BRB Nos. 96-1159
and 98-1275

RUSSELL JENSEN	)	
	)	
Claimant-Respondent	)	DATE ISSUED: June 25, 1999
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	
	)	
	)	
Self Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Decision and Order on Reconsideration of Nicodemo DeGregorio, Administrative Law Judge, United States Department of Labor, and the Order of Denial of Request for Modification and Supplemental Decision and Order Awarding Attorney Fees 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Reconsideration of Administrative Law Judge Nicodemo DeGregorio, and the Order of Denial of Request for Modification and Supplemental Decision and Order Awarding Attorney Fees (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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an

abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

While working as a dock builder for employer on July 22, 1991, claimant sustained injuries to his left foot, left hip and right knee as a result of a "trip and fall" accident. 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 partial 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 initially determined that claimant failed to establish any injury to his lower back, and thus, denied the claim for that injury. Judge DeGregorio then found that claimant could not return to his usual employment as a result of his right knee injury, and that employer did not show with any specificity the availability of suitable alternate employment. Accordingly, Judge DeGregorio ordered employer to pay temporary total disability from June 22, 1994, to August 22, 1994, and then permanent total disability from August 23, 1994, and continuing. In addition, Judge DeGregorio ordered employer to pay claimant for all related medical care and treatment. Employer thereafter requested reconsideration of Judge DeGregorio's decision, which was addressed by Decision and Order on Reconsideration dated May 16, 1996, wherein Judge DeGregorio granted the motion but denied the relief requested. Employer then appealed Judge DeGregorio's decisions to the Board and that case was assigned BRB No. 96-1159. Acting upon employer's motion, the Board dismissed that appeal, and remanded the case to the Office of Administrative Law Judges for consideration of employer's petition for modification. At that time, the case was assigned to Administrative Law Judge Ralph A. Romano.

In his Order dated June 5, 1998, Judge Romano denied employer's request for modification, finding its evidence on modification as to the availability of suitable alternate employment insufficient to establish the requisite change in condition.

On July 20, 1998, claimant's counsel submitted a petition for an attorney's fee to Judge Romano requesting a total fee of $19,000.45, representing 65.6 hours at an hourly rate of $250, plus costs of $2,600.45. Employer filed a timely objection to counsel's fee petition. In his 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.

On June 26, 1998, employer filed an appeal of Judge Romano's Order of Denial of Request for Modification and requested that its prior appeal, BRB No. 96-1159, be reinstated. By Order dated July 2, 1998, the Board assigned employer's subsequent appeal BRB No. 98-1275, reinstated employer's appeal in BRB No. 96-1159, and consolidated the appeals for purposes of rendering a decision. Employer's subsequent appeal of Judge Romano's Supplemental Decision and Order Awarding Attorney Fees, also was consolidated with BRB No. 98-1275.

On appeal, employer challenges 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. Claimant responds, urging affirmance.

JUDGE DeGREGORIO'S DECISIONS

Employer argues that Judge DeGregorio erroneously concluded that claimant's lack of cooperation with employer's alternate employment searches had no impact on either "the extent of disability" issue or employer's burden in establishing the availability of suitable alternate employment. Employer maintains that the lack of specificity in its evidence of suitable alternate employment is a direct result of claimant's unwillingness to assist employer in its efforts to identify alternate employment. Thus, employer asserts that claimant's actions should act as a bar to an award of permanent total disability benefits.

In *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985), *aff'd on recon.*, 17 BRBS 160 (1985)(Ramsey, J., concurring and dissenting), the Board held that an employee must reasonably cooperate with an employer's rehabilitation specialist and a failure to do so should be considered in evaluating the extent of disability. *See also Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985). The Board however cautioned that it did not intend to interfere with an administrative law judge's discretion in weighing the evidence and judging the credibility of witnesses, and thus, remanded the case for the administrative law judge to consider the relevance, if any, of claimant's lack of cooperation in evaluating the rehabilitation expert's testimony. *Villasenor*, 17 BRBS at 102. In *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989), the Board affirmed an administrative law judge's finding that the claimant was only partially disabled, as he properly considered claimant's refusal to cooperate with the rehabilitation counselor and he reasonably concluded that this behavior, which was in claimant's control, made an award of total disability inappropriate.

In both his initial decision and on reconsideration in this case, Judge DeGregorio addressed employer's contention that claimant's unwillingness to cooperate with its vocational expert prevented employer from establishing the availability of suitable alternate employment. Citing *Villasenor*, Judge DeGregorio

found that it was unnecessary to determine whether claimant's refusal to cooperate with employer's vocational specialist was reasonable or unreasonable, because the refusal did not prevent employer from conducting a job search and the deficiency in employer's evidence, *i.e.*, the lack of specificity regarding the physical and mental requirements of the identified employment, is not due to claimant's failure to cooperate. Decision and Order at 7. In particular, employer's evidence of suitable alternate employment consisted only of a list of alternative job areas with generic job and industry descriptions, the general backgrounds needed for this employment, average annual salaries in those areas and job trend information. Emp. Ex. 8. Consequently, Judge DeGregorio found that he could not evaluate the suitability of the identified jobs as employer's evidence lacked a description of the specific job duties, as well their physical and mental requirements. *See Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988); *Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987).

Upon reconsideration, Judge DeGregorio once again found that claimant's refusal to cooperate with employer's vocational rehabilitation specialist is insufficient, without more, to preclude an award for total disability. Judge DeGregorio determined that even though employer's expert, Dr. Ehrenreich, was unable to interview claimant, he nevertheless knew of certain potentially suitable jobs available to claimant, and there was no showing that he was prevented by claimant's lack of cooperation from describing the jobs' duties and the necessary physical and mental abilities.[1] Thus, in the instant case, Judge DeGregorio explicitly considered and found immaterial claimant's failure to cooperate with employer's vocational rehabilitation specialist, *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990); *Dangerfield*, 22 BRBS at 104, *Villasenor*, 17 BRBS at 99, since employer's evidence as to the availability of suitable alternate employment is otherwise flawed as it lacks the necessary information for the administrative law judge to address the jobs' suitability. *Thompson*, 21 BRBS at 94; *see generally Pietrunti v. Director, OWCP,* 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). Inasmuch as the administrative law judge's finding is rational and supported by substantial evidence, we affirm Judge DeGregorio's finding that claimant is entitled to an award of total disability benefits.[2] Accordingly, his Decision and Order and Decision and Order on

[1]Judge DeGregorio found that claimant's refusal to cooperate with Dr. Ehrenreich did not hinder his ability to do a job survey, particularly given his testimony that when an interview is not possible, he adopts the worst case approach.

[2]In addition, employer's contention that claimant's failure to exhibit a willingness to work precludes entitlement to a total disability award is likewise without merit, as Judge DeGregorio was not required to address the issue of whether claimant diligently sought work because he found employer's evidence insufficient to establish the availability of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Piunti v. ITO Corp.*

Reconsideration are affirmed.

of Baltimore, 23 BRBS 367 (1990).

JUDGE ROMANO'S DENIAL OF MODIFICATION

Employer argues that Judge Romano erred in denying its petition for modification, inasmuch as it submitted evidence of suitable alternate employment sufficient to establish a change in claimant's economic condition. Judge Romano determined that employer's evidence in support of its modification request, *i.e.*, the labor market survey and accompanying testimony of Victor F. Steckler, was insufficient to establish that the jobs now identified for purposes of modification were not available at the time of the first hearing or became available only after Judge DeGregorio's decision was issued. Judge Romano concluded that employer now merely possesses evidence of suitable alternate employment which it did not choose to develop adequately 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 or litigating an issue which could have been raised at the initial proceedings. Order of Denial of Request for Modification at 4.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I],* 515 U.S. 291, 30 BRBS 1 (CRT)(1995). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997)*; Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990). The Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment. [3] *See, e.g., Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guaranty Ass'n,* 28 BRBS 1, 8 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52 (1989); *Blake v. Ceres Inc.,* 19 BRBS 219, 221 (1987). Contrary to employer's contention, however, employer is not entitled to modification as a matter of course merely because it offers evidence of suitable alternate employment. The evidence offered must demonstrate 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. *Compare Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998) *with Delay*, 31 BRBS at 204, *Moore,* 23 BRBS at 52, and *Blake*, 19 BRBS at 220-221. As Judge Romano correctly noted,

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

Section 22 is not intended as a method for a party "to correct errors or misjudgments of counsel." *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 26, 14 BRBS 636, 640 (1st Cir. 1982)*; see also Kinlaw v. Stevens Shipping & Terminal Co., Inc.,* BRBS , BRB No. 98-1180 (May 17, 1999); *Lombardi*, 32 BRBS at 86-87; *Delay*, 31 BRBS at 204.

Nevertheless, we agree with employer that Judge Romano erred in refusing to reopen the instant case in order to determine whether modification of the total disability award was warranted. Employer submitted with its request for modification the labor market survey of Mr. Steckler dated March 2, 1998, in which he identifies 14 employment positions that he believed claimant, given his background and physical capabilities, should be capable of performing. In turn, this labor market survey is based on new medical and vocational evidence. In formulating his labor market survey, Mr. Steckler took into account the more recent medical reports of Dr. Greifinger dated June 23, 1997, and December 2, 1997. HT on Modification at 51. As a result of his physical examinations, Dr. Greifinger testified that claimant had some changes in his physical abilities since his prior evaluation in April 1995. In particular, Dr. Greifinger found that claimant could no longer do any overhead lifting, but that his ability to walk had increased from three hours to five or six hours a day.[4] Employer's Exhibit on Modification 13 at 37-40. Thus, Dr. Greifinger's statements provide evidence of a change in claimant's physical condition since the issuance of Judge DeGregorio's decisions in this case. *See generally Spitalieri v. Universal Maritime Service Corp.*, 33 BRBS 6 (1999).

Moreover, although Judge DeGregorio rationally concluded that claimant's lack of cooperation with employer's vocational efforts did not hinder its ability to identify suitable alternate employment at the time of the initial hearing, claimant's subsequent cooperation with employer's vocational experts provides a basis for employer's pursuit of modification. In this regard, we note that claimant's failure to cooperate with vocational efforts at the time of the initial proceeding should not preclude employer's attempt to improve its evidence of suitable alternate employment upon its receipt of additional vocational information, as this would permit claimant to benefit through his lack of cooperation. In *Blake*, 19 BRBS at 221, the Board refused to restrict modification based on a change in economic condition to the situation where the claimant was working post-injury and subsequently obtained higher wages. The Board concluded that to limit modification to the

[4]Moreover, in his deposition testimony dated May 15, 1998, Dr. Greifinger opined that claimant should be able to perform a number of the jobs identified in Mr. Steckler's labor market survey. Employer's Exhibit on Modification 13 at 40-45.

situation where the claimant was working would permit a claimant to refuse jobs which he was capable of performing in order to retain an award of total disability benefits. The Board held that "[t]he compensation scheme embodied in the Act must be construed in a manner which encourages employees to return to jobs within their skills and abilities." *Id.* Consequently, as the evidence employer submitted on modification is sufficient to bring the claim within the scope of Section 22 by way of a change in claimant's physical and economic condition after the time of Judge DeGregorio's award, *see generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 14 (1993); *Moore*, 23 BRBS at 52, we vacate Judge Romano's denial of employer's petition for modification. The case is remanded 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 in this case. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). If the administrative law judge determines that employer has established the availability of suitable alternate employment, he must then consider whether claimant can rebut that showing, and retain eligibility for total disability benefits, by establishing that he diligently pursued alternate employment opportunities but was unable to secure a position within the scope of employment identified as suitable. *Id.*

JUDGE ROMANO'S AWARD OF ATTORNEY'S FEES

Claimant's counsel submitted a petition for an attorney's fee to Judge Romano requesting a total fee of $19,000.45, representing 65.6 hours at an hourly rate of $250, plus costs of $2,600.45. Employer filed a timely objection to counsel's fee petition. Judge Romano awarded $13,350 in fees and $2,100.45 in costs, disallowing 12.2 hours.

Employer argues that Judge Romano's fee award violates the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as he failed to fully discuss and render adequate findings regarding its numerous objections to the fee petition. In particular, employer asserts that objections regarding its liability for any attorney's fee, the hourly rate requested, and the sufficiency of the fee petition, warranted full analysis and conclusions regarding their merit.

We agree with employer that the administrative law judge did not sufficiently address its contentions. In particular, employer's contention that the hourly rate requested by counsel is excessive given the nature of this case was neither set forth nor addressed by Judge Romano in his decision. In fact, Judge Romano's decision is completely devoid of any specific statement regarding the hourly rate awarded to claimant's counsel in this case.[5] Moreover, the objections raised by employer to

[5]The hourly rate, presumed to be $250, is calculated by dividing the total attorney's fee awarded by Judge Romano by the number of hours allowed.

specific hourly charges in the fee petition were, with the exception of two contentions, summarily overruled. Specifically, Judge Romano noted "[e]mployer's numerous objections to various fee service charges are overruled except for those relating to preparation of brief (19.2 hours claimed), and a $500 claimed disbursement for an examination of claimant by Dr. Post." Supplemental Decision and Order Awarding Attorney Fees. With regard to the latter two objections, Judge Romano reduced as excessive the number of hours requested by seven, and completely disallowed the alleged $500 disbursement as the record lacked any underlying documentation in support of that charge. Given the cursory nature of Judge Romano's supplemental decision, the Supplemental Decision and Order Awarding Attorney Fees is vacated. On remand, the administrative law judge must adequately discuss employer's objections to the fee petition; he also should consider employer's contentions relating to its liability for claimant's attorney's fee in light of his decision on remand.[6]

Accordingly, the Decision and Order and Decision and Order on Reconsideration of Judge DeGregorio are affirmed. Judge Romano's Order of Denial of Request for Modification and his Supplemental Decision and Order Awarding Attorney's Fees are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[6]At the time Judge Romano issued his fee award employer was properly held liable for claimant's attorney's fee as claimant successfully defended his award of permanent total disability benefits in the face of employer's petition for modification.