



BRB No. 20-0277

KENNETH H. NEAL)

Claimant-Petitioner)

v.)

DATE ISSUED: 09/28/2020

PORTS AMERICA OUTER HARBOR)

TERMINAL)

and)

PORTS INSURANCE COMPANY)

Employer/Carrier-)

Respondents)

SSA TERMINALS, LLC)

and)

HOMEPORT INSURANCE COMPANY)

Employer/Carrier-)

Respondents)

DECISION and ORDER

Appeal of the Decision and Order Denying Petition for Modification and Order Denying Petition for Reconsideration of Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Kenneth H. Neal, San Leandro, California.

Laura G. Bruyneel, Gursimmar S. Sibia, and Alan Chang (Bruyneel Law Firm, LLP), San Francisco, California, for SSA Terminals, LLC and Homeport Insurance Company.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without legal representation, appeals Administrative Law Judge Stewart F. Alford's Decision and Order Denying Petition for Modification and Order Denying Petition for Reconsideration (2019-LHC-00503) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). In an appeal by a claimant without counsel, the Benefits Review Board will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, while working for Ports America as a longshoreman on April 18, 2013, sustained an injury to his left ring finger. He reported the incident immediately to Employer, and treatment was administered consisting of an ice pack, application of antiseptic, and a bandage. He went to the emergency room, where the nurse noted a minor abrasion of the left ring finger, gave Claimant a splint, and prescribed pain medication. On April 24, 2013, Claimant sought treatment from an orthopedist, Dr. Fred Blackwell, who diagnosed an avulsion laceration of the left ring finger and a contusion and sprain of the left hand. Dr. Blackwell removed Claimant from work until June 4, 2013, when he opined Claimant could "return to full work" the next day. Ports America paid Claimant temporary total disability and medical benefits from April 19 through June 4, 2013. Claimant returned to longshore work with Stevedoring Services of America (SSA) on June 5, 2013.

After his second day of work with SSA on June 6, 2013,¹ Claimant went to the emergency room for left hand symptoms, where Dr. Ashley Mull diagnosed "hand pain" and replaced Claimant's finger splint. Claimant followed up with Dr. Blackwell on June 7, 2013, who removed Claimant from work and began treating him regularly. Dr. Blackwell subsequently diagnosed Claimant with Complex Regional Pain Syndrome (CRPS), which he stated is directly related to the April 18, 2013 work injury. Dr. Blackwell prescribed nerve blocks, performed by Dr. Babak Jamasbi on January 7 and April 29, 2014, and acupuncture. He opined, on June 30, 2014, that Claimant was permanent and

¹ Claimant worked with SSA as an auto driver on day one, using only his right hand, and then as a signalman on day two.

stationary and capable of working within the restrictions he imposed.² Dr. Douglas Chin, an orthopedic hand specialist, and Dr. Charles Skomer, a neurologist, disagreed with Dr. Blackwell's diagnosis of CRPS. Both physicians opined, based on the lack of existing physical conditions and objective evidence of CRPS, that Claimant has a somatoform pain disorder. Dr. Chin stated Claimant was permanent and stationary and should be physically capable of returning to work as a hold man, auto driver, baggage porter or tractor driver. Ports America paid Claimant temporary total disability benefits from June 7, 2013 through August 19, 2014, when a labor market survey commissioned by Ports America identified light to medium jobs that Claimant was capable of performing. Claimant, however, has not worked since June 6, 2013.

Claimant filed a claim under the Act against Ports America, alleging the April 18, 2013 left ring finger injury caused CRPS, which rendered him permanently totally disabled since June 7, 2013. Ports America controverted the claim on the ground that Claimant's April 18, 2013 work injury had completely resolved by June 4, 2013. Ports America also joined SSA to the case to assert, in the alternative, that any disability Claimant experienced after June 4, 2013, is due to an aggravation/injury he sustained while working for SSA on June 5-6, 2013. SSA asserted Claimant did not sustain an aggravating or new injury during his work on those two days.

Following a formal hearing, Administrative Law Judge King found the work-related left hand/arm injury Claimant sustained on April 18, 2013, completely resolved on June 4, 2013, without any permanent impairment.³ Decision and Order at 16-17. He also

² Dr. Blackwell precluded Claimant from: repetitive use of the left upper extremity; power grasping and gripping; use of his left upper extremity for work at or above shoulder level; lifting, carrying, pushing, or pulling greater than five pounds; data entry work; and work involving unprotected heights or climbing. Dr. Blackwell, however, subsequently stated, apparently based on Claimant's representation concerning his work abilities and given Claimant's pursuit of a total disability claim, that Claimant would be unable to work until he completed a vocational rehabilitation program. On December 30, 2014, Dr. Blackwell opined Claimant has a 13 percent left upper extremity permanent impairment.

³ Prior to the formal hearing, Judge King held a telephonic conference with the parties to address Ports America's motion, opposed by Claimant, to compel a psychiatric examination "on the grounds that the Claimant's orthopedic diagnosis, Complex Regional Pain Syndrome, may in part be based on psychological factors." Ports America Motion dated April 4, 2016. Claimant stated he was not claiming a psychological condition, but only a "scheduled" injury to his hand/arm. Judge King discussed with Claimant the consequences of his waiving any claim based on a psychological injury and concluded he "made a knowing stipulation that he is alleging a scheduled injury to his left upper

determined Claimant does not have CRPS related to the April 18, 2013, injury. Judge King further found Claimant did not sustain a work-related injury with SSA on June 5-6, 2013, that could have caused further physical impairment. *Id.* Accordingly, Judge King denied Claimant's claim for additional compensation and medical benefits.

Claimant appealed Judge King's decision to the Board. The Board held Judge King did not err in determining Claimant did not make any claim for a psychological condition/somatoform disorder, and affirmed the finding that Claimant's left ring finger injury resolved on June 4, 2013, without permanent impairment. *Neal v. Ports America Outer Harbor Terminal*, BRB No. 17-0624, slip op. at 4-6 (May 18, 2018) (unpub.). The Board also affirmed the finding that Claimant did not sustain an injury at SSA on June 5-6, 2013, and does not have CRPS due to any employment injury. *Id.*, slip op. at 6-7. Accordingly, the Board affirmed Judge King's Decision and Order Denying Medical and Compensation Benefits.

On June 7, 2018, Claimant requested Section 22 modification, 33 U.S.C. §922, of Judge King's decision based on new evidence and a mistake of fact. SSA Resp. Br. at ex 5. The case was assigned to Administrative Law Judge Alford (the administrative law judge), and a hearing was held. The administrative law judge determined Claimant did not show a mistake of fact in the prior decision and that the award of disability benefits by the Social Security Administration does not warrant modification of the denial of the claim under the Act. Decision and Order on Modification at 9-13. Accordingly, the administrative law judge denied Claimant's petition for modification. He summarily denied Claimant's subsequent motion for reconsideration. Order Denying Motion for Reconsideration at 2.

extremity and no more and that he's knowingly waiving any claim for an unscheduled injury of any kind," including any claim based on a psychological condition. Telephonic Conference Call Tr. dated April 18, 2016 at 58-64, 69. Ports America's counsel stated its motion for a psychological evaluation thus was moot. *Id.* at 58-59, 65. Judge King memorialized these findings in an Order Approving Claimant's Stipulation, issued on April 19, 2016, in which he dismissed Ports America's motion for a psychiatric examination. In his decision, he stated Claimant "adamantly denied any psychiatric problems, conditions, or claims, and steadfastly refused to undergo a psychiatric examination even though he was clearly informed that doing so would limit his claim to a left upper extremity claim." Decision and Order at 2.

Claimant appeals the denial of his motion for modification. SSA responds that the administrative law judge's decision should be affirmed. Ports America has not responded.

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). The party requesting modification bears the burden of proving that the claim comes within the scope of Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Cont'l Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). 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); *see also Banks*, 390 U.S. 459.

Claimant's LS-18, Prehearing Statement listed the issues for modification as "Nature and Extent somewhat Date of Injury." SSA Resp. Br. at ex 8. Thus, the administrative law judge addressed whether Claimant established a mistake in the determination that he was not disabled after June 4, 2013. He found Claimant's subjective complaints are not credible because his medical records do not support his complaints, such as atrophy. Decision and Order on Modification at 8. Decision and Order on Modification at 9; *see* SSA Resp. Br. at ex 5. He rejected Claimant's reliance on the June 4 and June 6, 2013 x-ray readings by Dr. Grace Lee, an emergency room physician, because they showed no acute fracture or dislocation but only irregular contouring of the phalanx. CX 5 at 46; SX 7 at 20-21. He found these readings consistent with the record as a whole and support a finding that Claimant did not suffer an acute injury with SSA on June 6, 2013. Decision and Order on Modification at 10. The administrative law judge also rejected Claimant's contention that the negative x-ray interpretations of Dr. Chin are not credible because he is not a radiologist, as his negative readings are consistent with the other readings of record. *Id.* Moreover, the administrative law judge found Dr. Chin has extensive experience specializing in hand and wrist surgeries. *Id.*; *see* PX 1 at 18-24. The administrative law judge found "without merit" Claimant's objection to Drs. Chin and Skomer's not conducting a hand grip test because these doctors noted Claimant's reluctance prevented this testing. Decision and Order on Modification at 10; *see* SXs 19 at 121; PX 1 at 6. He also noted other objective testing was normal, such as nerve conduction velocity and electromyography, as were the results of Dr. Skomer's physical examination.⁴ Decision

⁴ He rejected Claimant's contention that neither Judge King nor the Board reviewed the September 24, 2013 neurology report of Dr. Jonathan Rutchik, noting the report had

and Order on Modification at 10; *see* SX 19 at 120-122. Thus, the administrative law judge rejected Claimant's contention that this evidence established a mistake in the prior finding that Claimant was not disabled after June 4, 2013. *Id.* at 9-10.

The administrative law judge also rejected Claimant's assertions that modification is warranted because he did not receive a copy of Dr. Skomer's April 20, 2016 examination conducted at the request of SSA, *see* SX 19 at 115-126, and Judge King did not admit into evidence the February 4, 2015 vocational rehabilitation report of Kim Page.⁵ The administrative law judge found, assuming, *arguendo*, SSA did not provide Dr. Skomer's report to Claimant before the first hearing, Claimant in fact received the report at the hearing and it was admitted into the record. Decision and Order on Modification at 11. Moreover, the administrative law judge found Dr. Skomer's opinion does not support ongoing disability. *See* n.5, *supra*. Ms. Page opined vocational rehabilitation was not feasible because Claimant cannot use his left hand, is limited to lifting three to five pounds, and has non-physical limitations. CX 1 at 11. The administrative law judge determined Ms. Page's vocational report does not warrant modification, however, based on the credited medical evidence of record that Claimant's work injury completely resolved by June 4, 2013, with no functional limitations.⁶ Decision and Order on Modification at 11.

been admitted into the record at the hearing before Judge King. Dr. Rutchik, a neurologist, conducted an EMG on September 24, 2013. PX 6 at 78-84. He concluded the test showed "borderline medial neuropathy at the left wrist, ulnar neuropathy at the elbow, cervical radiculopathy or polyneuropathy." PX 6 at 80. Judge King noted Dr. Gordon discussed the results of Dr. Rutchik's EMG. *See* Decision and Order at 10 & n.101. Dr. Skomer reported the results of Dr. Rutchik's EMG were normal, with borderline median neuropathy, *see* SX 19 at 117, and his own tests had normal results as well. *See* n.5, *infra*.

⁵ Dr. Skomer is a psychiatrist and neurologist; on April 20, 2016, he reviewed the results of prior examinations, physically examined Claimant, and conducted EMG and nerve conduction studies. SX 19 at 115. He stated the studies were "within normal limits" as was the physical examination of Claimant's left hand. *Id.* at 120, 122. He opined Claimant has a "somatoform pain disorder" as "[H]is symptoms are out of proportion to clinical and radiology study findings." *Id.* at 123. Dr. Skomer was deposed on August 4, 2016; the deposition states that Claimant was notified of the deposition but he did not appear. SX 24 at 349-350. Ms. Page, a vocational consultant, opined in her February 4, 2015 report that Claimant is not a candidate for vocational rehabilitation because of his left upper extremity physical restrictions and non-physical limitations. CX 1.

⁶ The administrative law judge also noted Howard Stauber, a vocational consultant, testified at the hearing before Judge King that he reviewed Ms. Page's report and rejected

Lastly, Claimant submitted on modification a favorable Social Security Administration decision dated March 31, 2017. The administrative law judge determined this award does not compel a finding of disability under the Act because of differing legal standards and substantive law. Decision and Order on Modification at 11-12.

The administrative law judge has broad discretion under Section 22 to determine if consideration of old and new evidence warrants modification of the finding that Claimant's work-related disability ended on June 4, 2013. *O'Keeffe*, 404 U.S. 254; *Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008). The administrative law judge addressed the relevant evidence presented, *see Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988), and found Claimant did not offer any creditable evidence of ongoing medical disability after June 4, 2013. *See generally Island Operating Co., Inc. v. Director, OWCP [Taylor]*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013). The administrative law judge permissibly rejected Claimant's testimony concerning his subjective complaints as they are not supported by medical evidence. *See generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). Moreover, Social Security Administration disability determinations are not controlling in cases arising under the Longshore Act as they involve the application of different standards. *See generally Jones v. Midwest Machinery Movers*, 15 BRBS 70 (1982); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). As Claimant failed to establish ongoing physical disability, the vocational report of Ms. Page does not establish Claimant's entitlement to benefits. *Nardella v. Campbell Mach., Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975). Having adequately considered Claimant's contentions and evidence, the administrative law judge did not abuse his discretion in finding Claimant failed to establish grounds for modification of the prior denial of benefits. *See generally Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000).

her conclusions. Decision and Order on Modification at 11; August 12, 2016 Tr. at 299, 320-322.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Petition for Modification and Order Denying Petition for Reconsideration.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge