BRB No. 04-0938

LANETTE K. VIPOND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHELL OIL COMPANY	)	
	)	
and	)	
	)	
ESIS/ACE USA	)	DATE ISSUED: 09/15/2005
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Kurt A. Gronau (Law Offices of Gray & Prouty), Honolulu, Hawaii, for claimant.

Gilbert A. Garcia (Veatch, Carlson, Grogan & Nelson), Los Angeles, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2004-LHC-0293) of Administrative Law Judge Stephen L. Purcell 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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).

On February 26, 1981, claimant sustained a work-related injury to her back while working for employer as a production technician on an offshore platform. Initially, claimant neither sought medical attention nor informed employer of her injury. Moreover, claimant never returned to her employment with this employer. She resigned shortly after her February 2, 1981, work accident and stated that her resignation was for personal reasons. Thereafter, claimant secured a non-maritime job performing heavy manual labor for the City of Ventura, California. Claimant passed her pre-employment physical examination and was hired as a maintenance worker on October 6, 1981. On February 18, 1984, claimant suffered a work accident where she "felt a pop" in her back. The next day, claimant was unable to get out of bed, because of the severe pain in her back radiating into her lower extremity. Claimant contended that she had not been gainfully employed since that incident. Claimant filed a claim for benefits under the Act, which resulted in a formal hearing on February 27, 1985, before Administrative Law Judge Henry B. Lasky.

Judge Lasky found that claimant was entitled to temporary total disability benefits from February 27, 1981 through October 6, 1981, the date on which she began her employment with the City of Ventura. The administrative law judge also found that claimant's position with the City of Ventura did not fairly and accurately represent her post-injury wage-earning capacity, because it was not suitable given her restrictions from the work injury with employer, and he found that she suffered a 50 percent loss of wage-earning capacity.[1] Thus, the administrative law judge awarded claimant permanent partial disability benefits of $148.67 per week. The administrative law judge awarded future medical benefits, *see* 33 U.S.C. §907, and in addition, awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In 2003, claimant sought to modify Judge Lasky's 1985 award of permanent partial disability benefits to permanent total disability benefits, based on a mistake of fact or a change of condition. *See* 33 U.S.C. §922. Claimant also sought reimbursement of

[1] In a footnote, the administrative law judge stated his belief that at the time of the 1985 hearing claimant was actually totally disabled but at least fifty percent of that total disability must be attributed to her injury in 1984 with the City of Ventura. Lasky Decision and Order at 8 n.1.

medical expenses, as well as continuing medical care. A formal hearing was held before Judge Purcell on February 24, 2004.[2] In his Decision and Order, Judge Purcell denied claimant's modification request, rejecting her contention that Judge Lasky made a mistake in fact regarding her post-injury loss of wage-earning capacity. Judge Purcell also found that claimant did not meet her burden of establishing either a change in her physical or economic condition. Moreover, the administrative law judge denied claimant's request for medical benefits. In this regard, the administrative law judge found that claimant failed to meet her burden of establishing that the medical treatment she received was for the 1981 injury, or that the costs of such treatment were incurred after authorization was requested and withheld by employer.

On appeal, claimant alleges that the administrative law judge erred in denying her modification petition. Claimant also alleges that the administrative law judge erred in denying medical benefits. Employer responds, urging affirmance of the administrative law judge's denial of modification and medical expenses.[3] The Director has not responded to this appeal.

Section 22 of the Act provides the only means for changing an otherwise final compensation order. Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. *See* 33 U.S.C. §922. In considering mistake in fact, the fact-finder had 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 (1971), *reh'g denied*, 404 U.S. 1053 (1972). In order to obtain modification for a mistake in fact, the modification must render justice under the Act. *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Modification based on a change in condition may be predicated on a improvement or deterioration in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

[2] The Director, Office of Workers' Compensation Programs (the Director), was not represented at the formal hearing but submitted a post-hearing brief in opposition to claimant's modification request.

[3] We deny employer's motion to dismiss, as claimant's Petition for Review and brief were filed in a timely manner. 20 C.F.R. §§802.211, 802.221.

On appeal, claimant first contends that there was a mistake in fact in Judge Lasky's decision in that he found her job with Ventura to be unsuitable for her, yet used one-half of the wages of this job as the basis for her ongoing permanent partial disability benefits award after she left that employment. Claimant contends the administrative law judge did not address this contention in his decision denying modification.

We agree with claimant that the administrative law judge did not adequately address her contention and therefore we must remand the case for reconsideration. *See, e.g., Zepeda v. National Steel & Shipbuilding Co.,* 24 BRBS 163 (1991); *Finch v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 196 (1989)(wage-earning capacity is a mixed question of law and fact subject to Section 22). Judge Lasky implicitly found that claimant could not return to her usual work.[4] Employer thus bore the burden of establishing suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Claimant obtained a job on her own which Judge Lasky found was "totally unsuited" to claimant's capabilities because of her physical condition due to the work injury. Lasky Decision and Order at 7. His award of permanent partial disability benefits while she worked in the unsuitable position therefore was appropriate for as long as she was employed by Ventura. *See generally Ezell v. Direct, Labor, Inc.,* 37 BRBS 11 (2003).

However, in her modification petition, claimant alleged that the ongoing permanent partial disability award was based on a mistake in fact since she was unable to retain the unsuitable job or to obtain other employment due to her work injury. Claimant therefore maintained that she was entitled to a greater award. This mistake of fact issue should have been addressed by the administrative law judge.[5] *O'Keeffe,* 404 U.S. 254; *see Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). As claimant was employed in work which was unsuitable after her work injury, this job cannot constitute suitable alternate employment; in order to be suitable, employment must be within the medical restrictions claimant had as a result of her work-related 1981 injury and prior to her 1984 aggravating injury with the City of Ventura. *See generally Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT)

[4] This inference is supported by the award of temporary total disability benefits from the date of injury until she was hired by Ventura, and by his finding that the manual labor required by the Ventura job, similar to that performed with employer, was unsuitable for claimant. *See* Lasky Decision and Order at 7-8.

[5] The administrative law judge rejected claimant's assertion that Judge Lasky committed a mistake of fact by determining claimant's wage-earning capacity in proportion to her earnings with the City of Ventura. Claimant has failed to raise a specific error in the administrative law judge's determination in this regard.

(9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). Judge Lasky, however, made no determination regarding suitable alternate employment in his decision, despite finding that claimant's earnings in the job with the City of Ventura did not represent her wage-earning capacity. He apparently based his finding of a 50 percent loss in wage-earning capacity on the fact that he believed claimant to be totally disabled but that 50 percent of this disability is due to her injury in 1984. Lasky Decision and Order at 8, n.1.

On modification, Judge Purcell discussed the medical evidence relating to claimant's work restrictions in addressing her change in condition contention. He found that prior to her 1984 injury in Ventura, claimant was restricted from performing heavy work, including heavy lifting, and from repeated bending and stooping. Decision and Order on Modification at 16. He also found that these same restrictions were imposed by claimant's physicians in 2003. These findings are amply supported by substantial evidence. *See* EXs 3-6. As Judge Lasky found, this evidence also establishes the unsuitability of both claimant's usual work with employer and the Ventura job, thus shifting to employer the burden of establishing suitable alternate employment within these restrictions after claimant stopped working for Ventura.

The case is remanded to the administrative law judge for consideration of the extent of claimant's disability as of 1984, and therefore for findings as to whether claimant established that Judge Lasky's ongoing permanent partial disability award is based on a mistake in fact.[6] As the proponent, claimant bears the burden of establishing a basis for modification. Once this burden is met, the standards normally applicable in a disability case apply. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 138-140, 31 BRBS 54, 61-62(CRT) (1997). The administrative law judge should address claimant's wage-earning capacity pursuant to Section 8(h), 33 U.S.C. §908(h), *see Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Evidence regarding jobs claimant held in the intervening years may be relevant to claimant's wage-earning capacity. *See* Purcell Decision and Order at 19. The record also contains a statement by Dr. Murphy that claimant was to start a suitable job as a computer programmer trainee in August 1985. EX 6 at 30. If employer established the availability of suitable work or claimant obtained suitable, steady work on her own and left these positions for reasons other than her 1981 work injury or voluntarily removed herself from the workforce, employer does not bear a renewed burden of establishing new suitable alternate employment thereafter. *See generally Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT).

[6] Employer, however, is not liable for any increase in claimant's disability due to the 1984 injury with Ventura. *See generally Leach v. Thompson's Dairy*, 13 BRBS 231 (1981).

We next address claimant's contention that the administrative law judge erred in finding claimant did not sustain a change in her physical condition. As stated above, the administrative law judge's finding that the medical evidence does not establish a change in claimant's physical condition is supported by substantial evidence. Moreover, the administrative law judge rationally found that claimant is not a credible witness and thus rejected her assertion that her pain is disabling. Purcell Decision and Order at 17-20. First, he rejected claimant's explanation regarding why her notice to employer of her injury was late. *Id.* at 17.[7] For example, Judge Purcell stated that it is not clear why, when claimant resigned from employer for "personal" reasons, she might have been in fear of the people she worked with since she never returned to work on the oil platform after her February 26, 1981 injury. The administrative law judge also found that when claimant went to work for the City of Ventura she intentionally withheld information about her prior back injuries. Judge Purcell found that this conduct by claimant evidenced her willingness to deceive others when doing so inured to her benefit. *Id.* at 18. The administrative law judge found that her testimony and other evidence of record raised concerns about claimant's ability to be candid when doing so would preclude an award of benefits.[8] *Id.* Third, the administrative law judge found that claimant's testimony regarding her lack of income called into question her overall credibility.[9] In adjudicating a claim, it is well established that an administrative law judge is entitled to determine the weight to be accorded the evidence of record, and is entitled to evaluate the credibility of all witnesses. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Cordero v. Triple A. Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge's finding that claimant's testimony is not credible is rational, and as the administrative law judge's

[7] Contrary to claimant's contention, the fact that Judge Lasky accepted claimant's explanation is irrelevant, as an administrative law judge in a modification proceedings is not bound by any findings or inferences previously made. *See generally O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972).

[8] One example the administrative law judge cited was claimant's "incredible" testimony concerning her denial that she had filed a workers' compensation claim in California, testimony which took her attorney by surprise. Tr. at 24. The administrative law judge also found incredible claimant's testimony that her condition had deteriorated so much she forgot how to walk at times. *Id.* at 53-54. Purcell Decision and Order at 18-19.

[9] The administrative law judge cited at length business records from concerns claimant operated with her boyfriend. The administrative law judge also noted claimant's testimony about her volunteer work. Purcell Decision and Order at 19.

finding that claimant remains capable of performing the same level of work at this time as she performed in 1985 is supported by substantial evidence, we affirm the finding that claimant did not establish a change in her physical condition.[10] *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983).

Claimant also contends that the administrative law judge erred in denying her claim for medical benefits. In his 1985 decision, Judge Lasky awarded claimant necessary future medical benefits pursuant to Section 7 of the Act. With regard to reimbursement for medical expenses incurred beginning in 1999, the administrative law judge rationally rejected claimant's testimony that she contacted employer, an alleged carrier, and the Department of Labor prior to 2003 to request authorization for medical care from new physicians and/or chiropractors. The administrative law judge also found that there is no indication that the chiropractic care was for a spinal subluxation. As it is rational and supported by substantial evidence, we affirm the administrative law judge's denial of reimbursement for medical expenses incurred prior to 2003. *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989); 20 C.F.R. §702.404.

With regard to claimant's need for medical benefits as of 2003, the administrative law judge found that claimant contacted the Department of Labor and employer's carrier to request authorization. The administrative law judge found, however, that claimant failed to establish that she required treatment for her 1981 injury. Dr. Mandell stated in November 2003 that claimant's present condition is the result of attrition over the years and that "to delineate a specific event of 1981 is unlikely." EX 3. Dr. Parke, a chiropractor, treated claimant from 1999 to 2003. He referenced a 1979 injury to claimant's coccyx and back, and stated in April 2003 that it is common for low back injuries to destabilize the spine and to predispose it to future injury and degenerative changes. He stated that this appeared to occur in claimant's case although he could not "objectively and conclusively determine" that claimant's condition is related to the 1979 injury. EX 4. He stated she needs palliative care. *Id.* Dr. Fern, also a chiropractor, stated it was difficult to determine the causes of claimant's back condition due to his lack of a complete medical history. He stated, however, that injuries more recent than the 1981 work injury may have contributed to her current condition. EX 5. He did not state whether or not claimant requires treatment for her back.

[10] Claimant does not specifically challenge the administrative law judge's finding that she did not establish a change in her economic condition. Rather, the evidence claimant cites with regard to her employability is in reference to claimant's contention that the administrative law judge should have modified Judge Lasky's decision due to a mistake in fact. The administrative law judge's finding that claimant did not sustain a change in her economic condition therefore is affirmed.

We cannot affirm the administrative law judge's denial of future medical care, as the administrative law judge did not apply the Section 20(a) presumption to the issue of the work-relatedness of claimant's current condition. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989); 33 U.S.C. §920(a). Claimant need not affirmatively establish that her condition is related to the 1981 injury in order to be entitled to the Section 20(a) presumption. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Moreover, if claimant's condition is the result of the natural progression of her 1981 injury, employer remains liable for necessary medical treatment. *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). If the Section 20(a) presumption is invoked, it is employer's burden on rebuttal to establish that claimant's condition is the result of an intervening cause which is not the natural or unavoidable result of the work injury. *See generally Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954). We therefore vacate the administrative law judge's denial of future medical benefits. On remand, the administrative law judge must address the cause of claimant's current condition in accordance with Section 20(a). *See Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002). If claimant's condition is related to the 1981 injury, she is entitled to reasonable and necessary medical benefits at employer's expense.[11] 33 U.S.C. §907(a).

Accordingly, we vacate the administrative law judge's findings that claimant did not establish a mistake in fact in Judge Lasky's decision and that claimant is not entitled to future medical care, and the case is remanded for further findings consistent with this decision. In all other respects, we affirm the administrative law judge's Decision and Order-Denying Benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

[11] As stated, *supra*, Dr. Mandell opined that claimant needs palliative care, including prescription medication. EX 3. No doctor opined that claimant does not need care for her current condition. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Chiropractic care, however, is compensable only for manual manipulation of the spine necessary to treat spinal subluxation. *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998); 20 C.F.R. §702.404.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge