

BRB Nos. 89-100
and 90-585

GEORGE R. KRYLA)
)
 Claimant-Respondent)
)
 v.)
)
 BRADY-HAMILTON STEVEDORE) DATE ISSUED:
 COMPANY)
)
 and)
)
 MANHATTAN RE-INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeals of the Decision and Order and Order Denying Motion for Modification of James J. Butler, Administrative Law Judge, United States Department of Labor.

Donald R. Wilson (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

John Dudrey (Williams, Fredrickson, Stark, Weisensee & Goldsmith, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Motion for Modification (82-LHC-1757) of Administrative Law Judge James J. Butler awarding benefits 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time that this case has been appealed to the Board. To briefly recapitulate,

claimant suffered a separated right shoulder on November 7, 1980, when he stepped into a hole and fell aboard a ship. He returned to light duty work on April 19, 1981, and has remained in such work at least until 1987. In his initial Decision and Order, dated May 3, 1983, the administrative law judge found that claimant's post-injury wage-earning capacity was \$349.85, based on his physical impairment and claimant's testimony of his inability to work at approximately 30 percent of the employment opportunities that would be available to him except for his injury. The administrative law judge awarded claimant permanent partial disability benefits in the amount of \$99.95 per week (two-thirds of the \$149.93 difference between his average weekly wage at the time of his injury and his wage-earning capacity thereafter). *See* 33 U.S.C. §908(c)(21), (h). The administrative law judge also awarded employer relief pursuant to 33 U.S.C. §908(f) because claimant's back condition and ankle injury were previous disabilities manifest to employer that combined with the shoulder injury to produce a greater degree of permanent disability. Employer then appealed the administrative law judge's decision to the Board. *See Kryla v. Brady-Hamilton Stevedore Co.*, BRB No. 83-1272 (Dec. 31, 1987) (unpublished).

The Board vacated and remanded the administrative law judge's finding that claimant sustained a 30 percent loss of wage-earning capacity. The Board instructed the administrative law judge on remand to specifically determine whether claimant's post-injury employment is regular and continuous so as to establish his true wage-earning capacity; in making this determination, the Board specifically noted that the administrative law judge on remand should discuss the relevant factors and evidence, including the medical and vocational evidence, as well as the photographs, film, and statistics in arriving at claimant's wage-earning capacity and loss. *See id.*, slip op. at 3.

In his Decision and Order on remand, dated November 27, 1988, the administrative law judge, without addressing the evidence noted by the Board in its decision, reinstated his prior award based on claimant's testimony that he is unable to perform 30 percent of the employment opportunities that would be available to him except for his shoulder injury. The administrative law judge also found that claimant's ability to secure longshore work in the future will diminish as his home port becomes more economically depressed. Employer thereafter appealed the administrative law judge's decision to the Board. BRB No. 89-100. While its appeal was pending, employer informed the Board that it was seeking modification of the administrative law judge's Decision and Order; pursuant to this communication, the Board, in an Order dated April 28, 1989, dismissed employer's appeal without prejudice and remanded the case to the administrative law judge for modification proceedings. In an Order Denying Motion for Modification dated January 17, 1990, the administrative law judge summarily denied employer's motion, stating that the issue of claimant's post-injury wage-earning capacity had been addressed in his May 3, 1983, decision.

Employer thereafter appealed the administrative law judge's Order Denying Motion for Modification to the Board. By Order of June 4, 1990, the Board acknowledged receipt of this appeal, BRB No. 90-585, and reinstated employer's prior appeal, BRB No. 89-100. On appeal, employer challenges the administrative law judge's finding that claimant sustained a 30 percent loss of wage-earning capacity due to his shoulder injury, as well as the denial of its petition for modification. Claimant responds, urging affirmance.

We first address BRB No. 89-100, in which employer appeals the administrative law judge's Decision and Order on remand. Employer asserts the administrative law judge erred by failing to comply with the Board's directive on remand to discuss the relevant evidence pursuant to the applicable law in determining claimant's post-injury wage-earning capacity. Additionally, employer challenges the administrative law judge's finding that only some of claimant's post-injury longshore employment constitutes claimant's regular and continuous employment.

In his Decision and Order on remand, the administrative law judge once again credited claimant's testimony in determining claimant's loss of wage-earning capacity. In rendering this determination, the administrative law judge did not follow the Board's instruction to discuss the relevant evidence pursuant to the applicable law for determining claimant's post-injury wage-earning capacity. Accordingly, we hold that the administrative law judge erred when he failed to comply with the Board's remand order. Section 802.405(a) of the regulations governing the operations of the Board provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such action shall be taken as is directed by the Board." 20 C.F.R. §802.405(a). See *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989). The Board's Decision and Order remanding this case to the administrative law judge explicitly directed the administrative law judge to discuss the relevant factors for determining claimant's post-injury wage-earning capacity, see generally *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979), and the relevant evidence of record, including the medical and vocational evidence, as well as the photographs, film and statistics in arriving at claimant's post-injury wage-earning capacity and loss thereof. See slip op. at 3. Thus, in considering the issue of claimant's post-injury wage-earning capacity, the administrative law judge ignored the Board's directive to consider all of the evidence relevant to that issue. We, therefore, are compelled to remand this case once again for proper consideration of the record evidence in accordance with the Board's previous decision.¹ See *Obert*, 23 BRBS at 157; *Randolph*, 22 BRBS 443.

In BRB No. 90-585, employer appeals the administrative law judge's denial of its motion for modification. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification of a prior decision is permitted based on a mistake of fact or change in claimant's condition. See *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In order to reopen the record under Section 22, the moving party must allege a mistake of fact or change in condition and assert that evidence to be produced or of record would bring the case within the scope of Section 22. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989).

¹On remand, the administrative law judge should also address employer's contention that all of claimant's post-injury longshore employment constitutes his regular and continuous employment and establishes claimant's true wage-earning capacity.

Employer attached to its petition for modification claimant's wage records from 1980 to 1987. Employer asserted that this evidence established no loss of wage-earning capacity after claimant returned to work from his shoulder injury and established either a change in claimant's condition or a mistake of fact. In his one-paragraph Order Denying Motion for Modification, the administrative law judge did not address employer's evidence; rather, the administrative law judge found that this issue had been addressed in his prior May 3, 1983, decision, and that his finding still stands on the record made at that time. We hold that the administrative law judge erred by failing to address employer's evidence submitted on modification. Although the administrative law judge is permitted to have before him the record from the prior hearing when considering a motion for modification, it is an abuse of discretion not to consider new evidence submitted in a modification proceeding. *See Dobson*, 21 BRBS at 174. Accordingly, we vacate the administrative law judge's Order Denying Motion for Modification and remand this case for the administrative law judge to consider employer's motion in light of both the old and new evidence of record.²

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Modification are vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

²We note that consideration of any evidence employer submitted on modification to establish a change in condition must be considered consistent with the decision in *Rambo v. Director, OWCP*, 28 F.3d 86, 28 BRBS 54 (CRT) (9th Cir. 1994), *cert. granted*, 63 U.S.L.W. (U.S. Jan. 13, 1995)(No. 94-820). In *Rambo*, the United States Court of Appeals for the Ninth Circuit held that change in non-physical conditions is not sufficient to meet the change in condition requirement for granting modification. Oral argument on this issue will be held before the Supreme Court on April 25, 1995.