BRB No. 03-0586

WILLIAM S. DAVIDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES TERMINALS	)	DATE ISSUED:May 20, 2004
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

William S. Davidson, Baltimore, Maryland, *pro se*.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order on Modification (01-LHC-2233) of Administrative Law Judge Jeffrey Tureck 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 findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant, a heavy equipment operator, sustained injuries to his hands on November 2, 1992, when he fell while descending a forklift; he has undergone six

surgeries on his hands.[1] Employer paid claimant compensation for temporary total disability from the date of injury through March 1, 1993, and from April 22, 1994, through October 21, 1994. Employer terminated benefits based upon its perception that claimant's fall at home on September 9, 1994, constituted a new and non-work-related injury for which it was not liable. In a Decision and Order Awarding Benefits, issued November 29, 1996, Administrative Law Judge Mollie W. Neal found that claimant was entitled to ongoing compensation for temporary total disability commencing on October 21, 1994.

On September 17, 1998, Administrative Law Judge Jeffrey Tureck (hereinafter the administrative law judge) issued the second Decision and Order in this case based upon the parties' agreement that claimant had reached maximum medical improvement on September 16, 1996. The administrative law judge found that employer established the availability of suitable alternate employment and that therefore claimant was entitled only to an award under the schedule for impairments to his thumbs, 33 U.S.C. §908(c)(6), which employer had already paid.

Claimant filed an appeal to the Board on February 15, 1999, indicating his dissatisfaction with the Decision and Order denying additional compensation. Employer filed a motion requesting that the appeal be dismissed as untimely. By Order dated April 7, 1999, the Board held that although claimant's appeal was untimely, 33 U.S.C. §921; 20 C.F.R. §802.205, his submission of additional evidence indicating a worsening of his condition would be considered a request for modification. 33 U.S.C. §922; 20 C.F.R. §802.301(c). The case was remanded to the administrative law judge for consideration of claimant's motion for modification.

On modification, claimant sought compensation for a 75 percent impairment to each hand. Employer conceded that claimant's condition now resulted in impairments to his hands rather than to his thumbs, but argued that claimant's current impairment ratings are 19 percent to his right hand and 15 percent to his left hand for which it had fully compensated claimant.[2] 33 U.S.C. §908(c)(3). The administrative law judge concluded that all of the physicians' reports lack probative value and that none of the medical evidence of record is entitled to any weight. He awarded claimant additional

[1] Claimant took disability retirement under the Steamship Trade/International Longshoreman Association Retirement Fund on June 12, 1995.

[2] Employer had previously paid claimant compensation for an 11.25 percent impairment to his left thumb and a 45 percent impairment to his right thumb. 33 U.S.C. §908(c)(6); EX 4.

compensation based on employer's concessions regarding the extent of the impairments to claimant's hands. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

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 has the burden of showing the change in condition or mistake in fact. *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 this case, claimant contended that his work-related condition deteriorated such that he now has a 75 percent impairment to each hands. Employer conceded that claimant's condition has worsened but contended that the impairment is now 19 percent to the right hand and 15 percent to the left hand. It is claimant's burden to establish that he is entitled to an increased disability award. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *see also Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

In his decision, the administrative law judge fully addressed the medical evidence of record. Four physicians submitted opinions on the degree of claimant's impairment. Dr. Segalman, claimant's treating physician and surgeon, initially rated claimant's impairments as 25 percent in both upper extremities, EX 97, but later reduced these ratings to 19 percent in the right hand and 15 percent in the left. EX 98. Dr. Matz, a board-certified orthopedic surgeon, agreed with Dr. Segalman's ratings. EX 102. Dr. Launder, an orthopedist, examined claimant once and rated him with a 50 percent impairment to the right hand and a 40 percent impairment to the left hand. CX 101. Dr. Propper, the physician who initially referred claimant to Dr. Segalman, rated claimant with 75 percent impairments to both hands. CX 102. The administrative law judge determined that none of these opinions was entitled to any weight, but awarded claimant additional benefits based on Dr. Segalman's opinion due to employer's concession that claimant was entitled to these benefits. Decision and Order at 3.

The administrative law judge rejected the opinion of Dr. Segalman, despite his status as claimant's treating physician and the surgeon who performed several of claimant's operations, because Dr. Segalman failed to adequately explain how he reached his ratings under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) or to explain why he changed his initial ratings from those for claimant's upper extremities to those for his hands. As Dr. Matz merely

reiterated Dr. Segalman's ratings for impairments to claimant's hands and concurred with them, the administrative law judge found that his opinion also was not probative.

Similarly, the administrative law judge rejected the opinions of Drs. Propper and Launder. The administrative law judge found that Dr. Propper failed to explain how and to what degree he factored into his ratings claimant's subjective complaints of pain, loss of motion, endurance, weakness, atrophy, scarring and disesthesia. Finally, while Dr. Launder purported to use the AMA *Guides*, the administrative law judge found that he did not explain his use of various tables or how claimant's pain, dysfunction and loss of endurance provided significant additional impairment percentages to each hand.

We reject claimant's contention that the administrative law judge erred by failing to award him additional benefits. It is well established that the administrative law judge has the discretion to determine the weight to be accorded to the evidence of record. *See John W. McGrath Corp., v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *Anderson*, 22 BRBS at 22. Although the Act does not require that impairment ratings for scheduled injuries other than hearing loss be given pursuant to the AMA *Guides*, *see Cotton v. Army & Air Force Exchange Services*, 34 BRBS 88 (2000), the administrative law judge may validly question the reasoning of any medical opinion. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). In this case, the administrative law judge rationally determined that the medical opinions of record lack a fully supportive explanation for the impairment ratings. As the administrative law judge's weighing of the evidence is rational, we affirm his determination that claimant failed to meet his burden of establishing that he is entitled to greater compensation. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *see also Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

We also reject claimant's contention that the administrative law judge erred in admitting into evidence employer's videotape after the deadline established for the exchange of evidence. The administrative law judge admitted the tape in rebuttal to claimant's testimony regarding his ability to use his hands. HT at 36. The administrative law judge has a duty to inquire into all matters at issue and to admit all probative evidence. 20 C.F.R. §702.338. He may admit evidence offered in violation of a pre-hearing order. *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986). Thus, the administrative law judge committed no error in admitting the tape into evidence. In his decision, moreover, the administrative law judge found that the taped evidence was of poor quality and tended to support rather than to contradict claimant's own testimony regarding his abilities. Decision and Order on Modification at 2.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge