BRB No. 06-0960

C.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAE SYSTEMS NORFOLK SHIP REPAIR	)	DATE ISSUED: 07/27/2007
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

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

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

PER CURIAM:

Employer appeals the Decision and Order on Modification (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). 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 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 for employer 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 has any current impairment related to these injuries. The administrative law judge found that claimant's left knee condition reached maximum medical improvement on March 19, 2004, and that she sustained a 10 percent permanent knee impairment. The administrative law judge found that claimant's back condition reached maximum medical improvement on March 31, 2004, and that she has work restrictions related to her pain and limited mobility. The administrative law judge found that claimant is unable to return to her usual employment as a shipfitter due to her back and left knee injuries based on the opinion of her treating physician, Dr. Wardell, and a functional capacity evaluation (FCE) conducted on December 22, 2003. The administrative law judge found that employer established the availability of suitable alternate employment, and that claimant has a post-injury wage-earning capacity of $384 per week from December 20, 2004, when Dr. Wardell opined that claimant could return to full-time sedentary work and approved specific positions identified in employer's labor market survey. Claimant's claim for a *de minimis* award was rejected. Claimant's claim for payment of medical expenses also was rejected. Employer was ordered to pay permanent total disability benefits from June 13 to December 19, 2004, permanent partial disability benefits for a 10 percent permanent impairment of the left leg, and permanent partial disability for claimant's back condition commencing on December 20, 2004, based on a weekly loss of wage-earning capacity of $282.17. Employer's petition for reconsideration was denied.

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 does not prevent her from returning to her usual employment as a shipfitter. In this regard, 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 surveillance videotape of claimant taken on February 23, 2005, and an FCE 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 on December 20, 2004. 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. Dr. Wardell stated that he reviewed the February 2005 surveillance videotape and FCE, and that, based on this evidence, he found no ongoing back impairment as of December 20, 2004. 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.

On appeal, employer challenges the denial of its petition for modification. Claimant has not responded to employer's appeal.

Section 22 provides the only means for changing otherwise final decisions on a claim; 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.[1] *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Modification based on a change in condition may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Id.*; *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*,776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). It is well established that the party requesting modification bears the burden of proof. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In this case, employer requested modification alleging a change of condition based on Dr. Wardell's revised opinion that claimant was not disabled by her back condition after December 20, 2004. Tr. at 7-10, 13; *see also* EXs 2; 2A. The administrative law judge found in his initial August 2005 decision that claimant was restricted to full-time sedentary work as of December 20, 2004, based on the opinion of Dr. Wardell. In order to show a change in condition, employer must establish that claimant's physical or economic condition changed following the administrative law judge's decision. While Dr. Wardell's revised opinion was dated November 3, 2005, he stated that claimant had no back disability as of December 20, 2004, based on the videotape surveillance of claimant recorded on February 23, 2005, and an FCE conducted that same day. EX 2. Thus, his new opinion addresses claimant's back condition as of December 2004, the original date claimant's permanent partial disability commenced. As such, it cannot

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[1] Section 22 of the Act provides, in pertinent part:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under Section 908(f) of this title), on the grounds of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner 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 (including a case under which payments are made pursuant to Section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in Section 919 of this title, . . .

33 U.S.C. §922.

establish a change in claimant's physical condition subsequent to the administrative law judge's initial decision of August 30, 2005. As is it supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to show a change of condition. *See Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *Fleetwood*, 776 F.2d 1225, 18 BRBS 12(CRT); *Rizzi v. The Four Boro Contracting Co.*, 1 BRBS 130 (1974).

However, employer's evidence, if credited, could establish a mistake in fact in the administrative law judge's initial determination of claimant's disability as of December 2004. Although employer has framed its assertions in support of modification on appeal and below in terms of change of condition, its specific arguments are relevant to demonstrating a mistake in fact. Given this fact and the case precedent discussed below, we remand the case for the administrative law judge to consider whether employer's motion for modification should be granted based on a mistake of fact.

An application for modification need not meet formal criteria but need only be sufficient to trigger review before the one-year limitation period expires. *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996). 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 initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 359 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002), *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); 33 U.S.C §922. The Supreme Court's decisions in *O'Keeffe* and *Banks* make clear that the scope of modification based on a mistake in fact is not limited to any particular kind of factual errors; any mistake in fact, including the ultimate fact of entitlement to benefits, may be corrected on modification. *See Rambo I*, 515 U.S. at 295-296, 30 BRBS at 2-3(CRT); *Old Ben Coal Co.*, 292 F.3d at 545, 36 BRBS at 43-44(CRT); *Betty B Coal*, 194 F.3d at 497; *Jessee*, 5 F.3d at 725; *see also Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000).

Recent decisions regarding the scope of Section 22 have emphasized the broad scope of modification. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *see also Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT). The modification process is flexible, easily invoked, and intended to secure accuracy and justice under the Act. *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), *citing Banks*, 390 U.S. 359. A party need not establish that the evidence on which it bases its modification request was unavailable at the initial hearing, *Jensen*, 346 F.3d at 277, 37 BRBS at 101(CRT), and modification is not foreclosed merely because a party chose one path in litigating the case

initially. *Old Ben Coal Co.*, 292 F.3d at 550-554, 36 BRBS at 42-46(CRT) (administrative law judge may weigh many factors in determining whether justice under the Act will be served by reopening).

The scope of Section 22 thus is sufficiently broad to permit the administrative law judge in this case to consider employer's motion based on a mistake of fact once he determined that employer's evidence, as a matter of law, does not establish a change of condition. Employer alleged that Dr. Wardell's opinion supports a finding that claimant was not disabled as of the date that claimant's Section 8(c)(21) award commenced. This argument raises an allegation of a mistake in fact. We, therefore, vacate the administrative law judge's denial of employer's motion for modification, and we remand the case for the administrative law judge to address employer's evidence and determine whether to grant modification based on a mistake of fact.

Accordingly, the administrative law judge's Decision and Order on Modification denying modification on the basis that employer did not establish a change of condition is affirmed. The case is remanded for the administrative law judge to address whether employer established its entitlement to modification of the prior award based on a mistake in fact.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge