BRB No. 04-0718

DARRYL H. GOODMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: May 23, 2005
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-1774) of Administrative Law Judge Richard K. Malamphy 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to both of his knees while working for employer on July 14, 1998. Dr. Stiles diagnosed bilateral chondromalacia, and performed surgeries on claimant's left knee on September 16, 1998, and on claimant's right knee on December 30, 1998. Claimant remained out of work until May 2001, when he obtained employment with Wackenhut Security. The parties reached an agreement, memorialized in the district director's Compensation Order Award of Compensation dated April 4, 2002, wherein employer paid periods of temporary total disability benefits from

September 16, 1998, to April 11, 1999, and from May 13, 1999, through May 28, 2001, as well as scheduled awards of permanent partial disability benefits for claimant's right and left lower extremities. Claimant's Exhibit (CX) 5; *see also* Employer's Exhibit (EX) 37. Specifically, the scheduled awards were based on a 13 percent permanent impairment to claimant's right lower extremity and a 15 percent permanent impairment to his left lower extremity. CX 5.

Meanwhile, claimant temporarily stopped working for Wackenhut Security between May 1, 2002, and August 16, 2002, in order to undergo another surgery on his right knee, which was performed by Dr. Stiles on May 2, 2002. As a result of his most recent right knee surgery, claimant sought additional compensation under the Act by filing a request for modification of the district director's April 4, 2002, Compensation Order pursuant to Section 22 of the Act, 33 U.S.C. §922. CX 4, 6. In response, employer acknowledged that it was willing to pay temporary total disability benefits from May 2, 2002, until August 15, 2002, as well as an additional 5 percent scheduled award on claimant's right knee. CXs 2, 6. However, employer rejected claimant's request for periods of temporary partial disability, *i.e.* from May 21, 2001 until May 1, 2002, and July 16 to October 16, 2002, based on the parties' prior stipulations that claimant reached maximum medical improvement with regard to his knee injuries as of April 4, 2001. CX 6. In response, claimant asserted that he did not reach maximum medical improvement with regard to his overall condition until October 17, 2002.

In his decision on modification, the administrative law judge initially determined that the instant case falls within the parameters of Section 22 of the Act. He then found that the record establishes that claimant reached maximum medical improvement with regard to his condition as of October 17, 2002, rather than in April 2001. Accordingly, the administrative law judge found claimant entitled to temporary partial disability benefits from May 21, 2001 to May 1, 2002, and from July 16, 2002 until October 16, 2002.

On appeal, employer challenges the administrative law judge's award of periods of temporary partial disability benefits. Claimant responds, urging affirmance.[1]

Employer initially asserts that, in contrast to the administrative law judge's decision, claimant should be bound by his stipulation to permanency in this case as articulated by the district director's Compensation Order dated April 4, 2002. Employer maintains that the administrative law judge did not address its contention in this regard,

---

[1]The fee petition in this case remains pending subject to the submission of a written request for settlement of that issue from both parties. *See Goodman v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 04-0718 (Feb. 4, 2005) (unpub. Order).

but that in any event, as the stipulations regarding permanency were binding, claimant's claim for temporary partial disability benefits should have been barred as a matter of law. Employer also argues that the administrative law judge did not articulate how Section 22 of the Act allowed him to vacate the district director's prior order in this case, and otherwise maintains that the record does not provide any basis to invoke Section 22 to vacate the district director's April 4, 2002, Compensation Order.

Stipulations are offered in lieu of evidence and thus may be relied upon to establish an element of the claim. *See generally Williams Electronics, Inc. v. Arctic Int'l, Inc.,* 685 F.2d 870 (3d Cir. 1982). As a general rule, stipulations made by parties are binding upon those who made them. 73 AM. JUR. 2d *Stipulations* §8 (1974); *Ramos v. Global Terminal & Container Services, Inc.,* 34 BRBS 83 (1999); *see also 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). With regard to adjudicatory matters, it is well settled that a district director may issue a compensation order based on the parties' stipulations where the parties are in agreement, *see* 20 C.F.R. §702.315, and that any resulting award is subject to Section 22 modification. *See* 33 U.S.C. §922; *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994); *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).

Section 22 modification 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). 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). Once this burden is met, the applicable legal standards are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *Id.*

In his decision, the administrative law judge, following a review of the parties' contentions,[2] Decision and Order at 3-4, and the pertinent evidence, Decision and Order at 4-5, determined that "this case is subject to a Section 22 request for modification based on a change in condition within one year." Decision and Order at 5. The administrative law judge then found that "the record indicates that the impairments were not stable in 2001 as surgery was required in the following year." *Id.* Given this, he determined that

[2]Thus, in contrast to employer's assertion, the administrative law judge explicitly set out and addressed its argument that claimant should be bound by his prior stipulation to permanency in this case. Decision and Order at 3.

"[i]t appears reasonable to accept October 17, 2002, as the date of MMI as stated by Dr. Stiles." *Id.* In making these determinations, the administrative law judge has concluded that claimant established a change in condition by virtue of the fact that he underwent an additional surgery on his right knee in May 2002.[3] Moreover, the administrative law judge's statement that the record establishes that "claimant's impairments were not stable in 2001," Decision and Order at 5, coupled with his finding that claimant reached maximum medical improvement as of October 17, 2002, demonstrates that there was a mistake in fact in the district director's compensation order.[4] *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *see also Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). As the record supports the administrative law judge's finding that the requirements of Section 22 have been met, we hold that he had the authority to modify the district director's compensation order. 33 U.S.C. §922; *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *Wheeler*, 37 BRBS 107.

In considering the case on the merits, the administrative law judge found, based on Dr. Stiles' overall opinion, that claimant reached maximum medical improvement with regard to his work-related injuries as of October 17, 2002. The administrative law judge surmised that while Dr. Stiles "provide[s] confusion in this case by 'suggesting' permanent restrictions in January 2001, and assigning permanent ratings in April of that

---

[3]The mere fact that claimant underwent additional surgery on his right knee in May 2002 indicates a change in claimant's condition from the date of the district director's compensation order. Employer concedes as much in its brief and by its actions in paying temporary total disability benefits for the time which claimant missed from work for the surgery and a subsequent recovery period, as well as agreeing to liability for an additional five percent permanent impairment of claimant's right knee as a result of the May 2002 right knee surgery.

[4]Under Section 22, the administrative law judge has 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); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *see also Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). The scope of modification based on a mistake in fact is not limited to any particular kind of factual errors; any mistake in fact, including the ultimate fact of entitlement to benefits, may be corrected on modification. *See Rambo I*, 515 U.S. at 295-296, 30 BRBS at 2-3(CRT); *Wheeler*, 37 BRBS 107. The decision to reopen a case due to a mistake in fact must render justice under the Act. *See O'Keeffe*, 404 U.S. at 256.

year," he ultimately concluded, in 2002, "that these were not accurate and were made to 'accommodate' the claimant." Decision and Order at 5. The administrative law judge thus found, in Dr. Stiles' records, a sufficient explanation for the alteration in this physician's opinion regarding claimant's date of maximum medical improvement.[5] The administrative law judge found further evidence of the speculative nature of the April 2001 date of maximum medical improvement in the opinion of Dr. Cardea, who in October 2000, indicated that claimant may require additional surgery for his condition, as well as in the fact that claimant actually underwent additional surgery on his right knee in May 2002.[6]

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Whether claimant's condition is permanent is primarily a question of fact based on the medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Additionally, the weight to be accorded to the evidence of record is for the administrative law judge as the trier-of-fact, and the Board must respect his rational evaluation of the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within the administrative law judge's discretion to accept or reject all or any part of any evidence according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

The administrative law judge rationally rejected Dr. Stiles' self-admitted speculative earlier statements regarding the permanency of claimant's condition and instead relied on Dr. Stiles' latter opinion on this subject. *Heyde*, 306 F.Supp. 1321. Thus, the administrative law judge's decision to modify the date upon which claimant reached maximum medical improvement for his work-related conditions from April 4,

---

[5]In particular, the administrative law judge acknowledged Dr. Stiles' declaration, in July 2003, that claimant's "restrictions were temporary until October 17, 2002," for claimant's right "knee continued to deteriorate after his [1998 surgery] and necessitated repeat surgery." Decision and Order at 5; CX 10, p. 15.

[6]Furthermore, the date of maximum medical improvement is "the time at which no further medical improvement is possible," *Director, OWCP v. Berkstresser,* 921 F.2d 306, 312, 24 BRBS 69, 74(CRT) (D.C. Cir. 1990), and as the record establishes that claimant's condition medically improved following his May 2002, surgery, the administrative law judge correctly rejected employer's contention that claimant had reached maximum medical improvement in April 2001.

2001 to October 17, 2002, is supported by substantial evidence, *i.e.*, Dr. Stiles' July 2003 statement that claimant's restrictions were temporary until October 17, 2002. *Ballesteros*, 20 BRBS 184. Consequently, we affirm the administrative law judge's award of temporary partial disability benefits for the periods of May 21, 2001, to May 1, 2002, and from July 16, 2002, to October 16, 2002.[7]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

____
ROY P. SMITH
Administrative Appeals Judge

____
BETTY JEAN HALL
Administrative Appeals Judge

____
JUDITH S. BOGGS
Administrative Appeals Judge

---

[7]We reject employer's suggestion that claimant's return to work on August 15, 2002, should serve as the date of claimant's maximum medical improvement. The date a claimant returns to work is relevant to the extent of disability, *i.e.,* whether it is total or partial, and is not determinative of the nature, or permanency, of claimant's condition, which is premised on the finding regarding maximum medical improvement. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *see also Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).