U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 February 2005

Case No.: 1993-LHC-00213

OWCP No.: 6-136408

BRB No.: 02-0762

In the Matter of

EARL LAWRENCE,
Claimant,
v.
STEVENS SHIPPING COMPANY
Employer,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

Appearances:

Ralph R. Lorberbaum, Esq.,
For the Claimant

Stephen Darling, Esq.,
For the Employer/Carrier

BEFORE: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

I. Preliminary Matters[1]

Subsequent to a conference call with the parties on September 23, 2004, the parties chose to waive a hearing on this remand and have this matter decided on the record. The parties submitted briefs on the issues before this Court pursuant to an order I issued on September 24, 2004.

II. Facts

The Claimant, Earl Lawrence, has twenty-six years experience as a longshoreman. Tr. at 11. At the original hearing held in this case, Claimant testified that he finished the eighth grade, could not read and write very well, and had to wear prescription eye glasses. Tr. at 10 – 11. He has never had any vocational training. Tr. at 11.

While employed at Stevens Shipping on January 16, 1991, Claimant was involved in a motor vehicle collision. Tr. at 22-23. As a result, Claimant sustained injury to both knees, and experienced pain in his right shoulder, back, and right leg. Tr. at 23-26. Claimant was initially diagnosed with neck and back strain and contusions of the right shoulder and knee. After seeking medical treatment for his injuries, Claimant went back to work although he did not feel that he had recovered from his back or knee injuries. Tr. at 30. In February 1992, Claimant decided he could no longer work due to pain. Tr. at 31. After briefly attempting to go back to work, Claimant decided that he was in too much pain and did not work again after March 27, 1992. Tr. at 35. The Claimant testified that he was in so much pain at that time he could barely walk. Tr. at 35.

III. Procedural History

This case is well-traveled; it has been remanded by the Board five times on various issues. In its most recent opinion in this case, the Board called on the administrative law judge to determine whether grounds for modification exist, noting, "Dr. DuBois's 1996 opinion that claimant is totally disabled is indeed different from his earlier opinion, and if credited, establishes a basis for modifying the denial of benefits on the back injury claim." Lawrence, BRB No.: 02-0762 (Jul. 25, 2003), slip op. at 4. The Board furthermore charged the ALJ to "provide valid and rational reasons for the weight he assigns to the relevant opinions of Drs. DuBois, Thompson and Nicholson." Id. at 4-5.

Since Judge John Holmes is no longer with the Department of Labor, this case was assigned to a new Administrative Law Judge pursuant to Strantz v. Director, OWCP, 3 BLR 1-431 (1981).

IV. Stipulations

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[1] *The following abbreviations will be used as citations to the record:*

JS	-	*Joint Stipulations;*
TR	-	*Transcript of the Hearing*
CXI	-	*Claimant's Exhibits*
CXII	-	*Claimant's Exhibits in support of his Motion for Modification; and*
EX	-	*Employer's Exhibits.*

The parties have stipulated to and I find the following facts:

1. The jurisdiction of the Longshore Act applies;
2. The date of the accident was January 16, 1991;
3. An injury occurred out of and in the course of employment;
4. Claimant's average weekly wage was $796.22.

V. Issues

1. Whether Claimant has established his inability to return to his usual work due to his work-related back condition, so as to establish a change in condition or mistake of fact warranting a modification of his benefits pursuant to Section 22 of the Act.

2. Whether, assuming Claimant's inability to return to his former Longshore employment, the employer has shown suitable alternate employment within the meaning of the Act.

VI. Contentions

A. Claimant's Contentions

Claimant argues that the opinion of Dr. DuBois, his treating physician, should be accorded greater weight in determining whether a change in condition warranting a Section 22 modification has occurred. Claimant contends that his back condition, which has already been found to be causally related to the January, 1991 work accident, has worsened, thus entitling him to permanent total disability benefits.

B. Employer's Contentions

Employer, on the other hand, first argues that Claimant has yet to establish that there has been a change in condition or mistake of fact that warrants a Section 22 modification under the Act. Second, Employer argues that this Court should discount Dr. DuBois's testimony due to the conflicting opinions he has given through the years. Finally, Employer asserts that it has established the existence of suitable alternate employment.

VII. Summary of Evidence

A. Claimant's Testimony

Claimant, Earl Nelson Lawrence, was born September 25, 1948. Tr. at 10. He finished the eighth grade, and testified that he did not read or write very well. Tr. at 10-11. He wears prescription eye glasses for near-sightedness. Tr. at 11. At the time of the hearing in this case, Claimant had not received any vocational training, and had worked as a longshoreman for

twenty-six nonconsecutive years. Tr. at 11-12. Claimant had a South Carolina driver's license at the time of the hearing in this case. Tr. at 43.

Claimant worked for Local 1422, and received jobs on a seniority system. Tr. at 12. He held an "F" classification; only union members who held a "Gold Star" or "A" through "E" classification received work before he did. Tr. at 13. Claimant testified that he had, among other things, worked as a hold man, truck driver, and forklift driver. Tr. at 13.

The Claimant was involved in several work accidents and motor vehicle accidents away from work, the most recent of which occurred January 16, 1991, while working for Stevens Shipping. Tr. at 15-21. At that time, Claimant was driving a yard Hustler – a small truck used to move containers – when he was hit broad-side by another truck coming from the left. Tr. at 22-23. Claimant testified that immediately after the accident, he felt pain in his back, his right leg, and his right shoulder, as he was thrown across the front seat of the truck. Tr. at 24.

Immediately following the accident, Claimant was taken to the emergency room and was told to take three days off from work. Tr. at 24. Due to continued pain, Claimant eventually consulted Dr. Emily Tatum, who had treated him following an earlier, non-work-related motor vehicle accident. Tr. at 25. Dr. Tatum prescribed physical therapy, which Claimant believed made his condition worse. Tr. at 25-26.

Claimant was then referred to Dr. Thompson. Tr. at 28. Claimant was not pleased with the treatment he received from Dr. Thompson, and Dr. Thompson sent Claimant back to work in May of 1991. Tr. at 28. Claimant did not feel that he had recovered at that time, and testified that he was in constant pain in his knees and had bad headaches. Tr. at 29-30.

Following his return to work in May 1991, Claimant testified that he tried to get jobs as a longshoreman that were lighter duty, and got through his work limping and "eating pain pills." Tr. at 31. In February, 1992, Claimant decided that he could no longer work through so much pain, and consulted Dr. Gilmore. Tr. at 32. After finding that treatment from Dr. Gilmore would not be covered by insurance, Claimant did not pursue further treatment. Tr. at 33-34. Claimant went back to work, until, he testified, the pain became unbearable. Tr. at 35. Claimant did not work again after March 27, 1992. Tr. at 35.

Eventually, Claimant consulted Dr. Friedman. Dr. Freidman treated Claimant's knee injury, eventually performing knee surgery. Tr. at 36. In April of 1992, Dr. Friedman referred Claimant to Dr. DuBois for treatment of his back, shoulder and neck. Tr. at 37. Claimant testified that he was having "a bunch of muscle spasms" and that he had constantly been in back pain since January 16, 1991. Tr. at 37.

Claimant testified that he believes that he is incapable of returning to longshore work, and that he believes he is incapable of working an eight hour day anywhere. Tr. at 39. Claimant testified that he cannot sit or drive for long periods of time because of pain. Tr. at 40-41.

B. <u>Medical Evidence</u>

Emily Tatum, M.D.

Dr. Tatum treated Claimant after the motor vehicle accident. See CXI - 8. While a review of her records indicates that she was primarily concerned with Claimant's knee injury, she did note that Claimant suffered from mild chronic low back pain and mild chronic neck and shoulder pain secondary to chronic muscular ligamentous strain in a letter dated July 3, 1990. Dr. Tatum stated in that letter that she did not feel Claimant's back condition would improve.

Dr. Tatum suspected Claimant of malingering, and in her January 29, 1991, notes wrote that Claimant had a "full range of motion in his shoulder when unobserved," and pointed out that "Mr. Lawrence moves easily in the room, hops onto exam table with no difficulty." Dr. Tatum also indicated that Claimant had "muscle spasms in the shoulder girdle and some muscle spasms in the peri-spinous lumbar muscles." On February 14, 1991, Dr. Tatum described Claimant's condition as musculoskeletal pain syndrome secondary to work accident.

Susan Harvey, M.D.

Dr. Harvey examined Claimant subsequent to a referral from Dr. DuBois. See CXI - 9. Dr. Harvey noted "multiple areas of paraspinus and gluteal muscle spasms with multiple active trigger points." She diagnosed Myofascial Pain Syndrome, but reported that Claimant did not take his medication consistently and did not progress well with physical therapy. Dr. Harvey referred the patient back to Dr. Dubois for determination of his disability rating.

Joseph A. Thompson, M.D.

Dr. Thompson, an orthopedic surgeon, performed an independent medical evaluation of Claimant on March 13, 1991. CXI - 10. Claimant indicated he was suffering from pain in the back, neck, shoulder, and lower back. Dr. Thompson did not observe any muscle spasm, and noted that "[w]ith any attempts to produce range of motion, he [Claimant] complains bitterly of pain though, when he is distracted, the range of motion is somewhat improved." Dr. Thompson diagnosed back sprain and back strain, and advised Claimant to return for further treatment. On May 3, 1991, Dr. Thompson recorded a "perfectly normal" CT scan of Claimant's back and stated that Claimant could return to work in two weeks.

Waddell Gilmore, M.D.

Dr. Gilmore examined Claimant on February 20, 1992. CXI - 12. Dr. Gilmore noted discomfort in the left and right trapezius musculature and lower back pain, but he did not record any evidence of spasm. Dr. Gilmore diagnosed chronic lumbar sprain or strain, and, in a letter to Employer's counsel dated September 18, 1992, wrote, "I have not found anything to indicate he has permanent impairment" due to a back injury. EX - 9.

John A. Nicholson, M.D.

Dr. Nicholson, an orthopedic specialist and Assistant Professor in the Back Pain Clinic at the Medical University of South Carolina, examined Claimant on January 8, 1993, and on

January 15, 1993. CXI – 13. In his notes, Dr. Nicholson wrote "low back pain, possibly secondary to myofascial pain syndrome although no discreet palpable spasm was detected. Many elements of his examination were not felt to be valid." Dr. Nicholson informed Claimant that he believed that he was at maximum medical improvement at that time and should return to work. Dr. Nicholson related that Claimant strongly disagreed with his recommendation.

John J. DuBois, M.D.

Dr. John DuBois is Claimant's primary care physician. CXI – 17. He first saw Claimant on April 29, 1992. In a letter dated September 8, 1992, Dr. DuBois summarized his records regarding Claimant's medical treatment, and gave the following opinion regarding Claimant's disability:

> The history of two previous disabilities makes his present disability more complex. He apparently sustained a back injury in 1983, and an injury with a chip fracture of the triquetrum bone of the left wrist in 1986. The left wrist injury has resolved. The back injury continued to cause him problems until 1988. At the time he was initially seen I was impressed by the degree of muscle spasm in the para vertebral area, and his complaint of back pain which he dated to the Jan [*sic*] 1991 accident. I obtained an MRI Scan at MUSC, which showed a normal lumbar spine. This ruled out the possibility of significant back injury. I believe it is possible that the injury in 1991 aggravated his partial disability from the previous back injury of 1983 and is a contributing factor for the slowness of his recovery. However, the normal MRI implies that the pain is all from myositis, or inflammation of the paraspinal muscles, not from vertebral damage, and should not be permanently disabling.
>
> If the patient had a partial disability with back pain and muscle spasm from a previous injury, the accident could have aggravated this condition, particularly with the gait disability from his knee injury, and made his present disability more severe.
>
> A previous back injury, aggravated by the Jan. 1991 accident, would make his present disability more severe because of the increase in back muscle spasm and pain and may be an explanation of the slowness in his recovery.

On August 28, 1992, Dr. DuBois stated that "it is clear" Claimant "has been magnifying his symptoms and appears to be unable or unwilling to return to the heavy type of trucking duty that he was performing" prior to the 1991 accident. On October 28, 1992, Dr. DuBois wrote, "I am concerned that he is attempting to head toward permanent disability because of the continued muscle pain. It is clear at this time that he is unable or unwilling to move with sufficient energy to enable him to return to a laboring type job." Dr. DuBois then referred Claimant to the Pain Management Center, in hopes that "local nerve block therapy might be of help in reducing his discomfort and at least allowing a better idea as to what his disability is.

In December, 1992, Dr. DuBois reported he was still treating Claimant for chronic low back pain, and expected him to be able to return to work in another one to two months. On January 20, 1993, Dr. DuBois opined that Claimant was permanently disabled due to myofacial pain syndrome, chronic low back pain, and persistent myositis with motion disability, all of which arose out of a 1986 injury as aggravated by the January, 1991 accident. In his treatment notes for January 13, 1993, Dr. DuBois wrote that Claimant

> had a poor progress in either physiotherapy and chronic pain. It was there pain [*sic*] that he needed to receive an impairment rating since it was clear that he was still having low back pain and was incapable of returning to work. I see little alternative but to this approach. His original accident was in 1986. I believe that this was the onset of his back injury. This probably was aggravated again by the accident that occurred in 1991. Persistent disability following accidents appears to be a pattern with this patient.

On June 29, 1993, Dr. DuBois reported Claimant still had "marked tenderness of the paravertebral muscles with any movement. Patient winces with any pressure on his back." Dr. DuBois also noted that there were "marked muscular spasms in back and neck consistent with his myosfacial pain syndrome." Dr. DuBois's treatment notes through March, 1996 all record Claimant's continued complaints of pain and the various treatments Dr. DuBois tried to alleviate Claimant's condition.

Dr. DuBois summarized his most recent opinion in a letter dated May 14, 1996. There, Dr. DuBois concluded that while Claimant may exaggerate his symptoms, he is certainly in pain from myofascial pain and fibromyalgia. Dr. DuBois has objectively seen and documented Claimant's muscle spasms, which causes his back pain. Dr. DuBois believes that Claimant is unable to work as a longshoreman because of his continued myofascial pain and fibromyalgia causing muscle spasms and making it difficult for him to continue to operate any form of equipment or be involved in labor-type work situations. This is essentially the same information Dr. DuBois included in his 1993 disability reports.

C. Vocational Expert Testimony

Lynn Morris McCain, an employee of Palmetto Rehabilitation Services, testified as a vocational expert at the hearing. Tr. at 70-71. Ms. McCain performed a job market survey in this case on April 20, 1993. Tr. at 72; EX 10.

In that job survey, Ms. McCain identified five positions that she stated Claimant could do within his physical limitations. Tr. at 78. In preparing the job market survey, Ms. McCain reviewed Claimant's medical reports and deposition testimony. Tr. at 72. Ms. McCain did not personally test or interview Claimant, nor did she personally speak with any of his physicians. Tr. at 82. Based on that information, Ms. McCain looked for jobs that did not involve "heavy work" and positions that would allow Claimant to "sit and stand interchangeably, and probably

sit more . . . than standing or walking," and jobs that required a ninth grade education. Tr. at 73. Ms. McCain located the jobs through the newspaper and the Job Service – a free employment agency provided by the state of South Carolina that lists available jobs. Tr. at 73-74.

After identifying positions that she believed the Claimant could perform, Ms. McCain sent the job descriptions to the physicians that had treated Claimant: Dr. Tatum, Dr. Friedman, Dr. Thompson, and Dr. DuBois. Tr. at 74. Ms. McCain summarized the doctor's responses to the job positions in her testimony:

> Dr. Friedman approved track hoe operator, bulldozer operator, front end loader, and cab driver. He disapproved delivery driver. Dr. Tatum only approved cab driver. Dr. DuBois approved cab driver and did not approve any of the other positions. Dr. Thompson approved track hoe operator, front end loader, delivery driver, and cab driver, and he did not approve bulldozer operator.

Tr. at 75.

Ms. McCain did not specifically discuss Claimant's situation with any of the potential employers, including his history of injury and pain problems, including his use of pain medication. Tr. at 83. Ms. McCain did not evaluate Claimant's mental capacity, instead relying on his deposition testimony that he dropped out of school in the ninth grade. Tr. at 84.

VIII. Discussion

A. Modification

This is a Section 22 modification case. Section 22 states, in essence, that any party-in-interest may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in condition.

Traditional notions of res judicata do not govern Section 22 modification proceedings, which may be brought whenever changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the LHWCA. Bath Iron Works Corp. v. Director OWCP [Hutchins], 244 F.3d 222 (1st Cir. 2001). Section 22 is not, however, intended to provide a back-door route to retry a case, or to protect litigants from their counsel's litigation mistakes. Kinlaw v. Stevens Shipping & Terminal Co., 33 BRBS 68 (1999).

Since the rationale for allowing modification under the act is to render justice, the trier of fact is given wide discretion to modify a compensation order. O'Keeffe v. Aerojet-General Shipyards, 404 U.S. 254 (1971).

This case turns on whether Dr. DuBois's medical records indicate a change of Claimant's physical condition or whether there was a mistake of fact on Administrative Judge Holmes's part at the original hearing.

1. Change in Condition

I find that the Claimant has not established a change in his physical condition warranting modification under Section 22 of the Act.

When a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in the claimant's condition. Jensen v. Weeks Marine, Inc. (Jenson II), 34 BRBS 147 (2000), decision and order on remand at BRBS (BRB No. 01-0532) (Nov.30, 2001).

This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought.

In its most recent remand, the Board noted that "Dr. DuBois's 1996 opinion that claimant is totally disabled is indeed different from his earlier opinion, and if credited, establishes a basis for modifying the denial of benefits on the back injury claim." Lawrence, BRB No.: 02-0762 slip op. at 4 (Jul. 25, 2003).

Here, the Claimant is arguing that his physical condition has changed. While there is no bright line rule as to what constitutes a change in physical condition sufficient to establish necessity for a modification proceeding or to award or decrease benefits, the Claimant here must show deterioration in his physical condition following the entry of Judge Holmes's original order (March 21, 1994) and before the filing of the Request for Modification (May 19, 1995). See Rizzi v. Four Boro Contracting Corp., 1 BRBS 130 (1974). The party requesting the modification bears the burden of proof in showing a change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding , Inc., 16 BRBS 168 (1984). The Section 20(a) presumption is inapplicable to the issue of whether a claimant's condition has changed since the prior award. Leach v. Thompson's Dairy, Inc., 6 BRBS 184 (1977).

In this case, Claimant argues that the medical records of Dr. DuBois, CXII-1, 3, and 4, establish a change in condition. The Board also indicated its belief that these records indicate a change in condition. See Lawrence v. Stevens Shipping Co., BRB No. 01-0172 (Oct. 22, 2001) (unpublished) at 5.

Dr. DuBois's records, as discussed supra, do not show deterioration in Claimant's condition between March 21, 1994 and May 15, 1995. On January 20, 1993, Dr. DuBois submitted an Examining Physician's Statement for the ILA Pension Fund, in which he characterized Claimant's condition as totally and permanently disabled as of April 29, 1992 due to non-responsiveness to treatment for pain. CXI-17. The letter Dr. DuBois addressed to Claimant's counsel on May 14, 1996 states "Mr. Lawrence's physical condition has not deteriorated since he

has been seen in 1993, [*sic*] it has stabilized." CXII-4. Dr. DuBois went on to state that "Mr. Lawrence is unable to work as a longshoreman because of continued . . . pain . . . and muscle spasm." Id.

These records do not show a change in Claimant's condition during the pertinent time. On the contrary, Dr. DuBois wrote in 1996 that Claimant's condition had stabilized since 1993. I find that there is, therefore, no evidence to support a finding of deterioration in Claimant's physical condition warranting modification under Section 22 of the Act. See Avondale Indus., Inc. v. Director, OWCP, 977 F.2d 186 (5th Cir. 1992) (holding that the judge is not required to accept the opinion or theory of a medical expert that contradicts the findings of the adjudicator which are based on common sense).

2. Mistake of Fact

A mistake of fact is also a basis for a Section 22 modification. The Administrative Law Judge has broad authority in correcting any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon the evidence initially submitted." O'Keeffe, 404 U.S. at 254; Kinlaw v. Stevens Shipping & Terminal Co., 33 BRBS 68 (1999). This authority "is not limited to any particular type of facts." McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (CRT) (D.C. Cir. 1976). It is, however, a discretionary authority: "it is clear that while the administrative law judge has the authority to reopen a case based on any mistake in fact, the administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening a case will render justice." Kinlaw, 33 BRBS at 72, citing Washington Soc'y for the Blind v. Allison, 919 F.2d 763, 769 (D.C. Cir 1991).

The Board in Kinlaw went on to explain:

> The holdings of both McCord and Woodberry belie the Director's assertion that the interest in arriving at the 'correct' result always overrides the interest in finality. In sum, the language of Section 22 itself . . . and the judicial interpretations of the 'mistake in fact' provision clearly demonstrate the discretionary nature of reopening, and that in deciding whether to reopen a case, the administrative law judge should consider whether reopening will render justice under the Act, a consideration which requires a weighing of competing equities. The Board will review the administrative law judge's findings in this regard under the abuse of discretion standard.

Id. at 73, citing Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998); Duran v. Interport Maintenance Co., 27 BRBS 8, 14 (1993); Dobson v. Todd Pacific Shipyards Corp., 21 BRBS 174 (1988).

In this case, the Board has called upon this administrative law judge to determine whether Judge Holmes made a mistake in fact when he interpreted the medical evidence before him at both the original hearing, and to supply "valid and rational reasons for the weight he assigns to the relevant opinions of Drs. DuBois, Thompson and Nicholson." Lawrence v. Stevens Shipping Co., BRB No. 02-0762 (Jul. 25, 2003), slip op. at 4.

As a general rule, unless there are valid reasons to discount it, the opinion of a treating physician is entitled to greater weight than the opinions of one time examining physicians or consultants who have never seen the Claimant. Auton v. Easter Gas & Fuel Corp., 10 BRBS 255 (1979); Honaker v. Jewell Ridge Coal Corp., 12 BRBS 609, 616 (1980). The administrative law judge is not, however, bound to accept the opinion or theory of any particular medical examiner. The judge may rely upon his/her personal observation and judgment to resolve conflicts in the medical evidence. A judge is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962); Ennis v. O'Hearne, 223 F.2d 755 (4th Cir. 1955). Furthermore, the trier of fact determines the credibility of the medical witnesses. Such determinations are to be respected on appeal. John W. McGrath Corp. v. Hughes, 289 F.2d 403 (2d Cir. 1961).

In his September 20, 2000, Decision and Order on Remand in this case, Administrative Law Judge Holmes explained his rationale in finding that Claimant was not totally disabled:

> Mr. Lawrence did testify that he does not feel that there are any longshore jobs he could perform. I do not credit this assertion, as I find that Mr. Lawrence exaggerates his symptoms and suffers what may be referred to as "compensation neurosis." Several doctors specifically state that they suspected malingering or exaggeration, while others cited inconsistent results. Dr. Tatum's treatment notes make mention of the difference in the Claimant's motion and apparent pain when observed and unobserved. Dr. Thompson noted a similar effect; range of motion improved when the Claimant was distracted from what the doctor was doing. Dr. Nicholson questioned the validity of the testing he performed, based on Mr. Lawrence's responses. Dr. Izard stated point blank, "I believe he is exaggerating his symptoms." Dr. Warren's 1988 statement that he is not sure an injury occurred can also be read as doubting what the Claimant tells him. Further, I note that Mr. Lawrence continued to seek additional opinions when he heard things he did not like, such as that he could and should return to work. He expressed to Dr. Gilmore that he was not happy with Dr. Thompson or Tatum because they "did not have his interests at heart." . . . .
>
> Moreover, after this accident and his initial treatment, Mr. Lawrence testified that he worked for an additional nine months as a longshoreman. This is quite a substantial length of time and seems at odds with the amount of pain Mr. Lawrence was complaining of. He did say that he stopped because of pain, but as I noted above, his assertions of such are not fully credible. It is solely within the judge's discretion to accept or reject all or part of any part of any testimony, according to his judgment. Perini Corp. v. Hyde, 306 F.Supp. 1321, 1327 (D.R.I. 1969). The Board will not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable." Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979); Phillips v. California Stevedore & Ballast Co., 9 BRBS 13 (1978).

Lawrence v. Stevens Shipping Co., Case No.: 1993-LHC-213 (Sept. 20, 2000), slip op. at 8-9 (internal citations omitted). Furthermore, Judge Holmes reiterated that his findings were "based upon . . . my firsthand observation of the witness at hearing." Id. at 9.

Thus, it is difficult to determine from the record in this case whether a mistake of fact existed, in which case reconsideration on modification is appropriate, or whether Judge Holmes was merely acting within his broad discretion as the trier of fact in this case and making the necessary credibility determinations, in which case Claimant's proper recourse is an appeal on the merits, involving review of Judge Holmes's findings under the substantial evidence standard. McCord v. Cephas, 532 F.2d 1377 (D.C. Cir. 1976).

In this case, valid, rational reasons exist for Judge Holmes's interpretation of the medical evidence. It is true that, as treating physician, Dr. DuBois's opinion would generally received greater weight, but Judge Holmes chose to discount that opinion for two reasons: first, Judge Holmes found the Claimant and his subjective complaints of pain lacked credibility; second, Judge Holmes found that Dr. DuBois's medical opinion was outweighed by the fact that other doctors, including Dr. Thompson and Dr. Nicholson, believed Claimant to be malingering. Even Dr. DuBois's 1996 letter to Claimant's counsel indicates that, even though Dr. DuBois's believes Claimant is disabled, Claimant exaggerates his symptoms.

Thus, I find rational, valid reasons exist to credit Dr. Thompson and Dr. Nicholson's opinions over Dr. DuBois's opinion. Even Dr. DuBois—the physician most sympathetic to Claimant's case—indicates that Claimant exaggerates his symptoms. Dr. Tatum, Dr. Nicholson, and Dr. Thompson all indicated that Claimant was exaggerating his symptoms as well. Judge Holmes, who had the opportunity to observe the witness and determine his credibility at the original hearing in this case, had good reason to disbelieve Claimant's version of the events in this case, casting further doubt upon Dr. DuBois's medical evidence.

I find that there is nothing in this record requiring a finding of mistake of fact and allowing a modification of the decision in this case so that the interests of justice may be served.

I note that Claimant did not submit any recent medical evidence regarding his alleged back condition at this stage of the case – the most recent medical evidence in the record is from 1996 – nor did Claimant request a hearing at this time. Assuming Claimant continues to pursue this case, evidence of a change of condition would obviously bolster his claim as there is nothing in the record as it now exists showing a change of condition or mistake of fact.

B. Suitable Alternate Employment

Since I have not found that Claimant is unable to return to his usual employment due to his back injury, I will not reach the issue of suitable alternate employment and Claimant's post-injury, wage-earning capacity.

IX. Conclusion

I find that Claimant has not met his burden of showing a mistake of fact or change of condition in this case.

X. Order

Claimant's motion for modification is DENIED.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/vlj
Newport News, Virginia