

BRB No. 08-0280

C.W. )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 BAE SYSTEMS NORFOLK SHIP REPAIR ) DATE ISSUED: 09/30/2008  
 )  
 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order on Modification Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

C.W., Virginia Beach, Virginia, *pro se*.

Dana Adler Rosen (Clarke, Dolph, Rapaport, Hull, Brunick & Garriott, P.L.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order on Modification Remand (2006-LHC-00302) of Administrative Law Judge Larry W. Price 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 an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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). If they are, they must be affirmed. *Id.*

This case is before the Board for a second time. To recapitulate the facts, claimant alleged she sustained injuries to her left shoulder, hip and right knee when she was hit by a car on September 13, 2002, during the course of her employment as a shipfitter. In addition, the parties stipulated that the work accident caused injury to claimant's back and left knee. Employer voluntarily paid compensation for various

periods of temporary total disability, 33 U.S.C. §908(b), from September 14, 2002, to June 12, 2004, and for a 10 percent permanent impairment of the left lower extremity, 33 U.S.C. §908(c)(2). Claimant sought compensation under the Act for permanent total disability. 33 U.S.C. §908(a).

In his initial decision dated August 30, 2005, the administrative law judge found that claimant established that the accident caused injuries to her left shoulder and hip, and right knee; however, he found that claimant failed to show that she had any impairment related to these injuries. The administrative law judge awarded permanent partial disability benefits pursuant to the schedule for a 10 percent left knee impairment. 33 U.S.C. §908(c)(2). In addition, the administrative law judge found that claimant was unable to return to her usual employment as a shipfitter due to her back injury and that employer established the availability of suitable alternate employment as of December 19, 2004. Thus, the administrative law judge awarded claimant permanent total disability benefits from June 13 to December 19, 2004, and permanent partial disability for claimant's back condition from December 19, 2004, and continuing, based on a loss in wage-earning capacity.

In November 2005, employer sought modification of the administrative law judge's decision under Section 22 of the Act, 33 U.S.C. §922, alleging a change of condition. Specifically, employer alleged that claimant's back condition did not prevent her from returning to her usual employment as a shipfitter. In support of its petition for modification, employer submitted a letter dated November 3, 2005, from Dr. Wardell in which he revised his opinion of claimant's back restrictions after he reviewed a surveillance videotape of claimant taken on February 23, 2005, and a Functional Capacity Evaluation conducted that same day. Dr. Wardell opined that there is no believable subjective or objective evidence of ongoing back symptoms as of the date he last examined claimant, December 20, 2004. Emp. Ex. 2.

In his decision on modification, the administrative law judge found that employer failed to establish a change in claimant's physical condition since the initial award was entered. Specifically, the administrative law judge found that Dr. Wardell's revised opinion does not establish that claimant's back condition changed subsequent to August 30, 2005. Accordingly, the administrative law judge denied employer's motion for modification based on a change of condition.

Employer appealed this decision to the Board. *C.W. v. BAE Systems Norfolk Ship Repair*, BRB No. 06-0960 (July 27, 2007)(unpub.). In its decision, the Board affirmed the finding that the evidence submitted did not establish a change in claimant's condition subsequent to the administrative law judge's initial decision of August 30, 2005. However, the Board held that employer's evidence, if credited, could establish a mistake

in fact in the administrative law judge's initial determination of claimant's disability status as of December 2004. Therefore, as employer's argument in support of the motion for modification was sufficient to raise an allegation of a mistake in fact, the Board vacated the administrative law judge's denial of employer's motion for modification, and remanded the case to the administrative law judge to address employer's evidence and to determine whether to grant modification based on a mistake in fact. *See C.W.*, slip op. at 4-5.

On remand, the administrative law judge found that Dr. Wardell opined that there is no believable subjective or objective evidence of ongoing back symptoms as of December 20, 2004. The administrative law judge also found that claimant's testimony regarding her physical limitations is not credible. The administrative law judge concluded that claimant did not demonstrate that she has any current problems relating to her back injury, and thus found that claimant did not establish a *prima facie* case of total disability. Therefore, the administrative law judge granted employer's motion for modification and found that claimant is not entitled to disability benefits for her back condition after December 19, 2004.

Claimant, without legal representation, appeals the administrative law judge's finding that employer established a mistake in fact. Employer responds, urging affirmance of the administrative law judge's decision granting the motion for modification.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(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, 256 (1971). Prior to the issuance of the administrative law judge's decision on remand, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the present case arises, held that a modification request under Section 22 is not automatically granted as a matter of right upon a showing of a mistake in fact in an earlier decision. Rather, determining whether to grant modification is a matter within the administrative law judge's discretion based on whether the modification will "render justice under the Act." *Sharpe v. Director, OWCP*, 495 F.3d 125 (4<sup>th</sup> Cir. 2007). The Fourth Circuit held that the administrative law judge should weigh any factors that are pertinent, including the moving party's diligence and motive for requesting modification, as well as the accuracy of the prior decision. *Sharpe*,

495 F.3d at 132-133; *see also Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7<sup>th</sup> Cir. 2002).

In *Sharpe*, a case arising under the Black Lung Benefits Act, which incorporates Section 22 of the Longshore Act, *see* 30 U.S.C. §932(a), the employer sought to modify a miner's award of benefits seven years after the award was affirmed by the Board and shortly after his widow had filed a claim for survivor's benefits. The court vacated the grant of modification on the miner's claim and remanded the case for the administrative law judge to address employer's motive for seeking modification on the now deceased miner's claim, including whether the claim was moot if overpayments could not be recovered. *Sharpe*, 495 F.3d at 132-133. In this case, the administrative law judge's original award of benefits was issued on August 30, 2005. Employer filed its motion for modification in November 2005 based on Dr. Wardell's November 3, 2005 opinion. Thus, unlike *Sharpe*, employer sought modification within a relatively short time after the award was entered. Moreover, as claimant had an ongoing award of compensation benefits, employer's modification request would not be futile if it was successful.

In granting employer's motion for modification based on Dr. Wardell's opinion, the administrative law judge noted that he had previously called into question claimant's credibility. Decision and Order on Modification Remand at 1-2, citing Decision and Order at 14-15 (Aug. 30, 2005). The administrative law judge noted he had found claimant unable to work as a shipfitter only because her testimony to that effect was supported by the uncontradicted medical opinion of Dr. Wardell. Based on a videotape the administrative law judge had initially used to discredit claimant concerning her restrictions, as well as on a Functional Capacity Evaluation performed on February 23, 2005, Dr. Wardell concluded in November 2005 there was no objective or subjective evidence of ongoing back symptoms and that claimant's work restrictions due to her back condition had, in fact, ended by December 20, 2004. Dr. Wardell noted that the videotape showed claimant twisting her torso greater than 90 degrees and getting in and out of a small vehicle without using her hands for support. Dr. Wardell stated claimant had a minimal limp, attributable only to her knee injury. Emp. Ex. 2. The administrative law judge also found that claimant's testimony regarding her pain and abilities is not credible given the inconsistencies among her testimony, the physician's reports, and the videotape. Thus, he found her testimony insufficient to establish that she is unable to return to her former duties due to her back injury. After reviewing the new evidence and further reflecting on the evidence submitted at the initial hearing, the administrative law judge found that employer established a mistake in fact and that claimant was not disabled from returning to her former job as a shipfitter as of December 20, 2004. The administrative law judge, therefore, granted employer's motion for modification and terminated the award of benefits.

We affirm this finding as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge rationally discredited claimant's testimony as it is unsupported by any objective medical evidence and is refuted by the videotape evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Dr. Wardell's November 2005 opinion, based on his review of the videotape and the Functional Capacity Evaluation, that claimant had no symptoms of a back condition as of December 20, 2004, constitutes substantial evidence in support of the administrative law judge's finding that employer established a basis for modification. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Thus, the administrative law judge's denial of all benefits for a back injury as of December 20, 2004, is affirmed.

Accordingly, the administrative law judge's Decision and Order on Modification Remand granting employer's motion for modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge