SECTION 22 – MODIFICATION

Introduction

Section 22 provides the only means for changing otherwise final compensation orders. Section 22 authorizes the fact-finder to, "upon his own initiative, or the application of any party-in-interest…on the grounds of a change in conditions or because of a mistake in a determination of fact," reopen a claim and issue a new compensation order. This action may be taken "at any time within one year of the last payment of compensation, whether or not a compensation order has been issued, or within one year of the rejection of a claim." The new compensation order "may terminate, continue, reinstate, increase or decrease such compensation or award compensation. Such new order shall not affect compensation previously paid, except that an award increasing compensation may be made effective from the date of injury and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of injury," with excess payments deducted from any unpaid compensation. 33 U.S.C. §922.

Section 22 is one of the sections incorporated into the Black Lung Benefits Act; thus, Board and appellate decisions under that Act may also be cited as legal precedent, *infra.* Relevant regulations are found at 20 C.F.R. §§702.373, 802.301. *See also* 20 C.F.R. §725.310.

While Section 22 specifically refers to the "deputy commissioner," the 1972 Amendments transferred the hearing functions formerly exercised by those officials to administrative law judges. 33 U.S.C. §919(d). In enacting Section 19(d) of the Act, Congress did not change references to the authority of the deputy commissioner in other provisions of the Act, but it is clear that hearing functions are held exclusively by the administrative law judges, *see, e.g., Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986), and that they are authorized to decide requests for modification. *See Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986). Nonetheless, unless the case is pending on appeal, requests for modification must be initiated by filing with the district office. *See* Modification of Orders on Appeal, *infra.* By regulation, in 1990 the title "deputy commissioner" was changed to "district director." 20 C.F.R. §702.105.

In *Intercounty Constr. Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), the Supreme Court held that the filing requirements of Section 22 apply only where a formal order has been issued. A claim which is timely filed and which has not been closed by an order awarding benefits or denying the claim remains open and pending for adjudication. The Court held that the phrase "whether or not a compensation order has been entered" is properly interpreted in context to mean that the one year limit on the power to modify existing orders runs from the date of the final payment of compensation even if the order sought to be modified is entered only after such date. Thus, where a claim is timely filed under Section 13 and has not been the subject of a formal order, the fact that no action was taken within one year of the last payment of compensation is irrelevant. *See Madrid v. Coast Marine*

Constr. Co., 22 BRBS 148 (1989) (where timely request for modification was made, administrative law judge erred in finding it abandoned where claimant took no further action for 3 years).

The 1984 Amendments added language to Section 22 providing that "any party-in-interest" includes an employer or carrier granted relief under Section 8(f) and that the section applies to cases in which payments are made from the Special Fund established in Section 44.

The 1984 Amendment also added a specific statement that the section "does not authorize the modification of settlements." *See Brady v. J. Young & Co.*, 18 BRBS 167 n.5 (1985) (decision on reconsideration); *Lambert v. Atl. & Gulf Stevedores*, 17 BRBS 68 (1985). This amendment is consistent with holdings that settlements were not subject to modification under the pre-amendment Act. *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986), *aff'g Downs v. Texas Star Shipping Co.*, 18 BRBS 37 (1986); *Lambert*, 17 BRBS 68. *See* Section 8(i) of the desk book.

An award based on the stipulations of the parties or approved by Order of the deputy commissioner/district director based on the parties' agreement, *see* 20 C.F.R. §702.315, is not a Section 8(i) settlement and is therefore subject to modification. *E.g., Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Madrid*, 22 BRBS 148; *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988); *Stock v. Mgmt. Support Assoc.*, 18 BRBS 50 (1986).

Section 22 provides the only means for changing otherwise final compensation orders. In fact, any evidence not previously admitted into the record by the administrative law judge can only receive consideration pursuant to a Section 22 motion for modification; it cannot be considered *de novo* by the Board. 33 U.S.C. §921(b); 20 C.F.R. §802.301(b). *See Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985); *Williams v. Nicole Enterprises*, 15 BRBS 453 (1983); *Ries v. Harry Kane, Inc.*, 15 BRBS 460 (1983).

As an attorney's fee order does not award "compensation," it is not a "compensation order" under Section 22. Thus, fee awards are not subject to modification. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997); *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982).

There is no requirement that the same administrative law judge who heard the initial claim also rule on a petition for modification. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988); *Finch*, 22 BRBS 196; *Baker v. New Orleans Stevedore Corp.*, 6 BRBS 382 (1977).

The Board initially held that an administrative law judge is not required to hold a formal hearing on every modification request, but rather, has the discretion to decide whether a modification hearing is necessary to render justice in a particular case. *Wojtowicz v.*

Duquesne Light Co., 12 BLR 1-162 (1989) (black lung case); *Williams v. Hunt Shipyards, Geosource Inc.*, 17 BRBS 32 (1985). Subsequently, in black lung cases, the Sixth and Eleventh Circuits held that a party who has requested a hearing in a modification case is entitled to one. *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6th Cir. 1998); *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994). *See generally Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994). The Board adopted this precedent in a black lung case, holding that the Black Lung Act and regulations mandate that an administrative law judge hold a hearing on any claim, including a request for modification, whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment. *Pukas v. Schuylkill Contracting Co*., 22 BLR 1-69 (2000). The Board subsequently cited these decisions in a Longshore case and held claimant must be granted a hearing because he made a timely request for one. *Jukic v. Am. Stevedoring, Inc.*, 39 BRBS 95 (2005). *See* 33 U.S.C. §919(c); 20 C.F.R. §§702.331-702.351, 702.373.

The scope of modification is not narrowed because the employer is seeking to terminate or decrease an award. *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), *rev'g* 1 BRBS 81 (1974); *Duran v. Interport Main. Corp.*, 27 BRBS 8 (1993); *Ramirez v. S. Stevedores*, 25 BRBS 260 (1992).

The Board has stated that Section 22 was

> intended by Congress to displace traditional notions of *res judicata*, and to allow the fact-finder, within the proper time frame after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. *Banks v. Chicago Grain Trimmers Association, Inc*., 390 U.S. 459 (1968); *O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971); *McCarthy Stevedoring Corp. v. Norton*, 40 F. Supp. 960 (E.D. Pa. 1940).

Hudson v. Sw. Barge Fleet Services, Inc., 16 BRBS 367 (1984) (district court affirmance of deputy commissioner's order under pre-1972 Act does not prohibit administrative law judge from considering Section 22 modification).

Thus, "the modification process is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276, 37 BRBS 99, 101(CRT) (2d Cir. 2003), *quoting Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497-498 (4th Cir. 1999) and *Banks*, 390 U.S. at 464. The Act reflects a preference of accuracy over finality; thus, the fact that evidence was not presented earlier in the proceedings is not a sufficient basis to deny a petition for modification. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jensen*, 346 F.3d 273, 37 BRBS 99(CRT); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009).

A "change in conditions" can be a change in claimant's physical or economic condition. *Metro. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). *See also Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

The sole basis for modification in a survivor's claim is proof of a mistake in a determination of fact. *Jourdan v. Equitable Equip. Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting on other grounds). *Accord Wojtowicz,* 12 BLR 1-162.

The Supreme Court has approved a broad construction of "mistake in a determination of fact." In *Banks*, 390 U.S. 459, the Court reversed a finding that claimant's second claim, filed several months after the first was rejected based on a lack of causation, was barred by the doctrine of *res judicata*. The Court relied on the legislative history regarding the addition of the mistake of fact ground for modification in the 1934 amendment, which stated that this ground was intended to broaden the grounds for modification where such a mistake makes modification desirable in order to render justice under the Act. *Id.* at 464. The Court found no support for a holding that a provision authorizing review of determinations of fact is limited to certain issues and thus rejected employer's attempted distinction between facts relating to disability and those relevant to liability. In the absence of persuasive reasons to the contrary, the Court held that the words of the statute were entitled to their ordinary meaning and therefore, the second claim came within the scope of Section 22.

The Court's decision in *O'Keeffe*, 404 U.S. 254, further addressed the broad scope of Section 22, stating

> There is no limitation to particular factual errors, or to cases involving new evidence or changed circumstances…. The plain import of [the 1934] amendment was to vest a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

Id. The Court rejected the argument that its construction rendered review under Section 21 meaningless, stating that such review is directed to the legal validity of the award.

A change in law or legal error is not grounds for Section 22 modification. *See Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986); *Swain v. Todd Shipyards Corp.*, 17 BRBS 124 (1985). *See also Downs*, 803 F.2d at 198 n. 11, 19 BRBS 43 n. 11(CRT). *See* Legal Error/Change in Law, *infra.*

The party seeking modification has the burden of proof in establishing the change in condition or mistake in fact. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Vasquez v. Cont'l Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Winston v. Ingalls*

Shipbuilding, Inc., 16 BRBS 168 (1984); *Kendall v. Bethlehem Steel Corp*., 16 BRBS 3 (1983); *Leach v. Thompson's Dairy, Inc.*, 6 BRBS 184 (1977). In discussing the availability of nominal awards under Section 8(c)(21) in *Rambo II,* the Court stated that on an initial claim under Section 8(c)(21), claimant as the proponent of an award bears the burden of persuasion. However, when employer seeks modification of a prior award, it is the proponent with the burden of demonstrating a change in conditions justifying modification. Where the prior award was based on a finding of a loss in earning capacity, employer satisfies its burden by demonstrating that as a result of changed circumstances, the employee's earnings have increased. At that point, the burden shifts back to claimant.

Once the proponent has established a change in condition or mistake in fact, the normal legal standards apply. Thus, the Board has held that the standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. Where claimant demonstrated he was laid off from a job which previously was found to constitute suitable alternate employment and he remained unable to perform his pre-injury work, he met his burden of establishing a change in condition. The burden then shifted to employer to establish the availability of suitable alternate employment, and it produced no evidence in this regard. The Board thus reversed the administrative law judge's decision that claimant's disability status was unaffected by the lay-off and held that claimant was entitled to permanent total disability benefits. *Vasquez*, 23 BRBS 428.

In considering a request for modification, it is appropriate for the administrative law judge to have before him the record from the prior hearing that resulted in the award or denial. *See Dobson v. Todd Pac. Shipyards Corp.*, 21 BRBS 174 (1988); *Jenkins*, 17 BRBS 183; *Baker*, 6 BRBS 382. This follows from the broad scope of modification based on a mistake in fact, which includes further reflection on the evidence initially submitted, and the fact that, where change in claimant's physical or economic condition is alleged, the prior record is relevant in determining whether there has been a change.

Digests

In a case of first impression in that circuit, the D.C. Circuit upheld a denial of modification of a settlement under pre-1984 law, which continues to apply in all cases arising under the pre-1982 D.C. Workmen's Compensation Act, relying in part on *Downs*, 803 F.2d 193, 19 BRBS 36(CRT). *Bonilla v. Director, OWCP*, 859 F.2d 1484, 21 BRBS 185(CRT) (D.C. Cir. 1988), *amended*, 866 F.2d 451 (D.C. Cir. 1989).

Where claimant sought modification of her average weekly wage based on new case law interpreting the time of injury for that purpose, the Board held that modification was not available as it was based on a change in law. The Board also rejected claimant's argument that she was entitled to modification based on the addition of Section 10(i) as her modification petition was pending at the time the 1984 Amendments were enacted. The Board held that a pending petition for modification alone is not a claim "pending" for purposes of application of the 1984 Amendments; the claim must actually be reopened under Section 22 for it to be "pending." Here, the initial Decision and Order became final in 1982 and the claim was not reopened via modification as there was no change in condition or mistake in fact independent of the passage of the amended provision. Therefore, the 1984 Amendments are not applicable. *McDonald v. Todd Shipyards Corp.*, 21 BRBS 184 (1988), *rev'd sub nom. McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56(CRT) (9th Cir. 1990). In reversing, the Ninth Circuit held that where a Section 22 modification petition was pending on the effective date of the 1984 Amendments, the 1984 Amendments apply to that motion. The court remanded for recalculation of claimant's benefits in accordance with Section 10(i). *McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56(CRT) (9th Cir. 1990).

The Board vacated the denial of benefits and remanded the case for the administrative law judge to conduct a hearing on claimant's motion for modification. The Board held that the administrative law judge erred in failing to grant claimant's request for a hearing where claimant asked for the opportunity to testify either via deposition or hearing regarding his foot condition. Although the administrative law judge explained why he believed claimant's testimony would not aid his case, the Board stated that only upon hearing the testimony and considering it in conjunction with any other evidence that might be admitted at the new hearing, as well as the originally-submitted evidence, would the administrative law judge be able to determine the relevance of claimant's testimony. Thus, although claimant made his request in the "eleventh hour," the request was timely and must be granted. *Jukic v. Am. Stevedoring, Inc.*, 39 BRBS 95 (2005).

Where claimant failed to timely file a claim within one year of the last payment of compensation, which employer paid voluntarily, the claim was properly denied under Section 13. The Section 22 modification procedure is not applicable where there has not been an award, and in any event, the timeliness requirements of Section 22 are also not met. *Daigle v. Scully Bros. Boat Builders, Inc.*, 19 BRBS 74 (1986).

The parties initially stipulated that claimant was totally disabled, but the first administrative law judge did not issue an order based on these stipulations and there was no adjudication of the claim. Therefore, as no final compensation order was issued in this case, the current claim before the administrative law judge must be viewed as the initial claim for compensation, and Section 22 is not applicable, pursuant to *Intercounty Constr.*, 422 U.S. 1, 2 BRBS 3 (1975). The Board thus reviewed the administrative law judge's disability findings, which he made under Section 22, as though they were made in an initial adjudication of claimant's claim. *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002).

Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. Thus, where claimant sought modification based on a mistake in fact in the initial determination on causation and a change in her physical condition, the administrative law judge erred in denying modification based on findings that claimant's evidence was "merely cumulative" and that he lacked jurisdiction to reweigh the evidence considered by the prior administrative law judge. Pursuant to *O'Keeffe*, the administrative law judge has jurisdiction to reconsider previously submitted evidence, and it is an abuse of discretion not to consider new evidence submitted in a modification proceeding. The Board remanded the case to the administrative law judge for consideration of the petition for modification in light of both the old and new evidence. *Dobson v. Todd Pac. Shipyards Corp.*, 21 BRBS 174 (1988).

Neither due process nor the regulations require that a Section 22 petition for modification be heard before the administrative law judge assigned to the original claim. In this case, there was no error in the assignment of an administrative law judge who did not preside at the initial hearing. The record developed at the initial hearing and subsequently at the modification hearing did not raise decisive witness credibility issues that would best be weighed by the administrative law judge who presided at the initial hearing. The Board vacated and remanded the case, as the administrative law judge failed to render specific findings on the change in claimant's condition or mistake of fact he relied upon to reach a different result regarding causation than did the administrative law judge who presided at initial hearing. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

There is no requirement that a motion for modification be heard by the same administrative law judge assigned to the original claim, particularly where the record developed at the initial hearing does not raise decisive witness credibility issues which would best be reviewed by the administrative law judge who presided at the initial hearing. Moreover, where the administrative law judge's award failed to provide for the complete discharge of employer's liability and did not contain findings as to whether the compensation awarded was in claimant's best interest, it did not constitute the approval of a settlement. Rather, it is an award based on parties' agreements and stipulations, which is subject to Section 22 modification. *Finch v. Newport News Shipbuilding & Dry Dock* Co., 22 BRBS 196 (1989).

The administrative law judge erred in construing the deputy commissioner's order as a Section 8(i) settlement, as it contained no findings regarding whether the compensation awarded was in claimant's best interests and did not provide for the complete discharge of employer's liability for payment of compensation. Thus, it must be considered an award based upon the agreements and stipulations of the parties pursuant to 20 C.F.R. §702.315. Such awards are subject to Section 22 modification, and the case is remanded for consideration of claimant's modification petition. *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988).

Inasmuch as the award in this case was based on the parties' stipulations, it is subject to modification if the requirements of Section 22 are met. As LIGA replaced Midland as the insurer, it had the right to seek modification of the prior award. The administrative law judge erred in summarily denying the motion for modification based on LIGA's failure to introduce new evidence. LIGA did have new evidence, but new evidence is not necessary for modification. *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1 (1994).

An award based on the parties' stipulations is subject to modification. Stipulations are offered in lieu of evidence and thus may be relied upon to establish an element of the claim. In this case, the parties stipulated that claimant was totally disabled at the time the initial compensation order was issued, and this stipulation establishes claimant's condition at that time. Employer, therefore, may attempt to show that this condition has changed. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

To reopen the record under Section 22, the moving party must allege a mistake of fact or change of condition, and assert that evidence to be produced or of record would bring the case with the scope of Section 22. To determine whether to grant modification, if the evidence is sufficient to so warrant, the administrative law judge must decide whether modification would render justice under the Act. In this case, the administrative law judge abused his discretion by denying employer's motions for reconsideration and discovery, as employer stated how the evidence it intended to introduce and of record would support its request for modification. Employer's failure to attend the initial formal hearing cannot serve as a basis for denying modification as modification proceedings are intended to replace traditional notions of *res judicata*, and the scope of modification is not narrowed because employer seeks to reduce an award. *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

Where the administrative law judge failed to determine the responsible carrier and directed the deputy commissioner to do so, he abdicated his responsibility to render findings of fact to resolve disputed issues. The deputy commissioner erred in modifying the administrative law judge's decision and the administrative law judge erred in directing the deputy commissioner to do so. The deputy commissioner does not have the power to modify the decision of an administrative law judge. Case remanded for required findings by the administrative law judge. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The Board viewed the deputy commissioner's letter purporting to alter language contained in an administrative law judge's Decision and Order as an impermissible modification, pursuant to *Sans*, 19 BRBS 24. Accordingly, reasoning that the deputy commissioner possessed no authority to issue this letter, the Board held that both the letter and the administrative law judge's second Decision and Order issued in response to it were of no legal effect, and that the period for filing an appeal with the Board thus began when the administrative law judge's first Decision and Order was filed. The Director's appeal, submitted some six months after this Decision and Order was filed in the deputy commissioner's office, was thus dismissed as untimely. *Hernandez v. Bethlehem Steel Corp.*, 20 BRBS 49 (1987).

The deputy commissioner exceeded his authority by vacating the administrative law judge's Decision awarding permanent total disability benefits and finding that claimant is only partially disabled. The deputy commissioner's role following the 1972 Amendments is to attempt an informal resolution of the claim; he is not authorized to modify a decision of an administrative law judge. Moreover, it was error for the deputy commissioner to engage in fact finding on the disability issue as no agreement had been reached between the parties. *Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986).

The Board affirmed the administrative law judge's finding that the deputy commissioner had no authority to issue a Notice of Modification of an administrative law judge award in a black lung case. The Board set out history of modification proceedings, through the Longshore Act, and reiterated its holdings that a deputy commissioner can only modify a decision of a deputy commissioner. The Board further noted that when, as here, no appeal is pending before the Board and new evidence is discovered, the deputy commissioner investigates the grounds for modification and forwards evidence to the administrative law judge. In this case, the administrative law judge did not consider the new evidence, and the case is accordingly remanded. *Yates v. Armco Steel Corp.*, 10 BLR 1-132 (1987) (black lung case).

As claimant timely filed a motion for modification, claimant's subsequent amending of that claim to assert entitlement to an additional period of benefits was permissible, as claimant may amend a pending claim. *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001).

Where claimant filed a letter in 1999, within one year of the last payment of benefits, and the Board determined that letter constituted a valid motion for modification, the Board rejected employer's assertion that a letter filed in 2000 was an untimely motion for modification. The Board rejected employer's argument that the requirement of FRCP 15(c) that an amendment to a pleading must "relate back" to the original filing was not met, as FRCP 15(c) is not applicable. In accordance with case precedent regarding open and unadjudicated claims, the Board held that although no action was taken on the 1999 motion, it was an open claim that had not been adjudicated or withdrawn, making the filing in 2000

a permissible amendment to the claim for a subsequent disability arising from the work injury. Accordingly, both the 1999 filing and the 2000 filing were timely. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

In a black lung case, the Fourth Circuit held that modification is permitted within one year of each final rejection of a claim, including a rejection on modification, thus indicating that multiple motions for modification may be filed. The court stated that a footnote in the Supreme Court's decision in *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), does not preclude the filing of multiple motions for modification. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

In a black lung case, the Seventh Circuit noted its agreement with the Fourth Circuit's holding in *Betty B Coal*, 194 F.3d 491, that Section 22 permits successive modification petitions as long as they meet the one-year requirement. The court further held that a modification request cannot be denied solely because it contains argument or evidence that could have been presented at an earlier stage in the proceedings. The court reasoned that Section 22 articulates a preference for accuracy over finality in the substantive award. In this regard, the court distinguished *Gen. Dynamics Corp. v. Director, OWCP, [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), and *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985), on the grounds that those cases involved modification attempts in order to gain Section 8(f) relief, which is an affirmative defense. In considering whether to grant Section 22 modification, the relevant inquiry is whether re-opening proceedings would render "justice under the Act." This inquiry should focus on a party's actions and intent in seeking modification. In determining whether a party's actions in a particular case overcome the statutory preference for accuracy over finality, relevant factors include the diligence of the parties, the number of times that the party has sought modification, and the quality of the new evidence which the party wishes to submit. An administrative law judge is not required to reopen a case under Section 22 where the party seeking modification engaged in sanctionable conduct, *e.g.*, recalcitrance and callousness toward the adjudicatory process, as in *McCord*, 532 F.2d 1377, 3 BRBS 371, where it is clear from the moving party's submissions that reopening could not alter the substantive award, or where a party was attempting to thwart a good faith claim or defense. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

The Fourth Circuit held in a Black Lung case that it is erroneous to assume that a party is entitled to modification of a previous award merely because it established there was a mistake made in the determination of a fact. Rather, because granting a request for modification is discretionary, the administrative law judge must exercise sound discretion by determining whether modification will render justice under the Act. To this degree, the court held that the administrative law judge must consider the accuracy of the previous decision as well as the requesting party's diligence and motive in moving for modification and whether a favorable ruling would nonetheless be futile. As neither the administrative

law judge nor the Board had discussed these factors, the case was remanded. *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007); *see Westmoreland Coal Co., Inc. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012), *cert. denied*, 570 U.S. 917 (2013) (decision after remand).

The administrative law judge erred in stating that modification in a longshore case must be initiated with the district director. Modification may be initiated before the administrative law judge while the case is pending before him or is on appeal to the Board. The Board remanded the case for the administrative law judge to address the modification request. *L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008).

The administrative law judge has broad authority to modify existing orders based on a mistake of fact or a change of condition. The party seeking modification need not, as a threshold matter, establish that the evidence it developed was unavailable at the first hearing. Finality also is not a valid consideration. Thus, to the extent the Board's first decision in this case suggests these criteria are valid, *Jensen I*, 33 BRBS 97, it is inconsistent with law. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

The Board rejected claimant's contention that the administrative law judge erred on remand in addressing rebuttal of the Section 20(a) presumption as the case had been remanded for disability and medical benefits issues. Employer submitted a new report on remand addressing causation. Thus, the underlying factual situation changed and the law of the case doctrine is inapplicable. Moreover, submission of the report and consideration of the causation issue is consistent with Section 22. Requests for modification need not be formal in nature and may consist of the submission of new evidence while the case is before the administrative law judge. *Manente v. Sea-Land Serv., Inc.*, 39 BRBS 1 (2004).

The Board reversed the administrative law judge's finding that the calculation of claimant's average weekly wage pursuant to Section 10(c) was not within the scope of Section 22. Claimant presented an issue of fact as to the ultimate calculation of her average weekly wage. The administrative law judge also erred in stating that claimant had not raised the Section 10(c) issue previously, as claimant raised in her supplemental brief urging of the use of co-workers' wages. The Board remanded for the administrative law judge to reconsider her average weekly wage. *S.K. [Khan] v. Serv. Employers Int'l*, 41 BRBS 123 (2007).

Where claimant's third-party claims were dismissed and the Section 33(g) forfeiture provision was inapplicable, the Board rejected employer's assertion that the administrative law judge erred in failing to modify claimant's 2003 award of benefits. The Board held that the administrative law judge correctly found that employer did not file a motion for modification and, in any event, as the forfeiture provision does not apply, there is no basis for modifying the prior decision. Accordingly, it was improper for employer to unilaterally terminate claimant's benefits, and as such determination subjected employer to a Section 14(f) assessment, the Board affirmed the administrative law judge's additional assessment pursuant to Section 14(f). *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010).

Where claimant had previously been awarded temporary total disability benefits based on the parties' stipulations, the administrative law judge properly granted modification of the prior 2002

decision which rested on a mistaken determination of fact regarding the nature of claimant's disability. The Board held that the administrative law judge properly modified the award retroactive to the date claimant reached permanency. The Board thus affirmed the administrative law judge's modification of a 2002 decision which had awarded claimant temporary total disability benefits to an award of permanent total disability benefits retroactive to September 2000. In this regard, the Board rejected the Director's contention that the administrative law judge granted modification based on a change in condition and that, thus, the award of permanent total disability benefits could not predate the decision being modified. *Buttermore v. Elec. Boat Corp.*, 46 BRBS 41 (2012).

The Board rejected the Director's contention that because claimant and employer previously stipulated that claimant's condition was not yet permanent and the original administrative law judge accepted that stipulation, the doctrine of judicial estoppel precludes modification on the ground of a mistake in fact regarding the nature of claimant's disability. A determination based on stipulations is subject to Section 22 modification based on grounds of either a change in condition or a mistake of fact, and Section 22, which reflects a statutory preference for accuracy, displaces equitable doctrines of finality such as judicial estoppel. *Buttermore v. Elec. Boat Corp.*, 46 BRBS 41 (2012).

As Section 22 provides the sole means by which a compensation award can be modified, decreased, or terminated upon a change in condition or a mistake in a determination of fact, the Board vacated as invalid two stipulations that attempted to avoid Section 22 by permitting the employer to unilaterally decrease or terminate claimant's compensation upon certain changes in condition. Such authority is given by Section 22 only to an administrative law judge in contested cases. *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014).

In 2003, the Board affirmed the administrative law judge's grant of a Section 33(f) credit based on claimant's third-party $60,000 settlement. In his order denying claimant's motion to modify that earlier decision, the administrative law judge found that, although claimant would be entitled to additional disability benefits exceeding $300,000, his failure to obtain prior written approval of the $60,000 settlement would invoke the Section 33(g) forfeiture provision. Consequently, he found claimant would be in a worse situation if he granted claimant's motion to modify because Section 33(g) would bar claimant's receipt of the additional disability benefits as well as any further medical benefits, so he denied the motion for modification. The Board affirmed, and held that the earlier decision remains in effect. The court affirmed, stating absent a change to the earlier decision awarding medical benefits with a Section 33(f) offset, that decision stands. Accordingly, the Board did not err in stating that claimant remains entitled to medical benefits for his work injury, subject to the Section 33(f) offset. *Mays v. Director, OWCP*, 938 F.3d 637, 53 BRBS 57(CRT) (5th Cir. 2019).

Request for Modification

A request for modification need not be formal in nature. It simply must be a writing which indicates an intention to seek further compensation. *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988); *Hudson v. Sw. Barge Fleet Services, Inc.*, 16 BRBS 367 (1984). In *Bergeron*, the last payment of compensation was made on May 29, 1969. On June 9, 1969, claimant's attorney telephoned the deputy commissioner who filed a written memorandum stating that he received a call from claimant's attorney on that date, that the attorney disagreed with the termination of compensation as employer took a credit greater than they were entitled to receive and that claimant is permanently totally disabled. The memorandum concluded that claimant "will file for a review under § 22 of the Act. When such filing is received, please return the case to me for further handling." The deputy commissioner subsequently inquired as to whether claimant intended to file for modification, and a formal petition was filed on April 8, 1971. The deputy commissioner held that the modification request was timely based on the date of the telephone memorandum, and the court affirmed this conclusion. *Accord Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

Thus, a deputy commissioner's memorandum of informal conference issued within one year of claimant's final appeal of a prior award was sufficient to constitute a modification request under Section 22 as it stated that claimant raised his entitlement to additional compensation at the conference as well as on previous office visits. *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975), *aff'd*, 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). Further, any person acting on claimant's behalf may submit a Section 22 request, including an attorney who has not been formally authorized to represent the claimant. *Hudson*, 16 BRBS 367.

The informal nature of a claim for modification is similar to the initial filing requirements under Section 13. *See Raimer*, 21 BRBS 98. Additional cases regarding a proper "claim" are addressed in Section 13 of the desk book.

It is irrelevant whether an action is labeled an application for modification or a claim for compensation as long as the action comes within the provisions of Section 22. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968). Similarly, consistent with the cases cited above, a claimant is not required specifically to characterize the modification request as being based on either a change in condition or mistake in determination of fact. In *Cobb*, 2 BRBS 132, the Board affirmed the conclusion that claimant was not entitled to further benefits as the administrative law judge's finding that he failed to prove reduced earnings was supported by substantial evidence; thus, his failure to make specific findings was harmless. *See also Vilen v. Agmarine Contracting, Inc.*, 12 BRBS 769 (1980) (employer's argument fails under either change in condition or mistake in fact as employer did not show a change in claimant's earning capacity).

Where a modification request is based on change in condition, the deputy commissioner may find modification appropriate based on a mistake in fact. *Jarka Corp. v. Hughes*, 299 F.2d 534 (2d Cir. 1962) (stating this principle, the court nonetheless remanded the case, as the deputy commissioner failed to state any basis for his modification of the award). Thus, an administrative law judge is not precluded from modifying a previous order on the basis of a mistake in fact where the modification was sought for a change in condition. *Thompson v. Quinton Eng'rs, Inc.*, 6 BRBS 62 (1977); *Pinizzotto v. Marra Bros., Inc.*, 1 BRBS 241 (1974

While the Fourth Circuit has agreed that requests for modification need not meet a particular form, in holding two letters filed by claimant were insufficient to demonstrate an intent to seek compensation, the court stated the letters failed to indicate any actual intention on the part of the claimant to seek compensation for a particular loss. The court held that this factor is critical assessing the sufficiency of the letters, distinguishing *Bergeron*, 493 F.2d 545. The court further stated that it was impossible for claimant to state such an intention in his first letter, as he did not suffer the additional period of disability until later, and it concluded that "[s]uch anticipatory filings cannot be thought of as initiating review." *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1995), *cert. denied*, 519 U.S. 807 (1996). The court similarly referenced the "anticipatory" nature of a filing in holding a doctor's opinion was insufficient to invoke Section 22 review, *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998), although the court provided additional bases for finding the report inadequate. *See also Raimer*, 21 BRBS 98.

Board decisions arising in the Fourth Circuit attempted to distinguish "anticipatory filings" from those presenting valid requests for modification. *See Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (2005); *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002); *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001); *Meekins v. Newport New Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000), *aff'd mem.*, 238 F.3d 413 (4th Cir. 2000). These cases are digested, *infra.* In this regard, the Board relied on the court's decision in *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999), a black lung case where the court stated that the validity of the request was to be judged by its "content and context."

In *Kea v. Newport News Shipbuilding & Dry Dock Co*., 488 F.3d 606, 41 BRBS 23(CRT) (4th Cir. 2007), *rev'g* 39 BRBS 113 (2006), the Fourth Circuit held that claimant's letter accompanied by a claim form was a valid claim for compensation. The court distinguished *Pettus* and *Greathouse*, as claimant filed his letter within days of the award of *temporary* benefits, specifically stating that he had sustained a *permanent* loss in wage-earning capacity and OWCP should consider the letter a "request for additional compensation in modification of the award." The letter thus disclosed the requisite intent to seek compensation for a particular loss. The court also held that the fact that the letter also

requested that an informal conference not be scheduled does not alter the result, as the Act does not require such in conjunction with a request for modification. Perhaps most significantly, the court stated that the record did not support the conclusion that the filing was "in anticipation of a future disability. Kea's filing conveys no intent to indefinitely preserve the right to obtain compensation for a disability that might occur in the future, nor will he ultimately obtain compensation for a permanent disability that did not exist when he filed his modification request." *Id.*, 488 F.3d at 612, 41 BRBS at 27(CRT). The court concluded that claimant filed a claim for an existing permanent disability, and the fact that the evidence of the particular degree of disability was developed later was irrelevant.

The Fourth Circuit's statements regarding "anticipatory filings" have not been repeated by other courts. In *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), the court rejected employer's argument that claimant had no viable claim for benefits at the time he filed his initial claim under Section 13 and that therefore his claim amounted to no more than an impermissible protective filing against speculative future injuries. Employer relied on *Pettus* in support of this argument. The court initially rejected employer's assumption "that a claim is viable only if it seeks compensation for an unpaid period of disability," citing the holding in *Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), that an employee with a work-related injury but no present disability may obtain a nominal award of compensation in anticipation of future economic loss. Regarding *Pettus*, the court initially held that it is distinguishable on the facts as claimant filed a formal claim for benefits, unlike the letters held insufficient in *Pettus*. With regard to the Fourth Circuit's statement about "anticipatory filings," the court stated that it did not read that "observation" as a cornerstone of the *Pettus* opinion, but "to the extent that *Pettus* does stand for the proposition that a claim may only seek compensation for an antecedent period of disability, it is in direct conflict with the Supreme Court's holding in *Metropolitan Stevedore*, and we must disregard it." *Pool Co.*, 274 F.3d at 181, 35 BRBS at 115(CRT).

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In General

The Board interpreted employer's submission of new evidence with its motion for reconsideration to the administrative law judge as a motion for modification, as the request need not be formal in nature. The Board remanded the case, holding that there is no valid reason for the administrative law judge's refusal to consider the evidence regarding claimant's post-injury return to heavy labor, which could establish grounds for modification based on a change in economic condition or a mistake of fact. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986).

A request for Section 22 modification need not be formal in nature, but simply must be a writing which indicates an intention to seek further compensation. Where a doctor's chart

notes did not indicate any intention to seek further compensation, but merely stated that claimant was experiencing continuing knee problems and may require surgery in the future, the Board held that the chart notes do not constitute a request for modification pursuant to Section 22. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

The Board affirmed the administrative law judge's finding that telephone calls made by claimant to the deputy commissioner's office within one year of the last payment of compensation were sufficient to constitute a timely modification request where the phone calls, as memorialized in writing by the deputy commissioner's staff, indicated that claimant believed he had suffered a change in condition and was seeking additional compensation. As a timely request for modification was made, the administrative law judge erred in finding it abandoned where claimant took no further action for 3 years. *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989).

Claimant was awarded permanent partial disability benefits for asbestosis in 1978. He ceased working in February 1991 and filed for modification to change his benefits to permanent total disability based on his average weekly wage at the time he stopped working. The court affirmed the Board's holding that by moving for modification and by arguing that the benefits should be based on his 1991 salary, claimant was necessarily asserting either that he sustained a new injury or an aggravation of his prior injury. As claimant satisfied the filing requirements of Section 22, he was not required to file a duplicative formal claim under Section 13. *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999).

As claimant requested modification of the administrative law judge's decision denying benefits by application of Section 33(g), attaching evidence to the request which, if credited, would establish the absence of any executed settlements, thereby making Section 33(g) inapplicable, the Board held that the administrative law judge erred in denying modification. As the evidence could demonstrate a mistake in the determination of a fact, the Board remanded the case for the administrative law judge to conduct appropriate Section 22 proceedings. *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001).

In this occupational disease case, the self-insured employer had sufficient notice, and was therefore not denied due process, where the carrier found responsible for claimant's medical benefits in the initial decision was allowed to raise the issue of the responsible insurer upon claimant's request for compensation benefits on modification. Employer had prior knowledge that the carrier sought to deny responsibility for compensation benefits based on additional harmful exposures after employer became self-insured. Employer received a transcript of claimant's deposition taken after issuance of the initial decision and it was able to cross-examine claimant at the modification hearing as to additional industrial exposure. Moreover, the administrative law judge expressed willingness to offer employer additional access to claimant before closing the record. *Bath Iron Works v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001).

Fourth Circuit

The Fourth Circuit held that two letters sent by claimant's counsel to the district director stating that demand was being made "for any and all benefits" that claimant is due or may be entitled to receive under the Act did not constitute a valid request for modification pursuant to Section 22. The court initially discussed the fact that the district director took no action upon receipt of the letters, thus indicating he did not view them as requests for modification. The court stated that "while a request for modification need not meet any particular form, there must be some basis for a reasonable person to conclude that a modification request has been made." Here, the court concluded that the letters were too "sparse" to meet even this lenient standard. The court noted that the letters made no reference to any change in claimant's condition or to a mistake of fact in the earlier order, to new evidence of disability, to dissatisfaction with the earlier award or to anything that would have alerted a reasonable person that the earlier compensation award might warrant modification. The court concluded that the letters failed to indicate any actual intention on the part of the claimant to seek compensation for a particular loss, a factor that the court stated is critical in assessing their sufficiency. In this regard, the court distinguished *Bergeron*, 493 F.2d 545. Finally, the court stated that it was impossible for claimant to state an intention to seek compensation for a particular loss in his first letter, as he did not suffer the additional period of disability until later, and it stated "[s]uch anticipatory filings cannot be thought of as initiating review." Accordingly, the request for modification was denied. *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1995), *cert. denied*, 519 U.S. 807 (1996).

Following its decision in *Pettus,* the Fourth Circuit held that a doctor's report of September 1987, stating that claimant was doing well and would be returning to work and that the doctor would check claimant again in another month, is not a claim for modification under Section 22, as the report did not manifest an actual intent by claimant to seek additional compensation but merely noted the possibility of a future increase in disability, it was not submitted by claimant, the statement that the doctor expected claimant to develop a 20 percent disability in the future was insufficient as "anticipatory filings" are precluded under *Pettus*, and the reference to an "increase" to 20 percent was inadequate in any event as employer had already paid for a 20 percent disability. Therefore, the administrative law judge properly denied claimant's claim for modification filed on November 4, 1991, as it was untimely filed by four years, the last payment of compensation having been made by employer on October 1, 1987. *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998).

In a black lung case, the Fourth Circuit cited *Pettus* for the proposition that a modification request need not meet formal criteria. Rejecting employer's argument that the district director's inaction in response to claimant's request indicated it was not a valid request for modification, the court stated that the "content and context" of the letter, rather than

OWCP's reaction to it, determines whether it is a request for modification. *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999).

The Board affirmed the administrative law judge's finding that claimant's letter to the district director seeking "additional" benefits in modification of the previous award and requesting that he not schedule an informal conference was merely a protective filing which does not constitute a valid claim for modification. Citing *Pettus*, 73 F.3d 523, 30 BRBS 6(CRT), and *Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT), the Board held that the filing was merely anticipatory, inasmuch as it does not identify a particular disability for a specific time period. Moreover, claimant did not have a claim for additional benefits until several years later. The request that an informal conference not be scheduled further supports the finding that the letter was merely an attempt to preserve indefinitely the right to seek modification. *Meekins v. Newport New Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000), *aff'd mem.*, 238 F.3d 413 (4th Cir. 2000) (table).

As claimant's petition specifically sought modification, claimed a deteriorating condition and referenced a change in medical circumstances and a disability purportedly in existence at the time that the request was made, the Board held that it was a valid request for modification pursuant to Section 22 of the Act. The case thus was distinguished from *Pettus*, 73 F.3d 523, 30 BRBS 6(CRT), *Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT), and *Meekins*, 34 BRBS 5. *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001).

Following a discussion of nominal awards and motions for modification, as well as *Pettus*, *Greathouse* and *Rambo II*, the Board held that, as a claim for a nominal award is a present claim which would give rise to a present ongoing award, it is not a prohibited anticipatory filing on its face, and it may be the basis for a motion for modification under Section 22. Next, in accordance with the Fourth Circuit's decision in *Borda*, 171 F.3d 175, that the validity of a motion for modification must be ascertained from both its content and its context, the Board held that the administrative law judge must consider the content of the filing as well as the circumstances surrounding the case in order to determine whether claimant filed a valid motion for modification. In this case, claimant injured his knees and was paid permanent partial disability benefits pursuant to Section 8(c)(1). Less than one year after final payment was made, claimant filed a letter requesting a *de minimis* award pursuant to *Rambo II*. Thus, the Board held that, on its face, claimant's letter satisfied the "content" requirement. It also held that the circumstances of the case establish that claimant's motion, which was filed after the development of a hip problem, a sequela of his work-related knee injuries which would be compensable under Section 8(c)(21), was filed with the intent to pursue a claim for additional benefits. Therefore, as both the content and context criteria were satisfied, the Board held that the 1999 letter constituted a valid motion for modification. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

Following the decision in *Jones*, 36 BRBS 105 (2002), the Board held that claimant's letter seeking a nominal award, filed in 1999 within one year of the last payment of benefits, satisfied the "content" element necessary to show whether a motion for modification is valid on its face. However, consideration of the "context" in which the claim was filed established a lack of intent to pursue a claim for a nominal award, thereby rendering the filing invalid. Specifically, the Board considered the fact that the claim for additional benefits was filed less than three weeks after the last payment of benefits, while the first evidence of a change of condition was dated more than one year after the 1999 letter was filed. Accordingly, the Board determined that claimant's 1999 letter was an anticipatory filing prohibited by *Greathouse* and *Pettus*. Further, claimant's actions following the filing of the claim established she lacked an actual intent to pursue the claim because, upon receiving a letter from the claims examiner requesting clarification of her 1999 letter, claimant informed the claims examiner that she did not want OWCP to schedule an informal conference, as in *Meekins*. In issuing such a response, claimant deliberately halted the processing of her claim and instead demonstrated she was attempting to hold her claim open indefinitely. The Board held, therefore, that claimant lacked actual intent to pursue the claim. Furthermore, the Board held that as claimant's injury was covered under the schedule, she could not seek nominal benefits for this injury on modification as they would payable under Section 8(c)(21), (h), and *PEPCO* precludes such an award. Accordingly, the Board held that the 1999 letter was not a valid motion for modification. *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002).

Claimant's letter to the district director, filed within one year of employer's final payment, stating a request for a "minimal ongoing compensation award" is a timely, valid request for modification for a *de minimis* award under the criteria set forth in *Rambo II* and *Jones*, 36 BRBS 105. The *de minimis* claim was filed after claimant's doctor stated her condition would deteriorate. Therefore, claimant's later claim for additional temporary total disability compensation also is timely as the *de minimis* claim remained pending when the later claim was filed. *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 F. App'x 333 (4th Cir. 2004).

The Board affirmed the administrative law judge's finding that claimant filed a "valid" motion for modification, rejecting employer's contention that it was an "anticipatory" filing. The timely letter evinced an intent to seek compensation for scheduled permanent partial disability benefits. The fact that claimant did not see a doctor and receive an impairment rating until many months after the letter was filed is not significant as the parties stipulated that claimant reached maximum medical improvement before the letter was filed, and a scheduled award runs from that date where, as here, claimant was working. Thus, the disability was in existence when claimant filed for modification. Moreover, *Pettus* does not require that the full extent of the loss claimed be quantified in the pleading, and there is a distinction between the information required to file a claim and that necessary to prove the claim. In this regard the Board cited *Avondale Indus., Inc. v. Alario*, 355 F.3d

848, 37 BRBS 116(CRT) (5th Cir. 2003). *Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (2005).

In light of Fourth Circuit precedent, *see Pettus*, 73 F.3d 523, 30 BRBS 6(CRT), as discussed in *Porter*, 36 BRBS 113, and *Meekins*, 34 BRBS 5, the Board affirmed the administrative law judge's finding that claimant's September 17, 1999, letter was an anticipatory filing even though he requested benefits for a loss in wage-earning capacity. Specifically, as determined by the administrative law judge, the Board held that claimant's statement that the letter is "not a request for the scheduling of an informal conference," belies his intent to seek additional compensation, as it is an indication that he "deliberately halted the administrative process." The Board also found it significant that claimant did not take any further action with regard to his claim until he received the report of Dr. Bryant, indicating that claimant reached maximum medical improvement, over three years after the date of his letter. The Board distinguished its decision in *Bailey*, 39 BRBS 11, on three points: (1) employer had not stipulated to maximum medical improvement; (2) claimant gave no indication that he was actively seeking specific evidence to support his claim; and (3) claimant specifically indicated that he did not want an informal conference. *Kea v. Newport News Shipbuilding & Dry Dock Co*., 39 BRBS 113 (2006), *rev'd*, 488 F.3d 606, 41 BRBS 23(CRT) (4th Cir. 2007).

Reversing this decision, the Fourth Circuit held that claimant's letter requesting additional compensation for a permanent partial disability in modification of his previous award for temporary disability was a valid request for modification. The court distinguished *Pettus* because the claimant was seeking compensation for an actual loss that was in existence, as evidenced by the parties' later stipulation, and the request was not an anticipatory filing, even though claimant had not obtained all of the evidentiary support needed at that time. The court stated that the Board placed too much emphasis on claimant's request that an informal conference not be scheduled, as the Act does not require such in conjunction with a request for modification. *Kea v. Newport News Shipbuilding & Dry Dock Co.*, 488 F.3d 606, 41 BRBS 23(CRT) (4th Cir. 2007).

Timely Request for Modification

A request is timely where it was filed within one year after the original claim was rejected; it is irrelevant that the hearing occurred over a year later. *Banks*, 390 U.S. at 462 n. 4. A timely request may be filed within one year of each rejection of a claim; thus, multiple motions for modification may be filed. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

Where benefits are awarded, the time runs from the last payment of compensation. *See Hudson v. Sw. Barge Fleet Services, Inc*., 16 BRBS 367 (1984). However, where the case is on appeal after the date of the last payment, the time for modification runs from the date of the final appeal rather than from the date of last payment. *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975), *aff'd*, 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). Similarly, the one year time period within which modification of a denial of a claim must be sought begins to run on the date the decision denying the claim becomes final, not on the date of the decision. Thus, modification may be requested within a year after the conclusion of the appellate process. *Black v. Bethlehem Steel Corp*., 16 BRBS 138, 142-43 n.7 (1984), *appeal dismissed*, 760 F.2d 274 (9th Cir. 1985) (table); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). Thus, an administrative law judge errs in denying a modification petition as untimely because it was filed more than one year after his decision where a timely appeal is pending. *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985) (black lung case).

The Board and the Fourth Circuit Court of Appeals have rejected the argument that a modification request must be filed within one year of the time the last payment would have been made if the compensation had been paid in installments rather than in a lump sum, holding it must be filed within one year of the last actual payment. *House v. S. Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983). *Accord Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

In *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), the Court held that the one year limitation under Section 22 only applies to the power to modify previously entered orders and does not bar consideration of a claim which was timely filed under Section 13 but the merits were never adjudicated. Thus, in those cases where a claimant timely files a claim and receives compensation without an adjudication, any subsequent request for benefits should be treated as the continuation of the initial adjudication and not a modification proceeding. Construing the phrase allowing modification "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued," the Court concluded that this means only that in the event of an award of benefits, the motion for modification must be filed within one year of the last actual payment of compensation, even if the order sought to be modified is actually entered only after such date. Accordingly, a timely filed claim remains open and pending

until it is adjudicated, and Section 22 does not bar consideration of the case more than one year after the last payment. *See Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002); *Norton v. Nat'l Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991); *Jackson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 8 BRBS 587 (1978), *aff'd*, 615 F.2d 916 (5th Cir. 1980) (table); *Gutierrez v. Giant Food Stores, Inc.*, 3 BRBS 203 (1 976); *Szymanski v. Erie Lackawanna Ry. Co.*, 2 BRBS 73 (1975). Where a 1975 settlement between claimant and employer was invalid because it did not meet the requirements of Section 8(i) or 20 C.F.R. §702.241, the Board rejected employer's contention that the claimant's 1978 request for modification was time barred; as there was no valid approval of the settlement, the claim remained open. *Bowen v. Alaska Interstate Co.*, 12 BRBS 577 (1980). Similarly, where a timely request for modification was made, the administrative law judge erred in finding it abandoned where claimant took no further action for 3 years; the timely request remained open. *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989). *Cf. Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984) (in a case subsequently limited to its facts, the Board stated that, as a matter of policy, old claims cannot be reopened and litigated years after the last payment of compensation).

A dispute existed for many years as to whether an ongoing nominal award could be entered in order to keep a claim open where claimant had no present loss of earnings but the prospect that earnings could be diminished in the future. Although the Fifth and District of Columbia Circuits held that such a *de minimis* award is an appropriate form of relief in cases where there is proof of a present medical disability and a reasonable expectation of future loss of wage-earning capacity, *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981), *rev'g* 12 BRBS 38 (1980); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984), *rev'g* 15 BRBS 233 (1983), the Board objected to such awards as having the effect of extending the right to Section 22 modification indefinitely. *Smith v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 287 (1984). *See Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3(CRT) (9th Cir. 1986) (Board noted its objection to *de minimis* awards, but did not disturb the award as neither party appealed it; the contested issue was whether Section 8(f) applies to such awards).

This question was ultimately resolved by the Supreme Court. *Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The Court found support for such awards in Section 8(h) which includes among the factors to be considered in addressing loss in wage-earning capacity "the effect of disability as it may naturally extend into the future." Since Section 22 liberally permits the modification of awards based on changed circumstances, there is no need to account for future possibilities in calculating a present loss; moreover, if the future possibilities were ignored and further compensation denied, Section 22 would bar modification after one year. The Court held that the better approach to account for future developments is to "wait and see," basing calculations on

current realities and permitting modifications based on the effects of an employee's disability as manifested over time. The employee with the potential of future harm nonetheless has a present disability under the Act, albeit a nominal one. Ordering nominal compensation holds open the possibility of a modified award if in the future claimant suffers depressed wages due to the effects of injury. Thus, the Court held that a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions. *See* Section 8 of the desk book.

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A request for modification must be made prior to one year from the last payment of compensation. Where payment is made in a lump sum, this time runs from the date of the lump sum payment, rather than from the date the last periodic payment would have been made. Thus, claimant's formal claim, filed within the time when ongoing payments would have been made but more than one year after the lump sum payment, was untimely. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

The deputy commissioner or administrative law judge need not issue his Section 22 modification order within one year of the last payment of compensation or of the denial of compensation; rather, the modification process need only be initiated within that time period. *Searls v. S. Ohio Coal Co.*, 11 BLR 1-161 (1988) (black lung case).

The parties initially stipulated that claimant was totally disabled, but the first administrative law judge did not issue an order based on these stipulations and there was no adjudication of the claim. Therefore, as no final compensation order was issued in this case, the current claim before the administrative law judge must be viewed as the adjudication of the previously-filed initial claim for compensation, and Section 22 is not applicable, pursuant to *Intercounty,* 422 U.S. 1, 2 BRBS 3. The Board thus reviewed the administrative law judge's disability findings, which he made under Section 22, as though they were made in an initial adjudication of claimant's claim. *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002).

The Board rejected employer's assertion that claimant's 1986 claim was untimely as a petition for modification under Section 22 or was barred by the doctrine of laches pursuant to *Rodriquez,* 16 BRBS 371 (1984). The majority found that the facts in this case were indistinguishable from those in *Intercounty,* 422 U.S. 1, 2 BRBS 3, wherein the Supreme Court held that the one year limitations period contained in Section 22 did not begin to run until a compensation order had been issued by the deputy commissioner. The Board stated that no order had been issued in this case which would bar claimant from pursuing his claim, rejecting employer's assertion that a 1977 "agreement" constituted such an order. The Board also rejected employer's assertion that the claims examiner's letter of July 21,

1977, which informed the parties that the informal disposition of the claim was approved but modified the proposed agreement, constituted the requisite "order." *Norton v. Nat'l Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991).

Prior to the Supreme Court's consideration of the issue, the Ninth Circuit held that a *de minimis* award is appropriate, following modification proceedings on claimant's prior permanent partial disability award, in order to preserve claimant's right to receive compensation in the future. *Rambo v. Director, OWCP*, 81 F.3d 840, 844, 30 BRBS 27, 30(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In a footnote, the Board stated that in determining the timeliness of a request for modification, the request would be considered timely if mailed within the one year period. Thus, where the date of mailing was within one year of the last payment of compensation, a modification request was timely. *Everson v. Stevedoring Services of Am.*, 33 BRBS 149 (1999).

In a black lung case, the Fourth Circuit held that modification is permitted within one year of each final rejection of a claim, including a rejection on modification, thus indicating that multiple motions for modification may be filed. The court stated that a footnote in the Supreme Court's decision in *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT) does not preclude the filing of multiple motions for modification. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

In a black lung case, the Seventh Circuit noted its agreement with the Fourth Circuit's holding in *Betty B Coal*,194 F.3d 491, that Section 22 permits successive modification petitions as long as they meet the one-year requirement. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

Section 22, and not Section 13, applies in determining whether the filing of a motion for modification is timely when a claim has been previously adjudicated, and Section 22 states that a motion for modification can be made at any time within one year of the rejection of a claim. A motion for modification filed less than one month after the completion of the appellate process which resulted in a rejection of claimant's claim is filed in a timely manner. Thus, the Board reversed the administrative law judge's determination that claimant's 1999 motion for modification was untimely. The 1999 motion sought to modify the finding that a 1992 motion was not timely filed. The Board affirmed the denial of modification, as claimant raised no factual basis for finding his 1992 motion timely and the argument that it was timely because filed within one year of the last state payment raises a legal issue which cannot be addressed on modification. *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001).

Where claimant filed a letter in 1999, within one year of the last payment of benefits, and the Board determined that letter constituted a valid motion for modification, the Board rejected employer's assertion that a letter filed in 2000 was untimely. The Board rejected employer's argument that the filing did not meet the requirement of FRCP 15(c) that an amendment to a pleading must "relate back" to the original filing, as FRCP 15(c) is not applicable. In accordance with case precedent regarding open and unadjudicated claims, the Board held that although no action was taken on the 1999 motion, it was an open claim that had not been adjudicated or withdrawn, making the filing in 2000 a permissible amendment to the claim for a subsequent disability arising from the work injury. Accordingly, both the 1999 filing and the 2000 filing were timely. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

Where the Board held that a 1999 letter requesting ongoing minimal compensation benefits filed by claimant within one year of the last payment of benefits did not constitute a valid motion for modification under applicable Fourth Circuit precedent because, *inter alia*, claimant's only injury was to a scheduled member and nominal awards for permanent disability fall under Section 8(c)(21), the letter could not hold open the claim for subsequent amendment. Thus, a second letter requesting temporary total disability benefits filed in 2001 was not timely filed. *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002).

Claimant's letter to the district director, filed within one year of employer's final payment, stating a request for a "minimal ongoing compensation award" is a timely, valid request for modification for a *de minimis* award under the criteria set forth in *Rambo II* and *Jones*, 36 BRBS 105. Distinguishing *Porter*, the Board stated that claimant's condition was temporary and thus a nominal claim was appropriate under Section 8(e), and it was filed after claimant's doctor stated her condition would deteriorate. Therefore, claimant's later claim for additional temporary total disability compensation also is timely as the *de minimis* claim remained pending when the later claim was filed. *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 F. App'x 333 (4th Cir. 2004).

Where claimant sustained an injury to his back and neck in 1990, and the administrative law judge denied permanent partial disability benefits in a Decision and Order issued in 1996, Section 22 rather than Section 13 applies in determining whether a later claim for temporary total disability resulting from the same injury is timely. Claimant did not allege a new injury when he had surgery in 2000, and thus, Section 13 cannot apply. That claimant sought a different type of benefits in the later filing does not make it a "new" claim. As neither party sought reconsideration or appeal of the administrative law judge's decision, it became final in November 1997 and a timely motion for modification was required to be filed within one year of this date. As claimant did not do so, he is barred from seeking additional disability benefits for the 1990 injuries. *Alexander v. Avondale Indus., Inc.*, 36 BRBS 142 (2002).

As the one-year period for requesting modification commenced in 2003, when the Board's prior decision affirming the administrative law judge's denial of the claim for permanent total disability benefits became final, the Board affirmed the administrative law judge's denial of claimant's 2007 modification request as untimely filed. The Board rejected claimant's contention that employer's continuing voluntary payment of medical benefits to claimant's health care providers constituted the payment of "compensation for purposes of tolling the Section 22 statute of limitations. The Board found no basis for adopting a different construction of the term "compensation" for purposes of the Section 22 limitations period than that adopted by the Supreme Court in *Marshall v. Pletz*, 317 U.S. 383 (1943) in which the Court held that employer's provision of medical care was not "compensation" within the meaning of Section 13(a) and, thus, did not toll the limitations period for filing a claim. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010), *aff'd*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *cert. denied*, 565 U.S. 1058 (2011).

The Fourth Circuit affirmed the decision of the Board that the administrative law judge properly denied claimant's request for modification as untimely. The court held that employer's voluntary payment of medical benefits to claimant's health care providers did not constitute "compensation" for purposes of tolling the Section 22 statute of limitations. The court stated that its construction of "compensation" in Section 22 as not including the payment of medical benefits is consistent with that section's legislative history, the purposes of Section 7, and the Supreme Court's holding in *Marshall v. Pletz*, 317 U.S. 383 (1943), that medical care is not "compensation" within the meaning of Section 13(a). The court further stated that equating medical benefits with compensation under Section 22 would effectively write out of the statute the one-year limitations period for requesting modification. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *cert. denied*, 565 U.S. 1058 (2011).

Change in Condition

Modification based on a change in condition is granted where the claimant's condition has improved or deteriorated following entry of the award. The Board has stated that the change must have occurred between the time of the award and the time of the request for modification. *Rizzi v. The Four Boro Contracting Corp.*, 1 BRBS 130 (1974).

The party requesting modification bears the burden of proof in demonstrating a change in condition or mistake in fact. *Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In *Rambo II*, the Court stated that on an initial claim under Section 8(c)(21), claimant as the proponent of an award bears the burden of persuasion. However, when employer seeks modification of a prior award, it is the proponent with the burden of demonstrating a change in conditions justifying modification. Where the prior award was based on a finding of a loss in earning capacity, employer satisfies its burden by demonstrating that as a result of changed circumstances, the employee's earnings have increased. At that point, the burden shifts back to claimant to demonstrate entitlement to a nominal award. *See Vasquez v. Cont'l Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990) (where claimant was laid off from suitable job provided by employer, he met burden to establish change in economic conditions); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984) (where claimant's inability to perform his secondary occupation of farming existed at the time of the initial proceeding and the evidence supported the administrative law judge's finding of no increased loss to claimant's injured hands, claimant failed to demonstrate a change of condition); *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983) (claimant did not establish that his back condition had worsened since the prior decision denying benefits and thus had no compensable disability as a result of his back injury). Since the party requesting modification has the burden to prove a change in condition or mistake in fact, the Section 20(a) presumption is inapplicable to the issue of whether claimant's condition has changed since the prior award. *Leach v. Thompson's Dairy, Inc.*, 6 BRBS 184 (1977).

In early cases, the Board stated that "change in condition" refers to a change in claimant's physical condition, *see Rizzi,* 1 BRBS 130; thus, the Board stated that a change in economic circumstances alone was insufficient to show a change in condition, although in some cases, it reviewed the contention under the "mistake in fact" standard. *See Brittain v. RMK-BRJ*, 9 BRBS 1059 (1978), *aff'd,* 620 F.2d 297 (5th Cir. 1980) (table); *Presley v. Tinsley Maint. Serv.*, 9 BRBS 588 (1979). *See also Vilen v. Agmarine Contracting, Inc.*, 12 BRBS 769 (1980) (employer's argument fails under either change in condition or mistake in fact as employer did not show a change in claimant's earning capacity but rather that his earnings increased due to increases in general wage levels and his greater seniority).

However, in *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd,* 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985), the Board held that modification may be granted based on a demonstrated change in claimant's earning

capacity as well as a change in his physical condition. In *Fleetwood,* claimant had received salary increases and a promotion, and based on this evidence, the administrative law judge granted employer's motion for modification, finding that claimant no longer had a loss in wage-earning capacity. Affirming this decision, the Board stated that disability is an economic as well as a medical concept and held that employer should no longer have to compensate claimant when there has been a change in claimant's economic condition such that he no longer has a loss in wage-earning capacity. In affirming, the Fourth Circuit reviewed prior decisions cited for the proposition that change in condition is limited to physical change and found that none of the cases held that modification cannot be granted when an employee experiences a permanent increase his wage-earning capacity. *See, e.g., Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964 (5th Cir. 1944) (modification denied where increased earnings are a result of booming economy and not indicative of an increase in wage-earning capacity); *McCormick Steamship Co. v. U.S. Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933) (court reversed modified order increasing award as claimant's lower earnings were a result of depressed economic conditions in general and not a decrease in claimant's earning capacity). The court also discussed *Gen. Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), *aff'g Woodberry v. Gen. Dynamics Corp*., 14 BRBS 431 (1981), finding that while it stated in a footnote that a change in conditions means a change in claimant's physical condition and not other conditions, the footnote rejected the argument that a change in the law is a change in condition under Section 22. In addition, the holding in that case was that employer cannot raise Section 8(f) for the first time on modification; it thus did not address a demonstrated change in earning capacity. *Accord Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 154(CRT) (1lth Cir 1985), *aff'g* 14 BRBS 220.15 (1981).

The Ninth Circuit subsequently addressed this issue and stated its disagreement with *Fleetwood.* In *Rambo v. Director, OWCP*, 28 F.3d 86, 28 BRBS 54(CRT) (9th Cir. 1994), *rev'd sub nom. Metrop. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), the court held that a party seeking modification based on a change in condition must prove that claimant has a change in his physical condition; a change in wages, training, skills or educational background is insufficient. This decision was reversed by the Supreme Court in *Metro. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The Court held that absent any change in the employee's physical condition, .a disability award may be modified under Section 22 where there is a change in the employee's wage-earning capacity. The Court stated that this interpretation is bolstered by the fact that the term "conditions" in Section 22 is not modified in any way; thus, the "conditions" that entitled a claimant to benefits in the first place, *i.e.*, economic disability, are subject to modification. The Court further stated that a change in wage-earning capacity is not demonstrated by "every variation in actual wages or transient change in the economy." In this case, however, the administrative law judge took care to account for inflation and risk of job loss in finding that the claimant acquired additional skills and a new job at higher wages and thus does not have a loss of wage-earning capacity. The *Rambo* case came before the Supreme Court a second time on the issue of a nominal

award under Section 8(c)(21) where a claimant with no present disability has a significant possibility of future economic harm, resulting in the decision in *Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). *Rambo II* also discusses the parties' relative burdens of proof in a Section 22 proceeding.

Digests

Following its holding in *Fleetwood*, 16 BRBS 282, the Board vacated the administrative law judge's decision and held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering to establish the availability of suitable alternate employment. Employer sought to develop this evidence prior to the initial hearing, but the administrative law judge refused to accept it because the rehabilitation counselor did not secure interviews for claimant prior to the hearing. On modification, employer argued that claimant had rejected rehabilitation offers and a job offer obtained for him. The Board stated that it is consistent with *Fleetwood* to allow evidence of suitable alternate employment. Moreover, the factors initially considered by an administrative law judge in determining claimant's work capabilities are also relevant on modification, and therefore where employer produces evidence of job opportunities, the standards for establishing suitable alternate employment apply in a modification proceeding. *Blake v. Ceres Inc.*, 19 BRBS 219 (1987).

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 as well as due to a mistake in fact. As the administrative law judge did not state the grounds for modifying the prior causation holding, the case was remanded. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

An employer may seek modification based on a change of condition by showing that claimant's temporary total disability became a permanent disability. Moreover, the Board held that the administrative law judge erred in finding that employer failed to assert a change in condition since employer asserted that it could prove that, through vocational rehabilitation, claimant obtained additional qualifications which rendered him able to obtain employment not previously available to him and that such jobs actually were available. Employer, moreover, was also entitled to seek modification of the award from temporary to permanent. The Board also held that application of *Fleetwood* is not limited to situations where claimant is actually working, and the administrative law judge erred in requiring employer to submit its evidence in response to a show cause order. The case was remanded for reconsideration. *Moore v. Washington Metro. Area Transit Auth.*, 23 BRBS 49 (1989).

If an award of continuing temporary total disability benefits is made and thereafter claimant's condition changes, either party may petition for Section 22 modification. *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Rejecting employer's argument that the administrative law judge erred in entering an award of temporary disability benefits extending beyond the date of his decision, the court noted the availability of Section 22 modification if claimant returns to work or reaches maximum medical improvement. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

The party requesting modification based on a change in condition has the burden of showing the change, and modification may be based on a change in the claimant's wage-earning capacity. The standard for determining disability is the same for a Section 22 modification proceeding as it is for an initial proceeding under the Act. Thus, where claimant demonstrated he was laid off from a job which previously was found to constitute suitable alternate employment and he remained unable to perform his pre-injury work, he carried his burden of showing a change in condition. The burden thus shifted to employer to establish the availability of suitable alternate employment, and it produced no evidence in this regard. The Board reversed the administrative law judge's decision that claimant's disability status was unaffected by the layoff and held that claimant was entitled to permanent total disability benefits. *Vasquez v. Cont'l Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990).

The Board held that the administrative law judge erred in imposing a "material" or "substantial" requirement for a change in economic condition (increase in wages) pursuant to Section 22. Modification may be granted on any change in economic condition as the scope of modification is not narrowed because employer is seeking to terminate benefits or reduce an award. The Board stated that the administrative law judge further erred in using a percentage method in determining whether claimant's wage-earning capacity changed. *Ramirez v. S. Stevedores*, 25 BRBS 260 (1992).

A change in economic condition may provide justification for modification and an employer may attempt to modify a total disability award by offering evidence of suitable alternate employment. As LIGA had such evidence to submit, the administrative law judge erred in summarily denying the motion for modification. *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1 (1994).

Although the administrative law judge erred in suggesting that employer is required to show a *significant* increase in claimant's wage-earning capacity for purposes of modification, the Board nevertheless affirmed his denial of modification, finding his analysis comports with applicable law. The administrative law judge considered factors relevant under Section 8(h), concluding that claimant's increased post-injury wages and hours reflect inflation and change in the economy in the form of greater job availability,

and also considered other intangible factors such as claimant's inability to work at night and as a commercial fisherman. This conclusion is consistent with the Supreme Court's recognition in *Rambo I,* 515 U.S. 291, 30 BRBS 1(CRT) (1995), that modification must be based on a change in claimant's wage-earning capacity and not every variation in actual wages or transient change in the economy. *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

The Board affirmed the administrative law judge's determination that employer established a change in claimant's condition. Specifically, the Board held that the administrative law judge acted within his discretion in crediting the opinions of two doctors who stated that claimant no longer is disabled. The Board, however, found that the administrative law judge erred in using the date of maximum medical improvement determined by claimant's doctor, who concluded claimant was permanently totally disabled as of that date in 1994, rather than the date the credited physicians stated claimant was able to return to work in 1996. *Spitalieri v. Universal Mar. Serv.*, 33 BRBS 6 (1999), *aff'd on recon. en banc*, 33 BRBS 164 (1999) (Brown and McGranery, JJ., dissenting on other grounds), *rev'd on other grounds*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

The parties stipulated at the time of the initial compensation order that claimant was totally disabled. This stipulation established that claimant was unable to return to his usual work. Employer submitted new medical evidence on modification stating that claimant is no longer precluded from performing his former longshore duties, and the administrative law judge rationally credited this evidence over claimant's subjective complaints. Thus, the Board affirmed the administrative law judge's finding that modification is warranted and that claimant is limited to an award under the schedule. *Ramos v. Global Terminal & Container Services, Inc.* 34 BRBS 83 (1999).

The administrative law judge erred in refusing to consider employer's labor market survey in a Section 22 modification proceeding, based on her determination that employer should have produced its evidence regarding suitable alternate employment at the initial hearing, where the evidence on which the labor market survey was based was not available on the date of the initial hearing. On remand, the administrative law judge must admit the evidence and determine if it establishes a change in condition or mistake in fact. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Where an employer attempts to modify a total disability award pursuant to Section 22 based on a change in claimant's condition by offering evidence establishing the availability of suitable alternate employment, such evidence must demonstrate that there was, in fact, a change in claimant's economic condition from the time of the award to the time modification is sought. In this case, employer's counsel made a tactical decision at the initial hearing not to argue that claimant was capable of performing suitable alternate employment and subsequently sought to present for the first time, on modification,

evidence of suitable alternate employment without any allegation that claimant's condition had changed or circumstances existed, as in *Delay*, that inhibited employer's ability to pursue this issue at the first hearing. Noting that Section 22 is not a back door for retrying or litigating an issue which could have been raised in the initial proceedings, the Board held that employer did not demonstrate a change in claimant's economic condition, but, rather, simply now possessed evidence of suitable alternate employment which it did not choose to develop at the time of the hearing. Therefore, the Board affirmed the denial of modification. *Lombardi v. Universal Mar. Serv. Corp.*, 32 BRBS 83 (1998).

The Board reversed the administrative law judge's decision modifying claimant's total award to partial, holding that the case cannot be distinguished from *Lombardi*, 32 BRBS 93 (1998). At the time of the first hearing, employer offered no evidence of suitable alternate employment. Employer sought modification by offering a labor market survey many years later. The Board held that this was merely an attempt to correct a litigation strategy, as employer offered no evidence that claimant's employability had changed, that jobs were unavailable at the time of the first hearing or that extenuating circumstances existed, as in *Delay*. Moreover, the administrative law judge's attempt to use the 1984 Amendment to the Section 44 assessment formula as a basis for justifying its belated attempt to establish suitable alternate employment fails as it involves a legal issue and in any event, comes more than 10 years after the amendment and thus it would not be in the interest of justice to permit its consideration. *Feld v. Gen. Dynamics Corp.*, 34 BRBS 131 (2000).

In a case ultimately resulting in three published Board opinions and an appellate decision, the Board held that the evidence employer submitted on modification, *i.e.*, a more recent medical opinion which altered claimant's physical limitations, and a labor market survey based in part upon that opinion identifying 14 positions which claimant should be able to perform, is sufficient to bring the claim within the scope of Section 22 by way of a change in claimant's physical and economic condition. Although employer submitted inadequate evidence of suitable alternate employment at the first hearing, employer should not be precluded from improving its evidence as claimant did not cooperate with employer's expert and should not benefit from this behavior. The Board therefore vacated the denial of employer's petition for modification and remanded the case for the administrative law judge to determine whether the evidence proffered by employer on modification is sufficient to establish the availability of suitable alternate employment. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

On remand, the administrative law judge summarily found suitable alternate employment established, stating he was constrained to do so by the Board's decision. On appeal by both parties, the Board again held that employer produced sufficient evidence to bring the claim within the scope of Section 22. In clarifying its previous decision, the Board distinguished *Lombardi*, 32 BRBS 83, and *Feld*, 34 BRBS 131, as employer, in the instant case, presented evidence of suitable alternate employment at the initial hearing, and offered

evidence on modification of a change in general economic conditions. Moreover, claimant's subsequent cooperation with employer's vocational experts enabled employer to obtain allegedly better evidence of alternate employment suitable for claimant. Furthermore, a doctor's statement regarding claimant's increased ability to walk provides evidence of a change in claimant's physical condition. Contrary to the administrative law judge's belief, however, the Board did not mandate that he modify the earlier decision based on this evidence. Therefore, the case is again remanded for the administrative law judge to evaluate the medical and vocational evidence of both parties and to determine the weight to be accorded the evidence to determine if there has been a change in claimant's condition. *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000).

On second remand, the administrative law judge found that employer did not present sufficient evidence of suitable alternate employment and again denied modification. The Board again remanded the case, stating it is not clear that the administrative law judge considered all of employer's evidence, and in particular Mr. Steckler's labor market survey, on second remand. Contrary to the administrative law judge's decision, this labor market survey, which identified seven positions as a security guard all approved by Dr. Greifinger after consideration of claimant's present physical condition, constitutes evidence of jobs different in kind to those submitted by employer at the initial hearing. The Board, stressing that a claimant should not be able to benefit from his lack of cooperation with vocational experts and noting that the administrative law judge again failed to appreciate the impact of claimant's subsequent cooperation with employer's vocational expert, *see Jensen I*, 33 BRBS 97, again held that employer is entitled to the opportunity to establish suitable alternate employment on modification. Lastly, the Board again rejected the administrative law judge's statements on second remand that the instant case is factually indistinguishable from *Lombardi*, reiterating its holding in *Jensen II*, 34 BRBS 147, that employer has always attempted to establish suitable alternate employment. *Jensen v. Weeks Marine, Inc.*, 35 BRBS 174 (2001).

On appeal following a final Board decision, *Jensen v. Weeks Marine, Inc*, BRB Nos. 02-0333 *et al.* (Jan. 15, 2003) (unpubl.), the Second Circuit affirmed the grant of modification. The court initially held that the Board properly remanded this case for reconsideration of employer's entitlement to modification based on the evidence employer presented to the administrative law judge in the Section 22 proceedings, and it affirmed the finding that employer established the availability of suitable alternate employment as supported by substantial evidence. The court stated that employer was not required to show that the evidence it developed was not available before the first hearing in order to secure a modification hearing. The court stated that modification proceedings are *de novo*, the administrative law judge is not bound by any previous fact-finding, and, after a modification request has been made, the administrative law judge has the "authority, if not the duty, to reconsider all of the evidence for any mistake of fact or change in conditions," citing *Consolidated Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). With regard to language in the Board's first decision discussing *Lombardi* and *Feld*, the court stated that

while the party seeking modification bears the burden of proving it is appropriate, to the extent the Board's decision implies that the moving party must proffer evidence of a change in condition or newly discovered evidence, such a reading would improperly restrict the mistake in fact ground. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

The Board affirmed the administrative law judge's decision to reopen this case on modification. Although the employer did not produce evidence of suitable alternate employment at the initial hearing, employer sought modification pursuant to Section 22 based on a labor market survey, prepared after the issuance of the administrative law judge's initial decision, which it averred established the availability of suitable alternate employment. Citing recent modification cases issued by the circuit courts and the Board, specifically *Jensen*, 346 F.3d 273, 37 BRBS 99(CRT), *Old Ben Coal*, 292 F.3d 533, 36 BRBS 35(CRT), and *Wheeler*, 37 BRBS 107, the Board stated that given the Act's preference for accuracy over finality, awarding claimant the appropriate amount of benefits for his disability is of paramount importance. Moreover, an accurate determination of claimant's entitlement to benefits renders justice under the Act. As the Board's prior decisions in *Lombardi*, 32 BRBS 83, and *Feld*, 34 BRBS 131, did not give weight to the need for an accurate determination of claimant's disability, and Section 22 permits the alteration of awards based on claimant's current physical or economic condition or to correct an award resting on a mistake in fact, the Board concluded that the limitations on evidence imposed by those cases cannot stand. Thus, the Board overruled *Lombardi* and *Feld*. Therefore, the administrative law judge properly reopened the case based upon a rational finding that employer's evidence, if credited, would demonstrate that either his initial decision was factually mistaken, or that conditions have changed to the point that claimant is no longer totally disabled. *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009).

In a case where claimant and her partner did not formally marry and did not enter into a common-law marriage or a "concubinage" relationship under Mexican law that is the equivalent of marriage, the Board held that the administrative law judge properly determined that claimant did not "remarry" pursuant to Section 9(b). Accordingly, the Board held that the administrative law judge properly found that employer did not establish a change in condition, *i.e.*, claimant remains decedent's widow, and it affirmed the administrative law judge's denial of employer's motion for modification and the continuation of claimant's widow's benefits. *A.S. [Schweiger] v. Advanced Am. Diving*, 43 BRBS 49 (2009) (McGranery, J., dissenting).

The Eleventh Circuit adopted the Board's burden-shifting approach, as articulated in *Vasquez*, 23 BRBS 428, on the question of how to define and allocate the burden of proof when a claimant seeks Section 22 modification based on a change in condition. In this case, the Eleventh Circuit held that substantial evidence supported the administrative law judge's finding that claimant met his initial burden to show a change in conditions by

establishing that the reduction in his wages and hours in his post-injury suitable employment did not result from any actions on his part. The court thus held that the burden shifted to employer to show a reasonably available suitable alternate job that offered a higher weekly wage than the one he had in order to defeat the claim for increased partial disability benefits. The court held that the administrative law judge's finding that employer did not present any evidence of actually available higher paying suitable alternate employment is supported by substantial evidence. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

Claimant's wages in his suitable alternate employment decreased and claimant sought an increased permanent partial disability award through modification proceedings. The Eleventh Circuit held that the administrative law judge rationally determined that the lower post-injury wages represented claimant's wage-earning capacity under Section 8(h). As the Section 8(h) factors were taken into account in the initial proceedings, the administrative law judge was not required to examine them again, as the only basis for modification was the change in claimant's actual wages. There is no evidence that claimant's skills, education or other similar factor changed, and it was employer's burden to introduce evidence to that effect if it wished to demonstrate a higher wage-earning capacity. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

Additional relevant cases may be discussed, *infra,* under mistake in fact.

Mistake in Fact

Mistake in a determination of fact is the second ground for Section 22 modification. The authority to reopen proceedings is not limited to particular facts but extends to all mistaken determinations of fact. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968). A party seeking to modify a decision on the basis of a mistake in fact is not barred from modification because the prior award based on the alleged mistake in fact was affirmed on appeal. *Hudson v. Sw. Barge Fleet Services, Inc*., 16 BRBS 367 (1984); *Cobb v. Schirmer Stevedoring Co*., 2 BRBS 132 (1975), *aff'd*, 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978); *Pinizzotto v. Marra Bros., Inc.*, 1 BRBS 241 (1974); *Gibbs v. Carolina Shipping Co.*, 1 BRBS 49 (1974).

As is the case with modification based on a change in condition, the party seeking modification bears the burden of demonstrating a mistake in a determination of fact. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

In *Banks*, 390 U.S. 459, claimant filed a claim for death benefits, asserting that her husband's death was due to a fall at work on January 26. This claim was denied. After discovering a witness to a work injury suffered by her husband on January 30, claimant filed a new claim for death benefits. The deputy commissioner awarded benefits. However, the Court of Appeals reversed, finding that the second claim was barred by the doctrine of *res judicata*. Before the Supreme Court claimant contended that her second claim fell within Section 22 because it challenged a determination of fact—the finding that her husband's fall was not the result of a work injury—while employer argued that a mistake in fact under Section 22 refers only to clerical matters and matters concerning an employee's disability. Rejecting employer's argument, the Court first discussed the legislative history to the 1934 Amendment, which stated that the language regarding mistake in fact was intended to broaden the grounds for modification where such a mistake makes modification desirable in order to render justice under the Act. *Id.* at 464. The Court found no support for a holding that a statute authorizing review of determinations of fact is limited to issues involving disability. Thus, in the absence of persuasive reasons to the contrary, the words of the statute were entitled to their ordinary meaning and therefore, mistake in fact applies to any determination of fact. Thus, the second claim, filed within a few months of the original claim, came within the scope of Section 22.

The Supreme Court's decision in *O'Keeffe*, 404 U.S. 254, further addressed the broad scope of Section 22. In that case, the deputy commissioner initially found that the evidence failed to establish that claimant's disability was related to his employment, but on modification, reached the opposite result. The Court of Appeals reversed the award, holding that in the absence of changed conditions or new evidence clearly demonstrating a mistake in the initial conclusion, the statute did not authorize the deputy commissioner to "change his mind" upon receipt of additional but cumulative evidence. *Id.* at 255. The Court reversed,

finding no support for this "narrowly technical and impractical construction." *Id.* (citation omitted). The Court stated

> There is no limitation to particular factual errors, or to cases involving new evidence or changed circumstances…. The plain import of [the 1934] amendment was to vest a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

Id. at 255-256. The Court rejected the argument that its construction rendered review under Section 21 meaningless, stating that such review is directed to the legal validity of the award.

The Board has applied the *O'Keeffe* holding that the fact-finder has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection on the evidence initially submitted in a number of cases. *E.g., Dobson v. Todd Pac. Shipyards Corp.,* 21 BRBS 174 (1988); *Jenkins v. Kaiser Aluminum & Chem. Sales, Inc.,* 17 BRBS 183 (1985); *Dean v. Marine Terminals Corp.,* 7 BRBS 234 (1977); *see Kellis v. Newport News Shipbuilding & Dry Dock Co.,* 17 BRBS 109 (1985) (administrative law judge abused his discretion in denying claimant's motion under Section 22 to reopen the record for new evidence).

The sole basis for modification in a survivor's claim is proof of a mistake in a determination of fact. *Jourdan v. Equitable Equip. Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting on other grounds). *Accord Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162 (1989) (black lung case).

Facts relating to the nature and extent of claimant's disability have been the subject of modification proceedings. *See, e.g., Allen v. Strachan Shipping Co.,* 11 BRBS 864 (1980); *Steele v. Associated Banning Co.,* 7 BRBS 501 (1978). Facts involving questions of coverage, employer-employee relationship, timeliness of claims, average weekly wage, and whether the injury arose out of and in the course of employment also have been the subject of decisions under Section 22. *Banks,* 390 U.S. 459 (causation); *McCord v. Cephas,* 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), *rev'g* 1 BRBS 81 (1974) (employment relationship); *Jenkins,* 17 BRBS 183 (coverage); *Winston,* 16 BRBS 168 (affirming denial of modification based on additional physical and psychological disability, as well as disfigurement, the Board held with regard to the latter that an alleged error in concluding that the 1972 amended version of Section 8(c)(20) does not apply to amount of benefits is based on a mistake in fact and is a proper basis for Section 22 modification but affirmed the existing award as claimant did not establish that his disfigured hands would handicap him in securing future employment); *Sutton v. Genco, Inc.,* 15 BRBS 25 (1982) (modification of average weekly wage denied); *Amantia v. Visek Tailors,* 14 BRBS 1043

(1982) (affirming denial of modification based on the claimant's alleged failure to understand that the agreement she signed was a final settlement of her claim); *Nasem v. Singer Bus. Machines*, 13 BRBS 429 (1981), a*ff'd mem.*, 691 F.2d 495 (4th Cir. 1982) (allegation of bias due to first administrative law judge's *ex parte* communications rejected as a basis for modifying finding of untimely notice);

The Board has concluded that the concept of mistake in determination of fact includes mixed questions of law and fact. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Presley v. Tinsley Maint. Serv.*, 9 BRBS 586 (1979) (S. Smith, dissenting, 10 BRBS 89 (1979)). Thus, modification may be based upon a mistake in the determination of the extent of claimant's disability. *Presley*, 9 BRBS 588; *see also Sutton*, 15 BRBS 25. In *Jenkins*, 17 BRBS 183, the Board affirmed the administrative law judge's decision to grant modification with regard to claimant's coverage under the Act based on the *O'Keeffe* standard as well as the fact that coverage is a mixed question of law and fact. The Board noted that the administrative law judge properly did not rely on a change in law which had occurred since the first decision but reconsidered testimony from the initial hearing and found that a mistake of fact occurred with regard to claimant's involvement in shipbuilding under the law existing at the time of the first decision.

In addressing the broad scope of modification based on a mistake in fact, the Court in *Banks* and *O'Keeffe* relied on the legislative history to the 1934 Amendment adding this grounds for modification, which stated that the language regarding mistake in fact was intended to broaden the grounds for modification where such a mistake makes modification desirable in order to render justice under the Act. Thus, where an administrative law judge finds a mistake in fact, the judge must also consider whether modification would render justice under the Act.

In *McCord*, 532 F.2d 1377, 3 BRBS 371, decedent was killed while allegedly in employer's employ; employer responded to the initial notice of injury by averring that decedent had never been in its employ. Over the course of the next four years, the widow's claim progressed through the administrative process with no participation by employer. Three months after issuance of an award of death benefits, employer filed a motion for modification and produced evidence it did not employ decedent. An administrative law judge granted modification, and the Board reversed, holding that the administrative law judge lacked jurisdiction to grant modification on grounds of a mistake in such a "jurisdictional fact" and that Section 22 did not allow the nullification of an award. Reversing this decision, the D.C. Circuit held that the fact-finder did have jurisdiction to reopen the claim under Section 22 regardless of the type of facts at issue and that Section 22 by its very terms allows termination of an award. However, the court stated that merely because there was power to reopen does not mean such is automatic upon a finding of a mistake in fact. The court relied on the statements in *Banks* and *O'Keeffe* that the basic criterion for reopening a case under Section 22 is whether reopening will "render justice under the Act." The court stated that an allegation of mistake in fact should not be allowed

to become a back door route to retry a case, and that it "would be difficult to describe a history of greater recalcitrance, of greater callousness towards the processes of justice, and of greater self-serving ignorance" than the attitude of employer in the years from the decedent's death until employer first began to raise its defenses. *Id.*, 532 F.2d at 1381, 3 BRBS at 377. The court thus remanded the case to the Board to determine whether reopening would render justice and, if reopening was justified, whether termination of the award should be retroactive or prospective only. On remand, the Board held that modification did not render justice under the Act where an employer sought to relitigate the question of employer-employee re1ationship four years later and its prior actions had shown contempt and disregard for the legal process. *McCord*, 4 BRBS 224 (1976), *aff'd*, 566 F.2d 797 (D.C. Cir. 1977) (table). *See also Thompson*, 6 BRBS 62 (after initial hearing and modification found decedent's condition work-related, employer sought to reopen this issue again years later when decedent sought modification of a temporary award to permanent; Board held modification did not render justice, as it was the third attempt by employer to retry this issue, decedent was suffering financial hardship and decedent therefore had to rely on a written report and prior hearing records in the attempt to refute the new expert witnesses produced by employer).

The Board subsequently relied on the holding that an allegation of mistake in fact should not be allowed to become a back door route to retry a case as the basis for denying modification in a series of cases involving the attempt to modify based on an issue that was not raised at the initial hearing or where evidence which was available at the time of initial proceedings was presented for the first time on modification. In *Lombardi v. Universal Mar. Serv. Corp.*, 32 BRBS 83 (1998), and *Feld v. Gen. Dynamics Corp.*, 34 BRBS 131 (2000), the Board held that an employer who did not raise suitable alternate employment at the initial proceeding and who did not establish a change in claimant's economic condition could not obtain modification based on new evidence of suitable alternate employment, an issue it chose not to raise at the initial hearing. In *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000), the Board stated that while the administrative law judge had the power to reopen the case under Section 22 to receive additional evidence regarding the basis for the opinion of employer's expert, she was not required to do so and thus did not abuse her discretion in rejecting employer's argument regarding a mistake in fact. The Board relied on the decisions in *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT) (11th Cir. 1985), and *Gen. Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), wherein the courts affirmed the Board's decision that employer could not raise Section 8(f) entitlement for the first time on modification. In *Woodberry*, the court stated that the need to render justice under the Act must be balanced against the need for finality in decision-making and held that

> reopening would not serve the orderly administration of justice which depends in no small part upon finality of judicial determinations. Parties should not be permitted to invoke §22 to correct errors or misjudgments of

> counsel, nor to present a new theory of the case when they discover a subsequent decision arguably favorable to their position.

Id., 673 F.2d at 26, 14 BRBS at 640. In *Verderane,* the court stated that Section 22 petitions are intended to prevent injustice resulting from erroneous fact-finding and not to save litigants from the consequences of their counsel's mistakes.

Subsequent cases, however, have disagreed with some of the language employed in this regard, finding that an emphasis on finality is not supported by the statute or the Supreme Court decisions. In *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002), a Black Lung Act case, the court held that Section 22 reflects a statutory preference for accuracy over finality. Thus, while something less than sanctionable conduct as in *McCord* may justify the denial of modification, the fact that evidence was available at an earlier stage of the proceedings is not enough. The court stated that the administrative law judge will need to consider many factors, including the diligence of the parties, the number of times a party has sought reopening and the quality of the evidence relied on in order to determine whether modification will render justice under the Act. In *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003), the court similarly stated that employer was not required to show that evidence it developed was unavailable before the initial hearing in order to obtain a modification hearing. The court further stated that while the party seeking modification must establish it is appropriate, to the extent the Board has implied that the moving party must proffer evidence of a change in conditions or newly-discovered evidence, such language would improperly restrict the mistake of fact ground.

The Board followed *Old Ben Coal* and recognized the importance of accuracy as opposed to finality in affirming an administrative law judge's decision to reopen the case for evidence of suitable alternate employment where claimant did not cooperate with the vocational counselor during the initial proceedings. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Affirming an administrative law judge's decision to reopen a case for evidence of suitable alternate employment despite the fact that the issue was not raised in earlier proceedings, the Board in *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009), cited the need for accuracy as opposed to finality in finding that modification rendered justice under the Act. *Lombardi* and *Feld* were overruled to the extent they are inconsistent with this holding.

In this case, the administrative law judge granted Section 8(f) relief on the permanent partial disability awarded in the first proceeding. On claimant's request for modification to permanent total disability, the administrative law judge granted the award but found Section 8(f) inapplicable. On appeal, the Board rejected employer's challenge to the administrative law judge's authority to address Section 8(f), holding that neither the "law of the case" doctrine nor the fact that Section 8(f) was not listed as an issue in the modification request precluded the administrative law judge's reopening this issue in view of his broad authority to address mistakes in fact. The case was remanded as the administrative law judge did not afford the parties an adequate opportunity to present evidence and arguments relevant to Section 8(f) once he notified them that he would address this issue in his decision on modification. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

Where, subsequent to the administrative law judge's initial decision, the State of Washington sought to obtain reimbursement of the state benefits it had previously paid claimant, and where the administrative law judge had awarded employer a credit pursuant to Section 3(e) for the state benefits, the administrative law judge properly granted modification. The Board concluded that the state order demanding reimbursement created a change in claimant's economic condition which potentially impinged on the availability and the amount of the Section 3(e) offset awarded to employer in the initial decision, thereby presenting a mistake in a mixed question of law and fact which is properly the subject of a Section 22 modification proceeding. *McDougall v. E. P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. Thus, where claimant sought modification based on a mistake in fact in the initial determination on causation and a change in her physical condition, the administrative law judge erred in denying modification based on findings that claimant's evidence was "merely cumulative" and that he lacked jurisdiction to reweigh the evidence considered by the prior administrative law judge. Pursuant to *O'Keeffe*, the administrative law judge has jurisdiction to reconsider previously submitted evidence, and it is an abuse of discretion not to consider new evidence submitted in a modification proceeding. The Board remanded the case to the administrative law judge for consideration of the petition for modification in light of both the old and new evidence. *Dobson v. Todd Pac. Shipyards Corp.*, 21 BRBS 174 (1988).

Employer sought modification based on a change in claimant's economic condition where he was receiving concurrent awards for permanent partial and permanent total disability. The Board rejected the administrative law judge's refusal to address modification because

the initial award was based on the parties' agreement, holding the case did not involve a Section 8(i) settlement. That claimant's average weekly wage and wage-earning capacity at the time of the first injury were selected by the parties or that claimant's actual average weekly wage at that time is indeterminable are not bases for denying modification. The Board set out the broad scope of the administrative law judge's authority under Section 22 for a change in condition and mistake in fact and stated that the method of calculating benefits after two injuries so as to avoid double recovery presents a mixed question of law and fact regarding average weekly wage and wage-earning capacity, which is subject to Section 22 modification. The case was remanded to the administrative law judge for findings as to claimant's actual wage-earning capacity after the first injury and appropriate adjustments in the two awards to avoid double recovery. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).

The Board rejected the contention that, as a matter of law, modification in a black lung survivor's claim may be based only on newly discovered evidence which was not reasonably available or ascertainable at the time of the initial hearing. The Board held that the relevant inquiry for the administrative law judge is whether a mistake in a determination of fact was demonstrated, and, if so, whether reopening the case would render justice under the Act. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In a case where the administrative law judge denied modification on the basis that claimant raised a legal error not subject to Section 22, the Board stated that the relevant issue, wage-earning capacity, may be considered a mixed question of law and fact subject to Section 22 modification. In this case, however, it was unnecessary to decide whether the administrative law judge correctly found that the requested inflationary adjustment to post-injury earnings was a legal error because claimant is not entitled to modification in any event. Claimant's award of benefits was based on the likelihood of a future decrease in earnings and not on an actual decrease in wage-earning capacity. Thus, since claimant's actual post-injury earnings were not the basis for the award, they cannot be related back to the time of injury to factor out the effects of inflation. Claimant submitted with his motion for modification the wages his present job paid at the time of injury but this is irrelevant to the issue presented. *Zepeda v. Nat'l Steel & Shipbuilding Co.*, 24 BRBS 163 (1991).

The Board held that the administrative law judge erred in denying employer's petition for modification regarding responsible carrier issues, and remanded the case for a new hearing. The Board initially noted that there was a mistake in the determination of the date of last injurious exposure, which is central to the issue of responsible carrier. Employer submitted newly discovered evidence, which could only be offered under Section 22, that asbestos was in use at the facility when Fidelity was on the risk. Moreover, there is uncontradicted testimony by a co-worker of decedent that, if credited, could establish that decedent was exposed to asbestos while Wausau was on the risk. The Board also held that there was a mistake in fact inherent in the administrative law judge's holding employer liable for claimant's benefits when employer was insured at all relevant times, and, thus, the

administrative law judge failed to inquire fully into matters that are fundamental to the disposition of the case. Finally, the Board noted that a denial of modification results in a manifest injustice to employer due to its joint representation with Wausau and the administrative law judge's failure to reopen the record and join potentially liable parties when it became apparent that employer and Wausau had divergent interests. *Jourdan v. Equitable Equip. Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting).

Where employer reopened the case under Section 22 for a determination of rights under Sections 33(f) and (g) where claimant had two potentially work-related disabling conditions and filed suit against a third party due to one of those conditions, the need to determine the work-relatedness of each condition falls within the scope of modification. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (*en banc*) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 27 BRBS 80 (1993)(McGranery, J., dissenting) (Decision on Remand), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

The First Circuit declined to address employer's assertion of fraud in the form of perjury in response to claimant's action to enforce his award under Section 21(d). Employer's remedy is under Section 22, as perjured testimony resulting in an erroneous finding of fact regarding the nature or extent of an employee's disability comes squarely within the realm of mistake in fact. *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993).

Where claimant's 1999 motion for modification sought to address anew the timeliness of his 1992 motion for modification and did not seek new benefits or to address the claim on its merits, the Board held that the timeliness issue presented a mixed question of fact and law and was appropriately addressed under Section 22. However, the Board affirmed the conclusion that the 1992 claim was untimely. *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001).

In a black lung case, citing *O'Keeffe*, the court stated that "claimant may simply allege that the ultimate fact…was mistakenly decided, and the deputy commissioner may, if he so chooses, modify the final order on the claim. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence." Observing that the "principle of finality" just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits, the court concluded that where a claimant avers generally that the administrative law judge improperly found the ultimate fact and thus erroneously denied the claim, he "has the authority, without more, to modify the denial of benefits. We suspect that such uncompelled changes of mind will happen seldom, if at all, but the power is undeniably there." *Jessee v. Director, OWCP*, 5 F.3d 723, 725-726 (4th Cir. 1993).

The Board affirmed the administrative law judge's denial of employer's motion for modification based on a mistake in fact, rejecting the contention that the administrative law judge must reopen a claim when a mistake in fact is alleged. In this case, the administrative

law judge initially found claimant cannot return to his usual work, rejecting the contrary opinion of employer's expert, Dr. Forrest, because his understanding of claimant's job requirements was faulty. On modification, employer submitted additional statements from Dr. Forrest regarding claimant's job requirements. Initially, the Board rejected the argument that the administrative law judge did not consider Dr. Forrest's new opinion. Finding that employer's second contention that the administrative law judge in considering the new report should have formally admitted it into the record was technically correct, the Board found any error harmless based on the administrative law judge's findings. The Board discussed the case law relevant to mistake in fact, and held that Section 22 gives an administrative law judge the authority to reopen a claim based on any kind of mistaken fact, but does not mandate that the judge do so. Rather, the administrative law judge has the discretionary authority to reopen based on a consideration of competing equities in order to determine whether reopening will render justice under the Act. The Board also relied on *McCord* and similar cases in stating that it is well established that Section 22 is not to be used to correct litigation errors. The Board affirmed the administrative law judge's finding that employer should have anticipated the need to develop Dr. Forrest's medical opinion at the time of the initial proceeding in view of the other evidence of record, which the administrative law judge reviewed. After a discussion of the evidence, the Board concluded she rationally found no need to conduct a full hearing on modification. *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000).

The Board affirmed the administrative law judge's denial of employer's and its current carrier's motion for modification regarding the issue of responsible carrier. In distinguishing *Jourdan*, 25 BRBS 317, in which the responsible carrier issue was raised prior to the initial decision and where the administrative law judge dismissed the only named carrier and held employer directly liable, from the instant case, the administrative law judge found that although employer and its carrier, Homeport, were represented by the same counsel at the initial hearing as in *Jourdan*, Homeport's status as responsible carrier was not challenged until well after the administrative law judge issued his decision. The Board held that since claimant was alleging many years of injurious noise exposure, employer and Homeport should have been aware that other carriers were on the risk. Adding another carrier on modification would require that it be given the opportunity to relitigate all of the issues in a new hearing. Under these circumstances, the Board held that the failure to raise and litigate the issue of responsible carrier at the initial hearing cannot be cured by invoking the modification provisions under Section 22 of the Act. Nonetheless, the Board noted that the administrative law judge erred in finding the modification request untimely as it was mailed within one year of the last payment. *Everson v. Stevedoring Services of Am.*, 33 BRBS 149 (1999).

After reversing the finding of change in condition based solely on new evidence of suitable alternate employment, the Board also reversed the administrative law judge's finding that there was a mistake in fact in the original decision awarding total disability benefits which

justified modification to permanent partial disability. The administrative law judge found on modification that the first administrative law judge erred in awarding claimant permanent total disability benefits because he was not physically incapable of working at the time of the first adjudication. However, the first administrative law judge awarded total disability benefits because of the absence of suitable alternate employment, not because of total physical incapacitation. Thus, there was no mistake in fact either in the interpretation of the medical evidence or in the ultimate finding of fact that claimant was entitled to total disability benefits in the absence of evidence of suitable alternate employment. *Feld v. Gen. Dynamics Corp.*, 34 BRBS 131 (2000).

The Board affirmed the administrative law judge's decision to reopen this case on modification. Although the employer did not produce evidence of suitable alternate employment at the initial hearing, employer sought modification pursuant to Section 22 based on a labor market survey, prepared after the issuance of the administrative law judge's initial decision, which it averred established the availability of suitable alternate employment. Citing recent modification cases issued by the circuit courts and the Board, specifically *Jensen*, 346 F.3d 273, 37 BRBS 99(CRT), *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), and *Wheeler*, 37 BRBS 107, the Board stated that given the Act's preference for accuracy over finality, awarding claimant the appropriate amount of benefits for his disability is of paramount importance. Moreover, an accurate determination of claimant's entitlement to benefits renders justice under the Act. As the Board's prior decisions in *Lombardi*, 32 BRBS 83, and *Feld*, 34 BRBS 131, did not give weight to the need for an accurate determination of claimant's disability, and Section 22 permits the alteration of awards based on claimant's current physical or economic condition or to correct an award resting on a mistake in fact, the Board concluded that the limitations on evidence imposed by those cases cannot stand. Thus, the Board overruled *Lombardi* and *Feld*. Therefore, the administrative law judge properly reopened the case based upon a rational finding that employer's evidence, if credited, would demonstrate that either his initial decision was factually mistaken, or that conditions have changed to the point that claimant is no longer totally disabled. *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009).

Pursuant to claimant's request for modification in which he sought compensation after obtaining medical benefits in the initial decision, the administrative law judge had the authority to redetermine the responsible insurer for claimant's compensation benefits. The court quoted *O'Keeffe*, 404 U.S. at 255, and the statement in *Jessee*, 5 F.3d at 725, that the "'principle of finality' just does not apply to Longshore Act…claims as it does in ordinary lawsuits," as well as a statement in the Board's opinion that the administrative law judge acted within his authority under Section 22 to consider all issues related to the cause, nature and extent of claimant's disability, including which entity should be held liable for claimant's disability. *Bath Iron Works v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001).

In a black lung case, the Seventh Circuit held that a modification request cannot be denied solely because it contains argument or evidence that could have been presented at an earlier stage in the proceedings. The court reasoned that Section 22 articulates a preference for accuracy over finality in the substantive award. In this regard, the court distinguished *Gen. Dynamics [Woodberry]*, 673 F.2d 23, 14 BRBS 636, and *Verderane*, 772 F.2d 775, 17 BRBS 155(CRT), on the grounds that those cases involved modification attempts in order to gain Section 8(f) relief, which is an affirmative defense. In considering whether to grant Section 22 modification, the relevant inquiry is whether re-opening proceedings would render "justice under the Act;" this inquiry should focus on a party's actions and intent in seeking modification. Thus, while something less than sanctionable conduct as in *McCord* may justify the denial of modification, the fact that evidence was available at an earlier stage of the proceedings is not enough. The court stated that the administrative law judge will need to consider many factors, including the diligence of the parties, the number of times a party has sought reopening and the quality of the evidence relied on in order to determine whether modification will render justice under the Act. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

The Board clarified that the burden on the party seeking modification based on a mistake in fact is to demonstrate that a mistake in fact exists in the initial decision and that justice will be served by modifying the decision. Under appropriate circumstances, the conduct of the party seeking modification may overcome the statutory preference for accuracy over finality and justify a refusal to reopen the case. In this regard, the Board cited the Seventh Circuit's holding in *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), that something less than sanctionable conduct may justify a refusal to reopen, but the fact that evidence may have been available at an earlier stage in the proceedings is not enough. In this case, the Board affirmed the administrative law judge's decision to grant modification based on a mistake in fact, holding that claimant's failure to cooperate with employer's vocational efforts at the time of the initial proceeding denied employer a full opportunity to develop its evidence of suitable alternate employment. Employer's evidence of suitable alternate employment provided a basis for a finding of a mistake in fact in the administrative law judge's initial determination that claimant is totally disabled; under these circumstances, granting modification served the interests of justice under the Act. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

Claimant sought modification of a denial of benefits. In its first opinion, the Board held that the administrative law judge erred in denying modification as the evidence submitted by claimant was sufficient to supports a conclusion that there was a mistake in fact in the prior decision regarding the cause of claimant's shoulder condition. On remand for the administrative law judge to address claimant's entitlement to disability and medical evidence, employer submitted new evidence, which the administrative law judge found sufficient to establish no causation and thus that there was no mistake in fact in the initial decision. On appeal, the Board rejected claimant's contention that the administrative law judge erred on remand in addressing causation, finding that the law of the case doctrine

does not apply in view of the change in the factual circumstances since the Board's first opinion. The Board held that employer's submission of new evidence on remand was within the scope of the Section 22 proceedings. As it was supported by substantial evidence, the Board affirmed the administrative law judge's finding on causation. As claimant's injury is not work-related, claimant's motion for modification based on a mistake in fact was properly denied. *Manente v. Sea-Land Serv., Inc.*, 39 BRBS 1 (2004).

The administrative law judge properly granted the Director's request to present additional evidence on modification. A party need not establish that the evidence on which it based its modification request was unavailable at the initial hearing. Moreover, cumulative evidence may be considered in a Section 22 proceeding. The Director was not raising a new legal theory on modification, but was challenging the ultimate fact of employer's entitlement to Section 8(f) relief, which is subject to modification. *G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011).

The administrative law judge erred in denying claimant's motion for modification on the ground that modification in a longshore case must be initiated with the district director. Modification may be initiated before the administrative law judge while the case is pending before him or is on appeal to the Board. In addition, the evidence claimant seeks to admit is relevant to the factual issue of claimant's dependency upon the decedent. The case is remanded for the administrative law judge to address this evidence, along with the old evidence, to determine if modification of the denial of benefits is warranted. *L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008).

The Board reversed the administrative law judge's finding that the calculation of claimant's average weekly wage pursuant to Section 10(c) was not within the scope of Section 22. Claimant presented an issue of fact as to the ultimate calculation of her average weekly wage. The administrative law judge also erred in stating that claimant had not raised the Section 10(c) issue previously, as claimant raised in her supplemental brief the use of co-workers' wages. The Board remanded for the administrative law judge to reconsider average weekly wage. *S.K. [Khan] v. Serv. Employers Int'l*, 41 BRBS 123 (2007).

The Fourth Circuit held in a black lung case that it is erroneous to assume that a party is entitled to modification of a previous award merely because it established there was a mistake made in the determination of a fact. Rather, because granting a request for modification is discretionary, the administrative law judge must exercise sound discretion by determining whether modification will render justice under the Act. To this degree, the court held that the administrative law judge must consider the accuracy of the previous decision as well as the requesting party's diligence and motive in moving for modification and whether a favorable ruling would nonetheless be futile. In this case, the administrative law judge granted employer's motion for modification, reversed his 1993 award in the living miner's claim based on a mistake in fact, and denied claimant's survivor's claim.

The Fourth Circuit vacated the grant of modification and the denial of the survivor's claim. It held that where employer filed the motion for modification of the living miner's claim two months after the miner died and nearly seven years after benefits were awarded, factors such as diligence, motive and futility were potentially relevant to the decision to grant the motion. As neither the administrative law judge nor the Board had discussed these factors, the case was remanded. *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007).

In its decision after remand, the Fourth Circuit held that the Board properly reversed the administrative law judge's grant of modification to employer on a deceased miner's claim, because the purpose of employer's motion was to thwart the widow's good faith claim by preventing the application of collateral estoppel to certain findings in the miner's claim. The court noted that employer did not seek modification until after the miner died, some seven years after the award was entered and had a full and fair opportunity to litigate the complicated pneumoconiosis issue in the initial proceeding. Thus, reopening would not render justice in the claim to be reopened, *i.e.*, the deceased miner's claim. The court left open the question of whether an improper motive can ever be outweighed by the strong interest in accuracy underlying Section 22. *Westmoreland Coal Co., Inc. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012), *cert. denied*, 570 U.S. 917 (2013).

Applying *Severin*, 910 F.2d 286, 24 BRBS 21(CRT), the Second Circuit held that Judge Geraghty properly determined that Judge Sutton's original award was not final and enforceable under Section 14(f) because it did not specify a compensation rate, only that compensation was to be based on wages of a comparable employee, an issue which remained in dispute between the parties, *i.e.* , a dispute remained regarding whether three payments made to the comparable employee should have been included in the benefits calculation. Consequently, the court held that Judge Geraghty properly used the broad power under Section 22 to modify the previous award based on her findings regarding the three disputed payments to the "comparable employee." *Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008).

Employer's unilateral suspension of benefits due under the terms of a compensation order as a result of its assertion of a Section 3(e) credit presents a mixed question of law and fact under Section 22 concerning the amount of benefits due claimant. The Board held that there is no statutory or regulatory impediment to employer's raising entitlement to a Section 3(e) credit on modification, so long as the Section 22 time limits are satisfied. The Board vacated the administrative law judge's finding that employer's stipulations in 2003 precludes employer from raising in 2008 its entitlement to a Section 3(e) credit arising from employer's earlier payments under a state compensation scheme. Modification is not defeated on the ground of finality alone. Moreover, claimant's ability to also seek modification of the prior stipulations may obviate any prejudice resulting from the application of Section 3(e). The Board remanded the case to the administrative law judge to address factors relevant to employer's entitlement to modification of the prior award and to a Section 3(e) credit. *M.R. [Rusich] v. Elec. Boat Corp.*, 43 BRBS 35 (2009).

Where claimant had previously been awarded temporary total disability benefits based on the parties' stipulations, the administrative law judge properly granted modification of the prior 2002 decision which rested on a mistaken determination of fact regarding the nature of claimant's disability. The administrative law judge stated that it was only with the benefit of hindsight that the private parties realized that claimant's condition had, in fact, been permanent in September 2000. Having found that the evidence supported the private parties' position that claimant reached maximum medical improvement in September 2000, the administrative law judge awarded permanent total disability benefits retroactive to that date. The Board affirmed, rejecting the Director's contention that the administrative law judge granted modification based on a change in condition and that, thus, the award of permanent total disability benefits could not predate the decision being modified. *Buttermore v. Elec. Boat Corp.*, 46 BRBS 41 (2012).

The Fifth Circuit affirmed the grant of claimant's motion for modification based on a mistake in fact. The court rejected employer's contention that modification could be based only on new and previously unavailable evidence in order to avoid compromising judicial finality, as such an interpretation is expressly contrary to the Supreme Court's holdings in *Banks* and *O'Keeffe*; modification is not limited to particular factual errors or to cases involving new evidence. As substantial evidence supported the administrative law judge's finding that claimant had ratable impairments to both knees, the court affirmed the modification of the award to include permanent partial disability benefits. *Island Operating Co., Inc. v. Director, OWCP [Taylor]*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013).

Legal Error/Change in Law

Section 22 is not a vehicle for challenging a prior award based on a change in law or a legal error. Thus, a challenge to the constitutionality of the schedule in Section 8(c) filed within one year of the payment of the award was rejected, as claimant failed to assert a mistake in fact in the award. Claimant's remedy was a timely appeal under Section 21. *Flamm v. Hughes*, 329 F.2d 378 (2d Cir. 1964). An alleged legal error committed by the administrative law judge, such as the exclusion of certain evidence, is not grounds for Section 22 modification. *Swain v. Todd Shipyards Corp.*, 17 BRBS 124 (1985). *See Smith v. The Am. Univ.*, 14 BRBS 875 (1982) (Miller, dissenting) (legal error in first decision awarding partial disability without regard to whether employer met its burden of showing suitable alternative employment cannot be addressed via Section 22). *Cf. Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989) (in a concurrent awards case, the Board held that the fact that claimant's average weekly wage and wage-earning capacity at the time of the first injury were selected by the parties or that claimant's actual average weekly wage at that time is indeterminable are not bases for denying modification in view of the administrative law judge's broad authority under Section 22; average weekly wage and wage-earning capacity present mixed questions of law and fact and administrative law judge on remand may make relevant findings regarding claimant's awards).

Claimant must challenge a legal error by a timely motion for reconsideration or a timely appeal pursuant to 33 U.S.C. §921. Thus, claimant and Director having failed to challenge the administrative law judge's legal authority to approve a settlement in the original proceedings or appeal on that issue were precluded from raising it under Section 22. *Downs v. Texas Star Shipping Co.*, 18 BRBS 37 (1986), *aff'd sub nom. Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986). Section 22 modification cannot be used to raise an issue of law. *Id.*, 803 F.2d at 198 n.11, 19 BRBS at 42 n.11 CRT).

Where the Board's decision denied the claim based on a finding claimant was not covered by the Act, *see Maples v. Marine Disposal Co.*, 14 BRBS 619 (1982) (Miller, dissenting), *aff'd on recon.* 15 BRBS 53 (1982) (Miller, dissenting), that finding could not be modified under Section 22 based in a change in the law regarding coverage. Claimant's remedy was to appeal the Board's decision and where she did not do so, the Board reversed the deputy commissioner's attempted modification based on the change in law. *Maples v. Marine Disposal Co.*, 16 BRBS 241 (1984). *Cf. Jenkins*, 17 BRBS 183 (new facts bearing on coverage may be considered under Section 22).

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Section 22 modification is not available for a strictly legal error such as whether a wrist injury should be compensated under Section 8(c)(1) or 8(c)(3). *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986).

A legal error or a change in law is not a ground for modification. Legal issues must be appealed to the Board under Section 21. Thus, the Board held that the administrative law judge properly denied modification which was sought after the Ninth Circuit rejected the date of "last injurious exposure" used by the Board in calculating average weekly wage, *Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), as it was based on a change in law. The Board also held that the 1984 Amendments, which provided a date of injury for average weekly wage, also did not apply because only the modification petition and not the original claim was pending on the date the amendments were enacted. *McDonald v. Todd Shipyards Corp.*, 21 BRBS 184 (1988), *rev'd sub nom. McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56(CRT) (9th Cir. 1990). On appeal, the Ninth Circuit reversed the Board's decision that modification was unavailable and remanded the case for reconsideration of claimant's average weekly wage pursuant to the 1984 Amendments, inasmuch as claimant's motion for modification was pending on the effective date of the 1984 Amendments, making Section 10(i) applicable. *McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56(CRT) (9th Cir. 1990).

Employer's attempt to reopen a final award for retroactive application of the Fifth Circuit's decision in *Phillips*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990)(*en banc*), in order to decrease the benefits resulting from the inclusion of Section 10(f) adjustments occurring during periods of temporary total disability is rejected. Employer has not raised a mistake in fact or change in condition, but is raising a legal issue based on subsequent case law. *Ryan v. Lane & Co.*, 28 BRBS 132 (1994).

The Board affirmed the administrative law judge's determination that the sole basis for claimant's petition for modification is an error in the interpretation of law, and thus affirmed his conclusion that he does not have the authority to modify the district director's award based on the parties' agreement. Claimant's petition for modification offered no new or mistaken factual information; the sole basis for the request is a mistake in an interpretation of law governing whether employer is entitled to a credit for claimant's post-injury receipt of container royalty and vacation/holiday pay. *Ring v. I.T.O. Corp. of Virginia*, 31 BRBS 212 (1998).

The Board rejected claimant's contention that there was a mistake in fact regarding the finding that his 1992 motion for modification was untimely filed. The Board first held that the 1992 motion, which was filed prior to the date employer's voluntary payments were made, cannot be considered to be filed within one year *after* those benefits ceased. Additionally, the Board held that claimant's primary argument that the payment of state

benefits tolls the time for filing a motion for modification under the Act is a new legal theory which had not been addressed previously. Section 22 cannot be used to raise issues involving only a new legal interpretation or to correct errors of law. As claimant did not establish a change in conditions or a mistake in the determination of a fact, there is no basis for modifying the decision, and the Board affirmed the administrative law judge's denial of modification. *Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001).

Section 8(f)

The Board has long held that employers must raise a claim for relief under Section 8(f) of the Act at the first hearing on permanent disability and that it cannot be raised in a Section 22 proceeding if it was not raised and litigated in the initial hearing. In *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979), employer appealed an administrative law judge's denial of a claim for Section 8(f) relief based on its failure to raise Section 8(f) at the initial hearing. Employer argued that Section 22 did not apply to its request, while the Director asserted that employer waived the issue by withdrawing it at the first hearing and that employer failed to establish a change in condition or mistake in fact as required by Section 22. The Board held that Section 22 applied but under the special circumstances of this case, it was in the interests of justice to remand the case for consideration of Section 8(f) relief. In *Egger*, employer raised Section 8(f) at the initial hearing but, after claimant objected, the parties agreed to bifurcate the trial on the issue of liability for death benefits and the applicability of Section 8(f). Employer explicitly stated it did not intend to waive Section 8(f) by not litigating it at that time. The Board concluded that Section 8(f) was not barred under these circumstances, but stated,

> It is our opinion that it is improper to bifurcate hearings on issues that can be litigated at one hearing. In any case in which the application of Section 8(f) is an issue, we hold that hereafter the issue must be raised and litigated at the first hearing of the case.

Id. at 899. The Board held that the "special circumstances exception" created in *Egger* was also met where the administrative law judge at the initial hearing failed to correct employer's misunderstanding that Section 8(f) only applied in cases of permanent total disability. *Tibbetts v. Bath Iron Workers Corp*., 10 BRBS 245 (1979). In *Dixon v. Edward Minte Co., Inc*., 16 BRBS 314 (1984), *aff'd sub nom. Director, OWCP v. Edward Minte Co., Inc.*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. 1986), the Board affirmed the administrative law judge's finding that special circumstances existed where invocation of Section 8(f) in connection with a 1966 award would have been futile because the Special Fund was inadequately funded at that time.

In all other cases, however, the Board and the courts have rejected the contention that special circumstances existed so that Section 8(f) could be raised for the first time in a modification proceeding. *See Adams v. Brady-Hamilton Stevedore Co*., 16 BRBS 350 (1984), *aff'd sub nom. Brady-Hamilton Stevedore Co. v. Director, OWCP*, 779 F.2d 512, 18 BRBS 43(CRT) (9th Cir. 1985); *Woodberry v. Gen. Dynamics Corp.*, 14 BRBS 431 (1981), *aff'd sub nom. Gen. Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *Wilson v. Old Dominion Stevedoring Co.*, 10 BRBS 943 (1979). Employer's belief that it could prevail on a notice defense and thus its failure to prepare an alternative litigation strategy does not constitute special circumstances. *Adams*, 16 BRBS 350. Employer's failure to raise Section 8(f) because it would require proof of

inconsistent defenses also does not constitute special circumstances since a party may state its claims of defenses alternately or hypothetically and may state as many separate claims and defenses regardless of consistency. *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985); *Price v. Cactus Int'l, Inc.*, 15 BRBS 360 (1983), *aff'd*, 733 F.2d 903 (5th Cir. 1984) (table); *Carroll v. Am. Bridge Div., U.S. Steel Corp.*, 13 BRBS 759 (1981), *aff'd sub nom. Am. Bridge Div., U.S. Steel Corp. v. Director, OWCP*, 679 F. 2d 81, 14 BRBS 923 (5th Cir. 1982). A subsequent change in the legal interpretation in effect at the time of the initial hearing is not a sufficient reason to reopen the proceedings in order to allow employer to raise Section 8(f). *Gen. Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982) (at the time of the initial proceeding, the Board had held that a pre-existing permanent partial disability had to be an economic disability; this holding was subsequently reversed on appeal and the Board acquiesced in the holding that a physical disability was sufficient).

The 1984 Amendments added Section 8(f)(3), which requires that employer raise Section 8(f) prior to the consideration of the claim by the deputy commissioner (district director) unless employer could not have reasonably anticipated that the Special Fund could be liable.

Where Section 8(f) has been addressed by the administrative law judge in a decision and order, such findings are subject to modification. *See G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011); *see also Bath Iron Works Corp. v. Director, OWCP [Bailey]*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991).

See Section 8(f) of the desk book.

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Where claimant sought modification to increase his award to permanent total disability, employer was entitled to raise Section 8(f) for the first time as a defense to limit its liability should claimant be successful in obtaining additional compensation. Employer was not required to show a change in condition separate from claimant's showing warranting an increased award. Moreover, the Director did not show that Section 8(f) would have been available on the permanent partial award that claimant received in 1966. The rule that Section 8(f) is waived unless raised at the earliest proceedings is not contained in the statute but is a procedural device imposed by the courts and by the Board. An employer is thus free to raise an 8(f) claim during initial proceedings and any subsequent modification proceedings; in such proceedings, the employer carries the burden of proving the applicability of Section 8(f). Where the Director opposes the employer's request for 8(f) relief on grounds of waiver, he bears the burden of raising the waiver issue and presenting facts supporting it. In the instant case, even if it is assumed that the Director obliquely raised the waiver issue before the Board, it is clear that he failed to show that waiver had

occurred. *Director, OWCP v. Edward Minte Co., Inc.*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co., Inc.*, 16 BRBS 314 (1984).

In this case, the administrative law judge granted Section 8(f) relief on the permanent partial disability awarded in the first proceeding. On claimant's request for modification to permanent total disability, the administrative law judge granted the award but found Section 8(f) inapplicable. On appeal, the Board rejected employer's challenge to the administrative law judge's authority to address Section 8(f), holding that neither the "law of the case" doctrine nor the fact that Section 8(f) was not listed as an issue in the modification request precluded the administrative law judge's reopening this issue in view of his broad authority to address mistakes in fact. The case was remanded as the administrative law judge did not afford the parties an adequate opportunity to present evidence and arguments relevant to Section 8(f) once he notified them that he would address this issue in his decision on modification. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

The issue of Section 8(f) relief need not be raised and litigated until the first hearing wherein permanent disability is at issue. The Board thus held that the administrative law judge erred by finding that employer waived its right to pursue Section 8(f) relief by failing to raise the issue at the original hearing or in its response to the administrative law judge's show cause order, since permanent disability was not at issue until employer sought modification, and employer clearly raised the issue of Section 8(f) at the modification hearing. *Moore v. Washington Metro. Area Transit Auth.*, 23 BRBS 49 (1989).

The Board held that the issue of Section 8(f) applicability, although not initially raised before the administrative law judge since only temporary disability benefits were sought, was properly raised on remand, since the extent of claimant's disability was then at issue, and since the Court of Appeals stated that the administrative law judge should consider the applicability of Section 8(f) on remand. The administrative law judge thus abused his discretion in denying employer's motion to reopen the record for submission of evidence bearing on permanency, given the "special circumstances" existing in this case, and given that employer's motion could be construed as a Section 22 petition for modification based on a change in claimant's medical condition. *Champion v. S & M Traylor Bros.*, 19 BRBS 36 (1986).

The Board reversed the administrative law judge's finding that employer is entitled to Section 8(f) relief. A request for Section 8(f) relief must be raised and litigated at the first hearing where permanent disability is at issue. Employer received notice of the deputy commissioner's intent to modify claimant's temporary partial disability benefits to permanent partial disability in 1969, and should have raised 8(f) issue at that time. However, the Director's contention that Section 8(f) can only be raised in modification proceedings if there has been a mistake in a determination of fact or change in condition with regard to an earlier Section 8(f) determination is rejected. *Allison v. Washington*

Society for the Blind, 20 BRBS 158 (1988), *rev'd,* 919 F.2d 763 (D.C. Cir. 1990). In reversing the Board's decision, the D.C. Circuit noted that under the pre-1972 version of 8(f), only a change in claimant's status to permanent total disability would have allowed 8(f) relief and thus found that employer did not waive any Section 8(f) right by failing to assert it in 1969 since the only question presented at that time was whether claimant had a permanent partial disability. The court upheld the Board's rejection of the Director's contention that Section 8(f) can only be raised in Section 22 modification proceedings if there has been a mistake of fact with regard to a previous 8(f) determination. *Washington Society for the Blind v. Allison*, 919 F.2d 763 (D.C. Cir. 1990).

Inasmuch as the Director conceded that employer was entitled to a hearing on modification regarding its request for Section 8(f) relief, the Board remanded the case for further proceedings and did not need to address LIGA's specific arguments regarding the administrative law judge's finding that it could have litigated the Section 8(f) issue earlier. *Lucas v. Louisiana Ins. Gua. Ass'n,* 28 BRBS 1 (1994).

Contrary to the Director's assertions, a claim for Section 8(f) relief may be raised for the first time via a petition for Section 22 modification if the employer shows there are special circumstances which warrant such action. Section 22, however, is not available merely to correct errors or misjudgments of counsel, or to circumvent the rule that Section 8(f) relief is waived if not properly raised at the first possible opportunity. In this case, where employer withdrew its claim for Section 8(f) relief from consideration following the initial hearing, and neither alleged nor demonstrated any reason for not having litigated Section 8(f) at that time, the Board reversed administrative law judge's finding and held that employer is not entitled to Section 8(f) relief under *Egger*, 9 BRBS 897. *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998).

In this D.C. Act case, where amended Section 22 and Section 8(f)(2)(B) (allowing employer participation on modification where Section 8(f) relief has been granted) do not apply, the Board vacated the administrative law judge's dismissal of employer from the modification proceeding in which claimant requested additional compensation from the Special Fund. The Board held that employer's financial interest in the modification proceeding was not too remote in order to establish standing under Section 702 of the APA. With respect to carriers and employers covered under the D.C. Act, any increase in payments to claimant from the Special Fund will result in an increase in employer's assessment to the Special Fund, pursuant to Section 44(c) of the Act. As employer had a cognizable interest in the modification proceeding, the Board vacated the administrative law judge's decisions and remanded the case for a new hearing. *Terrell v. Washington Metro. Area Transit Auth.*, 34 BRBS 1 (2000).

Employer, although granted relief pursuant to Section 8(f), may apply for modification under Section 22 as it retains all the rights it had under the Act prior to the Special Fund's

assuming liability, pursuant to Section 22 and Section 8(f)(2)(B). *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

In this case where claimant had previously been awarded temporary total disability benefits based on claimant's and employer's stipulations, the administrative law judge granted claimant's motion for modification on the basis that a mistake in a determination of fact had been made in the 2002 decision regarding the nature of claimant's disability. Having found that claimant, in fact, had reached maximum medical improvement on September 14, 2000, the administrative law judge awarded permanent total disability benefits as of that date. On modification, the administrative law judge granted employer's request for Section 8(f) relief, and found that employer's liability for permanent total disability benefits is limited to the period of 104 weeks commencing September 14, 2000. On appeal, the Director challenged the commencement date for the award of Section 8(f) relief, contending the administrative law judge erred by modifying the award of benefits retroactively to September 2000. The Board rejected the Director's contention that the administrative law judge granted modification based on a change in condition and, that, thus, the award of permanent total disability benefits could not predate the decision being modified. Accordingly, the Board affirmed the commencement date for the Section 8(f) award found by the administrative law judge. *Buttermore v. Elec. Boat Corp.*, 46 BRBS 41 (2012).

Modification of Orders Which Are on Appeal

Non-final orders can be modified. Thus, a party may simultaneously appeal a Decision and Order to the Board, U.S. Court of Appeals or the Supreme Court and seek modification under Section 22. *Craig v. United Church of Christ*, 13 BRBS 567 (1981). The administrative law judge is not deprived of jurisdiction over modification proceedings because an appeal is pending. *Miller v. Cen. Dispatch, Inc.*, 16 BRBS 63 (1984), *on remand from* 673 F. 2d 773, 14 BRBS 752 (5th Cir. 1982), *rev'g* 12 BRBS 793 (1980).

In *Craig*, the Board stated that where an appeal is pending before the Board, a party seeking modification should apply directly to the administrative law judge who initially tried the case. *See also Penoyer v. R & F Coal Co.*, 9 BLR 1-12 (1986), *modif. on recon.*, 12 BLR 1-4 (1986) (black lung case). In *Craig*, the Board adopted a procedure, subsequently modified, requiring the administrative law judge, if he found the petition to be meritorious and further proceedings to be in the interests of justice, to issue a brief memorandum so indicating; the Board would then remand the case upon motion of the party seeking modification. Where employer did not comply with the procedure mandated by *Craig*, 13 BRBS 567, the Board did not grant employer's motion to remand the case for consideration of newly discovered evidence relevant to Section 8(f). *Ramos v. Universal Dredging Corp.*, 15 BRBS 140 (1982). The Board also denied claimant's motion for remand based upon newly discovered evidence, which was in effect a timely request for modification, because the administrative law judge had not indicated if he would grant a modification hearing or further consideration. *Overman v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRSS 555 (1981).

The Board subsequently modified these procedures and adopted the following regulation:

> Any party who considers new evidence necessary to the adjudication of the claim may apply for modification pursuant to section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922. A party who files a petition for modification shall promptly notify the Board of such filing. Upon receipt of such notification, the Board shall dismiss the case without prejudice. Should the petition for modification be declined, the petitioner may file a request for reinstatement of his or her appeal with the Board within 30 days of the date the petition is declined. Should the petition for modification be accepted, any party adversely affected by the decision or order granting or denying modification may file a new appeal with the Board within 30 days of the date the decision or order on modification is filed.

20 C.F.R. §802.301. Based on the issues raised, the Board has upon occasion found it appropriate to proceed with the appeal and remand the case in its decision on the merits, *e.g.*, where the respondent seeks reconsideration and the petitioner objects, a cross-appeal

is also pending or other circumstances indicate this action is in the interest of judicial economy. *See Cheetham v. Bath Iron Works Corp.*, 38 BRBS 80 (2004).

The *Craig* procedure initially provided that, where an appeal is pending, the Board would remand the case to the administrative law judge, as that procedure is more efficient in resolving claims and returning the case to the Board for reinstatement given the district director's limited authority. Following the change to the procedure and adoption of the regulation, the Board has remanded Longshore cases to either the administrative law judge or district director pursuant to the request of the party seeking remand. In view of holdings regarding the necessity of an informal conference and recommendation in obtaining employer-paid attorney's fees under Section 28(b), *see* Section 28 of the desk book, remand to the district director will likely be more frequently sought. In Black Lung Act cases, the courts have held that modification requests must in all instances be initiated with the district director. *See Hoskins v. Director, OWCP*, 11 BLR 1-144 (1988) (Order), *infra*.

Where no appeal is pending or where an appeal already has been decided, a modification petition is properly initiated with the district director. The district director may hold an informal conference for the purpose of getting the parties to agree on the dispositive issues, but if no agreement is reached, the district director cannot modify the award but rather must refer the case to an administrative law judge. *Arbizu v. Triple A Mach. Shop*, 15 BRBS 46 (1982); *Penoyer*, 9 BLR 1-12; *Craig*, 13 BRBS 567; 20 C.F.R. §§702.373, 702.311-16. *See Cornelius v. Drummond Coal Co.*, 9 BLR 1-40 (1986), *aff'd sub nom. Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987) (black lung case).

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Claimant did not circumvent proper appellate procedure by simultaneously appealing to the Board and requesting Section 22 modification before the administrative law judge. "A simultaneous appeal to the Board and a proceeding for Section 22 modification is neither proscribed, *see Craig*, nor redundant, as the Board, unlike [the administrative law judge] presiding on modification, may not consider new evidence on appeal or reweigh the existing evidence." Claimant withdrew his appeal after his request for a new hearing was granted. *Wynn v. Clevenger Corp.*, 21 BRBS 290, 293 (1988).

In black lung cases, the Board stated it would remand petitions for modification to the deputy commissioner (district director) for consideration when an appeal is pending before the Board in light of circuit court decisions so holding (procedure in longshore cases remains unaffected). The Board stated its disagreement with this result, since given the deputy commissioner's limited authority (merely processing the petition under the procedures applicable to other claims), remand to the deputy commissioner rather than to the administrative law judge unnecessarily delays resolution of the case. While requiring modification be initiated at this level, the courts recognized that under 20 C.F.R. §725.310 and Section 22 of the Act, deputy commissioners can only modify decisions of a deputy

commissioner. This Order sets out the history of the Board's and the Courts of Appeals' decisions on these issues. *Hoskins v. Director, OWCP*, 11 BLR 1-144 (1988)(order).

When modification is sought in a case pending before the Board, it will remand the case for the administrative law judge to consider the modification petition. The party who filed the original appeal may seek reinstatement of its appeal to the Board after the administrative law judge rules on the modification petition, and any aggrieved party may also appeal the decision on modification. *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

Where a Section 8(j) issue was before the Board and completely briefed, the Board denied claimant's motion to dismiss employer's appeal without prejudice pursuant to Section 802.301(c) due to a pending motion for modification on the extent of claimant's disability. The Board found that as the issue on appeal was unaffected by the modification request, in the interest of judicial economy it would address employer's contention on appeal and remand the case to the administrative law judge for modification proceedings upon completion of the review process. *Cheetham v. Bath Iron Works Corp.*, 38 BRBS 80 (2004).

The administrative law judge erred in stating that modification in a longshore case must be initiated with the district director. Modification may be initiated before the administrative law judge while the case is pending before him or is on appeal to the Board. The Board remanded the case for the administrative law judge to address the modification request. *L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008).

Miscellaneous—Overpayment, Termination and Such

A modification order decreasing compensation may not affect any compensation previously paid, although employer is entitled to credit any excess payments already made against any compensation as yet unpaid. A modification order increasing compensation may be applied retroactively if the fact-finder, in his discretion, determines that according retroactive effect to the modification order renders justice under the Act. *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976).

A claimant who has received the pre-1972 amendment maximum of $24,000 for temporary total disability may seek modification of the award to permanent disability on the grounds of mistake in determination of fact or change of condition, even if the change of condition occurred after the date upon which the statutory maximum was paid. *Correia v. Gen. Dynamics Corp*., 8 BRBS 602 (1978); *Steele v. Associated Banning Co.*, 7 BRBS 501 (1978).

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Section 22 does not provide for recovery of an alleged overpayment of compensation by means of repayment by the employee, but only provides employer with a credit against prospective compensation payments. *Stevedoring Services of Am., Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992).

None of the three sections of the Longshore and Harbor Workers' Compensation Act which provide for recovery of overpayments, Sections 14(j), 8(j) and 22, provides for the employer to recover overpayments directly from the employee; such recovery can only be an offset against future compensation under the Act. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992).

The Board held that employer cannot receive a credit against its annual assessment to the Special Fund under Section 44. The administrative law judge found that claimant's compensation was terminated retroactive to the date employer filed for Section 22 modification. Pursuant to Section 8(f), the Special Fund paid claimant's compensation through the date the administrative law judge's Order was filed. The administrative law judge ordered that employer receive a credit to the extent its annual assessment under Section 44 of the Act was adversely affected by claimant's receiving compensation from the Special Fund after the date employer filed for modification. The Board held that neither Section 22 nor Section 44 allows a credit against a future assessment under Section 44. The plain language of Section 22 does not provide for retroactive termination of compensation. Moreover, Section 22 is limited by its terms to the modification of compensation orders. *Parks v. Metro. Stevedore Co.*, 26 BRBS 172 (1993).

Where employer asserted fraud and a state-law counterclaim in response to claimant's enforcement action, the First Circuit determined that Congress intended the affirmative defenses be adjudicated by DOL in a Section 22 modification hearing, and not by the district court, so as to prevent the needless duplication of judicial/administrative efforts and the possibility of inconsistent outcomes. *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993).

The Board held that the administrative law judge improperly granted employer a credit for benefits paid retroactive to the date he determined claimant was no longer disabled based on claimant's having reached maximum medical improvement. As the administrative law judge found that claimant was no longer disabled based on a report dated February 21, 1996, that was the earliest date which would be used, rather than the 1994 date used by the administrative law judge. Moreover, as the administrative law judge's decision did not decrease claimant's compensation rate, it could not affect any payments employer made prior to the date of his decision granting modification. Therefore, the Board vacated the administrative law judge's determination that employer overpaid compensation and is entitled to a credit. As the administrative law judge determined that claimant sustained a work-related hearing loss for which he would be entitled to benefits but for the offset, the Board awarded these benefits. *Spitalieri v. Universal Mar. Services*, 33 BRBS 6 (1999), *aff'd on recon. en banc*, 33 BRBS 164 (1999)(Brown and McGranery, JJ., dissenting), *rev'd*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). On reconsideration, the Board addressed employer's argument that the termination of benefits as of February 21, 1996, was a "decrease" under Section 22, entitling it to a credit for payments made between that date and the date of the administrative law judge's 1998 decision. Construing the terms "terminate" and "decrease" used in the statute, the Board majority concluded they have different meanings and reaffirmed its holding that employer was not entitled to a credit against the unpaid hearing loss benefits. *Spitalieri v. Universal Maritime Services*, 33 BRBS 164 (1999) (en banc) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 33 BRBS 6 (1999), *rev'd*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

On appeal, the Second Circuit reversed this decision, holding that benefits may be retroactively terminated pursuant to Section 22 at any point after the date of injury. Specifically, on modification, the administrative law judge, as further modified by the Board, terminated on February 21, 1996, claimant's temporary total disability award from injuries to his back, head, leg, and a psychological impairment. The employer had paid compensation for temporary total disability through January 20, 1998, amounting to an overpayment of approximately $54,000. The court reversed the Board's holding that employer is not entitled to credit this overpayment against its liability for a scheduled hearing loss award arising from the same accident. Contrary to the Board's holding, the court reasoned that a termination of benefits is a "decrease" in benefits as that term is used in Section 22, and thus is permitted to "affect compensation previously paid" in the form of a credit for benefits due for a different disability. *Universal Mar. Serv. Corp. v.*

Spitalieri, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

Section 22 permits compensation paid in excess of a decreased award to be deducted from any unpaid compensation. In this case, claimant was originally awarded permanent partial disability benefits under the schedule for a 30 percent impairment to his right ankle. In his decision on modification, the administrative law judge found that claimant's impairment, following his 1997 surgery, was reduced to 25 percent; however, he awarded claimant additional periods of permanent total disability benefits. Pursuant to the decision in *Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT), the Board affirmed the administrative law judge's finding that employer is entitled to a credit for the "excess" five percentage points of permanent partial disability benefits it paid against the unpaid award of permanent total disability benefits. Because the administrative law judge did not calculate the dollar amount of the credit, the Board remanded the case for this computation. *LaRosa v. King & Co.*, 40 BRBS 29 (2006).

In this Ninth Circuit case, the Board followed the decision of the Second Circuit in *Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT), and held that a decision terminating benefits due to a change in condition pursuant to Section 22 can be retroactive to the date of the change in condition, *i.e.*, a termination is a decrease under Section 22. *Spitalieri* is not limited to a case in which a credit is due for payments still owed. Moreover, the language of Section 22 prohibiting modification from affecting compensation previously paid means that claimant cannot be made to repay benefits paid before the modifying order is issued. To the extent that it is inconsistent with this holding, the Board overruled *Parks*, 26 BRBS 172 (1993). The Board modified the administrative law judge's decision on remand to reflect a termination date as of the date of the administrative law judge's first decision on modification in 1998. Use of this date is supported by the fact that wages from 1998 were the last used by the administrative law judge in finding that claimant no longer had a loss in wage-earning capacity. *Ravalli v. Pasha Mar. Services*, 36 BRBS 47 (2002), *recon denied*, 36 BRBS 91 (2002).