BRB Nos. 00-0206
and 01-0527

RICKY L. NELSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EMTECH ENVIRONMENTAL	)	DATE ISSUED: 10/30/01
	)	
and	)	
	)	
INSURANCE COMPANY OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and the Decision and Order on Employer's Motion for Modification of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Bradford M. Condit, Corpus Christi, Texas, for claimant.

Kenneth G. Engerrand (Brown Sims, P.C.) and Michael D. Murphy (Hays, McConn, Rice & Pickering, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Decision and Order on Employer's Motion for Modification (97-LHC-1273) of Administrative Law Judge C. Richard Avery 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).

This is the second time that this case is before the Board. To briefly reiterate the facts underlying this claim, claimant sustained a work-related back injury on March 26, 1995, for which employer voluntarily paid temporary total disability and medical benefits.[1] *See* 33 U.S.C. §§907, 908(b). The sole issue presented to the administrative law judge at the time of the initial hearing was whether claimant reached maximum medical improvement entitling him to permanent disability benefits. In his initial Decision and Order, the administrative law judge rejected claimant's argument that he had reached maximum medical improvement, and therefore awarded claimant continuing temporary total disability benefits. On appeal, the Board vacated the administrative law judge's determination that claimant's condition is temporary, and remanded the case for the administrative law judge to reconsider the evidence relevant to this issue. *See Nelson v. Emtech Environmental,* BRB No. 98-1159 (May 26, 1999)(unpublished).

In his Decision and Order on Remand, the administrative law judge considered the
evidence relevant to the issue of the nature of claimant's disability and concluded that claimant's disability remained temporary. Accordingly, the administrative law judge reaffirmed his prior Decision and Order awarding claimant ongoing temporary total disability compensation. Subsequent to the claimant's appeal of the administrative law judge's decision on remand to the Board, employer filed a timely motion for modification with the administrative law judge, alleging that suitable alternate employment has been available to claimant since August 1998. 33 U.S.C. §922. On February 12, 2000, the Board dismissed claimant's appeal, BRB No. 00-0206, and remanded the case to the Office of Administrative Law Judges for modification proceedings.

Before the administrative law judge on modification, the parties stipulated that claimant reached maximum medical improvement on August 18, 1998. Thereafter, the administrative law judge issued his Decision and Order on Employer's Motion for Modification wherein he found that claimant is not totally disabled as a result of his March 26, 1995, work-injury. Specifically, the administrative law judge found that, while claimant is unable to return to his usual employment duties with employer, claimant obtained on his own initiative post-injury employment between August 1998 and May 1999, employer's vocational expert identified numerous light-duty employment opportunities that were available to claimant, and the medical evidence of record does not support a finding that claimant is incapable of employment. Based upon the foregoing, the administrative law judge determined that employer

[1]Employer first paid benefits pursuant to the Texas workers' compensation law, and then pursuant to the Longshore Act.

established the availability of suitable alternate employment paying $6.00 per hour as of July 2, 1998. Accordingly, the administrative law judge modified claimant's award to reflect claimant's entitlement to temporary partial disability compensation from July 2, 1998 through August 17, 1998, and permanent partial disability compensation thereafter, based on two-thirds of the difference between claimant's average weekly wage of $360 and his post-injury wage-earning capacity adjusted for inflation. *See* 33 U.S.C. §908(c)(21), (e), (h).

Claimant appealed the administrative law judge's decision on modification to the Board. BRB No. 01-0527. Claimant then formally requested that the Board reinstate his prior appeal of the administrative law judge's decision on remand. In an Order issued May 24, 2001, the Board granted claimant's request, reinstated claimant's appeal in BRB No. 00-0206, and consolidated that appeal with BRB No. 01-0527 for purposes of decision.

We will first address the argument raised by claimant in his appeal of the administrative law judge's decision on remand. BRB No. 00-0206. In his appeal, claimant contends that the administrative law judge on remand erred by failing to find that claimant reached maximum medical improvement on September 11, 1996. Employer responds that claimant is bound by his subsequent stipulation, which was accepted by the administrative law judge, that he reached maximum medical improvement on August 18, 1998. We agree with employer. Stipulations are offered in lieu of evidence and thus may be relied upon to establish an element of the claim.[2] *See generally Williams Electronics, Inc. v. Arctic Int'l, Inc.,* 685 F.2d 870 (3d Cir. 1982). As a general rule, stipulations made by parties are binding upon those who made them. 73 AM. JUR. 2d *Stipulations* §8 (1974); *Ramos v. Global Terminal & Container Services, Inc.,* 34 BRBS 83 (1999); *see also Simonds v. Pittman Mechanical Contractors, Inc.,* 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). In the present case, while the claim was before the administrative law judge for modification proceedings, claimant stipulated that pursuant to the opinion of Dr. Halcomb he reached maximum medical improvement as of August 18,

[2]A stipulation has been described as a judicial admission, and as such, it is binding in every sense. Thus, the party who made it is prevented from introducing evidence to dispute it, and the opponent is relieved from the necessity of producing evidence to establish an admitted fact. *See Blair v. Fairchilds,* 25 N.C. App. 416, 213 S.E. 2d 428 (1975). Moreover, on appeal, neither party to a stipulation will be permitted to argue that the facts do not support their stipulation. *See* AM. JUR. 2d *Stipulations* §8 (1974).

1998. *See* Tr. at 11-12. This stipulation was thereafter accepted by the administrative law judge. *See* Decision and Order on Employer's Motion for Modification at 3. Accordingly, as the parties have agreed to resolve the issue of the nature of claimant's disability by way of a stipulation, that stipulation is binding and claimant's present attempt to change his position regarding the date his condition became permanent must be rejected. *See Brown v. Maryland Shipbuilding & Drydock Co.,* 18 BRBS 104 (1986). We therefore affirm the administrative law judge's determination on remand that claimant's condition had not yet reached maximum medical improvement as of September 11, 1996.

Claimant additionally challenges the administrative law judge's decision on modification wherein the administrative law judge determined that employer had established the availability of suitable alternate employment and, accordingly, modified claimant's award to reflect his entitlement to partial disability compensation. Specifically, claimant sets forth at length those medical opinions of record which support his contention that he has sustained a work-related condition as a result of his March 26, 1995, work-injury. BRB No. 01-0527.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I],* 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997)*; Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990). The Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment.[3] *See, e.g., Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guaranty Ass'n,* 28 BRBS 1, 8 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52 (1989); *Blake v. Ceres Inc.,* 19 BRBS 219, 221 (1987).

In the instant case, the administrative law judge found that employer met its burden on modification and thus that claimant was no longer totally disabled. In order to prevail on appeal, claimant must demonstrate error in the administrative law

[3]Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo I,* 515 U.S. at 296, 30 BRBS at 3(CRT); *Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 204 (1998); *Vasquez,* 23 BRBS at 431.

judge's decision. Under the Act, the findings of fact in the administrative law judge's decision "shall be conclusive if supported by substantial evidence in the record as a whole." 33 U.S.C. §921(b)(3). A party challenging the decision below must address that decision and demonstrate why substantial evidence does not support the result reached. *See* 20 C.F.R. §802.211(b).

In his brief to the Board, claimant asserts that the administrative law judge erred in reducing his weekly compensation benefits. In support of this contention, claimant sets forth the medical evidence of record documenting the ongoing nature of his work-related back condition.[4] Claimant, however, fails to allege specific error in the administrative law judge's decision to credit employer's labor market survey or in his reasoning that claimant is capable of post-injury employment based on claimant's ability to actually perform post-injury work between August 1998 and May 1999 and the lack of medical evidence that claimant is physically unable to work. The evidence credited supports the administrative law judge's finding that claimant is no longer totally disabled. Moreover, claimant does not cite any legal authority in support of his appeal. It is clear that claimant's brief fails to demonstrate reversible error in the administrative law judge's decision. The administrative law judge's modification of claimant's award is affirmed.

Accordingly, the Decision and Order on Remand and the Decision and Order on Employer's Motion for Modification are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER

[4]Contrary to claimant's implied contention, a physical impairment alone is insufficient to support a finding of total disability.

Administrative Appeals Judge