BRB No. 05-0712

MONTE W. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRICAL AND INSTRUMENTATION UNLIMITED OF LOUISIANA	)	DATE ISSUED: 05/08/2006
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	DECISION and ORDER

Appeal of the Order Granting Motion for Summary Judgment of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

James E. Shields, Jr. (Shields & Shields, APLC), Gretna, Louisiana, for claimant

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

PER CURIAM:

Claimant appeals the Order Granting Motion for Summary Judgment (2004-LHC-02320) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

On November 24, 1991, claimant was exposed to toxic chemicals during the course of his employment for employer as an instrumentation technician on an offshore oil platform. Claimant alleged that this exposure damaged his central nervous system and that he is unable to work. In a decision issued on April 1, 1994, Administrative Law Judge Miller credited the opinion of claimant's treating physician, Dr. Callender, and found that claimant established a work-related injury. The administrative law judge found that claimant was unable to return to his usual employment, and, inasmuch as employer offered no evidence of suitable alternate employment, he awarded claimant compensation for temporary total disability from November 26, 1991, to October 20, 1992, and continuing benefits for permanent total disability from October 21, 1992.

More than 10 years later, employer filed a motion for modification alleging a mistake of fact in the prior decision concerning the existence of a work-related injury. Subsequently, employer filed a motion for summary judgment. A hearing was held before Administrative Law Judge Kennington (the administrative law judge) on April 25, 2005, at which counsel for claimant and employer presented evidence and argument pertaining to employer's motion. In his Order Granting Motion for Summary Judgment, the administrative law judge discussed employer's new evidence, claimant's objections to employer's motion, and the existing evidence of record. The administrative law judge found that employer established rebuttal of the Section 20(a) presumption that claimant's condition is related to the work injury. 33 U.S.C. §920(a). The administrative law judge further found that, due to Dr. Callender's change of opinion that he cannot attribute claimant's toxic encephalopathy to chemical exposure at work, claimant has not produced any medical evidence establishing that claimant's condition is related to his employment. Accordingly, the administrative law judge granted employer's motion for modification, and terminated as of the date of his decision, May 2, 2005, claimant's entitlement to compensation and medical benefits under the Act.

On appeal, claimant challenges employer's ability to seek modification, and the administrative law judge's granting of employer's motion for summary judgment. Employer has not responded to this appeal.

Claimant argues that the administrative law judge erred by allowing employer to seek modification many years after the issuance of Judge Miller's decision. Section 22 of the Act provides that any party in interest may seek review of a compensation case on the ground of a change of conditions or mistake of fact at any time prior to one year after the date of the last payment of compensation or one year after the rejection of a claim. 33 U.S.C. §922. Inasmuch as claimant was receiving compensation for permanent total disability as of the date employer sought modification based on a mistake of fact, employer's request is timely within the plain language of Section 22. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Moreover, we reject claimant's contention that modification should have been denied because employer waited over 10 years from the date of Judge's Miller's decision awarding benefits to request modification. Claimant contends the principle of finality in decision making outweighs the merits of employer's motion for modification. 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), *reh'g denied*, 404 U.S. 1053 (1972); *see Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 359, *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). 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 Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Old Ben Coal Co.*, 292 F.3d at 541, 545, 36 BRBS at 40, 43-44(CRT); *Betty B Coal*, 194 F.3d at 497. The decision to reopen a case due to a mistake in fact must render justice under the Act. *See O'Keeffe*, 404 U.S. at 256; *Banks*, 390 U.S. at 464; *Old Ben Coal Co.*, 292 F.3d at 546-547, 36 BRBS at 44-45(CRT).

While finality may be a relevant consideration in determining whether modification would render justice under the Act, Section 22 incorporates a preference for accuracy in decision making. *See O'Keeffe*, 404 U.S. at 255-56; *Banks*, 390 U.S. at 465; *Old Ben Coal Co.*, 292 F.3d at 541-546, 36 BRBS at 40-45(CRT). In *Old Ben Coal*, the court listed examples of the types of actions that could overcome the Act's preference for accuracy. Granting modification would not render justice under the Act if employer unreasonably sought to delay payment, if it were clear that the moving party's submissions would not alter the substantive award, or if the administrative law judge would be required to overlook sanctionable conduct. *Old Ben Coal Co.*, 292 F.3d at 547, 36 BRBS at 44(CRT); *see McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). None of these types of circumstances is present herein. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Employer submitted on modification, *inter alia*, evidence of a change of opinion by Dr. Callender as to the cause of claimant's toxic encephalopathy. Inasmuch as Dr. Callender's former opinion was credited by Judge Miller in finding that claimant's toxic encephalopathy is related to the work injury, and employer's new evidence provides a basis for a mistake in fact in the initial finding of a work-related injury, the administrative law judge did not err in

addressing the merits of employer's motion for modification.[1] *See generally Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993); *Wheeler*, 37 BRBS 107.

Claimant next argues that the administrative law judge erred by granting employer's motion for summary decision as there are genuine issues of material fact in dispute. To defeat a motion for summary judgment, the party opposing the motion must establish the existence of an issue of fact which is both material and genuine, material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged factual dispute. *O'Hara v. Weeks Marine*, 294 F.3d 55, 61 (2d Cir. 2002); *Buck v. General Dynamics Corp./Electric Boat Div.*, 37 BRBS 53 (2003); 29 C.F.R. §§18.40, 18.41. In this case, claimant argues, *inter alia*, that Dr. Callender's initial opinion that claimant's toxic encephalopathy is related to his employment and his testimony at the hearing before Judge Miller that claimant's abnormal test results are not related to substance abuse establish a genuine issue of fact as to the cause of claimant's toxic encephalopathy, and that therefore summary decision should not have been granted.

We agree that Dr. Callender's initial opinion is substantial evidence from which the administrative law judge could have found on modification that claimant's toxic encephalopathy is related to chemical exposure at work. *See Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000). Nonetheless, we hold that the administrative law judge did not err in granting employer's motion for summary decision as a hearing was held on employer's motion at which both parties had the opportunity to submit evidence and argument. *See Jukic v. American Stevedoring, Inc.*, 39 BRBS 95 (2005) (claimant must be granted a hearing on his request for modification upon a timely request for one). At the April 2005 hearing, the judge was advised that Dr. Callender was unavailable for further testimony, and that claimant was unable to attend the hearing.[2] Tr. II at 30-31, 73-74. Claimant's counsel did not move that employer's request for modification be held in abeyance pending claimant's

[1] As employer's motion for modification is related to claimant's claim under the Act by extension of the Outer Continental Shelf Lands Act (the OCSLA), and as the Supreme Court has stated that the doctrine of laches does not apply under the OCSLA, the doctrine of laches does not apply to this case. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *see Fontenot v. Dual Drilling Co.*, 179 F.3d 969, 977, 33 BRBS 88, 94(CRT) (5th Cir. 1999).

[2] In his brief on appeal, claimant's counsel again concedes that claimant and Dr. Callender are unavailable to testify at a hearing. Claimant's Petition for Review and brief at 18 n.1, 20.

availability for a hearing, but requested only that all exhibits be admitted for purposes of appeal and the administrative law judge admitted them. Tr. II at 80. In this regard, the record includes deposition testimony from Dr. Callender taken on July 30, 2004, and from claimant taken on December 23, 2004. Claimant's counsel questioned Dr. Callender and claimant at their depositions. EXs 13, 14. Thus, the record contains the best available testimony from Dr. Callender, whose change of testimony formed the basis for employer's request for modification, and from claimant.

Moreover, the administrative law judge fully weighed the evidence formally admitted into the record at the hearing before concluding that claimant failed to establish, based on the record as a whole, that his toxic encephalopathy is related to his chemical exposure at work on November 24, 1991. Based on these facts, we hold that the administrative law judge did not err in granting employer's motion for summary decision inasmuch as the administrative law judge provided claimant with a full and fair hearing, and he rendered his decision based on all the evidence of record. *See generally Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); 20 C.F.R. §702.338.

Claimant next argues that the administrative law judge erred by crediting Dr. Callender's deposition testimony that claimant's toxic encephalopathy cannot be attributed to the work injury inasmuch as Dr. Callender had already addressed the possibility that claimant's condition could be caused by drug abuse.[3] The standards for determining on modification the cause of claimant's toxic encephalopathy are the same as in the initial adjudicatory process. *See generally Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed that could have caused or aggravated the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Once claimant has established his *prima facie* case, Section 20(a) of the Act provides him with a presumption that his injury is causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant's injury was not caused by his employment. *See Ortco Contractors Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1999). If the administrative law judge finds the Section 20(a)

[3] In addition to Dr. Callender's July 30, 2004, deposition, the record contains his deposition testimony taken at various dates in 1994 and 1995 with respect to a third-party suit in which claimant was a plaintiff. EXs 1; 1(a).

presumption rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id.*; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption based on uncontroverted evidence that completion fluid was accidentally discharged from a tank on a nearby drilling rig and blew across the platform where claimant was working, and testimony that claimant sustained skin irritation shortly after this exposure. Order at 7. The administrative law judge found the presumption rebutted based on the testimony of Drs. Stafford and Swift that there was no objective evidence to support claimant's self-reported medical complaints.[4] Tr. I at 314; Swift deposition at 34-35, 76-79, 89-91. The administrative law judge found that, in evaluating the evidence as a whole, claimant cannot rely on Dr. Callender's former testimony because he subsequently opined that he is unable to establish any cause for claimant's toxic encephalopathy due to claimant's history of chronic drug abuse. Order at 8; *see* EXs 1 at 1634-36, 1643-45; 1(a) at 1913-15, 1922-23; 12 at 38-39. The administrative law judge rejected the opinion of Dr. Devidoss that claimant sustained non-disabling kidney damage due to the work accident because Dr. Devidoss was not apprised of claimant's drug usage and he did not examine claimant until seven months after the work accident.[5] Order at 7; Devidoss deposition at 15-17, 24-26. The administrative law judge found that the remaining probative evidence is the testimony of Dr. Swift, who opined that claimant did not have any illness or disability related to chemical exposure. The administrative law judge concluded that claimant therefore failed to produce reliable medical evidence establishing a causal link between his exposure to completion fluids and any injury to the central nervous system or kidneys. Order at 8. Accordingly, the administrative law judge found that employer is entitled to modification of the previous award, and he authorized employer to terminate claimant's compensation and medical benefits.

In rendering a decision on modification, as in the original decision, the administrative law judge is entitled to weigh the evidence and may draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Jukic*, 39 BRBS 95. In his decision, the administrative law judge specifically quoted Dr. Callender's initial testimony in response

[4] This finding is not challenged on appeal.

[5] This finding is not challenged on appeal.

to Judge Miller's questioning whether claimant's test results could be attributable to drug abuse. Order Granting Motion for Summary Judgment at 4-5. The administrative law judge discussed employer's evidence admitted on modification, which he found established that claimant had extensively used illicit drugs, and that Dr. Callender considered claimant at the time of the trial before Judge Miller to have, at most, rarely used marijuana. *See* EXs 1(a) at 469-472, 509, 554, 692; 2 at 4-26; 6; 7; 14-17; 20-22; 26 at 14; 28 at 10-12, 118 The administrative law judge found that Dr. Callender erroneously believed that drug use was not a factor in determining the cause of claimant's toxic encephalopathy. Order at 6. The administrative law judge was not required to credit Dr. Callender's initial testimony that drug use did not contribute to claimant's toxic encephalopathy inasmuch as Dr. Callender subsequently testified that this testimony was based on an inaccurate assumption as to claimant's use of illegal drugs, and the administrative law judge credited substantial evidence supporting his finding that claimant extensively used such drugs. *See* EXs 1 at 1634-36, 1643-45; 1(a) at 1913-15, 1922-23; 12 at 38-39. Moreover, we reject claimant's argument that Dr. Callender's deposition testimony is not credible because he did not have claimant's medical records with him at his depositions. The administrative law judge rationally found that claimant proffered no evidence to show that Dr. Callender was unable to offer competent testimony absent claimant's medical file. Order at 7; *see generally Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); 20 C.F.R. §702.338. Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's toxic encephalopathy is not related to work exposure to completion fluids on November 24, 1991. Thus, we affirm the grant of modification to employer and the termination of the award of benefits. *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001); *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

Accordingly the administrative law judge's Order Granting Motion for Summary Judgment is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge