BRB No. 04-0360

GUISEPPE MANENTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICE, INCORPORATED	)	DATE ISSUED: 12/7/04
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand 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 self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2001-LHC-0821) of Administrative Law Judge Ralph A. Romano awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 working for employer as a hustler driver when, on November 24, 1995, he fell out of the cab hitting his back and right shoulder. In the initial Decision and Order issued in this case, 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. Judge Teitler further found that claimant did not present sufficient evidence that he was unable to perform his usual work due to 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. Subsequent to an appeal by claimant, 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.* [*Manente I*], BRB No. 98-0895 (April 14, 1999)(unpub.).

After undergoing surgery for a torn right rotator cuff, claimant filed a petition for modification under Section 22 of the Act, 33 U.S.C. §922, alleging that his right shoulder condition worsened. Administrative Law Judge Romano (the administrative law judge) found that claimant was not entitled to modification as there was no mistake in fact in Judge Teitler's decision or a change in claimant's shoulder contusion. The administrative law judge found that although claimant's shoulder tear had worsened, claimant did not establish a mistake in the finding that the tear was not causally related to claimant's work-related accident. Thus, the administrative law judge denied further benefits.

On appeal, the Board held that the newly submitted opinion of claimant's treating physician, Dr. Charko, attributing claimant's rotator cuff tear to his work trauma, Claimant's Exhibit (Cx.) 7, was sufficient evidence to support a conclusion that there was a mistake in fact in the prior decision regarding the cause of claimant's shoulder condition. The Board also held that as the opinion establishes that claimant has a torn rotator cuff that could have been caused by claimant's 1995 injury, the Section 20(a) presumption, 33 U.S.C. §920(a), was invoked as a matter of law. *Manente v. Sea-Land Service, Inc.* [*Manente II*], BRB No. 02-0584 (May 16, 2003), slip op. at 3. Further, the Board held that employer did not establish rebuttal of the Section 20(a) presumption and that claimant's right rotator cuff tear was therefore work-related as a matter of law. *Id.* Specifically, the Board held that Dr. Nehmer's opinion did not establish that claimant's shoulder condition was not aggravated by the work accident, and, in fact, established that the work accident could have aggravated claimant's condition.[1] *Id.*

[1]In a report dated January 25, 2002, Dr. Nehmer stated the rotator cuff tear diagnosed by Dr. Charko was the result of a natural progression of degenerative changes and not causally related to claimant's workplace fall. Employer's Exhibit (Ex.) D. However, Dr. Nehmer also testified in deposition that claimant's tendon could have reached a point of degeneration such that a relatively minor insult could cause a tear. Ex. E at 22, 28. The physician also testified that if claimant had no symptoms prior to the workplace accident and had symptoms subsequent to the accident, it increased the likelihood that the trauma he sustained played some part in the progression of his condition. Ex. E at 30-31.

The Board therefore held that the administrative law judge erred in denying modification. As such, the Board acknowledged that claimant was entitled to reasonable and necessary medical benefits pursuant to Section 7, 33 U.S.C. §907, and further observed that as claimant alleged that his rotator cuff tear caused additional disability, the case must be remanded to the administrative law judge for consideration as to whether claimant established a change in condition such that he was entitled to additional disability benefits. *Manente II*, slip op. at 4-5. Lastly, the Board instructed the administrative law judge, on remand, to consider claimant's counsel's entitlement to an attorney's fee, payable by employer, commensurate with claimant's success. *Manente II*, slip op. at 5.

On remand, the administrative law judge addressed a follow-up report of Dr. Nehmer, which employer submitted subsequent to the Board's remand, and concluded that the opinion, considered in conjunction with the remainder of the relevant evidence, establishes rebuttal of the Section 20(a) presumption by demonstrating that claimant's employment did not cause, accelerate, aggravate or contribute to his injury. Decision and Order on Remand at 2. The administrative law judge thus found that claimant did not establish a sufficient basis for modification, *i.e.*, that there was a mistake in Judge Teitler's determination as to the cause of claimant's right shoulder tear, and therefore the administrative law judge again denied the petition for modification.[2]

On appeal, claimant challenges the administrative law judge's denial of his petition for modification. Employer responds and urges affirmance of the administrative law judge's Decision and Order on Remand.

Claimant contends that the law of the case doctrine precluded the administrative law judge from determining, on remand, that employer established rebuttal of the presumption at Section 20(a). Claimant specifically argues that the Board's remand instructions limited the administrative law judge to the issues of disability, claimant's entitlement to medical benefits and attorney's fees. Claimant avers that the record in this

[2]In his previous Decision and Order, the administrative law judge found that the "treating physician status of Dr. Charko is, in part, offset by his ignorance of pre-accident medical documentation" in that the physician was not aware of and had not reviewed any data pertaining to claimant's pre-injury right shoulder condition. Decision and Order at 3. The administrative law judge further found that Dr. Charko acknowledged that rotator cuff tears may occur absent trauma due to a degenerative process and that over time normal muscle tone could gradually start to pull the tendon away from the bone. Cx. 7; Decision and Order at 3. Thus, the administrative law judge previously found the medical evidence of workplace causation in equipoise and not sufficient to modify Judge Teitler's decision. Decision and Order at 3.

case demonstrates claimant's entitlement to additional benefits related to his rotator cuff tear, based on the testimony of Dr. Charko as to an ongoing disability. In its response brief, employer argues that the administrative law judge properly considered the supplemental opinion of Dr. Nehmer, since the opinion is relevant medical evidence, the administrative law judge is legally permitted to reopen the record, and claimant offered no challenged to the submission of the evidence.

While the "law of the case" doctrine holds that the Board will not reconsider issues previously settled in its prior consideration of the case, *see Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Ravalli v. Pasha Maritime Services*, 36 BRBS 47 (2002), the Board has declined to apply the doctrine in instances where there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See, e.g., Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986).

In the instant case, the administrative law judge's decision on remand was based on the new "clarifying" opinion of Dr. Nehmer, in which the physician stated that claimant's rotator cuff surgery was neither caused nor aggravated by his workplace accident. Ex. F. While the administrative law judge's decision on remand reconsiders causation, an issue on which the Board ruled in its prior opinion, *Manente II*, slip op. at 3, the clarification by Dr. Nehmer of his views on causation demonstrates a change in the underlying factual situation of this case. We therefore reject claimant's assertion that the "law of the case" doctrine precluded the administrative law judge's admission of new evidence and finding on remand that employer established rebuttal of the Section 20(a) presumption. Further, under Section 22, the factfinder may admit new evidence and reconsider an issue on his own motion or that of any party. Thus, admission of this additional opinion is permissible under Section 22. An employer's right to modification under Section 22 displaces the notions of finality inherent in the law of the case doctrine and evinces the Act's preference for accuracy unless modifying the earlier decision would not render "justice under the Act." *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *see also 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).

As employer argues, claimant did not make any effort to foreclose its submission of this additional evidence after the Board's remand. Moreover, the issue of claimant's entitlement to disability benefits did not become final after the Board issued its decision in *Manente II*; as the case was remanded to the administrative law judge, the claim remained open for purposes of Section 22 modification. While employer did not formally invoke Section 22 in submitting its new evidence, requests for modification

need not be formal in nature and may consist of a submission of new evidence while the case is before the administrative law judge. *See Williams v. Nicole Enterprise, Inc.*, 19 BRBS 66 (1986). Accordingly, we hold that the administrative law judge properly reviewed the newly submitted opinion of Dr. Nehmer.[3]

Claimant further argues that Dr. Nehmer's newly submitted opinion is essentially a restatement of his earlier testimony as he did not offer any additional information or review any additional data. Claimant asserts that inasmuch as the Board has rejected Dr. Nehmer's opinion as support for a finding of rebuttal because the physician's opinion did not establish "that claimant's shoulder condition was not aggravated by the work accident," *Manente II*, slip op. at 3, this newly submitted opinion may be rejected on the same basis. Claimant also argues that absent a physical examination, Dr. Nehmer's conclusion concerning claimant's disability is not entitled to the weight of the contrary opinion of Dr. Charko.

In order to rebut the Section 20(a) presumption, an employer must present substantial evidence demonstrating that claimant's employment did not cause or aggravate his injury. *See 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 his newly submitted one page report, Dr. Nehmer stated, "[i]t remains my opinion that the rotator cuff tear, found by Dr. Charko, at the time of surgery, was not caused by nor aggravated in the accident of 11/24/95." Ex. F. Previously, Dr. Nehmer opined that claimant's rotator cuff was unrelated to claimant's workplace accident. Ex. D. However, the physician also testified that given certain circumstances, the trauma could have played some role in the progression of his condition. Ex. E at 30-31. As discussed above, the physician's latest opinion, submitted by the employer, clearly states that claimant's workplace accident did not cause or aggravate his torn rotator cuff. With this clarification, the administrative law judge properly found that Dr. Nehmer's opinion is sufficient to rebut the Section 20(a) presumption. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Swinton*, 554 F.2d 1075, 4 BRBS 466. Moreover, as it is within the administrative law judge's discretionary power to determine the weight accorded the evidence of record, including the opinions of the medical experts, *see, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Santoro v. Maher Terminals, Inc.*,

[3]As the administrative law judge could properly consider employer's new evidence, we reject claimant's assertion that the administrative law judge did not comply with the Board's remand instructions.

30 BRBS 171(1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), and he previously provided a rational basis for not according determinative weight to Dr. Charko, *see* note 2, *supra*, we affirm his conclusion that claimant has not established causation with regard to his right shoulder condition. Thus, the finding that claimant did not establish a sufficient basis for modification of the original decision is affirmed.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge