U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0137
and 15-0001

ADELINE COTTON RICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	DATE ISSUED: July 31, 2015
	)	
	)	
Self-Insured Employer-Respondent	)	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.

Adeline Ricks, Franklin, Virginia, *pro se.*

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, 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 (2013-LHC-00331) 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*. (the Act). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by substantial evidence, and 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).

This case has a long procedural history which need not be recounted at length, as it is well known to the parties. Claimant was injured during the course of her employment as a tank tester on July 27, 1977, when a metal plate fell two feet, striking her on her right shoulder and chest, and fracturing her sternum. Claimant attempted to return to work in September 1977 and January 1978, but was terminated for violating the rule requiring that she call employer once every five days when she was absent from work. Employer voluntarily paid claimant temporary total disability benefits from July 29 to September 7, 1977, and from September 29 to December 4, 1977, *see* 33 U.S.C. §908(b), and claimant subsequently sought continuing disability benefits under the Act. This claim was denied, as were claimant's subsequent motions for modification. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 92-2333 (Nov. 29, 1995); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0420 (Jan. 24, 2002), *aff'd mem.*, 46 F.App'x 213 (4th Cir. 2002), *cert. denied*, 538 U.S. 964, *reh'g denied*, 538 U.S. 1054 (2003); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 05-0493, 05-0922 (Feb. 21, 2006); *Ricks v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 08-0251, 08-0877, 09-0567 (Mar. 5, 2010), *aff'd mem.*, 410 F.App'x 665 (4th Cir. 2011), *cert. denied*, 132 S.Ct. 284, *reh'g denied*, 132 S.Ct. 806 (2011).

On October 1, 2012, claimant again sought modification pursuant to Section 22 of the Act. *See Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999). In support of this modification request, claimant resubmitted the 175 exhibits she had entered into evidence in her prior modification hearings, as well as a new medical report from Dr. McKenney dated December 14, 2012. Employer, in response, submitted into evidence various medical records, including a more recent report authored by Dr. McKenney. In a Decision and Order dated January 3, 2014, the administrative law judge addressed the evidence submitted and concluded that claimant did not establish a change in her condition or a mistake in a determination of fact. Consequently, the administrative law judge denied the modification claim.

Claimant appealed the administrative law judge's January 3, 2014, decision to the Board; this appeal was assigned BRB No. 14-0137. Claimant then informed the Board that she would again seek modification before the Office of Administrative Law Judges. The Board, by Order dated March 31, 2014, therefore dismissed claimant's appeal without prejudice. In an Order Denying Claimant's Request for Modification dated August 1, 2014, the administrative law judge, after stating that he had again considered claimant's evidence, denied claimant's request for modification.

Claimant, without the assistance of counsel, appealed this Order, BRB No. 15-0001, and also requested reinstatement of her prior appeal of the administrative law judge's January 3, 2014 Decision and Order, BRB No. 14-0137. In an Order dated October 24, 2014, the Board granted claimant's request and consolidated her two appeals

for purposes of decision. Employer, in responding to claimant's appeals, urges the Board to affirm the administrative law judge's decisions.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *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 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). 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*, 390 U.S. 459; *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co.*, 194 F.3d 491; *Jesse v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). Thus, although the administrative law judge has the authority to modify a prior decision based on "further reflection on the evidence initially submitted," *O'Keeffe*, 404 U.S. at 256, he is not required to do so. *See generally Jesse*, 5 F.3d 723; *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000) (table). In order to obtain modification for a mistake of fact, the modification must render justice under the Act. *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 2852 (2013).

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In support of her motion for modification filed on October 1, 2012, claimant submitted into evidence the 175 exhibits she had offered into evidence during her previous hearings on modification, as well as additional documents that included a note from Dr. McKenney dated December 14, 2012. Dr. McKenney stated that claimant "continues to be disabled by chronic pain stemming from a shipyard accident on 07/27/77." CXs 140, 314A. In response, employer presented, inter alia, reports from Dr. Ross, the last dated April 29, 2013, wherein he concluded that claimant's pain complaints are not related to her 1977 work injury. EXs 101, 102, 107. Additionally, employer submitted into evidence a follow-up statement from Dr. McKenney dated March 4, 2013, wherein Dr. McKenney withdrew his December 14, 2012 opinion regarding claimant's medical conditions.[1] EX 106 at 3.

[1] Upon its receipt of Dr. McKenney's December 14, 2012 note, employer forwarded to Dr. McKenney various records regarding claimant's medical treatment since 1978. Dr. McKenney subsequently responded in the affirmative to two questions

In his January 3, 2014 Decision and Order, the administrative law judge addressed the lengthy procedural history of this case, claimant's exhibits, Dr. McKenney's initial opinion regarding the cause of claimant's pain and his subsequent retraction of that opinion, and the reports of Dr. Ross. The administrative law judge concluded that claimant did not present any creditable evidence that her medical complaints are related to her 1977 work injury. Decision and Order at 2 – 10. Specifically, the administrative law judge found that none of claimant's medical records relate her current complaints to her 1977 work injury, and that Dr. McKenney's December 14, 2012, opinion was unsubstantiated and ultimately withdrawn. *Id.* at 9–10. Consequently, the administrative law judge concluded that claimant did not establish either a change in her condition or a mistake in a determination of fact in a prior decision, and he therefore denied claimant's request for modification. *Id.* at 10. The administrative law judge fully addressed the relevant evidence presented, *see Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988), and found that claimant did not offer any creditable evidence relating her medical conditions to her 1977 work injury. *See generally Island Operating Co., Inc. v. Director, OWCP* [*Taylor*], 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013). We therefore affirm the administrative law judge's finding that claimant failed to establish grounds for modification of the prior denial of benefits as it is supported by substantial evidence.

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In his August 1, 2014 Order, the administrative law judge found that the documents claimant submitted to him in March 2014 consisted primarily of previously submitted documents; the administrative law judge noted that the most recent document was dated April 2013, and that he had considered it in his January 2014 decision. The administrative law judge again found that claimant did not establish either a change in her condition or a mistake in a determination of fact in the earlier decisions, and he consequently denied claimant's request for modification. Order at 2–3 (Aug. 1, 2014).

As correctly stated by the administrative law judge, the exhibits presented by claimant in support of her March 2014 request for modification consist of documents spanning the period of July 27, 1977 through April 29, 2013, that were either considered in prior adjudications or by the administrative law judge in his January 3, 2014 decision. The administrative law judge acted within his discretion in concluding that this evidence is not sufficient to warrant modification of the prior denials of benefits. *Westmoreland*

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posed by employer: 1) Was his December 14, 2012 report based solely on claimant's comments and without the benefit of pre-2011 medical records; and 2) Based upon a review of the medical records provided, would he now withdraw his December 14, 2012 report? EX 106 at 1-3.

Coal Co., 692 F.3d 317; *Kinlaw*, 33 BRBS 68. Therefore, we affirm the administrative law judge's August 1, 2014 Order denying claimant's request for modification. *Id*.

Accordingly, the administrative law judge's Decision and Order dated January 3, 2014 (BRB No. 14-0137) and Order Denying Claimant's Request for Modification dated August 1, 2014 (BRB No. 15-0001) are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge