BRB Nos. 08-0605

R.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRIEDE GOLDMAN HALTER	)	DATE ISSUED: 03/13/2009
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Quentin D. Price (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Alexis M. Parrish (Montgomery, Barnett, Brown, Read, Hammond & Mintz, LLP), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-1195) of Administrative Law Judge Lee J. Romero, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On July 30, 2001, claimant sustained a work-related injury to his left foot. In a Decision and Order dated August 28, 2003, the administrative law judge determined that claimant reached maximum medical improvement on January 1, 2002, that claimant sustained an 18 percent impairment to his left foot, that claimant established that he could not return to his usual employment duties with employer, and that employer failed to produce any evidence to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from July 31, 2001 through December 31, 2001, and permanent total disability benefits from January 1, 2002, and continuing. 33 U.S.C. §908(a), (b).

On January 5, 2007, employer filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that claimant was no longer totally disabled. In support of its position, employer presented a March 22, 2007, labor market survey which it asserted identified the availability of suitable alternate employment that claimant was capable of performing.[1] In response to employer's petition, claimant asserted, *inter alia*, that there had not been a material change in economic circumstances since the issuance of the administrative law judge's August 28, 2003, decision to warrant modification under Section 22 of the Act. In his Decision and Order, the administrative law judge granted employer's motion for modification and, after addressing employer's evidence, found that employer established the availability of suitable alternate employment as of the date of its labor market survey. Thus, the administrative law judge modified claimant's permanent total disability award to one for permanent partial disability, specifically 36.9 weeks of benefits for claimant's 18 percent impairment to his left foot. 33 U.S.C. §908(c)(4), (19).

On appeal, claimant contends that the administrative law judge erred in modifying his award of permanent total disability benefits as the issue of the availability of suitable alternate employment was raised by employer for the first time on modification. Alternatively, claimant challenges the administrative law judge's determination that employer submitted evidence sufficient to establish the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well established that the party requesting modification bears the burden of showing that the claim comes within the scope of Section 22. *See, e.g.*,

[1] At the formal hearing, the parties stipulated that there had been no change in claimant's physical condition since the issuance of the administrative law judge's initial decision. Sept. 11, 2007 Tr. at 14.

Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, 31 BRBS 54(CRT) (1997)*; Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990). Moreover, the United States Supreme Court has stated that 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 submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *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). In order to obtain modification based on a mistake of fact, the modification must render justice under the Act. *See McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976).

In support of his contentions of error, claimant cites the Board's decisions in *Feld v. General Dynamics Corp.*, 34 BRBS 131 (2000), and *Lombardi v. Universal Mar. Serv. Corp.*, 32 BRBS 83 (1998), for the principle that Section 22 is not intended to be a backdoor for litigating an issue which could have been raised in the initial proceedings, or for correcting tactical errors or omissions of counsel. Thus, claimant contends that the administrative law judge erred in granting employer's motion for modification when it raised the issue of the availability of suitable alternate employment for the first time in the modification proceeding.[2]

In *Lombardi*, 32 BRBS 83, the administrative law judge found that claimant established his inability to perform his usual work due to his injury and that he was entitled to permanent total disability benefits since employer, who specifically declined the offer to leave the record open post-hearing so that it could introduce vocational evidence, did not offer any evidence of suitable alternate employment. Employer subsequently sought modification and introduced a labor market survey into evidence. The administrative law judge found that the employer could not establish a change in the claimant's economic condition with evidence of suitable alternate employment which was being submitted for the first time on modification, as it had declined to present such evidence in the initial proceeding. The Board affirmed the administrative law judge's denial of 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 relied on *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), and *McCord*, 532 F.2d 1377, 3 BRBS 371, in stating 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.

[2] Employer's counsel concedes that evidence of suitable alternate employment was not presented when this case was initially before the administrative law judge. *See* Sept. 11, 2007 Tr. at 15.

The Board further noted employer offered no explanation for its failure to develop vocational evidence at the first hearing and 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, employer's initial litigation strategy was to attempt to establish that claimant was not disabled at all. *Lombardi*, 32 BRBS at 87.

The Board followed *Lombardi*, in *Feld*, 34 BRBS 131, holding 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 rejected the administrative law judge's determination that *Lombardi* was distinguishable on the grounds that the employer was silent as to its litigation strategy at the initial proceeding, as opposed to the overt strategy of the employer in *Lombardi* of specifically declining to submit vocational evidence, and that a change in the formula relevant to Section 8(f) relief, 33 U.S.C. §§908(f), 944, provided a new incentive to mitigate claimant's disability from total to partial. Reiterating that Section 22 is not a back door for retrying issues that could have been raised in the initial proceeding, the Board reversed the administrative law judge's decision granting modification of the total disability award to a partial disability award.

The facts in this case are similar to those in *Lombardi* and *Feld.* Employer did not present evidence of suitable alternate employment at the initial hearing but sought to do so by submitting vocational evidence for the first time on modification. The administrative law judge found employer's evidence of suitable alternate employment was sufficient to establish either that the initial decision was factually mistaken or that conditions have changed and claimant is no longer totally disabled. For the reasons that follow, we conclude that the administrative law judge's decision in this case is supported by the case precedent addressing the scope of modification under Section 22. To the extent that *Lombardi* and *Feld* are inconsistent with our holding today, they are hereby overruled.

The Supreme Court's decisions support a broad construction of change in condition and mistake in fact, the statutory bases for modification. *See Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT)(Court holds that the term "change in conditions" is broad enough to encompass a change in earning capacity); *O'Keeffe*, 404 U.S. 254 (Section 22 vests an administrative law judge 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); *Banks*, 390 U.S. 459 (Court allows modification despite the fact that the evidence in support of the petition could have been discovered prior to the hearing). Recent appellate decisions have similarly recognized the broad scope of Section 22.

In *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003), the United States Court of Appeals for the Second Circuit affirmed the conclusion that employer established suitable alternate employment in modification proceedings.[3] The court stated that the authority of an administrative law judge to modify existing orders either based on mistakes in fact or a change in condition is broad, and that "the modification process is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Jensen*, 346 F.3d at 276, 37 BRBS at 101(CRT), *quoting Betty B Coal Co.*, 194 F.3d at 497-498, and *Banks*, 390 U.S. at 464. Citing the Supreme Court's decision in *O'Keeffe*, 404 U.S. 254, the court determined 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. *Id.*, 346 F.3d at 277, 37 BRBS at 101(CRT). The court continued by stating that Section 22 expressly mandates that modification proceedings are *de novo*, that the administrative law judge is not bound by any previous fact-finding, and that after a motion for modification 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." *Id.*, *citing Consolidated Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). With regard to language in the Board's first decision which referenced *Lombardi* and *Feld*, the court concluded that

> To emphasize the breadth of Section 22 is not to overlook the fact that the party seeking modification still bears the burden of establishing that modification is appropriate. But to the extent that the Board's decision may imply that, as a threshold matter, the moving party must proffer evidence of a change in conditions or newly-discovered evidence, such a reading would improperly restrict the mistake of fact ground, which is well-established.

Id., 346 F.3d at 277, 37 BRBS at 101-102(CRT).

In *Old Ben Coal Co.*, 292 F.3d at 546–547, 36 BRBS at 44–45(CRT), the United States Court of Appeals for the Seventh Circuit vacated a decision denying modification on the basis that evidence could have been presented at an earlier hearing and stating that

[3] The employer in *Jensen* presented evidence of suitable alternate employment at the initial hearing before the administrative law judge, but the administrative law judge found that evidence to be lacking in specificity. On modification, employer presented new evidence including a medical opinion altering claimant's physical limitations and a labor market survey. In three opinions, the administrative law judge rejected employer's evidence, citing *Lombardi* and *Feld.* Each time the Board vacated the administrative law judge's decision and remanded for reconsideration, ultimately holding that employer presented sufficient evidence to bring the case within the scope of Section 22. The Board distinguished *Lombardi* and *Feld* as applying only where employer chose not to contest suitable alternate employment in the initial decision and held those decisions were to be narrowly construed. *Jensen v. Weeks Marine, Inc.*, 35 BRBS 174 (2001).

the need for justice must be balanced against the need for finality in decision making. In so doing, the court discussed the line of Longshore Act decisions relied on in *Lombardi* and *Feld* which held that reopening a case under Section 22 was not in the interests of justice. *See Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT) (11th Cir. 1985); *General Dynamics*, 673 F.2d 23, 14 BRBS 636; *McCord*, 532 F.2d 1377, 3 BRBS 371; *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000)(table). The court concluded that *McCord* is compatible with the statute and controlling Supreme Court precedent in that its holding rested on employer's blatant disregard for the administrative process, *see McCord*, 532 F.2d at 1381, 3 BRBS at 377, and that *Verderane* and *General Dynamics* involved an employer's belated efforts to raise for the first time a defense under Section 8(f), 33 U.S.C. §908(f), although both contained language emphasizing finality interests. The court also found that the Board's decision in *Kinlaw* indicated that failing to develop an argument that could have been made earlier is a consideration deserving great weight which can justify the denial of modification.[4] Finding that this emphasis on finality is not supported by the statute or the Supreme Court's decisions in *O'Keeffe* and *Rambo*, the court held that modification under Section 22 reflects a statutory preference for accuracy over finality and the fact that evidence was not presented earlier is not a sufficient basis to deny a petition for modification. Stating that an 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 upon, the court remanded for the administrative law judge to consider whether modification would render justice under the Act.

As *Lombardi* and *Feld* relied on employer's failure to produce evidence of suitable alternate employment at the initial hearing as the basis for denying modification, it is apparent that those cases are at odds with *Jensen* and *Old Ben Coal*. Neither *Lombardi* nor *Feld* gave any weight to the need for an accurate determination of claimant's disability. Upon further consideration, we agree that Section 22 reflects the Act's preference for accuracy, as by its very terms the section 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. Thus, the limitations on evidence imposed in *Lombardi* and *Feld* cannot stand.

[4] In *Kinlaw*, the administrative law judge found claimant was disabled as he established an inability to return to his former work, rejecting the opinion of employer's expert, Dr. Forrest, and crediting other evidence. On modification, employer presented a revised opinion of Dr. Forrest which the administrative law judge rejected. While the Board's decision did rely on employer's failure to develop evidence earlier, the administrative law judge in *Kinlaw* weighed the evidence submitted and reached a result supported by substantial evidence.

Our decision here is consistent with a more recent Board decision which recognized the need for accuracy in affirming an administrative law judge's decision to grant modification based on a showing of suitable alternate employment. In *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003), claimant failed to cooperate with employer's vocational expert prior to the initial hearing which denied employer a full opportunity to develop its evidence of suitable alternate employment at that time. On modification, employer submitted evidence of available jobs which the administrative law judge credited. The Board relied on the Seventh Circuit's holding in *Old Ben Coal* regarding the preference for accuracy over finality and the need to consider many factors in addressing whether modification will render justice, as well as noting that the court held 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." *Id.*, 37 BRBS at 110. The Board concluded that the administrative law judge's initial consideration of claimant's disability was affected by her lack of cooperation and the evidence submitted on modification provided a more accurate evaluation of claimant's capability. Thus, the administrative law judge's decision to reopen the case served the interests of justice under the Act.

In the present case, we conclude that the administrative law judge properly granted employer's request for modification. *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *O'Keecffe*, 404 U.S. 254; *Banks*, 390 U.S. 459; *Jensen*, 346 F.3d 273, 37 BRBS 99(CRT); *Old Ben Coal Co.*, 292 F.2d 533, 36 BRBS 35(CRT). Given the preference for accuracy over finality, *see Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), awarding claimant the appropriate amount of benefits for his disability is of paramount importance. In this case, employer sought Section 22 modification to show that claimant is no longer totally disabled by producing a labor market survey which it averred established the availability of suitable alternate employment that claimant was capable of performing. The administrative law judge rationally found that employer's evidence of suitable alternate employment, 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. Decision and Order at 15. Moreover, as his decision to reopen the case to reconsider whether claimant is totally disabled results in an accurate determination of claimant's entitlement to benefits, it renders justice under the Act.[5] Accordingly, we affirm the administrative law judge's decision to reopen the case for modification.

Thus, we also reject claimant's contention that the employment positions identified by employer's vocational expert in 2007 cannot be relied upon to modify the earlier decision because such positions existed at the time of the initial hearing.

[5] To hold otherwise allows an employee to continue to receive total disability benefits indefinitely, notwithstanding the fact that evidence of suitable job opportunities may exist.

Moreover, the administrative law judge's finding that employer established suitable alternate employment is supported by substantial evidence. Where, as in the instant case, claimant has established that he is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRS 294 (1992).

In concluding that employer met its burden of establishing the availability of suitable alternate employment, the administrative law judge credited the March 22, 2007, labor market survey of Nancy Favaloro, employer's vocational expert. The administrative law judge found that four of the identified positions are not suitable for claimant. The administrative law judge then found that the positions of unarmed security guard, crew change driver, hand packager and rental car driver establish the availability of suitable alternate employment that claimant is capable of performing. As claimant does not specifically challenge the suitability of these identified positions, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment as of the date of its March 22, 2007, labor market survey. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). We therefore reject claimant's alternate contention that remand is required for the administrative law judge to find a specific date when suitable alternate employment was available. As suitable alternate employment was established as of March 22, 2007, claimant's total disability ended and his permanent partial disability award under the schedule, 33 U.S.C. §908(c)(4), commenced on that date.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge