BRB Nos. 98-0188
and 99-0223

JOHN NICASTRO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAHER TERMINALS	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

James R. Campbell, Middle Island, New York, for claimant.

William M. Broderick and Richard P. Stanton, Jr., New York, New York, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order on Modification (96-LHC-1166) 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 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 June 15, 1995, claimant injured his head, back, neck, right arm and leg at work after fainting and falling off a seat in a van. The van was transporting him from

the ship to the yard where he would drive cars onto the ship. Claimant has not returned to work. Employer voluntarily paid claimant temporary total disability benefits from June 16, 1995, to August 7, 1995. In his initial decision, the administrative law judge awarded claimant temporary total disability benefits from August 8, 1995, to November 12, 1995, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, up until November 12, 1995.

Claimant appealed the administrative law judge's decision to the Board, BRB No. 98-0188, and thereafter requested modification pursuant to Section 22 of the Act, 33 U.S.C. §922. Claimant sought continuing permanent total disability benefits after November 12, 1995, based on the submission of two magnetic resonance imagings (MRIs) of the cervical and lumbar spine performed on July 17, 1997, asserting that they established a change in condition or a mistake in a determination of fact in the administrative law judge's prior decision. Claimant asserted that the MRIs support his doctors' opinions regarding the extent of his disability. The Board therefore dismissed claimant's appeal, subject to reinstatement upon claimant's motion.

In his Decision and Order on Modification, the administrative law judge denied claimant's request for modification, finding the evidence insufficient to support an award of total disability benefits. Claimant appealed the administrative law judge's denial of his request for modification, and sought reinstatement of his prior appeal. By Order dated November 27, 1998, the Board reinstated claimant's prior appeal, BRB No. 98-0188, and consolidated it for purposes of decision with claimant's appeal of the administrative law judge's Decision and Order on Modification, BRB No. 99-0223.

On appeal, claimant challenges the administrative law judge's termination of total disability compensation on November 12, 1995, as well as his denial of claimant's motion for modification. Employer responds in support of both of the administrative law judge's decisions.

Claimant first argues that the administrative law judge erred in terminating total disability benefits on November 12, 1995, as the opinions of Drs. Head, Post and Patel, as well as the objective tests, establish total disability beyond this date. To establish his *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). The administrative law judge is entitled to weigh the evidence and draw his own inferences from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

In his initial Decision and Order, the administrative law judge credited the opinions of Drs. Koval and Greifinger that claimant could return to work without restrictions on November 13, 1995, over the opinions of Drs. Patel, Head, and Post that claimant was still disabled. The administrative law judge credited the opinions of Drs. Koval and Greifinger over that of Dr. Patel based on their superior credentials.[1] Decision and Order at 5; Emp. Exs. C-E; Cl. Exs. 3, 5, 6; 1997 Tr. at 43, 135, 221. Additionally, the administrative law judge credited the opinions of Drs. Koval and Greifinger over that of Dr. Head because the latter was not aware of claimant's previous complaints and treatment for dizziness and headaches, and he incorrectly assumed that claimant worked full-time pre-injury when he assessed claimant's functional capacity post-injury.[2] Decision and Order at 5; Emp. Exs. F, H; Cl. Exs. 4, 7; 1997 Tr. at 292-293, 378-380. Moreover, the administrative law judge found that Dr. Post's assessment of claimant's functional capacity post-injury is consistent with claimant's actual work history and therefore does not support his claim that he cannot perform his usual work. Decision and Order at 5; Cl. Ex. 8; 1997 Tr. at 22-23, 292-293. As the administrative law judge acted within his discretion in weighing the medical evidence, *see Calbeck*, 306 F.2d at 693; *Hughes*, 289 F.2d at 403, and his finding is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish his inability to perform his usual work after November 12, 1995.

In denying claimant's request for modification, the administrative law judge

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[1]Drs. Koval and Greifinger are Board-certified orthopedic surgeons while Dr. Patel is a Board-certified general surgeon. 1997 Tr. at 43, 135, 221.

[2]Records from the Brooklyn Longshoremen's Medical Center indicate that claimant was complaining of dizziness and headaches for some time prior to the work injury. Emp. Ex. F. Claimant did not work full-time prior to his injury, as he worked only 71 hours in the first six months of 1995, and worked a total of only 174 hours between 1988-1995, due to the guaranteed annual income program. Emp. Ex. H; 1997 Tr. at 292-293.

credited the opinion of Dr. Greifinger rather than those of Drs. Post and Head, and found that claimant did not establish total disability after November 12, 1995, despite claimant's submission of newly obtained MRIs which, claimant asserted, supports his doctors' opinions regarding the extent of his disability.

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 based on a mistake of fact or change in condition. Modification based on a change in condition may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Additionally, a fact-finder's authority to reopen proceedings pursuant to Section 22 extends to all mistaken determinations of fact. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972).

We affirm the administrative law judge's denial of claimant's motion for modification. The administrative law judge credited Dr. Greifinger's statement that the new MRIs do not change his opinion that claimant can return to work without restrictions over the contrary opinions of Drs. Post and Head. The administrative law judge found that Dr. Greifinger has greater expertise in reading MRI films than Dr. Post. Decision and Order on Modification at 2-3; Emp. Exs. D, E; Cl. Exs. 10-R, 11-R, 15-R; 1998 Tr. at 27, 66-83, 106-107. Moreover, the administrative law judge found Dr. Head's opinion to be vague and inconsistent. Decision and Order on Modification at 3-4; Cl. Exs. 13-R, 14-R; 1998 Tr. at 66-83, 106-107, 157-160, 178-179. As the administrative law judge acted within his discretion in crediting Dr. Greifinger's opinion over those of Drs. Post and Head, and as this opinion supports the administrative law judge's finding that claimant is not disabled, we affirm the administrative law judge's denial of claimant's request for modification. *See Calbeck*, 306 F.2d at 693; *Hughes*, 289 F.2d at 403.

Claimant also contends that the administrative law judge erred in not finding employer liable for payment of the medical services provided by Drs. Patel and Head, as well as for the MRIs. Section 7 describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. In order for a medical expense to be assessed against employer, the expense must be reasonable, necessary, and related to the work injury. 33 U.S.C. §907; *Romeike v. Kaiser Shipyards,* 22 BRBS 57, 60 (1989). The Act does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses,

but only that the injury be work-related. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

In his initial decision, the administrative law judge awarded claimant reimbursement for Dr. Patel's unpaid charges up to the date of Dr. Koval's report, November 13, 1995. Decision and Order at 6. The administrative law judge did not address whether the remaining charges of Dr. Patel, those of Dr. Head, and the MRIs are compensable in either of his decisions. Thus, the case must be remanded to the administrative law judge for consideration of the compensability of these medical services. *Romeike*, 22 BRBS at 57.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Modification are affirmed. The case is remanded to the administrative law judge for consideration of the compensability of the medical services at issue.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge