

BRB No. 02-0460

EDWARD BESS)
)
 Claimant-Petitioner)
)
 v.)
)
 PALMETTO SHIPPING COMPANY) DATE ISSUED: MAR 24, 2003
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Stephen E. Darling (Haynsworth Sinkler Boyd, P.A.), Charleston, South Carolina, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (00-LHC-2748) of Administrative Law Judge Linda S. Chapman 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). 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer from 1969 to 1986. On December 26, 1986, claimant sustained an injury to his back when the fifth wheel cylinder of the trailer bed attached to the tractor trailer claimant was driving malfunctioned, sending the cab of the trailer tossing about with claimant inside. CX 23 at 4. Pursuant to the parties' stipulations, the district director issued a compensation order on June 13, 1990, awarding claimant temporary total disability benefits from December 26, 1986, to March 9, 1988, and permanent partial disability benefits thereafter. This order also found employer to be entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), effective March 8, 1990. CX 5. See 20 C.F.R. §702.315. On February 12, 1991, claimant sought modification of the district director's compensation order based on a change in condition. Specifically, claimant sought permanent total disability benefits under the Act. In a Decision and Order dated November 11, 1993, Administrative Law Judge Mahony found that claimant had not established a change in his physical condition and that claimant remained permanently partially disabled. Accordingly, Judge Mahony denied claimant's claim for modification. CX 4. On January 17, 2002, claimant filed a motion for modification of Judge Mahoney's November 11, 1993, decision, alleging that a change in his physical condition has rendered him permanently totally disabled.

In her decision addressing claimant's motion for modification, Administrative Law Judge Chapman (the administrative law judge) found that claimant did not establish a change in his condition, and that claimant remains presently able to work at a sedentary position with essentially the same restrictions as before 1993.¹ Thus, the administrative law judge denied claimant's motion for modification.

On appeal, claimant challenges the administrative law judge's determination that claimant has not established a change in his condition and as a result, is not entitled to permanent total disability benefits. Employer responds, urging affirmance of the administrative law judge's decision.

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); see also *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000). It is well-established that the party requesting modification due to a change in condition has the

¹There was no formal hearing in this case; it was decided on the written record.

burden of showing the change. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). In order to obtain modification on this basis, the moving party must demonstrate that there was, in fact, a change in claimant's physical or economic condition between the time of the initial award and the time modification is sought. *See Jensen*, 34 BRBS at 149. Once the moving party shows a change in condition, the standard for determining disability is the same as in the initial proceeding. *See Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

Claimant contends that the opinion of Dr. Schuster, if credited, and the opinion of Mr. Yuhas, a vocational counselor, establish a change in his condition since the November 1993 decision of Judge Mahony. *See* Employee's brief at 8-9. In rendering her decision, the administrative law judge considered all of the evidence submitted by claimant and compared this new evidence with the previously submitted medical evidence. Specifically, the administrative law judge determined that claimant's testimony regarding his restrictions and continuing pain are not corroborated by the objective medical evidence of record. In this regard, the administrative law judge found that the medical reports of record indicate symptom magnification. Moreover, the administrative law judge found claimant's credibility to be seriously undermined by his continued assertion that he was not involved in a 1995 automobile accident when police and insurance reports, as well as a civil countersuit for damages filed by claimant as a result of this incident, indicate otherwise. *See* Decision and Order at 10, 12. Next, the administrative law judge found Dr. Schuster's diagnosis of lumbar disease and facet arthritis, with an MRI confirming degeneration of claimant's intervertebral discs at L3-4 and L5-S1, to be consistent with claimant's previously diagnosed condition and thus not indicative of a change in claimant's condition. Moreover, the administrative law judge found Dr. Schuster's January 2000 assessment was not well-reasoned or persuasive since Dr. Schuster provided no explanation for his conclusory statement that claimant exhibits a 30 percent permanent partial impairment, yet he is 100 percent disabled from regular or other gainful employment.² CX 20 at 1. Similarly, the administrative law judge found unreliable Mr. Yuhas's conclusion that there were no jobs in the Charleston, South Carolina, area that were attainable for claimant, since Mr. Yuhas based that opinion upon both information from Dr. Schuster which is not contained in reports in the record,³ and upon claimant's testimony, which the administrative law judge found to be

²In contrast, on May 20, 1999, Dr. Schuster had stated that claimant could not return to his regular heavy duty work, but could perform some kind of selective work. *See* CX 20 at 9.

³The information reportedly obtained by Mr. Yuhas from Dr. Schuster on October 5, 2000, and November 14, 2000, indicating that claimant could work less than four hours per

unreliable. In contrast, the administrative law judge found that the reports of Drs. Jones, Aymond and Novack were well-reasoned, supported by the objective medical evidence and supported the determination that claimant remains able to work.

As the trier-of-fact, the administrative law judge is entitled to weigh the evidence, and determine the credibility of witnesses, and her findings must be accepted if rational and supported by substantial evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The administrative law judge fully considered the evidence relied upon by the claimant in support of his motion for modification and concluded that it did not establish a change in claimant's condition. As the administrative law judge's finding regarding this issue is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *See generally General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

day, had to relax after one hour, and was "very unstable," is not in the record. Decision and Order Denying Modification at 12; *see* CX 20.