BRB No. 96-1602

ALMETIA BOSTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED:
	)	
and	)	
	)	
THOMAS HOWELL GROUP	)	
	)	
Self-Insured Employer/Administrator-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Modification and Order Denying Petition for Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Gretchen Guzman (Cantrell, Green, Pekich, Cruz, McCort & Baker), Long Beach, California, for claimant.

Roy D. Axelrod (Littler, Mendelson, Fastiff, Tichy & Mathiason), San Diego, California, for employer.

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

PER CURIUM:

Employer appeals the Decision and Order Awarding Modification and Order Denying Petition for Reconsideration (94-LHC-283) of Administrative Law Judge Edward C. Burch 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*., as extended by the Nonappropriated Fund Instrumentalities Act. 5 U.S.C. §8171 *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).

Claimant suffered an injury to her head on July 30, 1978, during the course and

scope of her employment. As a result of the head injury, claimant began experiencing post-traumatic seizure disorder for which she was awarded permanent partial disability benefits based on her stipulated average weekly wage of $97.58 in a decision by Administrative Law Judge James R. Howard dated January 7, 1983.[1] On October 19, 1993, claimant filed a petition for modification alleging a change in her medical condition such that she is now totally disabled. In response, employer also filed a petition for modification, alleging a mistake in fact in the original decision.

In his Decision and Order on modification, Judge Burch (the administrative law judge) initially rejected employer's request for modification as its contention of a mistake in fact was not raised for over ten years following the issuance of the original decision. Moreover, the administrative law judge found that the termination of claimant's benefits would contravene the policies of the Act. The administrative law judge also found that the evidence establishes that claimant's present cognitive impairment arose from her work-related seizure disorder, that claimant is unable to return to her former work, and that employer has failed to identify suitable alternate employment that claimant would be capable of performing given her mental difficulties. Thus, the administrative law judge awarded claimant permanent total disability benefits under the Act, based on a compensation rate of $184.58. Employer's motion for reconsideration was denied.

Employer contends on appeal that the administrative law judge erred in granting claimant's petition for modification as the evidence does not establish that claimant suffers from a work-related cognitive disorder that renders her permanently totally disabled. In addition, employer contends that the administrative law judge erred in denying its petition for modification. Lastly, employer contends that the administrative law judge failed to limit claimant's weekly compensation rate to $97.58 pursuant to Section 6(b) of the Act, 33 U.S.C. §906(b). Claimant responds, urging affirmance.

[1]In an Amended Decision and Order Awarding Benefits, Judge Howard ordered employer to pay claimant compensation for permanent partial disability in the amount of 66 2/3 percent of $67.58 from August 6, 1979 and continuing. This was adjusted to 66 2/3 percent of $97.58 in an Errata.

In the present case, employer contends that the administrative law judge erred in relying on the opinion of Dr. Britt as well as the testimony of claimant and her husband to establish that claimant suffers from a cognitive condition causally related to her work-related injury that renders her permanently and totally disabled.[2] The administrative law judge found that the opinion of Dr. Britt that claimant suffers from a cognitive impairment secondary to her seizure disorder is based on extensive testing of claimant's intellectual and cognitive status and is well-reasoned. Cl. Ex. 2. In addition, he found the opinion to be supported by Dr. Kent's opinion that frequent seizures over a long period of time can cause mental deterioration and noted that Dr. Kent agreed that the compromise in claimant's intellectual functioning was likely caused by her seizure disorder. Cl. Ex. 1. The administrative law judge also found that Dr. Britt's opinion that claimant's cognitive abilities had deteriorated was supported by the fact that claimant graduated from high school and functioned in the labor market until the mid-1980's. As the administrative law judge's decision to credit Dr. Britt's opinion is rational, we reject employer's contention that the administrative law judge's reliance on Dr. Britt's opinion is erroneous.[3] *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d (2d Cir. 1961).

The administrative law judge found that Dr. Britt's opinion, in conjunction with Dr. Kent's opinion, establishes that claimant suffers from a cognitive impairment which is a result of her work-related seizure disorder. Although the administrative law judge did not determine the applicability of the Section 20(a) presumption, the administrative law judge considered all relevant evidence prior to finding that a causal relationship between claimant's work injury and her cognitive impairment is established. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). As we affirm the administrative law

[2]The administrative law judge considered the other physicians' reports of record and found that the reports of Drs. Sloop and Curry are not persuasive as they did not perform anything but cursory mental examinations. Decision and Order at 7. Likewise, the administrative law judge did not accord persuasive weight to the opinion of Dr. Klemes as he did not examine claimant and disclaimed his own comments as "observations on the significance of the contents of record reviewed." Emp. Ex. 19; Decision and Order at 7.

[3]We reject employer's contention that the Federal Rule of Evidence 702 requires the administrative law judge to reject Dr. Britt's opinion in the instant case. The Advisory Committee's Notes to Rule 702 state that "physicians, physicists and architects" are "experts in the strictest sense of the word..." and therefore authorized by Rule 702 to "testify in the form of an opinion or otherwise." With a doctoral degree in psychology, Dr. Britt is clearly an expert contemplated by Rule 702. In any event, Section 23(a) of the Act, 33 U.S.C. §923(a), states that common law or statutory rules of evidence are not binding in administrative proceedings under the Act. Moreover, the administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. 20 C.F.R. §§702.338, 702.339; *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

judge's credibility determinations, and the physicians' opinions to which the administrative law judge accorded probative weight diagnosed that claimant suffers from a cognitive impairment secondary to her work-related seizure disorder, we affirm the administrative law judge's finding that claimant's cognitive condition arose from her work-related seizure disorder as it is supported by substantial evidence. *See generally Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Employer also contends that the administrative law judge erred in shifting the burden of proof to employer to prove that claimant was not permanently and totally disabled due to a work-related condition. Employer contends that claimant has the burden to successfully establish the grounds for modification. Pursuant to Section 22, 33 U.S.C. §922, modification may be granted based on a change in condition or mistake in fact in the initial decision at any time prior to one year after the last payment of compensation. 33 U.S.C. §922; *Metropolitan Stevedore Co. v.* Rambo, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). The standard for determining disability is the same in a Section 22 modification proceeding as it is for an initial proceeding under the Act. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Therefore, claimant must first establish that she is unable to return to her usual work due to a work-related condition. *See, e.g., SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (CRT)(5th Cir. 1996). If claimant establishes that she cannot return to her usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. *Id.* The administrative law judge applied this analysis in his decision. Specifically, the administrative law judge found that claimant is unable to return to her former employment as a part-time cashier following cognitive changes related to her seizure disorder, based on claimant's testimony that she is unable to make change, her husband's testimony that claimant is incapable of handling money and Dr. Britt's report that claimant has severe difficulties with simple arithmetic. Contrary to employer's contention, it is within the administrative law judge's discretion to credit the testimony of claimant and her husband regarding her abilities. *See generally I.T.O. Corp. v. Director, OWCP*, 883 f.2D 422, 22 BRBS 126 (CRT)(5th Cir. 1989). The administrative law judge also found that the positions identified by employer's vocational consultant require the employee to accept money from customers and to make change, which is beyond claimant's capabilities. Therefore, the administrative law judge found that employer failed to establish the availability of suitable alternate employment and that claimant is entitled to permanent total disability benefits under the Act. *See, e.g., Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). As we affirm the administrative law judge's credibility determinations, we affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits under the Act as it is supported by substantial evidence.

Employer also contends that the administrative law judge erred in denying employer's petition for modification based on a mistake in fact in the original decision. Employer asserted that since claimant was found to be capable of returning to her usual employment by Judge Howard, she sustained no loss of earning capacity upon which to base an award of benefits. In order to obtain modification for a mistake in fact, the modification must render justice under the Act. *McCord v. Cephas*, 532 F.2d 1377, 3

BRBS 371 (D.C. Cir. 1976); *Wynn*, 21 BRBS at 290. In *McCord,* the court emphasized that an allegation of mistake in fact should not be allowed to become a back door route to retry a case. *McCord*, 532 F.2d at 1384, 3 BRBS at 378.

The administrative law judge found that "claimant's compensation [1983] award was not calculated in conformity with Section 8 of the Act." Decision and Order Awarding Modification at 6. However, Judge Burch denied employer's petition for modification after considering that employer failed to raise this argument for over ten years following the issuance of the initial decision, and that this lapse of time, combined with the hardship that would be imposed upon claimant if her benefits were terminated, weighs against employer's petition. Moreover, the administrative law judge found that the medical evidence, as reported by Judge Howard, supports the conclusion that claimant suffered some form of disability as a result of her injury and the consequent seizure disorder, and he noted that there is no record of the original hearing. As the administrative law judge has considered the equitable considerations in this case, including the time lapse before employer raised this issue, as well as the fact that claimant did suffer from a seizure disorder following her injury in denying employer's petition, we hold that the administrative law judge did not err in denying employer's petition for modification.

Finally, employer contends on appeal that the administrative law judge erred in his calculation of claimant's compensation rate under Section 6(b). Section 6(b)(2), states

> Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage ..., except that if the employee's average weekly wages as computed under Section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

33 U.S.C. §906(b)(2). Employer contends that the administrative law judge erred in awarding claimant benefits at the rate of $184.58, rather than at her average weekly wage of $97.58, inasmuch as her actual average weekly wage is less than 50 percent of the national average weekly wage of $369.15 in effect in October 1993 when claimant became totally disabled. The administrative law judge awarded claimant compensation at a rate reflecting half the national average weekly wage applicable in October 1993. Claimant maintains the administrative law judge's award should be affirmed as the full effects of claimant's injury were not known until 1993.

We agree that the administrative law judge erred in awarding claimant benefits based on one-half of the October 1993 national average weekly wage. Claimant's actual average weekly wage, as stipulated by the parties, is less than one-half of the 1993 national average weekly wage. Pursuant to Section 6(b)(2), therefore, claimant's compensation is to be her actual average weekly wage. Thus, we modify the administrative law judge's award of permanent total disability benefits to reflect a compensation rate of $97.58, claimant's actual average weekly wage at the time of injury,

beginning October 19, 1993, with annual adjustments under Section 10(f), 33 U.S.C. §910(f).[4]

Accordingly, the administrative law judge's Decision and Order on modification awarding permanent total disability benefits is modified to reflect a compensation rate of $97.58. The decision is affirmed in all other respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]Arguably, the applicable national average weekly wage is the one in effect in July 1978, as claimant has been continually disabled since the time of injury, contrary to claimant's contention that her disability is latent. If so, claimant would be entitled to one-half of $183.62, or $91.81, as her actual average weekly wage is more than one-half of this national average weekly wage. We need not decide this issue as employer contends that $97.58 is the correct compensation rate.