BRB No. 92-0731

WILLIAM C. NARVELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Eugene A. Shapiro and Suzanne C. Shapiro, Baltimore, Maryland, for claimant.

Michael W. Prokopik (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-0691) of Administrative Law Judge Edward J. Murty, Jr. 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).

On May 22, 1987, claimant was injured while working for employer as a welder when a stage board fell and struck him on his left shoulder, back, and arm. On January 27, 1989, claimant and employer entered into a stipulation which was later incorporated by

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

the district director[1] into a compensation order. Pursuant to the parties' stipulations, the district director awarded claimant compensation under the schedule for a 15 percent loss of use of the left arm. *See* 33 U.S.C. §908(c)(1),(19). Thereafter, on August 2, 1989, in response to claimant's complaints of unremitting pain, Dr. Young performed an ulnar nerve decompression of the left elbow. Contending that the surgery made his condition worse, claimant sought modification of the district director's compensation order pursuant to Section 22 of the Act, 33 U.S.C. §922, based on a change in condition.

The administrative law judge denied modification, stating that claimant must understand that he has settled his claim with regard to the injury to his arm and that pain is only compensable under the Act when it interferes with the ability of claimant to do his job. The administrative law judge further noted that he did not believe claimant's surgery was necessary, and that rather than helping him, it may have hurt him. Finally, the administrative law judge concluded that if in any event claimant had any impairment, it was no more than the 15 percent found by Dr. Kan, the same rating on which the parties' original stipulation had been based. Claimant appeals the denial of modification and employer responds, urging affirmance.

Under Section 22, an aggrieved party may seek modification within a year of the date of the last payment of compensation or within one year of the denial of the claim based on a change in condition or mistake of fact. 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, 260-265 (1992).

After careful review of the administrative law judge's decision in light of the evidence of record, we agree with claimant that the administrative law judge's denial of modification cannot be affirmed. Initially we note that the administrative law judge's Decision and Order contains language

[1]We note that the title "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

which suggests that he believed that the district director's compensation order encompassing the agreement and stipulations of the parties was a Section 8(i), 33 U.S.C. §908(i)(1988), settlement which could not be modified under Section 22. Specifically, we note that in the last paragraph of the decision, the administrative law judge states:

> Claimant must understand that he has settled his claim for the injury to his arm. The award recognized that his arm was not what it should have been and probably never would be again. That is why the shipyard paid the money. The settlement represents an approximation, arrived at upon the advice of counsel.

Decision and Order at 3. Because, however, the district director's compensation order did not provide for the complete discharge of employer's liability, and did not contain any findings as to whether the compensation awarded was adequate and not procured by duress as is required under Section 8(i) as amended in 1984, it was simply an award of benefits based on the agreement and stipulations of the parties, 20 C.F.R. §702.315, which is subject to modification under Section 22. *See Bass v. Broadway Maintenance and Lumberman's Mutual Casualty Co.*, 28 BRBS 11, 18 n.4 (1994); *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79, 84 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown J., dissenting); *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148, 152 (1989). Because it appears that the administrative law judge was not cognizant of the distinction between an award under Section 702.315 and Section 8(i) settlements, and may have erroneously believed that the parties' agreement could not be modified, we vacate his denial of modification and remand for reconsideration of the modification issue consistent with

applicable law.

We also agree with claimant that the administrative law judge erred in denying modification based on his determination that the ulnar nerve surgery, which claimant contends made his condition worse, was unnecessary and may have hurt him. Decision and Order at 3. Employer is liable for claimant's entire resultant disability unless the subsequent progression of claimant's condition is due to an intervening cause, in which case employer is relieved of the liability attributable to the intervening cause. The courts and the Board have held that in order to break the causal connection, the intervening cause must be due to the intentional or negligent conduct of claimant or a third party with no relationship to the primary injury or to claimant's employment. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Consequently, as claimant asserts, a physician's treatment of a work-related injury, even to the point of malpractice, does not break the causal connection. *Id.* at 26. Furthermore, if claimant's conduct in seeking treatment and his choice of doctor are reasonable under the circumstances, claimant may receive disability benefits for any increased disability due to the failed surgery. 1 A. Larson, *Workmen's Compensation Law*, §1321 (1987). Because the administrative law judge's decision suggests that he erroneously believed that employer was not, in any event, liable for any increased disability following what he viewed as unnecessary surgery, we also vacate the denial of modification on this basis. On remand, if the administrative law judge finds that claimant's conduct in undergoing the surgery was reasonable from a pre-surgical perspective, he should reconsider the nature and extent of claimant's disability in accordance with the aforementioned legal precedent and determine whether claimant sustained a change in his physical condition sufficient to support modification of the district director's award under Section 22.

Finally, we agree with claimant that in denying modification the administrative law judge also erred in concluding that in longshore cases, pain is only compensable when it interferes with claimant's ability to do his job. In cases such as the present one, where claimant's injury is to a scheduled member, pain contributing to loss of function is compensable. *See Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Moreover, claimant correctly asserts that credible complaints of pain alone may establish disability under the Act. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 56 (1992); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). In determining the extent of claimant's disability, the administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of symptoms and

the physical effects of his injury. *See Pimpinella*, 26 BRBS at 159-160; *Bachich v. Seatrain Terminals of California, Inc.*, 9 BRBS 184 (1978).

We note that the record contains the medical reports of Drs. Young and Propper, which indicate that following the left ulnar nerve surgery claimant's permanent physical impairment increased based in part on pain contributing to loss of use. *See* CX-1. In his July 12, 1990, report, Dr. Propper opined that claimant had a 70 percent permanent partial disability, taking into account nerve root damage, muscular atrophy, and lack of range of motion to his shoulder and muscular weakness. In a March 9, 1990, report, Dr. Henry A. Young opined that claimant has a 50 percent permanent partial disability of the left upper extremity due to ulnar entrapment neuropathy, noting that claimant exhibited tenderness over the left ulnar groove, weakness of the left ulnar intrinsics, and significant loss of endurance and motion due to pain. The administrative law judge did consider the aforementioned evidence in denying modification and chose to credit the medical opinion of Dr. Kan, who rated claimant's permanent impairment at 15 percent. While credibility determinations are within the purview of the administrative law judge, *see Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 127 (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), we are unable to affirm the administrative law judge's denial of modification based on Dr. Kan's opinion because in analyzing and weighing the conflicting medical evidence the administrative law judge erroneously assumed that pain which did not interfere with claimant's ability to work is not compensable. Accordingly, we vacate the administrative law judge's finding that if claimant has an impairment it is no more than the 15 percent found by Dr. Kan and remand the case for him to reconsider the extent of claimant's permanent physical impairment following the surgery based on all of the relevant evidence, taking into account any increased disability claimant may have sustained due to pain. In considering the evidence on remand, the administrative law judge must adequately detail the rationale behind his decision, indicating the evidence he has accepted or rejected and the reasons therefore consistent with the requirements of Administrative Procedure Act. 5 U.S.C. §557(c). *See also Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380 (1990).[2]

Accordingly, the administrative law judge Decision and Order

[2]We note that once claimant, as the moving party, submits evidence of a change in condition or mistake in fact, the standards for determining the extent of disability are the same as in the initial adjudication process. *See Duran v. Interport Maintenance Corp.*, 27 BRBS 12, 15 (1993); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

denying modification is vacated, and the case is remanded for further consideration of whether claimant established a change in his condition consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge