BRB No. 99-0863

JOHN C. CRAFT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: _____
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Denying Claimant's Petition for Modification of Larry W. Price, Administrative Law Judge, United States Department of Labor.

John C. Craft, New Orleans, Louisiana, *pro se*.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Order Denying Claimant's Petition for Modification (93-LHC-2137) of Administrative Law Judge Larry W. Price 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 representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

On April 29, 1985, claimant was operating a forklift during the course of his employment when the brakes failed, causing the forklift to strike a post and throwing claimant to the ground. X-rays of claimant's right thumb, lumbrosacral spine, and left rib cage taken on April 30, 1985, were interpreted as normal, and soft tissue swelling of the right thumb was noted. On June 4, 1985, claimant was examined by Dr. Diodene. He diagnosed a strain of the ulnar collateral ligament of the right thumb and a lumbar strain. On July 29, 1985, claimant was referred to Dr. Kinnett for treatment of his right thumb. Dr. Kinnett reported that claimant also had occasional back pain. On December 2, 1985, claimant

returned to longshore employment. He reported left buttock pain on January 14, 1986, which he related to the April 1985 work injury. On January 28, 1986, Dr. Kinnett noted blockage of the left kidney, which required hospitalization, and claimant was unable to work from February to September 1986. Claimant returned to work until October 1988. On January 5, 1989, claimant filed a claim for benefits under the Act for an alleged work-related low back injury on October 5, 1988, while working for a different employer. He has not worked since this alleged injury.

On January 24, 1994, a formal hearing was conducted, where claimant, proceeding without counsel, alleged that he had been totally disabled since October 5, 1988, due to his April 29, 1985, work injury. Claimant's pre-hearing statement further alleged that, as a result of the April 29, 1985, accident, he sustained injuries to his back, left elbow, right thumb and hand, rib cage, left side, including his buttocks, hip and leg, as well as kidney and urologic injuries. In his Decision and Order, Administrative Law Judge Thomas denied the claim for benefits. Specifically, he found that any injury sustained to claimant's lower back, at most, temporarily aggravated claimant's pre-existing degenerative arthritis, and that the back injury and thumb injury were fully treated and not currently disabling. Decision and Order at 9. The administrative law judge also found that claimant failed to establish the reasonableness of an additional needle biopsy of the ischium and an MRI of the spine. *Id.* at 10. Claimant appealed this decision to the Board. On September 12, 1996, the Decision and Order was administratively affirmed by the Board pursuant to Public Law 104-134, and the claimant subsequently appealed to the United States Court of Appeals for the Fifth Circuit. On February 18, 1997, the court granted claimant's unopposed motion to remand the case to the Office of Administrative Law Judges (OALJ) for modification proceedings pursuant to Section 22 of the Act, 33 U.S.C. §922. The case was assigned to Judge Price (the administrative law judge) due to the intervening retirement of Judge Thomas. After a formal hearing on March 12, 1999, the administrative law judge issued his Order Denying Claimant's Petition for Modification on April 19, 1999.

In his decision, the administrative law judge addressed the arguments raised in claimant's modification petition, which was filed with the assistance of counsel. The administrative law judge found that Judge Thomas did not make any mistakes of fact in his consideration of the evidence or in his findings of fact. Accordingly, he denied claimant's petition for modification.

On appeal, claimant, representing himself, requests review of the administrative law judge's denial of his petition for modification. Employer has not responded to this appeal.

Section 22 provides that, upon his own initiative or at the request of any party, on the grounds of a change in condition or mistake in a determination of fact, the fact finder may, at any time prior to one year after the denial of a claim or the last payment of benefits, reconsider the terms of an award or denial of benefits. Section 22 was intended to displace traditional notions of *res judicata* and to allow the fact finder 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, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 295-296, 30 BRBS 1, 2-3 (CRT) (1995) [*Rambo I*].

We initially address claimant's allegations that he sustained various injuries in the work accident. It is claimant's burden to prove the existence of an injury or harm and that a work-related accident occurred or that working conditions which could have caused the harm in order to establish a *prima facie* case. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Where claimant has established his *prima facie* case, Section 20(a) of the Act, 33 U.S.C. §920(a), provides him with a presumption that his condition is causally related to his employment. The burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's condition was neither caused nor aggravated by his employment. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999)(*en banc*); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, the administrative law judge found no mistake of fact in Judge Thomas's finding that the injuries to claimant's lower back and right thumb were fully treated and are no longer disabling. We affirm this finding. Specifically, the administrative law judge rationally found Judge Thomas's decision in this regard supported by the opinions of Drs. Hoerner and Faust that any current back disability is solely due to degenerative disc disease which was, at most, temporarily aggravated by the April 29, 1985, work injury. *See* EX 14 at 12, 14-15; EX 15 at 18-19, 27-29; EX 16 at 10-12. Regarding the thumb injury, which Judge Thomas found was fully treated and not currently disabling, this conclusion is supported by the report of Dr. Diodene, EX 11 at 2, and the testimony of Dr. Faust, EX 14 at 11, and thus Judge Price's finding that there was no mistake of fact regarding this injury is affirmed. Moreover, we also affirm the administrative law judge's determination that Judge Thomas did not err in finding that claimant did not sustain a rib cage injury in the work accident. X-rays taken the day after the accident were interpreted as revealing a normal lower left rib cage, and this is sufficient evidence to support the administrative law judge's determination. *See Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

We hold, however, that the case must be remanded for the administrative law judge to reconsider whether there is a mistake in fact in Judge Thomas's decision regarding the alleged work-related injuries to claimant's left leg, right hand, as well as kidney and urologic problems. Claimant alleged in his initial pre-hearing statement that he injured these body parts in the work accident. The administrative law judge found only that Judge Thomas referred to Dr. Hoerner's testimony regarding claimant's leg pain, Order at 3, to Dr. Braud's negative x-ray in reference to the hand pain, Order at 4, and that Judge Thomas credited Dr. Wilcox's opinion that claimant's kidney/urological problems are not related to the work injury, Order at 4, 6. A review of the evidence of record reveals numerous references to claimant's complaints of left buttock, hip and leg pain, which were initially reported to Dr. Kinnett as related to the April 1985 work injury on January 14, 1986. EX 6; *see also* EX 9. Neither administrative law judge discussed this evidence. Moreover, while Dr. Hoerner treated claimant for leg pain, his testimony did not explicitly address the etiology of the leg pain. *See* EX 15. Additionally, the x-ray evidence credited by Judge Price contains no reference to the right hand but is limited to the right thumb, EX 8, and the administrative law judge did not separately consider whether claimant sustained an injury to his hand, apart from his thumb, *see* EX 10. Finally, while Dr. Wilcox stated he could not relate claimant's kidney/urological problems to the work injury, he also stated he could not say that these problems are not related to the work injury. CX 5. Accordingly, we vacate the administrative law judge's finding that there were no mistaken determinations of fact by Judge Thomas with regard to these injuries.

On remand, the administrative law judge must initially determine whether claimant established a *prima facie* case for each alleged injury entitling him to invocation of the Section 20(a) presumption.[1] *See U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. at 608, 14 BRBS at 631. Should he find claimant entitled to the Section 20(a) presumption, he must then determine whether employer rebutted the presumption by producing substantial evidence that claimant's injury was not caused or aggravated by the work accident. *See Conoco*, 194 F.3d at 684, 33 BRBS at 187 (CRT). Finally, should the administrative law judge find the presumption rebutted, he must resolve the issue of causation, based on the record as a whole. *See Santoro*, 30 BRBS at 171. To determine whether to grant modification, if the evidence is sufficient to so warrant, the administrative law judge also must decide whether modification would render justice under the Act. *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999); *see also McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976).

[1]We note that neither Judge Thomas or Price applied the Section 20(a) presumption to determine whether these alleged injuries are related to the work accident.

We affirm the administrative law judge's rejection of the remaining arguments raised in claimant's Petition for Modification. Specifically, the administrative law judge rationally found no mistake of fact in Judge Thomas's finding that claimant initially reported having suffered injuries only to his thumb and lower back. *See* EX 6 at ex. 2; EX 11. Claimant's allegation that Judge Thomas erred in failing to credit his complaints of pain is meritless as the administrative law judge rationally found that Judge Thomas credited claimant's complaints, but also properly focused on the cause of claimant's pain. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999). The administrative law judge rationally found that Judge Thomas had all of Dr. D'Ambrosia's deposition testimony before him when he considered the evidence of record, *see* EX 16, and moreover, he rationally found no error in Judge Thomas's weighing of Dr. D'Ambrosia's testimony. The administrative law judge rationally determined there was no mistake in fact in Judge Thomas's finding that claimant failed to produce any evidence that another MRI of the spine, over three years after the work injury and after claimant had returned to work for over two years, was reasonable and necessary. *See* 33 U.S.C. §907(a); *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993). Finally, we affirm the administrative law judge's rejection of claimant's challenge to stipulations regarding claimant's average weekly wage and payment of past medical benefits that were accepted by Judge Thomas. He rationally found that claimant offered no evidence that the stipulated average weekly wage was inaccurate, and that the new evidence offered was of no assistance in determining whether any allegedly compensable medical bills remained unpaid. *See generally Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT)(4th Cir. 1994).

Accordingly, the administrative law judge's Order Denying Claimant's Petition for Modification is vacated with regard to the alleged injuries to claimant's left leg and right hand, as well as his kidney and urologic infirmities, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge