BRB No. 02-0584

GUISEPPE MANENTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICE, INCORPORATED	)	DATE ISSUED: May 16, 2003
	)	
Self-Insured Employer-Respondent	)	
	)	
		DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-LHC-00821) of Administrative Law Judge Ralph A. Romano 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was a hustler driver when, on November 24, 1995, he fell out of the cab onto the chassis of the hustler, hitting his back and right shoulder. Claimant sought total disability benefits under the Act. Administrative Law Judge Paul H. Teitler found that claimant sustained only a shoulder contusion and that the shoulder tear shown on a MRI was pre-existing and not work-related. In addition, Judge Teitler found that claimant did not present sufficient evidence that he was unable to perform his usual work due to either his back or shoulder injury after November 1,

1996. Thus, Judge Teitler awarded claimant temporary total disability benefits until November 1, 1996, but denied continuing benefits thereafter. Claimant appealed this decision to the Board. The Board affirmed Judge Teitler's finding that claimant's back injury had resolved and that claimant had fully recovered from his shoulder contusion. *Manente v. Sea-Land Service, Inc.*, BRB No. 98-0985 (April 14, 1999).

Claimant subsequently underwent surgery for a torn right rotator cuff, and he filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that his right shoulder condition had worsened. He sought disability and medical benefits under the Act.

In his decision, Administrative Law Judge Ralph A. Romano (the administrative law judge) found that claimant is not entitled to modification as there was no mistake in fact in the initial decision or a change in claimant's shoulder contusion. The administrative law judge found that although claimant's shoulder tear has worsened, claimant did not establish a mistake in the finding that the tear is not causally related to claimant's work-related accident. Thus, the administrative law judge denied further benefits under the Act.

Claimant contends on appeal that the administrative law judge erred in finding that there was not a mistake in fact regarding whether his right shoulder tear is causally related to his work injury. Claimant further contends that he is entitled to disability benefits because his shoulder tear has deteriorated. Claimant also contends that he is entitled to an award of an attorney's fee as the administrative law judge found that employer is responsible for further medical benefits. Employer responds, urging affirmance of the administrative law judge's decision on modification.

Section 22, 33 U.S.C. §922, provides the only means for changing otherwise final compensation orders. The authority to reopen proceedings extends to all mistaken determinations of fact. The fact-finder 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 also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). A party seeking to modify a decision on the basis of a mistake in fact is not barred from modification because the prior award based on the alleged mistake in fact was affirmed on appeal. *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984). A prior decision also may be modified on the basis of 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).

In the present case, the administrative law judge found that claimant failed to

establish that there was a mistake in fact regarding the cause of his right shoulder tear. In the original decision, Judge Teitler found that claimant's right shoulder tear pre-existed the work accident. Emp. Ex. at 13. In his decision on modification, Judge Romano evaluated the more recent reports of Drs. Charko and Nehmer, and concluded that the evidence regarding the cause of claimant's rotator cuff tear is in equipoise and thus insufficient to establish a mistake in fact. Decision and Order at 3.

We hold that the administrative law judge erred in finding the evidence insufficient to establish a mistake in fact regarding the cause of claimant's torn rotator cuff, as he failed to apply the Section 20(a) presumption, 33 U.S.C. §920(a), to this causation issue. Section 20(a) provides claimant with a presumption that his disabling condition is causally related to his employment if claimant establishes a *prima facie* case by proving that he suffered a harm and that working conditions existed which could have caused the harm. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). On modification, claimant presented the opinion of Dr. Charko, his treating physician, who testified that upon his review of the new MRI taken on July 21, 1999, and his observations at surgery, the tear was caused by the work trauma. Dr. Charko stated that the tear could have been caused by the impact of the fall on the area of the shoulder while the muscles were contracting, Cl. Ex. 7 at 19, and that as claimant was asymptomatic prior to the fall and experienced problems after the fall, it was more probable that the tear was post-traumatic rather than degenerative in nature. Cl. Ex. 7 at 14. This new evidence is sufficient to support a conclusion that there was a mistake in fact in the prior decision on the cause of claimant's shoulder problem. Moreover, as this evidence establishes that claimant suffers from a torn rotator cuff that could have been caused, at least in part, by the work injury on November 24, 1995, we hold that invocation of the Section 20(a) presumption is established as a matter of law. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. INA v. United States Department of Labor [Peterson]*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

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[1]The administrative law judge found that Dr. Charko stated that claimant's rotator cuff tear is work-related, and that Dr. Nehmer opined that it is due to the natural progression of pre-existing degenerative changes. The administrative law judge found that the qualifications of the two physicians are "essentially equal," and that Dr. Charko's status as a treating physician is offset by his ignorance of pre-accident medical documentation. Decision and Order at 3.

[2]Once the party moving for modification produces sufficient evidence that could support the administrative law judge's modifying the prior decision, the standards for adjudicating a claim that apply in an initial proceeding are equally applicable in the modification proceeding. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

As claimant has presented sufficient evidence to invoke the Section 20(a) presumption, as well as to demonstrate the existence of a mistake in fact in the initial decision, the burden of production shifts to employer to rebut the Section 20(a) presumption with substantial evidence demonstrating that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In this regard, the record contains the report and deposition of Dr. Nehmer. In a report dated January 25, 2002, Dr. Nehmer stated that the rotator cuff tear found by Dr. Charko was a result of the natural progression of degenerative changes and is not causally related to claimant's fall in November 1995. Emp. Ex. D. However, Dr. Nehmer also testified in a deposition in February 2002 that claimant's tendon could have reached a point of degeneration so that a relatively minor insult could cause a tear. Emp. Ex. E. at 22, 28. In addition, he stated that if claimant had no symptoms prior to the injury and had symptoms subsequent to the injury, it increases the likelihood that the trauma he sustained played some part in the progression of his condition. Emp. Ex. E at 30-31. Under the "aggravation rule," where an employment-related injury aggravates, accelerates, or combines with an underlying condition, employer is liable for the entire resultant condition. *See Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Obert v. John T. Clark & Son of Maryland,*, 23 BRBS 157 (1989). Dr. Nehmer's report does not establish that claimant's shoulder condition was not aggravated by the work accident, and in fact establishes that the work accident could have aggravated claimant's condition. Thus, we hold that Dr. Nehmer's opinion is insufficient to establish rebuttal of the Section 20(a) presumption that claimant's right shoulder tear was caused at least in part by his employment. As there is no other rebuttal evidence of record, claimant's right rotator cuff tear is work-related as a matter of law. *See Conoco*, 194 F.3d at 690, 33 BRBS at 192(CRT); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995).

To obtain modification based on a mistake in fact, the modification must render justice under the Act. *See generally Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). As the administrative law judge did not apply the Section 20(a) presumption, and as application of Section 20(a) establishes the work-relatedness of claimant's shoulder condition as a matter of law, we hold that the administrative law judge erred in denying modification. Claimant is entitled to reasonable and necessary medical benefits for his work-related rotator cuff tear. 33 U.S.C. §907. Moreover, as claimant alleged that his rotator cuff tear has caused additional disability, the case is remanded to the administrative law judge to consider

whether claimant has established a change in his condition such that he is entitled to additional disability benefits.

Claimant lastly contends that the administrative law judge erred in failing to consider claimant's counsel's entitlement to an attorney's fee award. The administrative law judge ordered employer to pay for MRIs taken in March 1996. In addition, pursuant to this decision, claimant is entitled to medical benefits for his right shoulder rotator cuff tear, and on remand he may be found entitled to additional disability benefits. Therefore, on remand, the administrative law judge is instructed to consider claimant's counsel's entitlement to a fee award, payable by employer, commensurate with claimant's success. 33 U.S.C. §928; 20 C.F.R.§702.132.

Accordingly, the administrative law judge's Decision and Order denying modification is reversed. Claimant's right rotator cuff tear is work-related as a matter of law. The case is remanded for further consideration consistent with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge