BRB No. 07-0386

D. P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MID-COAST MARINE OREGON CORPORATION	)	DATE ISSUED: 10/19/2007
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

D.P., Bandon, Oregon, *pro se*.

Norman Cole (Sather Byerly & Holloway LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Request for Modification (2004-LHC-0540) of Administrative Law Judge Paul A Mapes 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

[1] In his appeal, claimant states that his name is not "D.P." The Department of Labor has instituted a policy that any document published on the Department's website shall not contain the claimant's name. Thus, the captions of decisions use only claimant's initials.

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, working as a marine electrician for employer, sustained an injury to his lower back as a result of a fall on September 5, 1989. Following treatment with a number of physicians, claimant filed a claim seeking benefits under the Act based on his back injury and an alleged psychiatric injury. In a decision dated December 2, 1992, Administrative Law Judge Donald B. Jarvis concluded that claimant was entitled to periods of temporary total and temporary partial disability benefits, as well as medical benefits for a work-related spinal injury and post-injury psychological examinations. 33 U.S.C. §§908(b), (e), 907. Judge Jarvis found that claimant was capable of performing his usual pre-injury employment as a marine electrician as of March 20, 1990. Carrier, SAIF Corporation, paid benefits for the low back strain, with the final payment of compensation occurring on April 16, 1993.

In June 1993, claimant underwent an MRI which was interpreted as showing a disc herniation at the L-4/5 level. Claimant testified that he made telephone calls to the Department of Labor (DOL) on three occasions in June 1993, stating that he had proof of the cause of his pain and that he wanted his claim to be reopened. Additionally, claimant contacted the office of United States Congressman DeFazio with respect to his claim. Claimant thereafter alleged that these communications constituted requests for the modification of Judge Jarvis's 1992 decision. Employer controverted on the ground that claimant's request for modification was not timely since claimant's telephone calls were insufficient to constitute a valid request for modification.

In his Decision and Order, Administrative Law Judge Robert L. Hillyard concluded that claimant did not file a valid, timely claim for modification. Judge Hillyard nevertheless reviewed the record to determine whether the evidence supported modification, and concluded that claimant did not establish a causal connection between his disc herniation and the 1989 work accident. Accordingly, claimant's request for modification was denied. On claimant's appeal, the Board reversed the administrative law judge's finding that claimant's documented June 23, 1993, telephone call to DOL did not constitute a valid modification request under Section 22. However, the Board affirmed the administrative law judge's finding that employer presented substantial evidence to rebut the Section 20(a) presumption, and the administrative law judge's determination, based on the record as a whole, that claimant's disc herniation is not causally related to his work accident. *[D.P.] v. Mid-Coast Marine Oregon Corp.*, BRB No. 01-0888 (Aug. 5, 2002) (unpub.).

On May 21, 2003, claimant filed a second request for modification, asserting that Judge Hillyard's decision contained a mistake in fact. Following a formal hearing before Administrative Law Judge Mapes (the administrative law judge), the administrative law judge granted employer's request to re-open the record for the submission of additional

evidence. On November 22, 2005, the administrative law judge granted claimant's counsel's motion to withdraw as claimant's representative; claimant was given 60 days by the administrative law judge in which to obtain new counsel. On February 14, 2006, the administrative law judge informed the parties that a formal hearing would be held on June 5, 2006. During the June 5, 2006, hearing, which neither claimant nor a representative of claimant attended, no testimony was received from any witnesses; rather, employer submitted into evidence multiple exhibits in support of its defense to claimant's claim for benefits. While claimant apparently obtained counsel sometime after March 24, 2006, that counsel withdrew its representation of claimant on or about August 4, 2006.[2] Both claimant and employer submitted timely post-hearing briefs to the administrative law judge, with claimant attaching three additional exhibits in support of his claim. In his Decision and Order Denying Request for Modification, the administrative law judge addressed at length the volumous record before him and determined that claimant failed to establish a mistake in fact regarding Judge Hillyard's decision.[3] Specifically, the administrative law judge found that employer submitted sufficient evidence to rebut the Section 20(a) presumption and that claimant did not establish, based on the record as a whole, that his work injury caused, aggravated or accelerated his lumbar spinal condition. Accordingly, the administrative law judge concluded that Judge Hillyard made the correct decision when he determined that claimant was not entitled to any additional benefits under the Act, and he denied claimant's request for modification.

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

Claimant initially contends that the administrative law judge demonstrated bias toward him by finding employer's witnesses to be credible, by adopting the prior decision of Judge Hillyard, by disallowing claimant the opportunity to present evidence, and by ordering claimant not to be represented by counsel. Claimant's contentions are without merit. An administrative law judge's adverse rulings alone are insufficient to demonstrate bias. *Raimer v. Willamette Iron & Steel Co.,* 21 BRBS 98 (1988). Moreover, the record in this case reveals that, contrary to claimant's allegation, the

[2] Claimant, in a letter to the administrative law judge dated March 24, 2006, objected to a motion filed by employer; accordingly, it appears that claimant had not obtained new counsel as of that date. Thereafter, in a letter to the administrative law judge dated August 4, 2006, a San Francisco-based law firm informed the administrative law judge that it would not be able to represent claimant due to the amount of documents contained in the record and that henceforth claimant would be representing himself.

[3] The present record consists of 271 exhibits submitted by employer, 63 exhibits submitted by claimant, and the transcripts of the multiple hearings held regarding this claim.

administrative law judge did not prevent claimant from obtaining new counsel after his initial representative withdrew. Rather, the administrative law judge gave claimant ample opportunity to obtain new counsel, and the record indicates that although claimant initially obtained new counsel, this second representative also withdrew from representation of claimant after receiving claimant's records. Additionally, there is no indication that the administrative law judge refused to accept any evidence from claimant; to the contrary, the administrative law judge accepted into evidence the additional exhibits attached to claimant's post-hearing brief. Lastly, while claimant argues that as a layman he does not understand the law, the Act does not require an administrative law judge to act as an unrepresented claimant's legal advisor. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). Accordingly, we reject claimant's assertion of bias by the administrative law judge in this case.

We next address claimant's challenge to the administrative law judge's decision to deny his request for modification of Judge Hillyard's decision. Section 22 of the Act permits the modification of a final award if the party seeking modification demonstrates either a change in claimant's physical or economic condition or a mistake in a determination of fact. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). In seeking modification of Judge Hillyard's decision, claimant contended that it contained a mistake in fact in the determination that claimant's back condition is unrelated to his September 5, 1989, work-injury.

In the instant case, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption; the burden of proof thus shifted to employer to rebut the presumption with substantial evidence. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge determined that employer established rebuttal of the Section 20(a) presumption based on the reports and testimony of Drs. Neumann and Coulter. In his discussion of the medical evidence of record, the administrative law judge stated that Dr. Neumann concluded that claimant's original injury had resolved and that claimant's present degenerative disc and facet disease are unrelated to his September 5, 1989, work-injury. Decision and Order Denying Request for Modification at 9. The

administrative law judge found that Dr. Coulter similarly opined that claimant's work-related thoracic and lumbar spine strains had resolved, and that claimant's work-injury did not produce any anatomic or pathologic changes in claimant's lumbar discs nor did it cause a disc herniation. *Id.* at 13. As these opinions sever the presumed causal link between claimant's current back complaints and his employment with employer, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

In weighing the evidence on causation as a whole, the administrative law judge initially stated that overwhelming evidence establishes that claimant has been intentionally dishonest in describing his post-injury work activities. Specifically, the administrative law judge found that claimant, since at least 1997, has been working regularly as an electrician.[4] The administrative law judge additionally found that the record contains convincing evidence that claimant has been exaggerating his alleged medical problems since at least 1991; in this regard, the administrative law judge noted claimant's inconsistent medical complaints as well as his conflicting testimony regarding his ability to work as an electrician post-injury. Pursuant to these findings regarding claimant's lack of credibility, the administrative law judge gave less weight to the opinions of Drs. Norelle, Gallo, Bert, Holbert and Pasternak, finding that all of them admittedly based their opinions that a relationship existed between claimant's medical condition and his work-injury in part on his representations. By contrast, the administrative law judge gave greater weight to the opinions of Drs. Coulter and Neumann, both of whom opined that claimant's present back condition is unrelated to his work-injury, since each of these physicians took a more skeptical view of claimant's assertions when addressing the potential relationship between claimant's medical condition and his employment with employer.[5] Lastly, the administrative law judge found that the multiple tests and examinations performed on claimant between 1989 and 1993 did not produce objective evidence of any material abnormalities.

[4] While testifying during the June 24, 2004, hearing, claimant stated that he had no recollection of performing any employment after March 31, 1997. *See* Tr. at 100-101. In a April 4, 2006, deposition, however, claimant conceded that he has worked as an electrician post-injury, although he further asserted that he was not paid for his services. *See* EX 258 at 816-889.

[5] The administrative law judge specifically considered claimant's evidence regarding Dr. Coulter's conduct in other cases, but concluded that this evidence did not establish that Dr. Coulter was biased in favor of employer.

Based upon this evaluation of the evidence, the administrative law judge concluded that claimant had not established a causal relationship between his medical condition and his work-injury, and that consequently there is no mistake in fact in the prior decision holding that claimant is not entitled to any additional benefits under the Act. It is well-established that an administrative law judge, as the trier-of-fact, is entitled to weigh the evidence and draw his own inferences therefrom, and he is not bound to accept the opinion or theory of any particular medical examiner.[6] *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, the administrative law judge acted within his discretion in weighing the relevant 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). As the administrative law judge's findings that claimant's testimony is not credible is supported by substantial evidence, and it was within his authority to find the opinions of Drs. Coulter and Neumann outweigh those of Drs. Norelle, Gallo, Bert, Holbert and Pasternak, the administrative law judge's determination that claimant has not established a mistake in fact in the decision of Judge Hillyard is affirmed. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see generally Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). We thus affirm the administrative law judge's denial of benefits.

Accordingly, 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

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] As the Board is not empowered to reweigh the evidence of record, we must decline claimant's invitation to examine the medical evidence with a fresh eye.