BRB No. 10-0300

JAMES MALLET	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 11/18/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Saxe, P.A.), Titusville, Florida, for claimant.

Grover E. Asmus (Asmus & Gaddy, LLC), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification (2008-LDA-00397) of Administrative Law Judge Alice M. Craft 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in

accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his back while working for employer in Afghanistan on January 28, 2005, and returned to the United States for treatment. He thereafter filed a claim for benefits under the Act. In his decision dated April 27, 2007, Administrative Law Judge Donald W. Mosser awarded claimant medical and ongoing temporary total disability benefits from January 28, 2005, based on an average weekly wage of $1,038.60. On May 6, 2008, claimant sought modification pursuant to Section 22 of the Act, 33 U.S.C. §922, on the ground that Judge Mosser applied wrong factual considerations and utilized an inappropriate blending approach in calculating claimant's average weekly wage. Specifically, claimant sought a recalculation of his average weekly wage pursuant to the Board's decision in *K.S. [Simons] v. Service Employees International, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009).

In support of his petition for modification, claimant requested documents from employer regarding wage information of employees who performed work similar to claimant in Afghanistan. Employer responded to some of claimant's evidentiary queries,[1] but otherwise objected on the grounds that such records are either "not relevant to the issue presented for hearing," or that the relevance of such evidence is "greatly outweighed by the burden, inconvenience, and expense that would be imposed on employer in providing such documentation." EX 12. At the hearing on modification, claimant moved to compel employer to produce the comparative earnings records of similar employees. The administrative law judge took claimant's "motion to compel under advisement" since she believed that comparative evidence was not crucial to the average weekly wage issue presented on modification. HT at 12, 15. The administrative law judge, however, added that she would reconsider claimant's motion if, at a later date, such evidence became relevant to the average weekly wage query in this case. *Id.*

In her decision dated December 23, 2009, the administrative law judge denied modification under Section 22 on the basis that claimant did not assert a change in his physical or economic condition or allege a mistake in a determination of fact in Judge Mosser's average weekly wage finding. The administrative law judge found that claimant's argument in support of his petition for modification, that Judge Mosser incorrectly applied the law in calculating claimant's average weekly wage, was one that could have been remedied only by the timely filing of a motion for reconsideration and/or

[1] Employer answered claimant's interrogatories regarding the time frame during which claimant worked for employer in Afghanistan and as to his total wages for that work. EX 13.

an appeal and not, as claimant attempted in this case, the filing of a petition for modification. The administrative law judge noted that claimant had not raised before Judge Mosser the issue of an average weekly wage calculated based on wages of comparable employees. The administrative law judge, nevertheless, analyzed Judge Mosser's average weekly wage determination in terms of claimant's arguments on modification, and found that it is in accordance with the Board's decision in *Simons*, 43 BRBS 18. Therefore, she denied modification on this basis as well.

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

Claimant contends that his modification petition raised a mistake in fact as to the calculation of his average weekly wage and thus, argues that the administrative law judge erred in finding that his challenge to Judge Mosser's average weekly wage determination was not subject to modification. We agree. Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). 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 submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Section 22 of the Act displaces any notions of finality and evinces the Act's preference for accuracy; the intent of Section 22 is to render "justice under the Act." *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *see also Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

A claimant's average weekly wage is an issue of both law and fact, *see S.K. [Khan] v. Service Employers Int'l*, 41 BRBS 123 (2007), and therefore is subject to Section 22 modification as the calculation of the resulting figure is an "ultimate fact." *See Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *Banks*, 390 U.S. 459. Thus, the issue claimant raised is not purely a question of law to which modification does not apply. *Ryan v. Lane & Co.*, 28 BRBS 132 (1994). The fact that the administrative law judge's prior order became final for purposes of appeal to the Board cannot bar a petition for modification, as Section 22 displaces traditional notions of finality and indeed provides the only recourse to a party where a prior decision has become final. *O'Keeffe*, 404 U.S. at 256. Moreover, that claimant did not raise the issue of comparable employees' wages

prior to filing for modification is not dispositive.[2] The administrative law judge thus erred in finding that claimant's challenge of Judge Mosser's average weekly wage determination cannot be addressed through modification proceedings. *Khan*, 41 BRBS 123.

Nevertheless, the administrative law judge examined Judge Mosser's average weekly wage determination in terms of claimant's contentions on modification and the applicable law.[3] Decision on Modification at 3, 6. The administrative law judge found that claimant signed an "Employment Agreement" to work for one-year at a monthly rate of $2,583, plus additional compensation for Foreign Service (5 percent), Area Differential (25 percent) and Danger Pay (25 percent), with leave, which was expected to be taken, paid at straight time. *Id.* at 3-4. Based on his contract, the administrative law judge found, as had Judge Mosser, that claimant earned a total of $23,637.26 in the 17 weeks he worked for employer overseas, working 12 hour days 7 days a week. *Id.* at 4.

The administrative law judge then found that Judge Mosser had calculated claimant's average weekly wage by computing the total wage claimant could have expected to earn over the course of his one-year contract with employer and dividing that figure by 52. Specifically, she observed that Judge Mosser's calculations, pursuant to Section 10(c), were as follows:

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[2] The facts in *Khan*, 41 BRBS 123, were that the claimant had raised the issue of comparable employees' wages in the initial proceeding. However, the Board did not state that this was a prerequisite for a valid motion for modification. Rather, the Board noted the broad scope of "mistake in fact" modification and stated that an average weekly wage is subject to modification because the calculation of that wage is a "fact." *Id.* at 126.

[3] With regard to modification, claimant argued before the administrative law judge, and again argues on appeal, that he has met the threshold requirements for entitlement to modification as he has established that: (1) Judge Mosser committed a mistake in the determination of fact in calculating claimant's average weekly wage since, under *Simons*, 43 BRBS 18, he should have simply divided the number of weeks claimant had been deployed into the amount of his actual earnings during that deployment to arrive at claimant's average weekly wage; and (2) Judge Mosser made factual errors in calculating the average weekly wage in this case by assuming that claimant would have been off from work for six weeks of vacation, and by failing to recognize that claimant would have worked some overtime hours had he remained on the job.

> Judge Mosser took the total wages paid for the claimant's 17 weeks of work, added 35 weeks at the contract rate (including wages and uplifts for the foreign service, area differential and danger pay), and then subtracted the uplifts for the 6 weeks of leave at straight pay provided for in the contract. Based on that calculation, he arrived at total earnings potential for a year of $54,007.42, and [after dividing that figure by 52, he arrived at] an average weekly wage of $1,038.60.

Decision on Modification at 3, 7. The administrative law judge found that Judge Mosser based his calculation exclusively on claimant's overseas wages, an approach which is in accordance with the Board's decisions on this issue. *See Simons,* 43 BRBS 18; *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006). She added that while Judge Mosser referred to his formula as a "blended" approach, he utilized the overseas employment agreement, which specified the uplifts and mandatory six week interim leave, as the sole basis for his calculations. The administrative law judge rejected claimant's contention on modification that his average weekly wage should have been based exclusively on his actual earnings for the 17 weeks that he was overseas. Additionally, the administrative law judge considered the relevance of the interim leave policy in the employment contract, and concluded that this leave was mandatory and was to be paid "at straight time (no uplifts)."[4] Decision and Order on Modification at 5, 12. Moreover, there is nothing in the record to suggest that overtime was a regular and normal part of claimant's employment.[5] *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Bury v. Joseph Smith & Sons*, 13 BRBS 694 (1981). Thus, the administrative law judge rejected claimant's contention that Judge Mosser's treatment of these considerations improperly skewed his average weekly wage determination.

The Board has held that where, as here, claimant is injured while working overseas in a dangerous environment in return for higher wages under a long-term contract, his annual earning capacity should be calculated based upon the earnings in that job as they reflect the full amount of the earnings lost due to the injury. *Simons*, 43 BRBS 18; *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006). The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). This inquiry includes consideration of claimant's

[4] Claimant put forth no evidence that he did not, in fact, plan to take interim leave.

[5] In contrast, claimant explicitly stated, at the hearing before Judge Mosser, that "we didn't get paid overtime," HT dated August 15, 2006, at 43, 72, and the contract does not appear to address overtime wages. EX 2.

ability, willingness and opportunity to work and the earnings claimant had the potential to earn had he not been injured. *See Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Jackson v. Potomac Temporaries*, 12 BRBS 410 (1980). Thus, the administrative law judge is to "make a fair and accurate assessment" of the amount the employee would have the potential and opportunity of earning absent the injury. *Simons*, 43 BRBS at 137. The Board will affirm an administrative law judge's average weekly wage determination under Section 10(c) if the amount represents a reasonable estimate of the employee's annual earning capacity at the time of the injury. *See Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); *Fox v. West State Inc.*, 31 BRBS 118 (1997).

The calculation of claimant's average weekly wage is, as found by the administrative law judge, based only on claimant's overseas earnings, *Simons*, 43 BRBS 18; *Proffitt*, 40 BRBS 41; that method accords with law, *id.*, and is within the broad discretion afforded to the administrative law judge when calculating average weekly wage pursuant to Section 10(c). *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT). By explicitly using only the actual terms of payment as delineated by claimant's entire employment contract with employer, the administrative law judge made a "fair and accurate assessment" of the amount which claimant would have had the potential and opportunity to earn with employer had he not been injured.[6] *Simons*, 43 BRBS at 137. We therefore affirm the administrative law judge's finding that claimant did not establish a mistake in fact in Judge Mosser's calculation of his average weekly wage in this case.[7]

[6] Moreover, we note that since the employment contract provides an accurate assessment as to the entire amount claimant could have expected to earn over the course of his employment with employer had he not been injured, the administrative law judge did not err in this case in declining to allow further discovery regarding wages paid to comparable employees. Claimant's contention of error in this regard is therefore rejected. *See generally Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

[7] Contrary to claimant's contention, the *Khan* and *Simons* decisions do not mandate that the average weekly wages of overseas workers must be derived by dividing that individual's actual overseas earnings prior to injury by the number of weeks he worked in that employment. Rather, these cases reflect that a claimant's average weekly wage must be based exclusively on the higher wages earned in the job in which he was injured in his overseas employment. The administrative law judge is afforded discretion in calculating average weekly wage within these parameters.

Accordingly, the administrative law judge erred in stating that claimant's average weekly wage in this case was not subject to Section 22 modification. Nonetheless, for the reasons stated herein, the administrative law judge's Decision and Order Denying Request for 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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JUDITH S. BOGGS
Administrative Appeals Judge