BRB Nos. 08-0251, 08-0877
and 09-0567

ADELINE COTTON RICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 03/05/2010
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Denying a Request for Modification Under Section 22 of the Act dated November 7, 2007, the Decision and Order Denying a Request for Modification Under Section 22 of the Act dated August 29, 2008, the Decision and Order Denying a Request for Modification Under Section 22 of the Act dated March 24, 2009, and the Decision and Order Denying Reconsideration of the March 24, 2009 Decision – Decision and Order Denying Modification of Previous Decisions of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Adeline Ricks, Franklin, Virginia, *pro se*.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying a Request for Modification Under Section 22 of the Act dated November 7, 2007, the Decision and Order Denying a Request for Modification Under Section 22 of the Act dated August 29, 2008, the Decision and Order Denying a Request for Modification Under Section 22 of the Act dated March 24, 2009, and the Decision and Order Denying Reconsideration of the March 24, 2009 Decision – Decision and Order

Denying Modification of Previous Decisions (2007-LHC-01078) of Administrative Law Judge Richard K. Malamphy 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 reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by substantial evidence, and in accordance with 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).

This case has previously been before the Board. To recapitulate the facts, claimant was injured during the course of her employment as a tank tester on July 27, 1977, when a metal plate fell two feet, striking her on her right shoulder and chest, and fracturing her sternum. Claimant attempted to return to work in September 1977 and January 1978, but was terminated for violating the rule requiring that she call employer once every five days when she was absent from work. Employer voluntarily paid claimant temporary total disability benefits from July 29 to September 7, 1977, and from September 29 to December 4, 1977. Claimant sought continuing disability benefits under the Act.

In the initial proceedings, the Board ultimately affirmed an administrative law judge's findings that the evidence did not establish claimant's inability to perform her work due to her injury after December 1977 and that claimant did not require further medical treatment for her work-related injury. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0420 (Jan. 24, 2002). This denial of benefits was summarily affirmed by the United States Court of Appeals for the Fourth Circuit. *Cotton v. Director, OWCP*, No. 02-1253 (Sept. 24, 2002).[1]

Claimant subsequently filed a petition for modification. In support of her petition, claimant submitted documentation regarding numerous and varied medical conditions suffered since the adjudication of her original claim. Administrative Law Judge Malamphy (the administrative law judge) found that there was no evidence that claimant's current conditions are causally related to her 1977 work injury, and he denied claimant's petition for modification. Claimant appealed this decision without assistance of counsel, but submitted additional documentation with her notice of appeal. Claimant then filed a petition for modification with the administrative law judge, and the Board remanded the case for its consideration. In his subsequent decision, the administrative

[1] The United States Supreme Court thereafter denied claimant's petition for writ of certiorari, *Cotten v. Director, OWCP*, 538 U.S. 964 (2003), and petition for rehearing, *Cotten v. Director, OWCP*, 538 U.S. 1054 (2003).

law judge found that the evidence submitted by claimant in support of her motion for modification had been previously submitted by employer and considered by the administrative law judge in the prior adjudication of her claim. Thus, as there was no new evidence to support a change in condition or a mistake in fact, the administrative law judge denied claimant's second request for modification. Claimant, without assistance of counsel, appealed the administrative law judge's decision denying modification, and also requested reinstatement of her appeal of the administrative law judge's December 28, 2004, decision. The Board affirmed the administrative law judge's finding that the evidence claimant submitted in support of her 2003 petition for modification did not establish a change in condition since the 2001 adjudication of her claim, as well as the administrative law judge's denial of modification as claimant did not establish a mistake in fact with regard to the medical conditions that were the subject of the prior proceedings or a change in her condition due to any work-related medical problem. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 05-0493, 0922 (Feb. 21, 2006).

Claimant then filed a new petition for modification. In a November 7, 2007, decision, the administrative law judge reviewed the medical reports submitted by claimant relating to treatment between 2006 and 2007 and found no evidence relating these findings to claimant's 1977 work-injury. Consequently, the administrative law judge found that the evidence presented by claimant did not establish a change in condition or a mistake in a determination of fact, and he denied claimant's request for modification. After appealing this decision to the Board, BRB No. 08-0251, claimant informed the Board that she had filed a request for modification with the administrative law judge. In an Order dated April 28, 2008, the Board dismissed claimant's appeal without prejudice and remanded the case to the administrative law judge for modification proceedings.

On August 29, 2008, the administrative law judge issued his decision on this modification request, finding that claimant had not submitted any medical records that had not already been considered;[2] the administrative law judge thus concluded that claimant had not presented any medical opinion for consideration which related any present impairment to her 1977 work-injury. Accordingly, the administrative law judge denied claimant's request for modification. On September 23, 2008, claimant filed an appeal of this decision with the Board and sought reinstatement of her appeal of the administrative law judge's November 7, 2007, decision. The Board acknowledged this appeal, assigned it BRB No. 08-0877, and reinstated claimant's appeal in BRB No. 08-

[2] In support of her modification request, claimant presented an additional eight exhibits for review, identified as Claimant's Exhibits 167 through 174.

0251, but subsequently dismissed these two appeals upon being informed by claimant that she desired to again pursue modification before the administrative law judge.

In support of her modification request, claimant submitted five new exhibits, identified as Claimant's Exhibits 175 through 179, for the administrative law judge to consider. The administrative law judge found that claimant's new medical evidence did not relate her 1999 heart problem to her 1977 work-related injury and that the absence of supporting medical evidence rendered claimant's statements regarding her medical conditions self-serving and not credible; he thus denied claimant's request for modification. He therefore again denied the claim.

Claimant, without the assistance of counsel, appealed this decision, BRB No. 09-0567, and also requested reinstatement of her prior appeals of the administrative law judge's November 7, 2007, and August 29, 2008, decisions, BRB Nos. 08-0251, 08-0877. In an Order dated May 29, 2009, the Board granted claimant's request and consolidated her three appeals for purpose of decision. Responding to claimant's appeals, employer urges the Board to affirm the administrative law judge's decisions in their entirety.

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. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well-established that the party requesting modification bears the burden of showing 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); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Moreover, the United States Supreme Court has stated that 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), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (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). Thus, although the administrative law judge has the authority to modify a prior decision based only on "further reflection on the evidence initially submitted," *O'Keeffe*, 404 U.S. at 256, he is not required to do so. *See generally Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000)(table). In order to obtain modification for a mistake of fact, the modification must render justice under the Act. *See R. V. [Vina]*, 43 BRBS 22.

In support of her request for modification in 2007, claimant submitted into evidence eight exhibits, identified as Claimant's Exhibits 159 through 166, documenting medical treatment which she received subsequent to October 2006 for back, dental, ear and TMJ pain, as well as vision problems.[3] In his November 7, 2007, decision, the administrative law judge addressed at length each of these exhibits and determined that none of them related claimant's present conditions to claimant's 1977 injury at work. The administrative law judge thus concluded that claimant's evidence did not establish a change in condition or a mistake in a determination of fact, and he consequently denied claimant's request for modification. Decision and Order at 4 – 6 (Nov. 7, 2007). We affirm this decision, as there is no evidence establishing that any of claimant's present medical conditions could have been caused by her 1977 injury. We therefore affirm the administrative law judge's finding that claimant failed to establish grounds for modification.

In seeking modification of this decision, claimant presented seven exhibits: physical therapy treatment records from August and September 2007, identified as Claimant's Exhibit 167, and seven documents previously issued by either the administrative law judge or the Board regarding her claim, identified as Claimant's Exhibit's 168 through 174. In response, employer submitted into evidence an April 23, 2008 report authored by Dr. Ross wherein that physician opined that claimant exhibited no residual impairments or functional limitations as a consequence of her 1977 work-injury. *See* Employer's Exhibit 102. In his August 29, 2008, decision, the administrative law judge found that claimant had not submitted any medical records that had not been previously considered, that his prior November 2007 decision summarizes the state of the case before him, and that there is no current legible medical opinion that relates any of claimant's present impairments to her 1977 work-injury. The administrative law judge thus concluded that claimant had not established a change in condition or a mistake in fact, and he consequently denied claimant's request for modification. Decision and Order at 5 (Aug. 29, 2008).

[3] In response, employer presented a report from Dr. Ross dated August 16, 2007, wherein that physician, after reviewing claimant's recent medical history, reiterated his prior opinion that claimant's present medical conditions are unrelated to her 1977 work-injury. *See* Employer's Exhibit 101.

We affirm the administrative law judge's decision. As the administrative law judge correctly stated, his November 2007 decision addresses the evidence presented by claimant, and no medical opinion relates claimant's present medical conditions to her 1977 work-injury. The administrative law judge rationally found that no evidence has been presented which establishes the work-relatedness of any current medical condition experienced by claimant. The administrative law judge's August 2008 denial of modification is therefore affirmed as claimant did not establish a mistake in fact with regard to prior findings or a change in her condition due to any work-related medical problem.

BRB No. 09-0567

In again seeking modification of the administrative law judge's prior decisions, claimant presented five new exhibits: July 1999 treatment records from Sentara General Hospital which indicated that claimant sustained a myocardial infarction at that time, identified as Claimant's Exhibit 175, and four administrative documents issued by either the administrative law judge or the Board regarding her claim in 2008, identified as Claimant's Exhibit's 176 through 179. In response, employer submitted into evidence a November 26, 2008, report authored by Dr. Ross wherein that physician reviewed claimant's Sentara General Hospital records and opined that there is no causal relationship between claimant's diagnosed myocardial infarction and her prior 1977 musculoskeletal injury. *See* Employer's Exhibit 102.[4] In a Decision and Order Denying a Request for Modification dated March 24, 2009, the administrative law judge considered claimant's evidence regarding the diagnosis of a myocardial infarction in 1999 and determined that these medical records contained no mention of claimant's 1977 injury and thus did not indicate a work relationship; additionally, the administrative law judge found that claimant's personal statements relating her medical conditions to her work-injury are self-serving and are not credible in the absence of supporting medical statements. Decision and Order at 4 – 6 (Mar. 24, 2009). Accordingly, the administrative law judge denied claimant's request for modification.

On April 2, 2009, claimant sought reconsideration of the administrative law judge's decision denying her request for modification; two days later, on April 4, 2009, claimant requested modification of all prior decisions and orders issued regarding her claim for benefits arising as a result of her 1977 work-injury. On April 10, 2009, claimant presented Claimant's Exhibits 167 and 175 to the administrative law judge for

[4] Although employer and the administrative law judge identified this report as Employer's Exhibit 102, Dr. Ross's previously admitted report dated April 23, 2008, was also designated Employer's Exhibit 102.

consideration. In a Decision and Order dated April 20, 2009, the administrative law judge denied both claimant's request for reconsideration as well as her request for modification.

We affirm the administrative law judge's March 24, 2009 and April 20, 2009, decisions in their entirety. With regard to the administrative law judge's last two decisions, claimant sought modification based on the 1999 medical reports regarding her treatment at Sentara General Hospital. In his decisions denying modification, the administrative law judge thoroughly reviewed these materials and properly determined that they did not indicate that claimant's diagnosed 1999 myocardial infarction was related to her 1977 work-injury; additionally, the administrative law judge correctly stated that the exhibits submitted by claimant had been previously placed in the record and considered by the administrative law judge. Similarly, in denying claimant's request for reconsideration, the administrative law judge correctly stated that no physician has related any of claimant's post-1977 medical problems to her 1977 injury. Moreover, employer has submitted substantial evidence in the form of multiple reports from Dr. Ross stating that claimant's 1977 injury resolved without permanent disability and any impairment she may have suffered since then is not related to the 1977 injury. As claimant thus has not established a mistake in fact or a change in her condition due to any work-related medical problem, the administrative law judge's March 24, 2009, and April 20, 2009, decisions denying claimant's requests for modification and reconsideration are affirmed.

Accordingly, the administrative law judge's Decision and Order Denying a Request for Modification Under Section 22 of the Act dated November 7, 2007 (BRB No. 08-0251), Decision and Order Denying a Request for Modification Under Section 22 of the Act dated August 29, 2008 (BRB No. 08-0877), Decision and Order Denying a Request for Modification Under Section 22 of the Act dated March 24, 2009, and the Decision and Order Denying Reconsideration of the March 24, 2009 Decision – Decision and Order Denying Modification of Previous Decisions (BRB No. 09-0567) are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge