

CHASE SCOTT HAYES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NATIONAL STEEL AND SHIPBUILDING)	DATE ISSUED:
COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Application for Modification and Decision and Order on Petition for Reconsideration of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Chase Scott Hayes, San Diego, California, *pro se*.

Roy D. Axelrod (Law Offices of Roy D. Axelrod), San Diego, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Application for Modification and Decision and Order on Petition for Reconsideration (94-LHC-2754) of Administrative Law Judge Daniel L. Stewart rendered on claims 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 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 initially pursued claims for various industrial injuries to his back and left knee which occurred during the course of his employment for employer between 1977 and 1981. On May 7, 1984, Administrative Law Judge R. S. Heyer issued a Decision and Order Awarding Benefits, wherein he found claimant entitled to one award as a result of the combined effects of his back and left knee impairments.¹ Judge Heyer also found that claimant's psychiatric condition did not constitute an independent impairment under the Act. Accordingly, Judge Heyer awarded a period of temporary total disability benefits under Section 8(b), 33 U.S.C. §908(b), followed by an award of permanent partial disability benefits based on a loss in wage-earning capacity of \$213.20 per week pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), as a result of claimant's back and left knee injuries. Judge Heyer also granted employer's request for Section 8(f) relief, 33 U.S.C. §908(f).² The parties thereafter entered into a Section 8(i) settlement, 33 U.S.C. §908(i), for medical expenses, which was approved by the district director on October 22, 1986.

In 1995, claimant sought modification of Judge Heyer's decisions under Section 22, 33 U.S.C. §922, alleging both a mistake in fact and a change in condition. Specifically, claimant argued that employer failed to comply with a 1981 settlement agreement under Section 8(i) of the Act, as well as with the terms of the 1986 settlement agreement for medical benefits, that his physical and psychiatric conditions have deteriorated, and that Judge Heyer committed a mistake in fact by failing to consider his alleged left arm and elbow injuries, and "affective disorder."

¹Claimant was known as "Robert L. Hayes" at the time of the original hearing before Judge Heyer.

²On April 17, 1986, Judge Heyer issued an Order on Motion for Reopening and Modification to correct a mistake in fact with regard to claimant's average weekly wage which resulted in a loss of wage-earning capacity of \$253.20.

In his decision dated June 2, 1995, Administrative Law Judge Thomas Schneider determined that the 1981 settlement agreement was not enforceable because it was never approved by the district director, that employer complied with the 1986 settlement agreement, that claimant did not establish a change in his physical or psychiatric condition, and that there is no mistake in fact in Judge Heyer's decisions. Accordingly, Judge Schneider denied claimant's claim for modification.³ Judge Schneider also denied claimant's motion for reconsideration.

Claimant's appeal of Judge Schneider's decisions was administratively affirmed by the Board pursuant to Public Law 104-134 (Omnibus Appropriations Act for Fiscal Year 1996), and his subsequent appeal to the United States Court of Appeals for the Ninth Circuit was dismissed as untimely. Claimant then filed a second claim for modification under Section 22, raising the same contentions initially presented before Judge Schneider, as well as alleging a mistake in fact in Judge Schneider's Decision and Order Denying Modification.

A hearing was held before Administrative Law Judge Daniel L. Stewart (the administrative law judge) on November 22, 1998, at which claimant appeared without counsel, resulting in the issuance of a Decision and Order on Application for Modification dated April 22, 1999. After an extensive review of the evidence of record in conjunction with claimant's assertions, the administrative law judge denied the claim for modification finding that claimant did not establish the requisite change in condition or mistake in fact. In his Decision and Order on Petition for Reconsideration, the administrative law judge explicitly addressed, considered and rejected all of the arguments raised by claimant. Accordingly, claimant's motion for reconsideration was denied.

³Judge Schneider also ordered employer to pay Hewitt F. Ryan, M.D., the sum of \$875 plus interest, in accordance with Judge Heyer's Decision and Order.

On appeal, claimant challenges the administrative law judge's denial of his claim for modification. Employer responds, urging affirmance.⁴

Section 22 provides the only means for changing otherwise final decisions on a claim; 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*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995). The fact-finder has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection of the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, *reh'g denied*, 404 U.S. 1053 (1972). Modification based on a change in condition may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Rambo*, 515 U.S. at 291, 30 BRBS at 1 (CRT); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985). It is well-established that the party requesting modification bears the burden of proof. See, e.g., *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997).

After consideration of the extensive record in this case, including the prior decisions rendered by Judge Heyer and Judge Schneider, as well as all of the evidence submitted in

⁴Employer asserts that pursuant to 20 C.F.R. §802.206, claimant's appeal is untimely and should be rejected as premature since it was filed with the Board on or before the date that the administrative law judge's Decision on Reconsideration was filed by the district director. Employer's contention lacks merit since, as the Board noted in its acknowledgment of appeal, the administrative law judge's Order on Reconsideration was filed with the district director on May 12, 1999, and thus, claimant's notice of appeal, postmarked May 15, 1999, is not premature. Moreover, employer's contention that claimant has filed an inadequate brief or is merely seeking a *de novo* review of the evidence by the Board is also without merit, in light of claimant's *pro se* appearance in this case. 20 C.F.R. §802.211(e).

support of the original claims and subsequent petitions for modification, claimant's allegations of mistakes in fact and changes in condition, and the administrative law judge's Decision and Order on Application for Modification and Decision and Order on Petition for Reconsideration, we affirm the administrative law judge's denial of modification in this case as his findings of fact and conclusions of law are supported by substantial evidence, rational, and in accordance with law. *O'Keefe*, 380 U.S. at 359.

In determining that claimant did not establish a mistake in fact, the administrative law judge extensively considered claimant's contentions in light of the evidence of record and the decisions rendered by Judge Heyer and Judge Schneider. First, the administrative law judge found that the evidence of record supports Judge Schneider's determination that the settlement application of 1981 was never approved by the district director, and that the injuries contained therein were addressed in Judge Heyer's decision. Thus, the administrative law judge properly concluded that it was not a mistake in fact for Judge Schneider to find that the 1981 agreement has no effect. Additionally, the administrative law judge rationally rejected claimant's contention that Judge Schneider committed a mistake in fact in his assessment of the 1986 settlement agreement as the record supports his finding that both parties understood and intended that the settlement agreement was to dispose of all claims for medical benefits.⁵

⁵In particular, Judge Schneider's decision to accord dispositive weight to the letter explaining the 1986 settlement agreement authored by Mr. Goyette is within his discretion, *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *see also generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and the administrative law judge further found Judge Schneider's determination in this matter supported by the fact that the district director had a copy of the letter in his files.

The administrative law judge further found no merit to claimant's allegation that Judge Heyer and Judge Schneider made mistakes in fact concerning his physical and psychiatric conditions. Specifically, he concluded that Judge Heyer's failure to consider claimant's injuries to his right shoulder and right knee which allegedly occurred in 1981 and 1984 respectively, cannot be treated as a mistake in fact since these injuries were never alleged by claimant before Judge Heyer. In addition, as he found that all of claimant's right knee injuries occurred as a result of a series of intervening causes, he properly determined that Judge Schneider did not err in finding that those injuries are not compensable. *See Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Wright v. Connelly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). Moreover, the administrative law judge rationally found that claimant did not establish that Judge Schneider, or for that matter Judge Heyer, committed a mistake in fact with regard to his psychiatric condition as the contrary opinions of Drs. Ryan, Bailey and Marcus are equally probative.⁶ *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43(CRT) (1994). Lastly, the administrative law judge considered and rejected claimant's assertion that Judge Schneider made a mistake in fact by calculating his residual wage-earning capacity based on the vocational rehabilitation reports prepared by REGAIN, which failed to consider his psychiatric condition, since that condition was not found to constitute an independent impairment of claimant's ability to work, and thus has no bearing on claimant's ability to do such work. The administrative law judge's finding that claimant did not meet his burden to show a mistake in a determination in fact in the decisions rendered by Judge Heyer and Judge Schneider is supported by substantial evidence and therefore affirmed.

The administrative law judge also found that claimant did not establish the requisite change in conditions for modification as a result of a right shoulder injury sustained on October 13, 1995, while working for Home Town Buffet or because he is unable to perform the suitable alternate employment outlined in employer's vocational report. Specifically, the administrative law judge found that there is no causal connection between the right shoulder

⁶While Dr. Ryan opined that claimant is impaired, disabled and presently unemployable due to his mental illness, Dr. Marcus stated that claimant is not currently psychiatrically impaired or disabled. Dr. Bailey opined that there is no psychiatric reason why claimant would be unable to perform any of the jobs listed in the Job Market Survey conducted by REGAIN.

injury and those injuries for which he was awarded benefits, *i.e.*, his back and left knee. In particular, the administrative law judge noted that prior to the accident on October 13, 1995, claimant sustained three intervening injuries to his right shoulder and at least five intervening injuries to his lower extremities which sever the nexus between the injuries sustained at employer's facility and the subsequent right shoulder injury. *Cyr*, 211 F.2d at 454; *Wright*, 25 BRBS at 161. With regard to the vocational evidence, the administrative law judge rationally concluded, based on his review of the medical record, that claimant is capable of performing the occupations of security guard, automobile rental clerk, parking lot attendant, cashier, customer service representative, and sales clerk, and thus employer, by presenting evidence of openings in each of these positions has demonstrated that suitable alternate employment is and has been available to claimant in both San Diego, California and Plano, Texas. The administrative law judge therefore rejected claimant's assertion that he is unable to perform suitable alternate employment and thus that he is entitled to modification of the award of permanent partial disability benefits based on a change in condition. The administrative law judge therefore rationally concluded that claimant did not meet his burden to show the requisite change in conditions to warrant modification in this case.

Accordingly, the administrative law judge's Decision and Order on Application for Modification and Decision and Order on Petition for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge