BRB No. 00-0474

GERALD L. KIRKLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JACKSONVILLE SHIPYARDS, INCORPORATED	)	DATE ISSUED: Jan. 31, 2001
	)	
and	)	
	)	
A.R.M. INSURANCE SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Request for Modification of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John A. Houser, Thomasville, Georgia, for claimant.

Christopher P. Boyd (Taylor, Day & Currie), Jacksonville, Florida, and Paul M. Doolittle (Seelie & Doolittle), Jacksonville, Florida, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Request for Modification (90-LHC-1713) of Administrative Law Judge Richard T. Stansell-Gamm 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 if they 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, a ship's rigger, suffered the injury giving rise to the current claim on August 14, 1984, when he slipped and fell, suffering a chip fracture to his right wrist and alleged injuries to his neck and right shoulder; claimant has undergone two surgeries for the injury to

his right wrist. In the initial Decision and Order addressing claimant's claim for benefits under the Act, Administrative Law Judge George A. Fath denied claimant's claim for disability compensation under Section 8(c)(21) of the Act, 33 U.S.C.§908(c)(21), based upon a claimed disability to claimant's neck and shoulder, but awarded compensation under Section 8(c)(3) of the Act, 33 U.S.C. §908(c)(3), based on a 32 per cent loss of use of his right hand. Judge Fath subsequently denied claimant's request for reconsideration.

Claimant appealed this decision to the Board, arguing that Judge Fath erred in finding that he had no residual impairment to his neck and shoulders due to the August 13, 1984, work injury. The Board affirmed the administrative law judge's denial of permanent partial disability compensation for these alleged conditions as rational and supported by the record. *Kirkland v. Jacksonville Shipyards, Inc.*, BRB No. 92-2046 (June 29, 1995)(unpublished). Following the Board's decision, claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. In his Decision and Order addressing claimant's motion for modification, Judge Stansell-Gamm (the administrative law judge) reviewed the evidence presented at both the September 1991 and October 1998 hearings and concluded that claimant failed to establish a mistake of fact in Judge Fath's determination that he was not disabled by neck and shoulder pain. Addressing claimant's contention that he had suffered a change in condition, *i.e.*, a deterioration of his neck and shoulder condition, the administrative law judge concluded that because claimant failed to establish that any neck or shoulder condition he may suffer is related to his work accident, any change in claimant's economic or physical condition attributable to his neck or shoulder condition is irrelevant. The administrative law judge also noted that claimant presented no medical opinions or evidence of economic change dated since Judge Fath's decision which could support a claim based on change in condition. Accordingly, the administrative law judge denied claimant's request for modification.

Claimant now appeals, challenging the administrative law judge's denial of his motion for modification. Employer responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, 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

[1]Claimant simultaneously filed an appeal to the United States Court of Appeals for the Eleventh Circuit. As the administrative law judge notes, the parties and the record are unclear as to the disposition of the case before the Court of Appeals but it appears the appeal was either denied by the court or withdrawn. Decision and Order at 3-4.

(CRT)(1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). In order to obtain modification for a mistake of fact, however, the modification must render justice under the Act. *See McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). It is well-established that the party requesting modification, whether it is the employer or the claimant, has the burden of showing the change in condition or mistake in fact. *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). Once this burden is met, the applicable legal standards are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *Id.*

We reject claimant's contention that the administrative law judge erred in determining whether the previous order was in error rather than freely reviewing the evidence of record. *See* Claimant's brief at 8. Contrary to claimant's contentions, the administrative law judge specifically stated that he evaluated the evidence presented to Judge Fath, the evidence admitted at his hearing, and the testimony from both hearings in rendering his decision as to whether there has been a mistake in fact in this case. *See* Decision and Order at 9. Thus, we reject claimant's assertion that the administrative law judge erred in conducting an "appellate review," rather then a *"de novo"* determination under Section 22.

In this regard, after throughly setting forth and discussing the evidence, *see id.* at 9-12, the administrative law judge agreed with claimant that, contrary to Judge Fath's statement, the medical record does contain an early reference to neck and shoulder pain. However, the administrative law judge concluded after a thorough discussion of the evidence that Judge

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[2]We note that claimant asserts error in the administrative law judge's statement that he should have made a "threshold decision" as to whether claimant's assertions warranted reopening the claim; the administrative law judge cited *Kinlaw v. Stevens Shipping Co.*, 33 BRBS 68 (1999), *aff'd mem.* 2000 WL 1804524, No. 99-1954 (Dec. 8, 2000), in support of his statement. Claimant is correct that a threshold determination is not required. An administrative law judge has broad discretion to reopen a claim under Section 22. *Kinlaw* affirmed a judge's decision not to reopen a claim based on employer's attempt to relitigate an issue from the initial proceeding. The Board did not hold that a threshold finding was necessary but upheld the administrative law judge's discretionary ruling that further proceedings were not warranted on the facts of that case. In any event, in this case the administrative law judge determined that, as he had already conducted a full evidentiary hearing, it was necessary to fully review the case. Thus, any misunderstanding of *Kinlaw* is harmless.

Fath's previous denial was based on the absence of an objective medical basis for claimant's neck and shoulder pain due to the 1984 accident coupled with the inconsistency between claimant's subjective complaints and the physical activity captured on surveillance videos; the administrative law judge found no error in these determinations. Further, he concluded that even if Judge Fath's conclusions were set aside, claimant had not proven he suffered a disability based on his neck and shoulder complaints. Thus, the administrative law judge independently reviewed the record and found that claimant failed to establish a mistake in fact in Judge Fath's decision. As the administrative law judge's finding regarding this issue is rational and supported by substantial evidence, it is affirmed.

With regard to change in condition, we note that in addressing this issue the administrative law judge stated that Judge Fath's conclusion that claimant had not proven a disability due to his shoulder and neck problems meant "that claimant failed to show a causal connection between the accident and his complaints of shoulder and neck pain." Decision and Order at 12. The judge then concluded that in the absence of a mistake in fact, claimant could not relitigate the issue of causation. In fact, causation is not at issue here. In the initial decision in this case, Judge Fath determined that, as employer had not introduced any evidence to rebut the Section 20(a), 33 U.S.C. §920(a), presumption, a causal relationship was established between claimant's work accident and his neck and shoulder problems. *See* Judge Fath's Decision and Order at 2. Thereafter, Judge Fath addressed the nature and extent of disability resulting from claimant's multiple injuries, ultimately concluding that the evidence of record was insufficient to establish that claimant had any residual shoulder or neck impairment; accordingly, Judge Fath denied claimant's claim for permanent partial disability compensation for his alleged neck and shoulder conditions under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). *Id.* at 2-4. Given that Judge Fath found causation, properly applying Section 20(a), 33 U.S.C. §920(a), in doing so, the administrative law judge's interpretation of the initial denial of disability compensation for claimant's alleged shoulder and neck conditions as based on claimant's failure to show a casual connection

[3]Thus, contrary to claimant's allegation, the administrative law judge did not confine his review to a search for specific mistakes or errors in Judge Fath's decision, but reviewed the ultimate finding that claimant was not disabled, as is proper. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-2C(4th Cir. 1993). Additionally, although the administrative law judge's discussion at times refers to the cause of claimant's alleged neck and shoulder pain and whether disability was related to the August 1984 injury, he ultimately relied on evidence that claimant had no functional impairment and could engage in unlimited activity. This evidence properly goes to the issue of disability and supports the administrative law judge's conclusion. Thus, any error in his references to whether claimant's shoulder and neck problems were related to the work injury, an issue to which Section 20(a), 33 U.S.C. §920(a), would apply, is harmless.

between the August 13, 1984 work-accident, and his subsequent shoulder and neck complaints, is erroneous. This error is harmless, however, based on the administrative law judge's alternate reasoning. The administrative law judge also found the record insufficient to support a change in condition; specifically, the administrative law judge noted that claimant had not demonstrated a physical or economic change as he failed to present any medical evidence or evidence that claimant's economic situation deteriorated subsequent to Judge Fath's decision. Decision and Order at 12 n.13, 13 n.14.

We reject claimant's general contention that the administrative law judge erred in concluding that he was is not entitled to modification based upon a change of condition. On appeal, claimant does not specifically challenge either the administrative law judge's finding that he has not sought treatment for his neck or back pain subsequent to the initial decision rendered by Judge Fath, or the conclusion that he did not submit any medical or other evidence since that decision which would demonstrate a physical or economic change. These findings support the administrative law judge's determination that claimant did not establish a change in condition subsequent to Judge Fath's decision in 1991, and claimant has failed to demonstrate error in this regard. 20 C.F.R. §802.211. *See Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990). As the administrative law judge's denial of modification on this basis is rational and in accordance with law, it is affirmed.

[4]The administrative law judge's implication that new medical evidence is necessary overlooks the fact that claimant did testify, and his testimony, if credible, could establish a change in condition. However, in discussing mistake in fact, the administrative law judge previously rejected claimant's testimony as a basis for finding disability. Decision and Order at 11.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge