BRB Nos. 00-0203
and 00-0203A

RUSSELL JENSEN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	DATE ISSUED: Oct. 24, 2000
	)	
	)	
Self Insured Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

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

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

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order on Remand (95-LHC-0217) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On July 22, 1991, claimant sustained work-related injuries to his left foot, left hip and right knee. Employer voluntarily paid compensation for temporary total disability and medical benefits from July 23, 1991, through June 22, 1994, as well as for a four percent

permanent impairment to claimant's right leg. Thereafter, claimant, who has not returned to his pre-injury or any other employment, filed a claim seeking continuation of temporary total disability compensation from June 22, 1994, and additional medical benefits due to the work-related injury to his right knee as well for an alleged lower back injury which subsequently developed as a result of the right knee injury.

In his Decision and Order dated March 25, 1996, Administrative Law Judge Nicodemo DeGregorio denied the claim for benefits based on claimant's alleged lower back injury, but awarded claimant temporary total disability benefits from June 22, 1994, to August 22, 1994, and permanent total disability benefits from August 23, 1994, and continuing for claimant's right knee injury. 33 U.S.C. §908(a), (b). Judge DeGregorio found that claimant's lack of cooperation with employer's vocational expert did not cause the defects in employer's evidence of suitable alternate employment. Rather, he determined that the identified jobs did not constitute suitable alternate employment because the duties and physical requirements of the positions were not described by employer's expert, and that this failure was not due to claimant's lack of cooperation. Employer appealed this decision to the Board. BRB No. 96-1159. This appeal was subsequently dismissed in light of employer's petition for modification under 33 U.S.C. §922. On modification, the case was reassigned to Administrative Law Judge Ralph A. Romano. In his Order dated June 5, 1998, Judge Romano denied employer's request for modification, finding that employer did not establish that the identified jobs were unavailable at the time of the first proceeding. He concluded that employer was merely attempting to retry, with better evidence, issues it could have presented at the initial hearing. In a Supplemental Decision and Order Awarding Attorney Fees, Judge Romano awarded claimant's counsel an attorney's fee totaling $13,350 and $2,100.45 in costs.

Employer appealed Judge Romano's Order of Denial of Request for Modification and the fee award. BRB No. 98-1275. Its appeal of Judge DeGregorio's decision was reinstated, and was consolidated with employer's new appeal. On appeal, employer challenged Judge DeGregorio's award of total disability benefits, as well as Judge Romano's denial of its request for modification and award of an attorney's fee.

In its decision, the Board affirmed Judge DeGregorio's award of total disability benefits. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). The Board, however, vacated Judge Romano's denial of employer's petition for modification, holding that the evidence employer submitted on modification is sufficient to bring the claim within the scope of Section 22 as it could support a finding of a change in claimant's physical and economic condition since the time of Judge DeGregorio's award. Specifically, the Board noted that Dr. Greifinger opined that claimant could no longer engage in any overhead lifting, but that claimant's ability to walk had increased. Moreover, the Board stated that inasmuch as claimant subsequently cooperated with employer's vocational rehabilitation efforts, employer's attempt to improve its evidence of suitable alternate employment should not be precluded in the modification proceeding. Thus, the Board concluded that the evidence

employer submitted on modification "is sufficient to bring the claim within the scope of Section 22 . . . ." *Id.* at 101. Therefore, the Board remanded the case for further consideration. Additionally, the Board vacated Judge Romano's award of an attorney's fee and remanded for a more detailed discussion of employer's objections to the attorney's fee petition. *Id.*

In his Decision and Order on Remand, Judge Romano (the administrative law judge) stated that the Board did not address the propriety of his determination that employer was inappropriately attempting to retry its case, but instead (1) held that employer established an improvement in claimant's medical condition contrary to his finding in his Order denying modification; (2) found that claimant's belated cooperation with the vocational expert constituted an additional ground for modification; and (3) remanded the case for the administrative law judge to determine if the new jobs identified constituted suitable alternate employment. The administrative law judge thus felt constrained to find, summarily, that suitable alternate employment was established. He further found that claimant did not diligently seek alternate work and therefore is limited to an award of permanent partial disability benefits. Thus, he granted employer's petition for modification and awarded claimant permanent partial disability benefits as of March 2, 1998, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on a weekly loss in wage-earning capacity of $127.50.

On appeal, employer challenges the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(21), contending that claimant is limited to an award under the schedule, 33 U.S.C. §908(c)(2), for the permanent partial disability to his knee. Claimant responds, urging affirmance. In his cross-appeal, claimant argues that in its prior decision, the Board engaged in a *de novo* review of the evidence and thus improperly substituted its view for that of the administrative law judge in finding that employer established a change in claimant's physical condition. Claimant further challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Employer responds to the cross-appeal, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *see also Jensen*, 33 BRBS at 100. It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1, 8 (1994); *Moore v. Washington*

Metropolitan Area Transit Authority, 23 BRBS 49, 52 (1989); *Blake v. Ceres Inc.*, 19 BRBS 219, 221 (1987). In order to obtain modification on this basis, however, employer must offer evidence that demonstrates that there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. For example, an employer could attempt to establish that claimant's employability has changed or that additional jobs have become available since the initial decision. An employer, however, may not attempt to establish suitable alternate employment for the first time in a Section 22 proceeding merely because it now possesses evidence it chose not to offer in the initial proceeding. *Compare Feld v. General Dynamics Corp.*, BRBS , BRB No. 00-0498 (Aug. 22, 2000), and *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998), *with Delay*, 31 BRBS at 204.

We initially address claimant's contention on cross-appeal that the Board, in remanding the case for the administrative law judge to address employer's evidence on modification, erred by engaging in a *de novo* review of the record. As it is apparent that the Board's prior decision did not clearly state the Board's intent in remanding the case to the administrative law judge, we clarify the previous decision and remand for further findings by the administrative law judge.

Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in claimant's condition. *See Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is, as the Board noted in its prior decision, sufficient to bring the claim within the scope of Section 22. If so, then the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in claimant's physical or economic condition from the time of the initial award to the time modification is sought. Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo II*, 521 U.S. at 121, 31 BRBS at 54(CRT) (1997); *Delay*, 31 BRBS at 204; *Vasquez*, 23 BRBS at 431.

In his Order denying modification, the administrative law judge determined that employer was precluded from obtaining modification because employer's evidence did not establish that the jobs now identified for purposes of modification were not available at the time of the initial proceeding. Citing *Lombardi*, 32 BRBS at 83, the administrative law judge concluded that employer only now possesses evidence of suitable alternate employment which it did not choose to develop at the time of the first hearing, and thus its request for modification must be barred since Section 22 is not intended to be a back door for retrying issues decided against a party. Order of Denial of Request for Modification at 4. In a footnote, the administrative law judge suggested that Dr. Greifinger's opinion that claimant

has an increased walking capacity does not establish an improvement in claimant's physical condition. *Id*. at 2 n. 4.

In essence, therefore, the administrative law judge determined that employer did not meet the threshold requirement of offering evidence of a change in claimant's condition. The intent of the Board's prior decision was to hold to the contrary, on the limited issue of whether employer's evidence indeed meets this threshold requirement. *See Duran,* 27 BRBS at 14-15. In this regard, the Board first held that Dr. Greifinger's opinion that claimant's increased ability to walk brings the claim within the scope of Section 22 as it "provides evidence of a change in claimant's physical condition." *Jensen,* 33 BRBS at 100. The Board did not hold that Dr. Greifinger's opinion establishes that the prior award should be modified in fact, and thus, the Board did not "reweigh" the evidence, which, we note, was only briefly discussed by the administrative law judge in a footnote.[1] Thus, we again hold that employer has produced sufficient evidence to bring the claim within the scope of Section 22. The administrative law judge, on remand, must weigh all the medical evidence and render findings of fact supported by substantial evidence regarding claimant's physical condition, providing reasons for crediting or discrediting the evidence submitted by both parties.[2] *See Wynn v. Clevenger Corp.,* 21 BRBS 290 (1988); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

With regard to the new vocational evidence offered by employer, the Board stated that this evidence, similarly, is sufficient to bring the claim within the scope of Section 22. *Jensen,* 33 BRBS at 101. The administrative law judge correctly states that the Board did not

[1]Although employer's primary contention before the administrative law judge on modification was that it established a change in claimant's economic condition, employer also contended that there is a change in claimant's physical condition. Emp. Closing Argument at 9 n.3.

[2]In addition to Dr. Greifinger's deposition testimony offered by employer during the modification proceedings, claimant offered the testimony of claimant and the report and testimony of Dr. Post. Employer also offered surveillance evidence which it alleges shows that claimant possesses greater physical capabilities than he contends.

squarely address his finding that employer merely possessed evidence it did not choose to develop at the time of the initial proceeding, and that therefore it was precluded from re-litigating this issue in a modification proceeding. We shall do so now, although, as will be discussed, the reliance on claimant's belated decision to cooperate with employer's vocational efforts is integral to the Board's holding.

In *Lombardi*, 32 BRBS at 83, the administrative law judge found that the claimant established his inability to perform his usual work due to his injury, and that he was entitled to permanent total disability benefits as employer did not offer any evidence of suitable alternate employment. The employer specifically declined the offer to leave the record open post-hearing so that it could introduce vocational evidence. The employer then sought modification and introduced a labor market survey into evidence. The administrative law judge found that the employer did not establish a change in the claimant's economic condition due to its decision not to offer evidence of suitable alternate employment at the initial proceeding.

The Board affirmed the administrative law judge's decision denying modification, holding that the employer did not establish a change in the claimant's economic condition from the time the first award was entered, but merely now possessed vocational evidence that it tactically decided not to develop at the first hearing. *Lombardi*, 32 BRBS at 86-87. The Board explained that Section 22 is not intended as a basis for trying issues that could have been raised in the initial proceeding or for correcting litigation tactics, citing *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), and *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). The Board further stated that the case did not present the situation wherein the employer was prevented from submitting evidence of suitable alternate employment at the first hearing; rather, its litigation strategy was to attempt to establish that claimant was not disabled at all. *Lombardi*, 32 BRBS at 87.

In its recent decision in *Feld*, the Board held, *inter alia*, that *Lombardi* cannot be distinguished on the ground that the employer was silent as to the reason it did not offer any evidence of suitable alternate employment at the initial proceeding, as opposed to the overt strategy in *Lombardi* of the employer's attempting to establish only that the claimant was able to perform his usual work. The Board stated that as the employer offered no evidence of suitable alternate employment at the initial proceeding, no evidence of extenuating circumstances that prevented it from doing so, and no evidence of a change in claimant's employability, the fact that employer now possessed evidence of the kind it chose not to develop at the initial hearing is insufficient to bring the claim within the scope of Section 22. The Board thus reversed the administrative law judge's finding that a total award should be modified to a partial award. *Feld*, slip op. at 5-7.

These two cases, however, do not apply in every instance where employer presents new evidence of suitable alternate employment on modification. They stand for the

proposition that when an employer presents no evidence of suitable alternate employment at the initial proceeding, and, on modification, no evidence of extenuating circumstances that prevented it from doing so, or of a *change* in the claimant's economic position, employer is not entitled to modification based on evidence of the current availability of jobs. Under these circumstances, the new submission reflects nothing more than a change in litigation strategy for which modification is not available. *See Lombardi*, 32 BRBS at 86-87; *Woodberry*, 673 F.2d at 25, 14 BRBS at 639; *see also Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT) (11th Cir. 1985).

In contrast, in *Delay*, 31 BRBS at 204-205, the employer sought to introduce evidence of suitable alternate employment following the claimant's introduction of new medical evidence concerning his physical condition. The Board held that the administrative law judge's exclusion of employer's vocational evidence was in error, as its evidence could not have been developed earlier since the medical evidence on which it was based was not previously available. The Board thus remanded the case for the administrative law judge to determine whether there was a mistake in fact or change in condition regarding the extent of the claimant's disability. *See also Lucas*, 28 BRBS at 6-8.

In the instant case, employer presented evidence of suitable alternate employment at the initial hearing, which was rejected by Judge DeGregorio as lacking the specificity necessary for him to determine if the jobs were suitable. On this basis, the instant case is distinguishable from *Lombardi* and *Feld*, wherein no evidence of suitable alternate employment was offered at the initial hearing. On modification, one of employer's vocational experts testified that the job market had improved since the time of the initial labor market survey. 1998 Tr. at 174. Thus, employer has offered evidence of a change in general economic conditions. More importantly, as discussed in the Board's initial decision, claimant cooperated with employer's vocational experts subsequent to the initial adjudication, which employer alleges has allowed it to obtain better evidence of alternate employment suitable for claimant.[3] These factors provide the basis for bringing the claim within the scope of Section 22, *see Duran*, 27 BRBS at 14-15, and for distinguishing this case from *Lombardi* and *Feld*. Contrary to the administrative law judge's statement in his decision on remand, claimant's cooperation with employer's vocational efforts is not a "further, independent ground" for modification. This factor is a central component of employer's assertion that there has been a change in claimant's economic condition.

[2]As the Board stated in its decision, claimant should not be able to benefit from his lack of cooperation with vocational efforts. *Jensen*, 33 BRBS at 101. The Board stated in *Blake*, 19 BRBS at 221, that the Act must be construed "in a manner which encourages employees to return to jobs within their skills and abilities."

Having clarified the Board's previous decision to hold merely that employer has produced sufficient evidence to bring the claim within the scope of Section 22, and that the instant case is distinguishable from *Lombardi*, we again remand the case to the administrative law judge to determine if claimant's award of total disability benefits should be modified. On remand, the administrative law judge is required to evaluate the medical and vocational evidence submitted by both parties, and to determine the weight it should be accorded, applying the same standards of proof that are required in an initial adjudication in determining if there has been a change in claimant's physical or economic condition.[4] *Rambo II*, 521 U.S. at 121, 31 BRBS at 54(CRT).

Turning to employer's appeal, employer asserts that the administrative law judge erred in not applying the holding of *Potomac Electric Power Co. v. Director, OWCP* [*PEPCO*], 449 U.S. 268, 14 BRBS 363 (1980), to limit claimant's recovery for permanent partial disability to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). We agree. In *PEPCO*, the Supreme Court held that a claimant who is permanently partially disabled due to an injury to a member listed in the schedule at Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), is limited to the recovery provided therein, and may not receive an award under Section 8(c)(21) for a loss in wage-earning capacity. *PEPCO*, 449 U.S. at 268, 14 BRBS at 363 ; *see also Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999).

In modifying claimant's award to one for permanent partial disability as of March 2, 1998, the administrative law judge found that the suitable alternate employment identified by employer paid an average of $360 per week, and thus that claimant sustained a weekly loss in wage-earning capacity of $127.50. Claimant was awarded ongoing benefits based on this loss in wage-earning capacity. In view of the fact that claimant's injury is to a scheduled member, *i.e.*, his right leg, he is precluded from receiving an ongoing permanent partial disability award based on a loss of wage-earning capacity. *PEPCO*, 449 U.S. at 268, 14 BRBS at 363. Pursuant to *PEPCO*, any permanent partial disability award in this case must be made under Section 8(c)(2) based on the degree of permanent physical impairment. *See also* 33 U.S.C. §908(c)(19). Thus, we vacate the administrative law judge's award of continuing permanent partial disability benefits from March 2, 1998. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 251, *aff'g on recon. en banc* 32 BRBS 165 (1998). If, on remand, the administrative law judge finds that claimant's total disability

[4]Given this disposition, we need not address claimant's specific contentions regarding the administrative law judge's summary finding that employer established the availability of suitable alternate employment.

award should be modified to a partial disability award, he must award claimant benefits under the schedule at Section 8(c)(2) based on the degree of permanent physical impairment.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge