

BRB Nos. 01-0719

SYLVIA E. ELLENBERG)
)
 Claimant-Petitioner)
)
 v.)
)
 UNITED STATES AIR FORCE) DATE ISSUED: June 7, 2002
 ROBINS AIR FORCE BASE, GEORGIA)
)
 and)
)
 AIR FORCE INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Daniel F. Sutton,
Administrative Law Judge, United States Department of Labor.

Sylvia E. Ellenberg, Warner Robins, Georgia, *pro se*.

Charles L. Brower (Office of Legal Counsel, Air Force Services Agency) San
Antonio, Texas, 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 Denying Modification (97-LHC-1221) of Administrative Law Judge Daniel F. Sutton 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without counsel, 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls*

Associates, Inc., 380 U.S. 359 (1965); 20 C.F.R. §§802.211(e), 802.220. If they are, they must be affirmed.

Claimant, whose work for employer entailed management of the breakfast department and the lunch soup and sandwich line at the Robins Air Force Officers' Mess, sought benefits under the Act for a work-related low back injury sustained on January 12, 1996. The pivotal facts with respect to the incident occurring on January 12, 1996, in which claimant allegedly sustained a back injury, were highly disputed. Claimant asserted that, in the course of pulling a cart filled with leftover breakfast items into a walk-in cooler, she slipped and fell on her back. Employer, while acknowledging the apparent occurrence of an accident on January 12, 1996, maintained that the incident was not accidental but, rather, was staged by claimant. While there is no record evidence that any individual witnessed claimant's fall, the record reflects that a crash was heard by claimant's supervisor, Dorothy Diaz. Immediately following this crash, several individuals proceeded to the walk-in cooler where they observed claimant lying on the cooler floor. Claimant was transported to the hospital emergency room, and was diagnosed with multiple contusions. Thereafter, she received medical treatment for a contusion of the low back and other back problems which she attributed to her January 12, 1996 work injury.

A formal hearing was held on May 4, 1999, with claimant represented by Diane M. Zimmerman. Included in the stipulations signed by Ms. Zimmerman and employer's attorney was a stipulation that claimant contends that her lower back injury arose in the course and scope of employment while employer contends that the accident was staged and, thus, did not arise in the course and scope of employment. At the hearing, claimant's counsel both conducted direct examination of claimant and cross-examination of employer's witnesses with respect to their testimony that claimant did not accidentally slip and fall.¹

In a Decision and Order - Denying Benefits issued June 28, 2000, the administrative law judge denied the claim on the basis that claimant did not suffer an injury arising out of and in the course of her employment, as defined by Section 2(2) of the Act, 33 U.S.C. §902(2). In this regard, the administrative law judge considered all of the record evidence

¹Claimant's counsel additionally conducted cross-examination of employer's witness, Mattie R. Howard, in a post-hearing deposition regarding claimant's alleged work accident. RX 20. In a post-hearing brief, claimant's counsel addressed the merits of employer's defense that claimant's accident was staged.

regarding the alleged January 12, 1996 incident, found claimant not to be a credible witness, credited the contrary testimony of employer's witnesses, and concluded that claimant did not accidentally slip and fall, but, rather, staged a fall in order to obtain disability benefits. The administrative law judge further found that even had he determined that claimant suffered an injury within the meaning of Section 2(2) of the Act, her claim would be barred by Section 3(c) of the Act, 33 U.S.C. §903(c), which precludes an award of compensation if the injury was occasioned by the willful intention of the employee to injure herself. Having accorded claimant the benefit of the Section 20(d), 33 U.S.C. §920(d) presumption, the administrative law judge concluded that employer met its burden of producing substantial evidence that any injury sustained as a result of the January 12, 1996 incident is directly attributable to claimant's willful intention to injure herself.

Thereafter, claimant timely requested reconsideration of the administrative law judge's Decision and Order. This request was denied by the administrative law judge on August 30, 2000, on the basis that claimant did not cite any evidence in the record or applicable law that was not thoroughly considered and addressed in the initial Decision and Order. Subsequently, in an order dated January 31, 2001, the administrative law judge notified the parties that claimant's *pro se* correspondence, dated August 24, 2000, and received by the Office of the Administrative Law Judges on September 14, 2000, would be treated as a request for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, of the administrative law judge's June 28, 2000 Decision and Order - Denying Benefits.²

In a Decision and Order Denying Modification issued May 8, 2001, the administrative

²By Order dated February 8, 2001, the administrative law judge marked for identification all correspondence and evidence submitted by claimant in support of her modification request, CMX 1 and Attachments A-S and CMX 2 and Attachments A-P, served the identified documents on employer, and allowed employer 15 days to respond to claimant's modification request. Employer filed a response dated February 20, 2001, urging that modification be denied.

law judge denied modification on the basis that claimant did not demonstrate that there was any mistake in a determination of fact in his June 28, 2000 Decision and Order - Denying Benefits. The administrative law judge further concluded that the interests of justice would not be served by reopening the record and conducting a new hearing, as the interest in finality outweighed the need for reopening the record.

On appeal, claimant, representing herself, challenges the denial of her petition for modification. Employer responds, urging affirmance.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. *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). To reopen the record under Section 22, the moving party must allege a mistake of fact or change in condition and assert that the evidence to be produced or of record would bring the case within the scope of Section 22. *See Kinlaw*, 33 BRBS at 73; *Duran v. Interport Maintenance Co.*, 27 BRBS 8 (1993).

Where modification based on a mistake of fact is sought, the decision as to whether to reopen a case under Section 22 is discretionary, and is contingent upon the administrative law judge's balancing the need to render justice against the need for finality in decision making. *See Kinlaw*, 33 BRBS at 72-73; *see also General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998). The Board will review the administrative law judge's findings in this regard under the abuse of discretion standard. *Kinlaw*, 33 BRBS at 73; *see also Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Duran*, 27 BRBS at 14; *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

³Employer's contentions that claimant has not filed a proper appeal and that her brief is inadequate are without merit in light of claimant's *pro se* appearance in this case. *See* 20 C.F.R. §§802.207(a)(2); 802.211(e).

In the present case, claimant's request for modification alleges a mistake in fact in the administrative law judge's June 28, 2000 Decision and Order - Denying Benefits; specifically, claimant disputes the administrative law judge's determination that she did not sustain an accidental injury but, rather, staged the incident occurring on January 12, 1996. Claimant alleges that, for a variety of reasons, employer's evidence was not credible and that she has reason to believe there are three people who could corroborate her testimony.⁴ After consideration of the record in this case, including the hearing transcript and all evidence submitted at the May 4, 1999 hearing, the administrative law judge's Decision and Order - Denying Benefits and Decision and Order Denying Motion for Reconsideration, all of the correspondence and evidence submitted by claimant in support of the allegations of mistake in fact raised in her request for modification, and the administrative law judge's Decision and Order Denying Modification, we affirm the administrative law judge's denial of modification. The administrative law judge thoroughly considered the competing equities to determine whether reopening the case would render justice. *See Kinlaw*, 33 BRBS at 72-73. In this regard, the administrative law judge stated that in seeking to reopen the claim, claimant challenges the credibility of employer's evidence and witnesses and alleges that her testimony could be corroborated by other employees at the club. The administrative law judge observed, however, that claimant was represented at the formal hearing by counsel, who had a full opportunity to cross-examine employer's witnesses. The administrative law judge further determined that claimant has not demonstrated that her attorney was prevented from calling additional witnesses or offering additional documentary evidence at the hearing to corroborate her testimony that she suffered an accidental injury on January 12, 1996. The administrative law judge found that the record would have to be reopened and a new hearing conducted in order to consider and weigh the additional evidence offered by claimant, as well as any responsive evidence proffered by employer. Having found that there are no unusual circumstances present in the instant case which justify relitigating the claim, the administrative law judge concluded that the need for finality outweighed claimant's interests in reopening the claim.

It is well-established that Section 22 is intended to prevent injustice resulting from a mistake in fact by the administrative law judge. Thus, an 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 initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Reopening a claim based on a mistake in fact is not, however, a means for a party to revise their litigation strategy, and it is not intended to shield litigants from the consequences of their counsel's judgments at trial. *See Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT)(11th

⁴The relevant portion of claimant's January 18, 2001 letter is set forth verbatim in the administrative law judge's Decision and Order Denying Modification at 3-4.

Cir. 1985); *Woodberry*, 673 F.2d 23, 14 BRBS 636; *McCord v. Cephas*, 523 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); *Kinlaw*, 33 BRBS at 73. In the present case, the administrative law judge rationally found that claimant was attempting to obtain modification based on evidence which could have been developed at the time of the initial proceeding. Under these circumstances, we cannot say that the administrative law judge abused his authority in declining to reopen the claim. *See Kinlaw*, 33 BRBS at 74-75. We therefore affirm the administrative law judge's denial of modification on the facts presented as a proper exercise of his discretionary authority.

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge