BRB No. 05-0207

DUSAN JUKIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN STEVEDORING, INCORPORATED	)	DATE ISSUED: 11/14/2005
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Second 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.

Christopher J. Field (Field, Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand (2000-LHC-2297) 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).

This is the third time this case has been before the Board. Claimant sustained a work-related injury to his right foot, diagnosed as a severe sprain, on January 15, 1999, and he remained out of work until June 27, 1999, with the exception of two brief attempts to return. Employer voluntarily paid temporary total disability and medical benefits from January 16 through February 19, 1999, ceasing when Dr. Nelson, an orthopedic specialist, stated that claimant's sprain had resolved and that he could return to work as a longshoreman wearing a high-top shoe and a protective boot. Subsequently, in August 2000, claimant was diagnosed with tarsal tunnel syndrome (TTS). Claimant filed a claim for disability and medical benefits to commence on February 17, 1999.[1]

In his first decision, the administrative law judge determined that claimant could return to his usual work as of February 17, 1999, and he denied any additional disability or medical benefits. Decision and Order (Aug. 20, 2001). Claimant appealed. The Board vacated the denial of benefits related to the sprain and remanded the case for the administrative law judge to delineate the time period for which medical benefits were requested and to reconsider whether claimant was disabled due to his right ankle sprain. However, the Board affirmed the administrative law judge's finding that claimant's TTS, diagnosed in August 2000, did not prevent claimant from returning to work between February 17 and June 27, 1999. *Jukic v. American Stevedoring, Inc.*, BRB No. 01-912 (Aug. 23, 2002).

On remand, the administrative law judge found claimant entitled to medical benefits related to the right foot sprain from February 17 through June 27, 1999, but not entitled to temporary total disability benefits, as he did not establish his inability to perform his usual work. Decision and Order on Remand (Jan. 28, 2003). Claimant appealed the denial of disability benefits. On appeal, the Board rejected claimant's assertion that the administrative law judge did not follow the Board's remand instructions, and it affirmed the denial of disability benefits for the period between February 17 and June 27, 1999. The Board stated, however, that the administrative law judge did not address claimant's motion for modification alleging a mistake in the determination that claimant was not disabled between February 17 and June 27, 1999, or thereafter, due to his TTS.[2] *Jukic v. American Stevedoring, Inc.*, BRB No. 03-384 (Feb. 6, 2004). Therefore, the Board remanded the case to the administrative law judge for consideration of claimant's motion for modification. *Id.*, slip op. at 4-5.

---

[1]Employer originally argued that it overpaid claimant when it paid benefits for February 18 and 19, 1999.

[2]Claimant's motion for modification of the administrative law judge's original decision dated August 20, 2001, was included in his brief on remand to the administrative law judge dated November 25, 2002.

Following the Board's second remand order, after granting a number of requested extensions, the administrative law judge set a deadline of September 20, 2004, for the submission of all evidence and briefings. On September 20, 2004, claimant faxed his medical consultant's report[3] and his brief, and, therein, for the first time, requested he be permitted via deposition or formal hearing to offer his own additional testimony about his condition. On October 20, 2004, the administrative law judge issued his decision on modification. Therein, he denied claimant's request that he be permitted to submit additional testimony via a formal hearing or deposition. After reviewing the newly-submitted and the originally-submitted medical evidence, the administrative law judge denied claimant's motion for modification.[4] Claimant appeals the administrative law judge's decision denying modification.

Claimant contends the administrative law judge erred in denying his motion for modification. Specifically, claimant argues that the administrative law judge erred in not allowing claimant to testify further about his condition, in not fully reconsidering the evidence of record, and in misinterpreting two of the medical reports. Claimant contends the administrative law judge's decision on second remand should be set aside and the case remanded for him to conduct a hearing on claimant's motion for modification. Employer responds, urging affirmance of the administrative law judge's decision.

Section 22 of the Act permits the modification of an award if the party seeking to alter the award establishes either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *see generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The administrative law judge has broad discretion to correct any mistakes of fact and may consider wholly new evidence, cumulative evidence, or may further reflect on evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). Generally, Section 22 is aimed at serving "justice under the Act," which overcomes notions of finality in decision-

[3]Claimant submitted a note from Dr. Sasson following a visit on September 14, 2004, wherein Dr. Sasson stated that he believed claimant's chronic TTS resulted from his January 1999 traumatic injury. He requested a repeat EMG with follow-up therapy and re-evaluation.

[4]The administrative law judge also found that the parties had agreed that the permanency of claimant's condition and his need for medical treatment after June 27, 1999, would not be resolved by the administrative law judge but would be remanded to the district director's office for development and consideration. The administrative law judge remanded the case accordingly.

making.[5] *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); *cf. McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1977). In rendering a decision on modification, as in an original decision, the administrative law judge is entitled to weigh the evidence and assess the credibility of all witnesses, including doctors, 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Claimant first alleges that the administrative law judge erred in failing to permit him to submit additional testimony, by deposition or at a hearing, regarding his foot/ankle condition. The administrative law judge declined to keep the record open and refused to let claimant testify again for three reasons. First, he found that, at the January 2001 hearing, although claimant was permitted to state that he still had pain in his foot, he was limited to testifying about his foot condition prior to June 27, 1999, the date he returned to work, as the parties agreed that his condition thereafter was not an issue before the administrative law judge. Tr. at 45-46, 48-49, 53. The administrative law judge also concluded that claimant's testimony would not establish there was a mistake in the finding that claimant did not suffer from TTS before June 1999 because claimant would need medical evidence to prove that he suffered from TTS during the period in question, and his testimony, alone, is not sufficient to render a diagnosis. Specifically, the administrative law judge stated:

> If Claimant wants to prove that he suffered from tarsal tunnel during the period in question, he needs medical evidence to prove that. Simply testifying that he has now been diagnosed with such and that he feels the same as he did prior to June 1999 is not going to convince me that Claimant was suffering from tarsal tunnel during the relevant period and therefore was totally disabled. As I found, and the BRB affirmed, Dr. Sasson did not testify as to whether Claimant's complaints during the relevant time period were a result of tarsal tunnel syndrome. Claimant's testimony cannot compensate for this shortcoming in the doctor's testimony.

[5]Thus, the administrative law judge is incorrect in stating that "Claimant cannot seek modification in attempt to get a second bite at the apple." Decision and Order on Second Remand at 12.

Decision and Order on Second Remand at 12; *see also* Decision and Order on Remand at 6 n.6. Finally, the administrative law judge determined that claimant had every opportunity to submit additional evidence prior to the close of the record on September 20, 2004, but did not do so. Instead, he requested yet another extension on the date the record was to close. Because the administrative law judge determined he had given the parties sufficient time to present their cases and because the administrative law judge had stated that the extension granted on July 30, 2004, was to be the "final" extension, the administrative law judge found that the request for an additional extension to submit additional deposition testimony or a hearing, on the date the record was to close, was not timely. Decision and Order on Second Remand at 12. In light of the specific facts of this case, we vacate the denial of benefits, and we must again remand this case to the administrative law judge.

Claimant unambiguously requested a hearing when this case was before the administrative law judge on his motion for modification. Cl. Brief on Second Remand at 3. As claimant requested a hearing prior to the close of record, albeit in the "eleventh hour," his request cannot be considered untimely. Moreover, although the administrative law judge gave reasons for believing that a deposition or hearing would be unnecessary because claimant's testimony would be irrelevant, a hearing allows the parties the opportunity to also introduce other evidence, which, if considered in conjunction with claimant's testimony, could make his testimony relevant to the resolution of the issue before the administrative law judge. Thus, until testimony or other evidence is actually presented and heard, its relevance is unknown, and it cannot be deemed irrelevant *per se*. Claimant, therefore, must be granted a hearing because he made a timely request for one. *See* 33 U.S.C. §§919(c), 922; *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994); *Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994); *see also Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). Therefore, we vacate the denial of the motion for modification and the denial of benefits, and we remand this case to the administrative law judge for him to conduct a hearing as requested by claimant, consistent with 20 C.F.R. §§702.331-702.351, 702.373.

In view of our decision to remand this case for an evidentiary hearing, we need not address claimant's contentions concerning the weighing of the medical evidence. In his decision, the administrative law judge should address the evidence previously submitted in conjunction with any new testimony and/or documentary evidence and make findings as to whether claimant established a mistake in fact in the prior decisions. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT)(2d Cir. 2003); *Manante v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

Accordingly, the administrative law judge's denial of benefits, denial of the motion for modification, and denial of claimant's request for a hearing are vacated, and the case is remanded for the administrative law judge to conduct a hearing on claimant's motion for modification.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

JUDITH S. BOGGS
Administrative Appeals Judge