regard. *Kinlaw*, 33 BRBS at 73.

As for a change in condition, the administrative law judge articulated the new evidence submitted by claimant on modification, specifically acknowledging the three reports by Dr. Stropp dated March 11, 2003, March 18, 2003, and April 2, 2003, and two reports by Nurse Shing, dated February 2, 2003, and April 15, 2003. The administrative law judge, however, found that the reports of Dr. Stropp reveal only that he rendered a treatment, an Intradiscal Electrothermal Annuloplasty (IDET) at L4/5, for treatment of claimant's annular tear: based on the credited medical reports of Drs. Berkowitz, Haimes and Wender, this condition was not causally linked to claimant's September 1997, work

[3] On modification, the administrative law judge acknowledged that claimant's request for modification is accompanied by a large volume of exhibits, including excerpts from texts and manuals, pain manuals, research materials, articles on pain patients, handwritten comments, documents prepared by claimant's fiancée, and medical reports, and thus incorporated this evidence into his consideration of the case.

injury. The administrative law judge found significant the fact that Dr. Stropp provided no assessment of the etiology of this condition in the original record, and did not address that issue in the documents filed on modification. The administrative law judge further found that Nurse Shing's treatment observations, that claimant seemed more relaxed following the IDET and reported significant improvement in the level of pain he was experiencing similarly shed no new light on the issue of etiology of claimant's annular fissure. As the administrative law judge's finding that the evidence submitted by claimant on modification is insufficient to establish a change in his condition is rational and supported by substantial evidence, it is affirmed. *See generally Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT). Accordingly, as claimant has not shown a mistake in fact or a change in his condition, the administrative law judge's denial of claimant's motion for modification is affirmed.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Modification are affirmed. The administrative law judge's Decision and Order, however, is modified to reflect that claimant is entitled to an award of temporary total disability benefits from September 22, 1997, to April 2, 1998, and that employer is entitled to a credit for any state benefits received by claimant for the same injury or disability.

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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REGINA C. McGRANERY
Administrative Appeals Judge