

NED O. MILLER)	
)	
Claimant-Petitioner)	
)	
v.)	
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HUNTINGTON INGALLS)	DATE ISSUED: <u>Aug. 19, 2014</u>
INCORPORATED-PASCAGOULA)	
OPERATIONS)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer’s Motion for Summary Decision of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin), Gulfport, Mississippi, for claimant.

Susan F. E. Bruhnke (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer’s Motion for Summary Decision 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). 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).

This case has a complicated procedural history. Claimant sustained work-related injuries to his back on August 4, 2006 and on July 19, 2007, for which he filed claims for benefits under the Act (OWCP Nos. 07-178646, 07-180902). In a Decision and Order dated May 29, 2009 on these two claims, Administrative Law Judge Avery awarded

claimant, inter alia, an ongoing de minimis award of permanent partial disability benefits in the amount of \$4.69 per week commencing September 15, 2008. 33 U.S.C. §908(c)(21). Claimant returned to work for employer whereupon, on January 19, 2011, he sustained another back injury which put him out of work until August 6, 2012, when he returned to work with restrictions. On August 20, 2012, claimant sustained yet another back injury which disabled him until May 27, 2013, when he was released to return to work with permanent restrictions. Claimant filed claims for benefits under the Act for these latter two injuries (OWCP Nos. 07-191424, 07-195809).

On February 25, 2013, employer filed a Motion for Modification of the de minimis award; in its motion, employer asserted that claimant's de minimis award should be suspended since employer had commenced voluntary payment of benefits to claimant as a result of claimant's August 20, 2012 work injury. Ultimately, employer's request for modification of the de minimis award in OWCP Nos. 07-178646 and 07-180902, and claimant's claim for benefits as a result of his two subsequent work injuries, OWCP Nos. 07-191424, and 07-195809, were referred to the Office of Administrative Law Judges. On February 3, 2014, employer filed a Motion for Summary Decision on its motion for modification of the de minimis award; employer averred that, as a result of claimant's January 19, 2011 and August 20, 2012, work injuries, it had voluntarily commenced payment of disability benefits to claimant, thus allowing it to suspend its payment to claimant of the de minimis amount ordered in Judge Avery's decision. On March 6, 2014, claimant, citing the need for judicial economy, filed a Motion to Consolidate the four pending claims on the ground that the claims are inherently related as employer's motion for modification rests on claimant's alleged disability resulting from one or both of the latter two work injuries. Additionally, claimant filed a brief in response to employer's Motion for Summary Decision and Petition for Modification, asserting that employer's motions are premature because the evidence regarding the latter two claims has not been developed and that genuine issues of material fact, including the extent of claimant's work-related disability, exist between the parties. Employer opposed claimant's motion to consolidate, arguing that adjudication of its motion for modification should not be delayed while discovery is undertaken on the later claims.

In his Decision and Order Granting Employer's Motion for Summary Decision, Judge Price (the administrative law judge) implicitly found that claimant did not demonstrate that there is a genuine issue of material fact before him with regard to claimant's entitlement to continuing de minimis payments by employer. Specifically, the administrative law judge found that it is "uncontested" that claimant's economic and medical conditions have changed, and that claimant's August 20, 2012, injury had resulted in employer's payment of permanent partial disability benefits of \$296.58 per week as of May 28, 2013. Decision and Order at 2. Consequently, the administrative law judge found that as claimant has a present loss in wage-earning capacity, claimant's

change in condition warranted modification of the de minimis award and, therefore, he terminated that award.

Claimant appeals the administrative law judge's grant of summary decision. Claimant contends that, in the context of addressing employer's motion for modification of the de minimis award, the administrative law judge erred in making findings of fact and conclusions of law with respect to claimant's claims for benefits resulting from his January 19, 2011, and August 20, 2012, work injuries, which are pending and scheduled for a formal hearing before a different administrative law judge. Additionally, claimant contends the administrative law judge erred in failing to address his response to employer's motion for summary decision and his motion to consolidate the four pending claims. Employer has filed a response brief, urging affirmance of the administrative law judge's decision and order granting summary decision.¹

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after reviewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §§18.40(c), 18.41(a). In addition, the trier-of-fact must draw all inferences in favor of the non-moving party. See *O'Hara v. Weeks Marine*, 294 F.3d 55 (2d Cir. 2002).

We agree with claimant that the administrative law judge erred in granting employer's motion for summary decision on its claim for modification of the de minimis award. In order to establish its entitlement to modification in this case, employer must show that there has been a change in claimant's physical or economic condition.² See

¹ Claimant's filing, labelled "Claimant's Motion to Reverse, Vacate and Set Aside Decision and Order Granting Employer's Motion for Summary Decision and for Modification and Motion to Remand," was accepted by the Board as claimant's Petition for Review and brief in an Order dated July 10, 2014. Employer's motion to strike this filing is denied.

² Section 22 of the Act states:

Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . .in

generally *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). Employer's motion for summary decision in support of its motion for modification rested on its recitation of the "facts" concerning claimant's January 19, 2011, and August 20, 2012, work injuries and the mere fact of its voluntary payments for these injuries. See Employer's Motion for Summary Decision dated February 3, 2014, Attachments D, E. Claimant objected to employer's motion, asserting it should be denied because it was premature to act on the motion for modification as genuine issues of material fact concerning the January 19, 2011 and August 20, 2012, injuries remain in dispute, as evidenced by the parties' LS-18 Pre-Hearing Statements and by the fact that discovery on these claims has not been completed.³ See Claimant's Response to Employer's Motion for Summary Decision dated March 6, 2014.⁴

In granting employer's motions for summary decision and modification in OWCP Nos. 07-178646, 07-180902, the administrative law judge did not address claimant's objections to employer's motion. Rather, the administrative law judge stated it was "uncontested" that claimant's physical and economic condition had changed by virtue of the occurrence of the subsequent work injuries and employer's voluntary payment of

accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation. . . .

33 U.S.C. §922.

³ Claimant avers that his claims for benefits arising out of the work incidents on January 19, 2011 and August 20, 2012, OWCP Nos. 07-191424, 07-195809, have been assigned to an administrative law judge other than Judge Price for adjudication.

⁴ Employer, in responding to claimant's motion to consolidate the four claims, acknowledged that discovery on claimant's two subsequent claims had not been completed. See Employer's Response in Opposition to Claimant's Motion to Consolidate dated March 10, 2014.

benefits for those injuries. In this regard, the administrative law judge erroneously drew inferences in favor of the party moving for summary decision. *Morgan*, 40 BRBS 9. The administrative law judge set forth, inter alia, the following “undisputed facts” concerning claimant’s January 19, 2011 and August 20, 2012 injuries: (1) claimant sustained a change in his condition because he sustained these two additional injuries; (2) claimant “was paid compensation for his time off work for [the January 2011] injury and he returned to work with restrictions on August 6, 2012; (3) employer paid claimant temporary total disability benefits for the August 20, 2012 injury; (4) claimant was placed at maximum medical improvement for the August 20, 2012 injury on May 27, 2013 and was released to return to work with permanent restrictions; (5) employer could not accommodate the restrictions and therefore obtained a labor market survey establishing a post-injury wage-earning capacity of \$290 per week; and (6) employer has been paying claimant permanent partial disability benefits of \$296.58 per week since May 28, 2013. Decision and Order at 2. As claimant correctly contends, some or all of these “undisputed facts” are the subject of the pending claims in OWCP Nos. 07-191424, 07-195809. Until these latter claims are adjudicated or the parties stipulate to facts, the administrative law judge cannot modify the prior de minimis award based on employer’s motion for summary decision. Employer’s voluntarily payment of compensation does not equate to a finding of fact that claimant is entitled to benefits under the Act for a subsequent injury such that the prior award should be modified based on a change in conditions. Therefore, as claimant’s claims for benefits for his subsequent injuries on January 19, 2011, and August 20, 2012, have yet to be adjudicated, there remains a genuine issue of material fact in this case as to claimant’s continued entitlement to the de minimis award.⁵ See *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in part. part on recon.*, 46 BRBS 57 (2012). Consequently, we vacate the administrative law judge’s grant of employer’s motion for summary decision and the order terminating the de minimis award. The de minimis award is reinstated.

Claimant filed with the administrative law judge a motion to consolidate employer’s motion for modification in OWCP Nos. 07-178646 and 07-180902, with his pending claims for benefits for his subsequent work injuries, OWCP Nos. 07-191424, 07-195809. The administrative law judge did not address claimant’s motion, but canceled the April 28, 2014 hearing in view of his granting employer’s motion for summary decision. As the issues raised by employer in its motion for modification of the de minimis award are inextricably linked to claimant’s claims for the two subsequent back

⁵ That is, there are “genuine issues of material fact” that “might affect the outcome . . . under the governing law” because an administrative law judge could find that claimant’s latter two claims are not compensable, which might demonstrate the propriety of a continuing de minimis award. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

injuries, we remand this case with the order that, in the interest of judicial efficiency, the claims be consolidated for adjudication by the same administrative law judge.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision and employer's motion for modification is vacated. The de minimis award is reinstated. The case is remanded for consolidation with the other pending claims and for adjudication.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge