BRB No. 12-0554

JOSEPH R. EGLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P.C. PFEIFFER COMPANY, INCORPORATED	)	DATE ISSUED: 05/30/2013
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Anthony P. Griffin (A. Griffin Lawyers), Galveston, Texas, for claimant.

James M. Davin (Julian & Seele, P.C.), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-2031) of Administrative Law Judge Lee J. Romero, Jr., 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 filed two claims under the Act as a result of injuries he sustained to his left shoulder and neck/back while working as a longshoreman on June 20, 2005. The first, seeking disability and medical benefits, was resolved by the administrative law judge's decision dated March 26, 2010, wherein the administrative law judge found that claimant cannot return to his usual work. The administrative law judge awarded claimant temporary total disability benefits from June 20, 2005 to May 23, 2006, and August 19, 2006 to July 31, 2008, followed by a continuing award of temporary partial disability

benefits. 33 U.S.C. §908(b), (e). The second, which is the subject of this appeal, involves a claim alleging that employer violated Section 49 of the Act, 33 U.S.C. §948a, because it refused to allow claimant to return to work, despite his having provided a full release from his treating physician, Dr. Masson.[1] Claimant alleged that employer's refusal to allow him to work was retaliation for his having filed a compensation claim and/or being the union president and that he is entitled to reinstatement and back wages. Employer argued before the administrative law judge that, per the administrative law judge's prior Decision and Order, claimant is disabled from returning to work by both shoulder and neck/back injuries, and Dr. Masson's release was not a full release as it did not provide sufficient information about claimant's disabling neck/back condition.

In his decision, the administrative law judge found that claimant continues to be disabled per the 2010 decision, which has not been modified; therefore, claimant could not establish a discriminatory act by employer nor could he be reinstated to his job pursuant to Section 49. Accordingly, the administrative law judge denied the requested relief. Claimant challenges the administrative law judge's decision, asserting that the administrative law judge erred in failing to modify his prior award and to find that employer did not discriminate against him. Employer responds, urging affirmance of the administrative law judge's decision.

Section 49 of the Act provides that an employer may not discriminate against an employee who has either claimed or attempted to claim compensation under the Act. 33 U.S.C. §948a.[2] If it is demonstrated that the employer did in fact discriminate against the

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[1]After the administrative law judge's 2010 decision, claimant continued to treat with Dr. Masson. On April 8, 2011, Dr. Masson released claimant to work as of April 11, 2011, allegedly without restrictions. Claimant returned to work on April 11, 2011, and worked four days. On the fifth day, employer informed claimant that he could not return to work and escorted him from the facility.

[2]Section 49 of the Act provides, in pertinent part, that:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter . . . . Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: *Provided*, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.

employee on this basis, the employer shall be liable for a penalty payable to the Special Fund and must reinstate the claimant to his employment and pay back wages, provided that the claimant is qualified to perform his job. *Id*.; *G.M. [Meeker] v. P & O Ports Louisiana, Inc.*, 43 BRBS 68 (2009); 20 C.F.R. §702.271(d). To establish a prima facie case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated at least in part by discriminatory animus or intent. *See Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *Gondolfi v. Mid-Gulf Stevedores, Inc.*, 11 BRBS 295 (1979), *aff'd*, 621 F.2d 695, 12 BRBS 394 (5th Cir. 1980). The essence of discrimination is in treating the claimant differently than other similarly-situated employees. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). Once these threshold elements are established, the employer may defeat the claim by demonstrating that its action was not motivated, even in part, by the claimant's exercise of his rights under the Act. *See Dunn*, 33 BRBS 204; *see also Monta*, 39 BRBS 104. The circumstances of the employee's discharge may be examined to determine whether the employer's reason for the action is the actual motive or a mere pretext, and the administrative law judge may infer animus from the circumstances. *See, e.g., 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); *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

In this case, instead of first addressing whether employer committed a discriminatory act against claimant, the administrative law judge addressed whether claimant was qualified to return to work and, therefore, would be entitled to a remedy if the claim were successful.[3] The administrative law judge found that claimant had been adjudicated disabled due to his shoulder, back, and neck conditions, based on the opinions of Drs. Masson and Cotler,[4] and that modification of that decision was not

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33 U.S.C. §948a.

[3]We note that if employer discriminated against claimant because of his prior claim, but claimant is not able to return to work, employer nevertheless "shall be" liable for a penalty payable to the Special Fund. 33 U.S.C. §§944, 948a; *G.M. [Meeker] v. P & O Ports Louisiana, Inc.*, 43 BRBS 68 (2009).

[4]Dr. Masson, claimant's treating physician, treated claimant primarily for his shoulder injury. Based on a February 5, 2007, functional capacity evaluation, Dr. Masson opined that claimant could not perform his longshore work but was capable of some sort of medium work with restrictions; claimant also could do sedentary work at the overhead level and heavy work below his waist. CX 13 at 36-37. Dr. Cotler evaluated claimant's neck and diagnosed cervical spinal stenosis and C5-6 radiculopathy. EX 23 at 29-30. Dr. Cotler opined claimant was unable to return to work as of February 3, 2009,

requested. Further, the administrative law judge found that he could not rely on Dr. Masson's April 11, 2011, "full-duty" release because: it addressed only claimant's shoulder condition; Dr. Masson's December 19, 2011, deposition testimony indicated that the release was only "partial;"[5] and no medical records supported Dr. Masson's opinion that claimant's neck problems had "cleared up." EX 1 at 6; Decision and Order at 15, 19. Based on the foregoing, the administrative law judge found that,

> [I]t is clear that Claimant was not fully qualified to perform his job with Employer at any time since his injury on June 20, 2005 . . . Claimant continues to have a cervical condition which Dr. Cotler has opined precludes his return to his former job. Dr. Cotler's opinion has not been clarified to release Claimant as qualified to work in his former employment. It follows that Claimant cannot establish a discriminatory act by Employer or be entitled to recover under Section 48(a) (sic).

Id. at 19. The administrative law judge then found that "there is no evidence of any indicia of discrimination in the instant case against Claimant for filing a claim under the Act or otherwise exercising his rights," and "Claimant has not demonstrated any animus. . . ." *Id*. at 20.

We agree with claimant that the case must be remanded for further findings. The administrative law judge relied on the prior disability award to find that claimant continues to be disabled and for that reason to hold that claimant cannot prove that employer's termination of his employment was a discriminatory act. The administrative law judge erred in failing to determine whether the existing award should be modified

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but stated that his restrictions were indeterminate without a functional capacity evaluation. *Id*. at 24.

[5]In responding to questions regarding a June 6, 2011, treatment note, which was not made part of the record but which the deposition testimony indicates as stating "Work type: Heavy, 3 to 4 hours," Decision and Order at 11, Dr. Masson testified in a December 19, 2011, deposition that, typically, it is his strategy to either get a functional capacity evaluation or do a trial period of work to see how a patient does just in case he has problems, and "that may have been my strategy. I – I don't recall specifically." EX 1 at 16. When further questioned, "if the normal schedule would be [claimant] could work 12 hours a day, [the release] really released him for only one-third of his workday?" Dr. Masson answered, "Yes." *Id*.

pursuant to Section 22 of the Act, 33 U.S.C. §922.[6] Although the administrative law judge accurately observed that no party formally requested modification, a request for modification need not be formal in nature.[7] *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989). Moreover, an administrative law judge can modify an award "upon his own initiative," if notice is given to the parties. 33 U.S.C. §922; *see Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008). Thus, "the modification process is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276, 37 BRBS 99, 101(CRT) (2d Cir. 2003) (quoting *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497-498 (4th Cir. 1999) and *Banks*, 390 U.S. at 464). Therefore, as claimant specifically argued before the administrative law judge that he is capable of returning to work, and as the prior finding that claimant cannot return to his usual work must be modified if claimant's Section 49 claim for reinstatement is to succeed, a request for modification was implicit in claimant's pleading. *See Stetzer*, 547 F.3d 459, 42 BRBS 55(CRT); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000); *Duran v. Interport Maintenance Co.*, 27 BRBS 8 (1993). The administrative law judge, therefore, should have addressed whether the prior decision should be modified prior to addressing the merits of the discrimination claim.

With respect to the remainder of the administrative law judge stated reasons for finding that claimant continues to be disabled, the administrative law judge did not address all relevant evidence. Specifically, contrary to the administrative law judge's findings, Dr. Masson testified that he considered claimant's cervical condition in releasing him to work on April 11, 2011. *See* EX 1 at 20, 29. Dr. Masson explained the

[6]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. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

[7]Although claimant alleges on appeal that he requested modification in his opening statement at the hearing, the record reflects that when specifically asked if he had requested modification, claimant stated, "Our case is a 948(a) case. I think in the course of that I think that [employer is] asking that the award, I guess in the alternative Your Honor's award be reformed so that they no longer are required to pay ongoing benefits; so to speak." Tr. at 23-24. The record further reflects employer argued only that claimant remains disabled from returning to work and that no Section 49 violation occurred. *Id*. at 32-37.

basis for his stating that claimant's neck symptoms had improved,[8] and the administrative law judge did not consider the fact that claimant worked four full-duty days before being escorted off employer's premises.

Moreover, we agree with claimant that, in finding claimant was not discriminated against, the administrative law judge did not consider all relevant evidence and circumstances concerning claimant's dismissal under the facts as they existed at that time.[9] The administrative law judge did not address that, at the time claimant returned to work, Dr. Masson had not yet indicated that claimant's release was for a trial period; claimant had presented the business agent with a full release without restrictions.[10] In addition, the administrative law judge did not address and weigh relevant evidence from employer's representatives regarding employer's practices when injured employees return to work.[11] *See generally Holliman v. Newport News Shipbuilding & Dry Dock*

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[8]Dr. Masson testified that he had monitored claimant's shoulder and neck symptoms for years. He explained that claimant developed an inferior spur after his January 2006 surgery which explained the recurrence of pain after an initial post-surgery improvement. Dr. Masson performed a second surgery in February 2011 to alleviate claimant's symptoms. When Dr. Masson released claimant to work in April 2011, claimant was not experiencing the pain that he had three to four years earlier, was willing to go back to work, and was not complaining of back or neck pain. Tr. at 13-15, 29. Dr. Masson additionally noted that Dr. Cotler reported in his December 2, 2010, report that claimant's condition was "not a surgical problem" and the plan was referral back to Dr. Masson, which Dr. Masson understood to mean that Dr. Cotler would not be treating claimant any longer and was releasing him back to Dr. Masson's care. EX 1 at 6-7, 39-40; EX 2.

[9]The administrative law judge stated, "[i]n the instant case, an employee who is similarly situated is not just an employee who has returned to work with a full duty work release, but an employee who received a compensation award of total disability and was partially released by his treating physician to a trial work period." Decision and Order at 20.

[10]On April 11, 2011, Dr. Masson released claimant to full duty without restrictions. CX 3. The first mention of a "work trial" and a 3-4 hour limitation on heavy-duty work appears in the record in Dr. Masson's December 19, 2011, testimony – well after the event that is the subject of this discrimination claim. EX 1 at 10.

[11]Specifically, the administrative law judge did not address the deposition testimony of Mr. Donofry that employer had never before found a work release to be insufficient or called the releasing physician to discuss the release, CX 6 at 11; the deposition testimony of Mr. Flanagan, Jr., that there are no written procedures to review medical releases and determine whether a worker is capable of returning to work and he

Co., 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988); *Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124 (1986); *Tibbs v. Washington Metro. Area Transit Auth.*, 17 BRBS 92 (1985), *aff'd mem.*, 784 F.2d 1132 (D.C. Cir. 1986).

In light of the foregoing, we vacate the administrative law judge's denial of claimant's Section 49 claim and we remand the case for further consideration.[12] On remand, the administrative law judge must first address whether the prior award should be modified based on a change in condition or mistake in fact, pursuant to Section 22. Then, in view of his modification findings and all relevant evidence of record, the administrative law judge must address whether claimant established that employer's refusal to allow him to return to work was a discriminatory act motivated at least in part by discriminatory animus. *See Jaros*, 21 BRBS 26; *Rayner v. Maritime Terminals, Inc.*, 19 BRBS 213 (1987); *Nooner v. National Steel & Shipbuilding Corp.*, 19 BRBS 43 (1986).

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did not recall any worker, other than claimant, who employer determined did not have sufficient paperwork to return to work, CX 5 at 5-6, 15; and the spot grievance notes indicating that claimant was not allowed to return to work because he was adjudicated disabled in his compensation claim. CX 3.

[12]The administrative law judge properly found he is without authority to rule on claimant's claim that he was discriminated against because of his union activities. *See Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981) (Miller, dissenting), *aff'd on other grounds*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982).

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge