

JASON Y. TERUYA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BAE SYSTEMS/CORROSION)	
ENGINEERING)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: <u>June 9, 2014</u>
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Following Remand of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Jason Y. Teruya, Honolulu, Hawaii, pro se.

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation, appeals the Decision and Order Following Remand (2009-LHC-00338, 2009-LHC-02030, 2012-LHC-00698) of Administrative Law Judge Richard M. Clark 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 claimant without legal representation, 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).

This case is before the Board for a second time. To recapitulate, claimant sustained an injury to his back on September 8, 2005. He took two days of leave and returned to light-duty work on September 14, 2005. On January 6, 2006, while working for employer in a light-duty capacity, claimant injured his right hand. Claimant testified that he took four hours of leave following the injury and then, with the exception of February 27 and 28, 2006, he continued to work in his light-duty position until March 2, 2006. The parties stipulated that these injuries occurred during the course of claimant's employment with employer, that claimant's average weekly wage is \$893.60, and that his back condition reached maximum medical improvement on February 9, 2006. Decision and Order at 2. Employer voluntarily paid claimant temporary total disability benefits for his back injury from September 29 through October 5, 2005, and from March 2, 2006 through October 24, 2008, and permanent partial disability benefits for that injury from October 25, 2008 through December 3, 2010. 33 U.S.C. §908(b), (c)(21); *see* ALJ Ex. 15; Emp. Ex. 4.

In the initial decision, Administrative Law Judge Gerald M. Etchingham awarded claimant temporary total disability benefits from September 9 through September 13, 2005, for February 27 and February 28, 2006, and continuing permanent partial disability benefits in the amount of \$250.67 per week from February 9, 2006 for claimant's back injury. Judge Etchingham also found that claimant is entitled to future medical benefits for his back condition, 33 U.S.C. §907, that he is entitled to reimbursement from employer for his litigation costs, and that employer is entitled to Section 8(f) relief, 33 U.S.C. §908(f). Judge Etchingham found that claimant had no disability related to his hand injury. Claimant, who was without counsel before Judge Etchingham, appealed the decision to the Board, also without the benefit of counsel.

The Board affirmed Judge Etchingham's finding that claimant is entitled to temporary total disability benefits from September 9 through September 13, 2005; however, the Board remanded for the administrative law judge to determine whether claimant is entitled to any additional temporary disability benefits prior to the date of maximum medical improvement on February 9, 2006. *Teruya v. BAE Systems/Corrosion Engineering*, BRB No. 11-0277, slip op. at 5 (Nov. 30, 2011), *aff'd on recon.* (Feb. 27, 2012) (unpub.). The Board noted that, on remand, the administrative law judge should address claimant's contention that he is entitled to an assessment pursuant to Section 14(e), 33 U.S.C. §914(e). *Id.* at 5 n.7. The Board also affirmed Judge Etchingham's

findings that employer established the availability of suitable alternate employment retroactive to the date of maximum medical improvement and that claimant's permanent partial disability compensation, therefore, commenced on February 9, 2006. *Id.* at 6-7. The Board vacated the finding that claimant has a post-injury loss of wage-earning capacity of \$517.60 per week and remanded the case for the administrative law judge to adjust this figure to account for inflation.¹ *Id.* at 7-8. The Board denied claimant's motion for reconsideration.

On remand, the case was assigned to Administrative Law Judge Richard M. Clark (the administrative law judge), who addressed the issues for which the Board remanded the case, as well as claimant's two motions for Section 22 modification, 33 U.S.C. §922. The administrative law judge found that claimant is entitled to additional temporary total disability compensation for only seven of the days that claimant alleged he took personal leave due to his back injury prior to the date of maximum medical improvement. Decision and Order Following Remand at 7-8. Accounting for inflation, the administrative law judge found that claimant's weekly post-injury wage-earning capacity is \$469. *Id.* at 9-10. Thus, claimant's permanent partial disability award was increased from \$250.67 to \$282.67 per week. The administrative law judge rejected claimant's contention that he is entitled to Section 10(f) adjustments, 33 U.S.C. §910(f), to his permanent partial disability compensation. *Id.* at 10-11. The administrative law judge also rejected claimant's contention that the Special Fund is not permitted to reduce his compensation award under Section 14(j), 33 U.S.C. §914(j), to account for employer's prior overpayment of compensation, and he found that claimant is not entitled to a Section 14(e) assessment, 33 U.S.C. §914(e). *Id.* at 11-13. The administrative law judge denied claimant's modification petitions. Specifically, the administrative law judge rejected claimant's contention that he is entitled to an award for his back injury based on the percent of impairment to his back or whole body. *Id.* at 13-14. The administrative law judge also rejected claimant's contention of a mistake of fact in Judge Etchingham's finding that he is not entitled to compensation for his right hand injury. *Id.* at 14-15. Finally, the administrative law judge declined to reconsider his July 25, 2012 order denying claimant's request for reimbursement of \$2,651.99 in costs incurred from May 2009 to January 2012.

¹ The Board affirmed the award of Section 8(f) relief as it was unchallenged on appeal; however, the Board noted that, on remand, the administrative law judge must determine if the amount of the Special Fund's liability or employer's reimbursement therefrom, are affected by any of his findings on remand. *Teruya*, slip op. at 8 n.11.

Claimant, pro se, appeals the administrative law judge's decision on remand.² Employer filed a response brief, urging affirmance.

ADDITIONAL TOTAL DISABILITY COMPENSATION

The administrative law judge addressed claimant's contention that he is entitled to temporary total disability compensation for fourteen days that he allegedly took personal leave due to his back condition, prior to his injury's reaching maximum medical improvement on February 9, 2006, and to permanent total disability compensation for three and half days of leave he took thereafter. The administrative law judge found that claimant had been awarded compensation by Judge Etchingham for September 9 and 12, 2005, and February 27, 2006. Decision and Order Following Remand at 7; *see* Decision and Order at 27. The administrative law judge found that claimant is entitled to compensation from September 29 to October 5, 2005, since he was taken off work by his doctor. Decision and Order Following Remand at 7. The administrative law judge denied claimant compensation for the remaining days he allegedly took personal leave since claimant provided no supporting documentation in the form of pay stubs or payroll records and because the administrative law judge adopted Judge Etchingham's finding that claimant is not a credible witness. *Id.* The administrative law judge stated that, although claimant missed four hours of work when he injured his right hand on January 6, 2006, he is not entitled to compensation under 33 U.S.C. §906(a) for these hours as the right hand injury resulted in a disability lasting less than three days.³

² Claimant's notice of appeal includes 25 exhibits. The Board's scope of review is limited to evidence admitted into the record by the administrative law judge; accordingly, any new evidence included among claimant's exhibits will not be considered on appeal. *See generally Williams v. Hunt Geosource, Inc.*, 17 BRBS 32 (1985). Claimant challenges the finding that employer established the availability of suitable alternate employment. As the Board thoroughly considered this issue in its prior decision *Teruya*, slip op. at 6, and the administrative law judge did not address this issue on remand, we decline to address this issue, as the Board's prior holding constitutes the law of the case. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

³ Section 6(a) of the Act provides in pertinent part:

No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 907 of this title. . . [unless] the injury results in disability of more than fourteen days

3 U.S.C. §906(a).

It is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The administrative law judge rationally declined to award claimant additional total disability compensation for his back injury based solely on claimant's testimony that he recollected that he had marked the days off on his personal calendar. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the denial of compensation for claimant's hand injury accords with law. 33 U.S.C. §906(a); *see also* discussion, *infra* at p.7.

POST-INJURY WAGE-EARNING CAPACITY

Utilizing the six positions that Judge Etchingham found constitute suitable alternate employment, and applying the percentage change in the National Average Weekly Wage (NAWW) to account for inflation, the administrative law judge concluded that the average wage of the six positions was \$11.74 at the time of claimant's injury, with a corresponding post-injury wage-earning capacity of \$469.60 per week. Decision and Order Following Remand at 9-10. The administrative law judge subtracted this figure from claimant's average weekly wage of \$893.60 to derive a post-injury loss of wage-earning capacity of \$424. As the administrative law judge's post-injury wage-earning capacity calculation is supported by substantial evidence and accords with law, it is affirmed. 33 U.S.C. §908(c)(21), (h); *see Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002).

CREDIT

Claimant challenges the reduction of his permanent partial disability compensation from \$250.67 to \$62.67 per week for the period during which the Special Fund is reimbursing employer under Section 14(j) for its overpayments of compensation to claimant. In its prior decision, the Board rejected claimant's challenge to the credit for overpayments of benefits. *Teruya*, slip op. at 3 n.4. On remand, the administrative law judge rejected claimant's contention that his benefits were erroneously reduced. The administrative law judge properly stated that the Special Fund is entitled to recoup employer's overpayment of \$39,020.60 from claimant's future benefits, and that the Special Fund must reimburse employer for its overpayment.⁴ *See Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *rev'd on*

⁴ The administrative law judge noted that the Office of Workers' Compensation Programs calculated a reduced weekly benefit rather than suspending benefits entirely during the recoupment period.

other grounds on reh'g en banc, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990). Therefore, we reject claimant's contention that his benefits were erroneously reduced.

SECTIONS 10(f) and 14(e)

We affirm the administrative law judge's finding that claimant is not entitled to Section 10(f) adjustments to his permanent partial disability award, as Section 10(f) applies only to benefits for death and permanent total disability. 33 U.S.C. §910(f);⁵ *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990). We also affirm the administrative law judge's finding that claimant is not entitled to a Section 14(e) assessment because employer timely filed its notice of controversion. Claimant's back injury occurred on September 8, 2005. Employer had knowledge of claimant's back injury on September 13, 2005, and it filed its notice of controversion on September 20, 2005, which is within the fourteen-day filing period specified in Section 14(d).⁶ Decision and Order Following Remand at 12-13; *see* EX 3 at 5. As employer timely controverted the claim, claimant is not entitled to a Section 14(e) assessment. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

⁵ Section 10(f) provides in pertinent part:

Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of—

33 U.S.C. §910(f).

⁶ Section 14(d) provides:

If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

33 U.S.C. §914(d).

SECTION 22

The administrative law judge denied claimant's September 29, 2011 modification petition.⁷ Claimant sought an award of benefits based on the percentage of medical impairment to his back or his whole body. We affirm the denial of this motion for modification, as, on the facts of this case, claimant is limited to an award for the loss of wage-earning capacity due to the back injury.⁸ See 33 U.S.C. §908(c), (21); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Freiwilling v. Triple A South*, 23 BRBS 371 (1990).

The administrative law judge also denied claimant's October 14, 2011 petition for Section 22 modification, finding no mistake of fact in Judge Etchingham's denial of compensation for claimant's January 6, 2006 right hand injury.⁹ Decision and Order Following Remand at 13-14. We affirm the administrative law judge's conclusion that claimant did not establish a compensable disability with respect to his right hand injury. The administrative law judge provided a rational basis for crediting the medical evidence that claimant does not have carpal tunnel syndrome or any permanent impairment to his hand over claimant's subjective complaints of a right hand impairment and Dr. McCaffrey's opinion that claimant is disabled by carpal tunnel syndrome. See generally *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

⁷ Section 22 of the Act 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).

⁸ Similarly, we reject claimant's contention that he is entitled to an award for his back injury under Section 8(c)(23), 33 U.S.C. §908(c)(23), because he voluntarily retired from the workforce. Cl. Brief at 6-7. Section 8(c)(23) is applicable only to occupational diseases. 33 U.S.C. §§902(10), 910(d).

⁹ Judge Etchingham found that claimant's right hand injury is not compensable and that there was no need for additional medical treatment. The Board affirmed Judge Etchingham's finding, stating that he rationally credited the opinions of Drs. Singer, London, Tang, and Davenport that claimant does not have carpal tunnel syndrome over the opinion of Dr. McCaffery. *Teruya*, slip op. at 4. None of those doctors opined that claimant has a right hand impairment.

COSTS

On February 16, 2012, claimant filed a motion that employer reimburse costs totaling \$2,651.99 for postage, copying, and office supplies that he incurred from May 2009 to January 2012; claimant filed amended motions on July 3 and 5, 2012. Employer opposed the motions. The administrative law judge denied the motions in an Order issued on July 25, 2012. The administrative law judge stated that some of the costs appear to have been incurred before the Office of Workers' Compensation Programs (OWCP) and the Board, and that he lacked jurisdiction to award such costs. The administrative law judge also stated that the motion for additional costs was not timely as to Judge Etchingham's December 2010 decision, in which he had been awarded reimbursement of some costs.¹⁰

Seven months later, on February 12, 2013, claimant filed a motion for relief from the administrative law judge's order denying costs, pursuant to Federal Rule of Civil Procedure (FRCP) 60. In his decision on remand, the administrative law judge rationally found that claimant had not shown the applicability of FRCP 60.¹¹ *See generally Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997). Moreover, the administrative law judge found that claimant did not timely request reconsideration of his order denying costs or file an appeal with the Board, and he did not explain why he waited seven months to submit his motion. *See* FRCP 60(c) (motion must be made within a reasonable time). The administrative law judge found the seven-month delay unreasonable, and he denied claimant's motion.

Although we agree with the administrative law judge that FRCP 60 does not provide claimant a remedy in this case, we nonetheless vacate the denial of costs and remand the case for further consideration. Section 702.132(a), 20 C.F.R. §702.132(a), provides that a fee application, and by extension, a motion for costs, shall be filed within the time frame specified by the reviewing authority. No specific time frames were set for

¹⁰ In his Order Denying Request for Costs, the administrative law judge noted that Judge Etchingham had granted claimant costs for litigation expenses totaling \$1,132.78. Specifically, Judge Etchingham ordered that employer reimburse claimant for: purchasing the hearing transcript and three deposition transcripts; copying; office supplies; and mileage. Decision and Order at 26-27.

¹¹ FRCP 60, Relief from a Judgment or Order, provides that the court may correct a clerical error or other mistakes of omission and oversight. FRCP 60(a). It also lists various grounds by which a court may provide relief to a party from a judgment, such as fraud, mistake, or newly discovered evidence. FRCP 60(b). The administrative law judge rationally found that none of the reasons applies in this case.

the pro se claimant in this case. Claimant submitted his February and July 2012 motions for additional costs to the administrative law judge while the case was pending before the administrative law judge on remand from the Board. Moreover, although claimant did not timely seek reconsideration of, or appeal, the July 2012 order denying costs, the administrative law judge was not divested of authority to rule on claimant's February 2013 renewed motion, as the case remained pending before him at that time as well. *Cf. Greenhouse*, 31 BRBS 41 (motion to reopen fee award on the ground of fraud untimely filed two years after the award became final). Under these particular circumstances, where a pro se claimant successfully prosecuted his claim for his back injury, the administrative law judge should have reviewed claimant's motions for costs on their merits, rather than denied them based on lack of timeliness or the inapplicability of FRCP 60. Therefore, we remand the case for him to do so. *See generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

Regarding the merits of claimant's motions, the administrative law judge denied claimant's request for costs in his July 2012 Order on the substantive grounds that the petition included expenses outside his jurisdiction and that claimant had not shown what the costs pertain to or whether some of the costs relate to expenses already awarded by Judge Etchingham. Order at 2. The administrative file establishes that the case was transferred to the Office of Administrative Law Judges (OALJ) on December 8, 2008, was remanded to the OWCP at some time after a continuance was granted on August 25, 2009, and returned to the OALJ on December 9, 2009. Judge Etchingham issued his decision on December 10, 2010; claimant appealed this decision on January 3, 2011. The Board remanded the case on November 30, 2011. It is well-established that the administrative law judge has the authority to award costs only for expenses incurred while the case was before the OALJ. *See generally Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); 20 C.F.R. §702.132. Claimant's submissions include a receipt for and a brief description of each claimed expense. If the administrative law judge finds that the motions for costs lack specificity, he may ask claimant to supplement the information. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

Accordingly, the administrative law judge's denial of claimant's motions for costs is vacated, and the case is remanded for him to address claimant's motions for costs incurred while the case was before the OALJ. In all other respects, the administrative law judge's Decision and Order Following Remand decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge