BRB No. 91-1653

EARL D. BOONE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED: _____)
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of Final Order Denying Petition for Modification of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Robert G. Skeen (Goldman & Skeen, P.A.), Baltimore, Maryland, for the claimant.

Richard W. Scheiner (Semmes, Bowen & Simms), Baltimore, Maryland, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Final Order Denying Petition for Modification (78-LHC-0553) of Administrative Law Judge Charles P. Rippey 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 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).

This case is before the Board for the third time. On August 8, 1975, claimant, a carpenter at employer's Sparrow Point Shipyard, sustained a work-related back injury. In the original Decision and Order dated February 6, 1979, Administrative Law Judge John W. Earman awarded claimant $30 per week in permanent partial disability compensation pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), and medical expenses. Claimant appealed, and on March 7, 1980, the Board affirmed the award of permanent partial disability compensation. On June 25, 1979, claimant sought modification of the administrative law judge's initial decision under Section 22 of the Act, 33 U.S.C. §922, asserting that he had become permanently totally disabled due to an increase in his physical disability and the emergence of a 20 percent psychiatric disability. On September 26, 1983, Administrative Law Judge Earman issued a Decision and Order denying claimant's motion. On

December 30, 1986, the Board affirmed this decision, finding that the administrative law judge acted within his discretion in crediting Dr. Hunt's opinion that claimant's physical disability had decreased over Dr. Lippman's contrary opinion, and in discrediting Dr. Spodak's finding of a 20 percent psychological impairment because it was based on the erroneous factual assumption that when claimant returned to work he met with only limited success. *Boone v. Bethlehem Steel Corp.*, BRB No. 83-2590 (Dec. 30, 1986)(unpublished).

Thereafter, claimant appealed to the United States Court of Appeals for the Fourth Circuit. In its decision issued on October 13, 1987, the Fourth Circuit affirmed the administrative law judge's determination that claimant did not sustain any increased physical disability due to his back injury. However, the court reversed his finding with regard to claimant's psychological condition. *Boone v. Director, Office of Workers' Compensation Programs*, No. 87-2533, (4th Cir. October 13, 1987) (unpublished). The court found that the administrative law judge improperly discredited Dr. Spodak's opinion, which was uncontroverted and established that claimant is unable to perform his former work. Thus, the court held that the administrative law judge's decision that claimant is not partially disabled due to his psychological condition was unsupported by substantial evidence. Noting that employer's vocational expert, Daniel Mauchline, testified that there were 41 different types of jobs which claimant could perform consistent with his physical and psychological limitations, the court held claimant's psychological impairment is not totally disabling, reversed the administrative law judge's finding that claimant did not sustain a permanent partial psychological disability, and remanded the case for the administrative law judge to increase claimant's level of benefits to account for this disability. By order dated March 4, 1988, the Board remanded the case to the administrative law judge in accordance with the court's decision.

After reopening the record, Administrative Law Judge Marvin Bober issued a Decision and Order on Remand dated May 3, 1989, denying increased benefits. He concluded that, while claimant may have a psychological impairment, it did not result in any increased loss in his wage-earning capacity over that resulting from his back injury. In so concluding, Judge Bober noted that both Dr. Spodak and Dr. Freedenberg indicated that from a psychological standpoint claimant could return to work as a rough carpenter provided that he did not work for employer, and that employer's vocational expert indicated in a report dated September 1, 1988 that the jobs he identified based on claimant's physical limitations would in no way be prescribed by the psychological limitations delineated by Dr. Spodak. Judge Bober also noted that Dr. Freedenberg had opined that from an exclusively psychiatric point of view, the 20 percent permanent partial disability identified by Dr. Spodak would not hinder claimant's return to his former employment as a rough carpenter and that claimant's refusal to return to this work was purely volitional. This decision was not appealed.

On July 9, 1989, claimant again petitioned for modification and requested a hearing to determine the nature and extent of his disability because of a change and worsening of his psychiatric condition and/or increase in his disability since Judge Earman's September 26, 1983, Decision and Order. Claimant submitted two medical reports by Dr. Ascher, a psychiatrist, who diagnosed claimant as having a psychotic depressive reaction or a major depressive disorder, after examining claimant on three separate occasions. On September 27, 1989, Judge Bober ordered a *de novo* hearing on claimant's modification petition. After conducting two hearings on September 18, 1990, and December 11, 1990, Administrative Law Judge Charles Rippey issued a Final Order Denying Petition for Modification in which he found that there was nothing in Dr. Ascher's

testimony or any other evidence submitted by claimant sufficient to establish that claimant's condition had changed since the November 10, 1982, hearing on which Judge Earman's 1983 decision was based. It is this decision which is the subject of the current appeal.

On appeal, claimant contends that the administrative law judge erred in finding the evidence submitted in support of his motion for modification insufficient to support a finding of a change in claimant's psychiatric condition. We find merit in claimant's contentions. Therefore, the administrative law judge's decision must be vacated, and the case remanded for reconsideration.

Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. 33 U.S.C. §922. Section 22 modification may be based on a change in a claimant's physical condition or in his wage-earning capacity. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores*, 25 BRBS 260, 264-265 (1992). We agree with claimant that the administrative law judge's determination that Dr. Ascher's opinion is insufficient to support a finding of a change in claimant's psychological condition is irrational. Dr. Ascher diagnosed claimant as having a psychotic depressive reaction or major depressive disorder resulting in a 75 percent permanent psychological impairment, which represented a marked deterioration from Dr. Spodak's prior diagnosis of mild paranoia and reactive depression in 1979, resulting in a 20 percent permanent psychiatric impairment.

We further note that although the administrative law judge found Dr. Ascher's written report and testimony insufficient to support a finding of a change in claimant's condition based on a statement which Dr. Ascher made indicating that claimant's condition had not changed since June 1979, in so doing he misconstrued this testimony and failed to recognize that it could provide a proper basis for modification on the alternate ground of a mistake in fact. In response to opposing counsel's question on cross-examination regarding why claimant had not worked since 1979, Dr. Ascher replied that claimant is impaired by chronic medical illness, that he cannot work, and that his condition has been essentially the same since 1979. Because the aforementioned testimony, however, differs substantially from Dr. Spodak's testimony at the 1982 hearing that claimant could return to some type of work, it suggests that Judge Earman's 1983 finding that claimant sustained no compensable psychological disability may have been based on a mistake in fact.

Moreover, although the administrative law judge found nothing in Dr. Ascher's written report or his testimony to indicate that claimant's psychiatric condition had changed since 1982, he erred by focusing solely on the aforementioned statement and ignoring the overall gist of Dr. Ascher's testimony, *i.e.*, that claimant was essentially unemployable due to his psychiatric disability. Dr. Ascher opined that claimant has a psychotic illness, that he is unable to concentrate, that he cannot accept supervision, and that he cannot fit into any kind of organized work activity on an eight hour per day, 40 hour per week basis. Tr. at 52-53. Dr. Ascher further indicated that to employ claimant would take the temperament of Sister Theresa. Tr. at 21. Although Dr. Freedenberg's testimony that claimant had no evidence of any work-related psychiatric syndrome or disability and

that claimant's psychiatric condition may have actually improved could support a finding that claimant's psychiatric condition had not changed, the administrative law judge failed to weigh and discuss this evidence in denying modification. In light of the aforementioned errors, and the administrative law judge's failure to weigh the conflicting medical evidence on modification, we vacate his finding that claimant failed to establish a basis for modification. On remand, the administrative law judge should reconsider Dr. Ascher's opinion in its entirety and determine whether proper grounds for modification exist based on all of the relevant evidence of record consistent with the Administrative Procedure Act, 5 U.S.C. §557(c). *See Duran v. Interport Maintenance Corp.*, 27 BRBS 12, 15 (1993).

Accordingly, the Final Order Denying Modification on the ground that claimant failed to establish a change in condition is vacated, and the case is remanded for reconsideration of this issue consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge