BRB No. 12-0108

FRANKLIN BASNIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 09/25/2012
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Petition for Remodification of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Franklin Basnight, Norfolk, Virginia, *pro se*.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order Denying Petition for Remodification (2006-LHC-01485, 2010-LHC-02065) of Administrative Law Judge Alan L. Bergstrom 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 reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a right foot injury, and alleged injuries to his right knee, left foot and low back as well as a psychiatric condition, as a result of an accident at work on May 8, 2004. Employer voluntarily paid claimant temporary total disability benefits

through April 4, 2005, and permanent partial disability benefits pursuant to Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4), for a 19 percent permanent impairment of claimant's right foot. Claimant thereafter filed a claim seeking additional disability and medical benefits, which employer controverted. In his initial decision dated February 20, 2007, the administrative law judge found claimant sustained a work-related right foot/ankle injury for which he awarded claimant periods of temporary and permanent total, and permanent partial, disability benefits.[1] Claimant appealed the administrative law judge's decision to the Board but also filed a petition for modification with the Office of Administrative Law Judges. 33 U.S.C. §922. By Order dated November 29, 2007, the Board dismissed claimant's appeal, BRB No. 07-560, and remanded the case to the administrative law judge for consideration of the petition for modification. 20 C.F.R. §802.301(c). In decisions dated November 18, 2008, September 4, 2009, and October 19, 2011, the administrative law judge denied claimant's successive petitions for modification, finding, each time, that claimant did not establish a change in condition or a mistake in a determination of fact in any of the administrative law judge's prior decisions.[2]

Claimant, appealing pro se, challenges the administrative law judge's denial of modification and ultimate denial of an award of continuing disability and medical benefits relating to his May 8, 2004 work injury. Employer responds, urging affirmance.

Section 22 of the Act 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. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *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). The standard for

[1]Specifically, the administrative law judge awarded claimant temporary total disability benefits from May 9, 2004 through March 14, 2005, permanent total disability benefits from March 15, 2005 through April 4, 2005, and a scheduled award of permanent partial disability benefits for 38.95 weeks. The administrative law judge, however, found that claimant did not establish any work-related psychiatric condition or injuries to his right knee, left foot and/or lower back.

[2]Claimant separately appealed the administrative law judge's first two decisions denying modification. BRB Nos. 09-0267, 10-0118. Claimant filed petitions for modification concurrently with his appeals, prompting the Board to dismiss the appeals and remand the case for consideration of the pending modification requests.

determining the extent of claimant's disability is the same in a modification proceeding as in the initial proceeding. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21CRT) (11th Cir. 2009)*; Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

In his initial decision, the administrative law judge, having found claimant incapable of returning to his usual employment as a longshoreman/gangway man from May 9, 2004 until May 22, 2006,[3] rationally found that employer established suitable alternate employment by indentifying for claimant at least twenty-eight entry level sedentary jobs, which were within claimant's physical limitations according to his treating physicians,[4] EXs 17, 24A, 29, 37, 43, 46-48, and which were appropriate for claimant's educational level. The administrative law judge's finding that employer established the availability of suitable alternate employment is rational, supported by substantial evidence and in accordance with law. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264, 31 BRBS 119, 124(CRT) (4th Cir. 1997). The administrative law judge's finding that claimant did not establish that he was diligent in seeking alternate employment is likewise supported by substantial evidence. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). The administrative law judge found that claimant had done numerous things to undermine his job search and repeatedly demonstrated an unwillingness to work. In particular, the administrative law judge found that claimant was uncooperative with his vocational case managers, that he refused to apply for any of the jobs identified by employer's experts, and that in the course of his own job search he consistently sought

[3]In finding claimant capable of returning to his usual employment as of May 22, 2006, the administrative law judge rationally relied on the May 22, 2006 opinion of claimant's treating physician, Dr. Quidgley-Nevares, as bolstered by the April 26, 2006 opinion of Dr. Ross, that claimant no longer had any work restrictions relating to his May 8, 2004 work injury. Specifically, the administrative law judge found that Dr. Ross opined that there was "no medical basis for any specific work restrictions" and that Dr. Quidgley-Nevares stated that claimant needed no further medical care and had no work restrictions relating to his May 8, 2004 work injury. EXs 36, 38-39.

[4]For example, the record establishes that on April 5, 2005, Dr. Warren approved six sedentary positions, and that Dr. Quidgley-Nevares subsequently approved nine sedentary positions on November 30, 2005, seven sedentary positions on February 2, 2006, and one more on April 14, 2006. EXs 18, 23, 26, 37. Moreover, the administrative law judge found that claimant was twice offered a light duty position, approved by both Dr. Quidgley-Nevares and Dr. Ross, at employer's facility in August 2006. EXs 40, 46-48.

jobs that were beyond the scope of the medical restrictions assigned by his treating physicians. CX 12; EX 43. The record also supports the administrative law judge's scheduled award of permanent partial disability for 38.95 weeks based on the 19 percent permanent impairment rating of Dr. Warren, as agreed upon by Dr. Quidgley-Nevares. 33 U.S.C. §908(c)(4), (19); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). The record contains no evidence of a higher permanent impairment rating with regard to claimant's right foot/ankle condition.

Moreover, the administrative law judge's finding that claimant did not need any further treatment for his work injury and thus, is not entitled to any additional medical benefits, is supported by the March 31, 2006 report of Dr. Mansheim, the April 24, 2006 report of Dr. Ross and the May 22, 2006 report of Dr. Quidgley-Nevares. EXs 35, 36, 39. In those reports, Drs. Mansheim, Ross and Quidgley-Nevares each opined that claimant did not need further treatment for any work-related injuries. *Id.* In addition, no physician who examined claimant after May 2006 indicated that further treatment was necessary for his work injury.[5] 33 U.S.C. §907(a); *see 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); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). We, therefore, affirm the administrative law judge's finding that claimant is not entitled to any additional medical benefits. *Id.*

In his decision dated November 17, 2008, the administrative law judge determined that claimant did not establish, by a preponderance of evidence, a change in condition demonstrating an increase in the right lower extremity permanent impairment rating, demonstrating an increase in right lower extremity vocational restrictions, or demonstrating a change from permanent partial disability. In reaching this determination, the administrative law judge rejected claimant's assertion that a determination by the Social Security Administration (SSA) that claimant is totally disabled, mandates his

[5]The administrative law judge properly also found, in contrast to claimant's position, that claimant has not been denied his right to choose his treating physician under the Act and that, moreover, claimant is not now permitted to change physicians without employer's or the district director's consent. *See* 33 U.S.C. §907(c). Specifically, the administrative law judge found that claimant initially choose Dr. Cohn as his treating physician and that employer consented to claimant's change of treating physicians first to Dr. Warren, a specialist in foot and ankle surgery, when Dr. Cohn deemed it necessary, and thereafter to Dr. Quidgley-Nevares, when Dr. Warren deemed it necessary for claimant to be evaluated by a pain specialist. Given the opinions of Drs. Quidgley-Nevares, Ross and Mansheim, that no further treatment was required for claimant's work-related injury, the administrative law judge rationally concluded that employer need not consent to any additional treatment.

entitlement to continuing total disability benefits from May 8, 2004, correctly finding that SSA determinations are not controlling in cases arising under the Act for they involve the application of different standards.[6] *See generally Jones v. Midwest Machinery Movers*, 15 BRBS 70, 73 (1982). The administrative law judge next found that the MRI and x-ray administered on October 3, 2008, did not support a change or worsening in claimant's condition since the February 20, 2007 decision, since no physician interpreted these tests as indicative of such. Rather, the tests showed no changes from claimant's May 19, 2005 MRI. Similarly, the administrative law judge found that neither Dr. Ross, in his reports dated April 7, 2008, and May 27, 2008; Dr. Graham, in his report dated May 23, 2008; nor Dr. Moore, in his statement dated October 28, 2008, observed any change or worsening of claimant's work-related condition since February 2007. EXs 58, 60-62.

In his decision dated September 4, 2009, the administrative law judge addressed claimant's allegation of a change in condition in terms of the newly submitted evidence,[7] and found that while Drs. Doss and Diaz respectively diagnosed right tarsal tunnel syndrome as related to claimant's complaints of right ankle pain, and chronic right ankle pain, reflex sympathetic dystrophy and right foot and ankle degenerative joint disease, neither physician correlated these diagnoses as in any way "arising out of, being aggravated by, or being accelerated by, claimant's work-related right foot injury of May 8, 2004 or the medical treatment related to that work-related injury."[8] Decision and Order dated September 4, 2009 at 11-12. Additionally, the administrative law judge found that neither physician placed any work restrictions on the claimant. *Id.* The administrative law judge also found that Dr. Ashman's reading of the October 3, 2008,

[6]Specifically, the administrative law judge properly found that the SSA determination was inapplicable to this case because it merely stated that "claimant became disabled under our rules on May 8, 2004," without providing any rationale or specifics as to the impairments considered in reaching that conclusion. *Jones v. Midwest Machinery Movers*, 15 BRBS 70 (1982); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978).

[7]Claimant submitted, in support of his second petition for modification, the opinions of Drs. Doss and Diaz, as well as Dr. Ashman's reading of the October 3, 2008 MRI.

[8]The administrative law judge found that Dr. Diaz, on June 8, 2009, stated that he did not disagree with the 19 percent permanent impairment rating previously assigned to claimant's right foot by Dr. Warren, he had no reason to disagree with the opinion that claimant could perform sedentary or some light-duty work assignments and that claimant's actions in the surveillance video of November 7, 2008, were inconsistent with claimant's subjective complaints. EX 64.

MRI which had been a part of the record considered with regard to claimant's first petition for modification, made no findings related to the claimant's May 8, 2004 right foot work-related injury or treatment. The administrative law judge thus concluded that claimant did not establish a change in condition related to his May 8, 2004 right foot injury at work.[9]

Addressing claimant's assertion that he is entitled to permanent total disability benefits, the administrative law judge found, in his October 19, 2011 decision, that none of the exhibits presented by claimant in support of this contention, i.e., medical reports and records from Drs. Kean, Doss, Beverly, Diaz, Rice and Warren, and medical testing from February 7, 2008, October 3, 2008, and August 24, 2010, expressed a well-reasoned medical opinion increasing the medical-vocational restrictions placed on claimant and relied upon in finding that employer established suitable alternate employment as of April 5, 2005. In particular, the administrative law judge found that while Dr. Doss originally diagnosed tarsal tunnel syndrome in the right foot, and reported on October 21, 2009, that claimant's "current problems are a result of his work-related injury on May 8, 2004," Drs. Kean, Ross, Moore and Gharbo all opined, after reviewing numerous EMG/NCS studies, that claimant could not be diagnosed with tarsal tunnel syndrome but instead that claimant had generalized polyneuropathy bilaterally in the lower extremities, which no physician opined was caused or aggravated by or arose out of the May 8, 2004 work-related right foot/ankle injury. CX 3; EXs 65, 66, 70, 72, 73. Moreover, the administrative law judge found it significant that while the various doctors who treated and/or examined claimant, including Drs. Kean, Beverly and Diaz, noted his reports of pain in his back and feet, none of them took claimant out of work or increased the level of restrictions previously placed on claimant, because of any condition arising out of his May 8, 2004 work-related right foot/ankle injury. CXs 3, 6, 7, 12. The administrative law judge thus concluded that claimant did not establish that his work-related injury deteriorated such that he is no longer able to perform the sedentary work found suitable.

Consequently, the administrative law judge found in his three decisions on modification that claimant did not submit any creditable evidence to establish a change in condition or a mistake in a determination of fact. Throughout the proceedings in this case, the administrative law judge acknowledged that claimant was without the assistance of counsel, and thoroughly explained to claimant his right to present evidence, to object

[9]The administrative law judge also reiterated his finding that claimant is not entitled to any additional medical benefits, including for any treatment provided by Drs. Diaz and Doss, as there is no evidence that claimant needed additional treatment for his work-related right foot/ankle injury. Moreover, the administrative law judge found that Dr. Warren was still the approved attending physician and that there is no evidence that claimant requested a change in attending physician to either Dr. Diaz or Dr. Doss.

to the admission of employer's evidence,[10] to examine and cross-examine any witnesses, and to explain his positions with regard to his original claim, as well as to each of his three petitions for modifications. *See* HT dated October 5, 2006 at 1-3; *see also* HT dated June 25, 2008 at 4-12; 39-40; HT dated August 21, 2009 at 5, 8-10, 35-39; HT dated December 1, 2010, at 4, 13-16; HT dated February 22, 2011, at 3-4, 28-31.

The administrative law judge's findings, in his initial decision, that claimant's work-related right ankle/foot condition reached maximum medical improvement as of March 14, 2005 with a 19 percent permanent impairment, that claimant was incapable of performing his usual work from May 8, 2004 through May 22, 2006, that employer established suitable alternate employment in the form of sedentary jobs within claimant's restrictions which claimant could perform as of April 4, 2005, and that claimant did not diligently search for post-injury employment are supported by substantial evidence, rational, in accordance with law and thus, are affirmed. We, therefore, affirm the administrative law judge's award of benefits. Moreover, the administrative law judge rationally found that claimant did not establish pursuant to Section 22 of the Act that there has been a change in his condition related to the work injury subsequent to the February 20, 2007 decision, or that there was a mistake in the determination of fact in any of the prior decisions. Rather, in each of his four decisions, the administrative law judge thoroughly addressed all of the evidence and he made rational findings which are supported by substantial evidence and are in accordance with the law. The administrative law judge is entitled to determine the weight to be accorded to the evidence and to draw his own inferences from it; the Board may not reweigh the evidence. *See generally Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.2d 449, 37 BRBS 6(CRT) (4th Cir. 2001). We, therefore, affirm the administrative law judge's findings that claimant did not establish a change in his physical or economic condition since the date of the administrative law judge's February 20, 2007 decision, or that there was a mistake in the determination of fact in any of the administrative law judge's decisions. 33 U.S.C. §922; *O'Keeffe*, 380 U.S. 359; *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

[10]Claimant objected to several of employer's exhibits. The administrative law judge, after consideration and an appropriate explanation, rationally overruled claimant's objections. *See* Decision and Order dated September 4, 2009 at 3-4; Decision and Order dated October 19, 2011 at 4-5; HT dated August 21, 2009 at 13-16; HT dated February 22, 2011 at 16-24.

Accordingly, the administrative law judge's Decision and Order Denying Remodification is affirmed.

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