

BRB No. 14-0202

JUDITH HARRIS)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: Nov. 25, 2014
 ELECTRIC BOAT CORPORATION)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Modification and the Decision and Order Denying Reconsideration of Timothy J. McGrath, United States Department of Labor.

Judith Harris, Hartford, Connecticut, *pro se*.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order Denying Modification and the Decision and Order Denying Reconsideration (2013-LHC-01475) of Administrative Law Judge Timothy J. McGrath 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 representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed. *Id.*

Claimant worked for employer as a painter. She painted submarines in confined spaces and developed breathing problems. She was transferred to a tank watch position but was still exposed to fumes and dust and continued to have difficulty breathing. Claimant continued to work until July 29, 2005, when she left work because of vertigo.

While claimant was off work, employer requested medical documentation of claimant's condition, which she did not provide. As a result, employer terminated claimant's employment. Claimant began working as a school bus driver in October 2006, and she continued to work in this employment part-time through the date of the hearing. Claimant sought permanent partial disability benefits under the Act.

In the initial Decision and Order in this case, dated December 14, 2009, Administrative Law Judge Daniel F. Sutton found that claimant established she has a work-related breathing impairment that reached maximum medical improvement on August 11, 2006, and that claimant cannot return to her former work as either a painter or a tank watch. Judge Sutton found that claimant's part-time employment as a school bus driver is suitable alternate employment but that employer established the availability of full-time bus driving positions, which were suitable for claimant, in a labor market survey dated October 14, 2008. Thus, Judge Sutton concluded that claimant's actual wages from August 11, 2006 to October 13, 2008, were representative of claimant's post-injury wage-earning capacity, but that, commencing October 14, 2008, claimant's wage-earning capacity is established by an average of the three full-time bus driver positions identified in the labor market survey. Claimant, without counsel, appealed the award. The Board corrected a transcription error in the compensation payment calculation but, otherwise, affirmed the decision in its entirety.¹ *Harris v. Electric Boat Corp.*, BRB No. 10-0287 (Sept. 3, 2010) (unpub.).

Claimant subsequently filed a claim for modification of Judge Sutton's award. In a Decision and Order dated January 8, 2014, Administrative Law Judge Timothy J. McGrath (the administrative law judge) denied modification, finding that claimant's newly submitted evidence does not establish a change in her condition or a mistake in fact in Judge Sutton's Decision and Order. Claimant requested reconsideration and submitted additional evidence. The administrative law judge again denied claimant's motion, finding that none of the evidence establishes a change in condition or a mistake in fact. Claimant, without legal representation, appeals the administrative law judge's decisions. Employer responds, urging affirmance of the administrative law judge's denial of claimant's motion for modification.

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

¹ Judge Sutton found claimant entitled to \$2.98 a week in disability compensation. The Board corrected a scrivener's error, adjusting claimant's disability compensation to \$3.06 per week. *Harris v. Electric Boat Corp.*, BRB No. 10-0287, slip op. at 5 (Sept. 3, 2010) (unpub.).

condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Spitalieri v. Universal Maritime Services*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). It is well established that the party requesting modification bears the burden of showing that the claim comes within the scope of Section 22. *See, e.g., Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

With respect to the evidence offered in support of her motion for modification, claimant submitted: (1) an August 16, 2013, service report by Dr. Johnson; (2) an October 22, 2013, work release by Dr. Johnson; (3) an October 20, 2013, medical report by Karolina Bartosik, P.A.; (4) an October 20, 2013, Discharge Instructions from Karolina Bartosik; (5) a November 6, 2013, medical report from Dr. Conway; (6) a November 12, 2013, document, titled “Page Notes” by Dr. Johnson; and (7) a November 8, 2013, service report by Dr. Johnson. CX 1-5. The administrative law judge fully addressed this evidence, finding that it supports Judge Sutton’s conclusion that claimant suffers from work-related asthma and an occupational lung disease, but that it does not support a finding of a mistake in Judge Sutton’s opinion or claimant’s contention that her lung conditions have worsened. Decision and Order Denying Modif. at 4. In support of her motion for reconsideration, claimant submitted: (1) a January 17, 2014, letter of Dr. Johnson; (2) a January 23, 2014, letter from claimant to Dr. Johnson; (3) an April 16, 2013, letter to claimant from her utility company; and (4) a January 2014 utility bill. The administrative law judge fully addressed this evidence as well, and found that it, also, does not establish a change in claimant’s condition. Decision and Order Denying Reconsideration at 2. Accordingly, the administrative law judge denied claimant’s motion for modification as she failed to establish a mistake in fact in the prior decision or change in her physical or economic circumstances.

We affirm the administrative law judge’s denial of modification, as it is rational and supported by substantial evidence. *See Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004). Each of claimant’s medical documents notes the existence of a lung impairment; however, claimant previously established the existence of a work-related lung impairment for which she was awarded partial disability benefits. Further, as the administrative law judge found, the only new evidence to address whether claimant’s physical circumstances have changed are the reports of Dr. Johnson and Dr. Conway, both of which state that claimant’s lung condition has not progressed in any way. Dr. Johnson’s January 2014 letter specifically states that “there has been no significant improvement nor deterioration in [claimant’s] lung function.” As the new evidence states that claimant’s physical condition has remained stable since Judge Sutton’s award, we affirm the finding that claimant’s physical condition has not changed. Moreover, claimant did not offer any evidence of changed economic circumstances, *see generally Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS

21(CRT) (11th Cir. 2009),² and the administrative law judge rationally concluded that claimant did not demonstrate a mistake in fact in Judge Sutton's decision, *Manente*, 39 BRBS 1. In light of our decision affirming the administrative law judge's denial of modification, claimant's award of permanent partial disability benefits at a rate of \$3.06 per week stands.

Accordingly, the administrative law judge's Decision and Order Denying Modification and the Decision and Order Denying Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

² To the extent claimant submitted the utility documents to show a change in her "economic circumstances," claimant is misguided. Claimant may show a change in her economic circumstances by demonstrating a change in her wage-earning capacity due to the work injury. See *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); see generally *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT).