BRB Nos. 09-0176
and 10-0470

RALPH B. COX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS	)	DATE ISSUED: 04/28/2011
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Denying Claimant's Motion for Modification, the Decision and Order Denying Motion for Reconsideration and Motion to Strike the Testimony of Michelle Edwards, the Order Granting Motion for Summary Decision, and the Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Ralph B. Cox, Whistler, Alabama, *pro se.*

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Claimant's Motion for Modification dated September 29, 2008, the Decision and Order Denying Motion for Reconsideration and Motion to Strike the Testimony of Michelle Edwards dated October 27, 2008, the Order Granting Motion for Summary Decision dated March 31, 2010, and the Order Denying Motion for Reconsideration dated April 15, 2010 (2008-LHC-00917 and 2009-LHC-01994) of Administrative Law Judge Clement J. Kennington 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). In an appeal by a claimant without representation by counsel, the Board will

review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by substantial evidence, and in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has a long procedural history. Claimant sustained a back injury while in the course of his employment as an electrician with employer on January 19, 2004. In his initial decision dated August 8, 2006, the administrative law judge found that claimant was unable to return to his usual employment duties with employer and that employer did not establish the availability of suitable alternate employment. The administrative law judge accordingly awarded claimant temporary total disability benefits from January 22, 2004 through January 10, 2005, and permanent total disability benefits from January 11, 2005, and continuing.[1] 33 U.S.C. §908(a), (b).

On January 19, 2007, employer sought modification of the administrative law judge's decision pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a change in claimant's economic condition. In support of its position that claimant was no longer totally disabled, employer presented evidence that it established the availability of suitable alternate employment by offering claimant a modified position at its facility at claimant's previous rate of pay and that claimant failed to timely report to work for this position as directed by employer. In a Decision and Order on Modification issued on July 20, 2007, the administrative law judge found that the modified job offered by employer was suitable for claimant and that claimant had timely knowledge of this offer of employment.[2] Pursuant to these findings, the administrative law judge concluded that claimant's entitlement to benefits ceased on September 12, 2006, the date on which employer's offer of suitable alternate employment to claimant expired. Decision and Order at 7-8 (July 20, 2007).

[1]The administrative law judge found that claimant reached maximum medical improvement on January 11, 2005, based on Dr. Schnitzer's report of that date assigning claimant permanent work restrictions. CX 14.

[2]In finding the job offered by employer to be suitable for claimant, the administrative law judge credited a job analysis performed by vocational consultant Tommy Sanders which stated that the job duties were within claimant's physical restrictions. EX 9.

On August 22, 2007, claimant, by his attorney Mr. Huey, sought modification of the administrative law judge's July 20, 2007 decision, asserting a change in economic condition on the basis of employer's subsequent refusal to hire him in August 2007.[3] While claimant's modification request was pending, employer found work for claimant within his restrictions and rehired him effective October 2, 2007. CX 31; Tr. at 56-59, 86 (June 27, 2008 hearing). In December 2007, claimant complained that he was unable to do his assigned work given his physical restrictions; claimant last worked for employer on December 12, 2007 because employer was not able to provide work within his restrictions.[4] CX 32; Tr. at 59-61 (June 27, 2008 hearing). By letter dated January 22, 2008, employer confirmed that claimant was on medical leave of absence due to a period of unavailability of work within his restrictions.[5] CX 33. On April 30, 2008, claimant filed a *pro se* pleading asserting additional grounds for modification;[6] specifically, claimant alleged a mistake in fact in the administrative law judge's findings regarding his termination by employer in September 2006 and an additional change in his economic condition as of December 13, 2007, when work within his physical restrictions was no longer available in employer's facility.

[3]On August 1, 2007, claimant reapplied for employment with employer; after initially being told to report to work on August 7, 2007, claimant was informed that there were no jobs available within his physical restrictions. CXs 23-26; Tr. at 52-55 (June 27, 2008 hearing).

[4]Claimant testified that for the first two months following his rehiring by employer, the job duties assigned to him were within his restrictions. Tr. at 115-116, 146-147 (June 27, 2008 hearing). He testified that he was then transferred to another ship where his new supervisor did not accommodate his restrictions. *Id.* at 116.

[5]As claimant was considered by employer to be a "new hire/rehire" and as he did not sustain a new injury or aggravation of his January 19, 2004 work injury, employer placed claimant on non-industrial medical leave. CX 32; Tr. at 85-86, 90, 92-93, 96, 99-100 (June 27, 2008 hearing).

On December 14, 2007, claimant obtained employment with the Mobile County Public School System as a substitute school bus aide and driver, and on August 6, 2008, his position was made full-time. *See* August 7, 2008 Motion for Modification; Tr. at 12-13, 15-19 (June 27, 2008 hearing).

[6]On January 14, 2008, Mr. Huey withdrew as claimant's counsel.

In a Decision and Order Denying Claimant's Motion for Modification issued on September 29, 2008, the administrative law judge first found that claimant failed to show a mistake in fact regarding his September 2006 termination by employer. The administrative law judge further found that claimant did not experience a change in his economic condition in August 2007 when employer failed to rehire him or in December 2007 when he was placed on medical leave. On October 27, 2008, the administrative law judge denied claimant's motion for reconsideration. After appealing these two decisions to the Board, BRB No. 09-0176, claimant filed a new petition for modification with the administrative law judge. In an Order dated June 10, 2009, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings.

On February 3, 2010, employer filed a Motion for Summary Decision with the administrative law judge and, on February 12, 2010, claimant filed an opposition to employer's motion. In an Order Granting Motion for Summary Decision issued on March 31, 2010, the administrative law judge found that the assertions made by claimant in his new request for modification do not demonstrate a mistake in fact or a change in condition, and he therefore denied claimant's new modification request. On April 15, 2010, the administrative law judge denied claimant's request for reconsideration. Claimant appealed this denial of modification to the Board and additionally requested that his prior appeal, BRB No. 09-0176, be reinstated. By Order dated June 8, 2010, the Board reinstated claimant's previous appeal, BRB No. 09-0176, acknowledged claimant's appeal of the administrative law judge's March 31, 2010 Order Granting Motion for Summary Decision and his April 16, 2010 Order Denying Motion for Reconsideration, BRB No. 10-0470, and consolidated these two appeals for purposes of decision. Responding to claimant's appeals, employer urges the Board to affirm the administrative law judge's decisions in their 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., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009); *Vasquez v. Continental Maritime 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); *see*

also Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459 (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). The party moving for modification need not show that the evidence offered in support of modification was unavailable at the time of the initial proceeding. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003). Section 22 evinces the intent to promote accuracy over finality, *see Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT), although in order to obtain modification based on a mistake of fact, the modification must render justice under the Act. *See Vina*, 43 BRBS 22.

In this case, the administrative law judge made several references to the proposition that modification pursuant to Section 22 of the Act cannot be used to relitigate previously-decided issues.[7] *See* Decision and Order at 9-10 (Sept. 29, 2008); Decision and Order at 3 (Oct. 27, 2008); Order at 5-7, 10 (March 31, 2010); Order at 2 (April 15, 2010). These statements, however, are inconsistent with the current legal standard governing Section 22 modification, as stated above. *See infra* at 4-5; *Vina*, 43 BRBS at 25. Nevertheless, any error committed by the administrative law judge in setting forth an incorrect legal standard with respect to Section 22 is harmless in the present case as he rationally determined that claimant did not establish a mistake of fact or a change in his economic condition.

In its response to claimant's appeals, employer contends that the administrative law judge properly denied modification as claimant's physical condition has not changed and employer offered claimant suitable work in its facility that claimant lost because of his failure to timely report to work in accordance with the applicable contractual provisions. We agree with employer's contentions and accordingly, we affirm the administrative law judge's denial of modification in this case.

Where, as in this case, a claimant has established a *prima facie* case of total disability by showing that he cannot return to his usual work, the burden shifts to the employer to establish the availability of suitable alternate employment. *See New Orleans*

[7]As support for this proposition, the administrative law judge cited *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), and *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000) (table). *See* Decision and Order at 9-10 (Sept. 29, 2008); Order at 5-6 (Mar. 31, 2010). Case precedent post-dating *McCord* and *Kinlaw*, however, emphasizes the Act's preference for accuracy over finality. *See, e.g., Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT); *Vina*, 43 BRBS at 25.

(Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1981); *see also 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). The employer may meet its burden by offering claimant a job within its own facility tailored to meet the claimant's specific restrictions so long as the work is necessary to its operation. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). If the claimant loses a suitable job in the employer's facility due to his own misconduct, the employer need not establish the availability of other suitable alternate employment, as a claimant is not entitled to total disability benefits when the loss of wages is due to actions within his control. *See Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

In seeking modification based on a mistake in fact, claimant contended that the administrative law judge errorously determined that his failure to timely report to employer's facility for work in accordance with prescribed procedures under the union contract was the reason that the modified job became unavailable to him. Specifically, claimant relied on evidence that he had reported to work for employer before the effective date of his termination. In his September 29, 2008 decision, the administrative law judge addressed all of the relevant evidence and concluded that claimant had not demonstrated that a mistake in fact had been made in the initial determination that claimant lost an available and suitable job in employer's facility due to his own violation of the applicable rules. Decision and Order at 3-9 (Sept. 29, 2008). The administrative law judge discussed claimant's testimony, the documentary evidence, and the testimony of Michelle Edwards, a senior nurse auditor for employer, *id.* at 5-6, and found Ms. Edwards's testimony to be persuasive. *Id.* at 8. In this regard, the administrative law judge credited Ms. Edwards's testimony that claimant's employment was automatically terminated as the result of his failure to report to work on September 12, 2006, and the four days thereafter, and that the September 25, 2006 termination date listed in employer's records merely reflects a lag in the entry of his termination into employer's computer system.[8] *Id.* at 6, 8; Tr. at 102-106 (June 27, 2008 hearing); *see also* Tr. at 113-117, 122, 127-131 (May 14, 2007 hearing).

It is well-established that the administrative law judge has the authority to address questions of witness credibility and is entitled to draw his own inferences from the evidence; that other inferences could have been drawn does not establish error in the administrative law judge's conclusion. *See James J. Flanagan Stevedores, Inc. v.*

[8]It is undisputed that the collective bargaining agreement provides for the termination of an employee with five consecutive days of unexcused absences from work. CX 19; EX 6.

Gallagher, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge made credibility determinations and drew inferences from the record evidence regarding employer's offer to claimant of modified work in its facility and the termination of claimant's employment with employer following claimant's failure to timely report to work. *See, e.g., Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT). The credited testimony of Ms. Edwards provides substantial evidence in support of the administrative law judge's finding that claimant lost the available and suitable job in employer's facility due to his violation of the provisions in the applicable collective bargaining agreement.[9] Therefore, we affirm the finding that claimant did not establish a mistake in fact in the administrative law judge's original finding that employer had no further duty to establish the availability of suitable alternate employment; claimant failed to timely report for the suitable modified job offered by employer at claimant's pre-injury rate of pay. *See Del Monte Fresh Produce*, 563 F.3d 1216, 43 BRBS 21(CRT); *Brooks*, 2 F.3d 64, 27 BRBS 100(CRT).

Claimant also sought modification based on two changes in his economic condition. First, claimant alleged that employer's refusal to rehire him with his physical restrictions in August 2007 constituted a change in his economic condition warranting modification. Claimant further alleged that, after employment within his restrictions became available and he was rehired by employer in October 2007, a second change in economic condition occurred when that job became unsuitable in December 2007.

In denying modification based on a change in condition, the administrative law judge found that neither employer's failure to rehire claimant in August 2007, nor the unavailability of work within claimant's restrictions after December 13, 2007, constituted a change in economic conditions. The administrative law judge reasoned that after claimant's employment was terminated in September 2006 due to his own actions, employer had no continuing obligation to offer claimant employment within his physical restrictions; thus, the fact that employer did not hire claimant when he re-applied for employment in August 2007 did not establish a change in condition for purposes of

[9]Claimant filed a motion to strike that portion of Ms. Edwards's testimony which, according to claimant, was based on unreliable hearsay evidence; the administrative law judge denied the motion to strike. Decision and Order at 1-2 (Oct. 27, 2008). We note that the testimony of Ms. Edwards to which claimant objected pertained solely to the issue of the suitability of the work assigned to claimant in December 2007. Claimant did not allege that Ms. Edwards's testimony regarding the events that occurred in August and September 2006 was impermissibly based on hearsay evidence. Therefore, no question is presented as to the admissibility of Ms. Edwards's testimony about the events in 2006.

Section 22 modification.[10] Decision and Order at 10 (Sept. 29, 2008). The administrative law judge further found that as employer was under no duty to offer claimant suitable work or otherwise to establish the availability of suitable alternate employment as of December 13, 2007, any evidence that employer did not have work available to claimant within his restrictions as a new hire, as of that date, did not constitute a finding of disability; in this regard, the administrative law judge stated that as of December 13, 2007, claimant "was merely unable to perform an occupation he had acquired after Employer's obligation for disability benefits had ceased." Order Granting Motion for Summary Decision at 9 (March 31, 2010) *see also* Order Denying Motion for Reconsideration at 2 (April 15, 2010).

In finding that claimant failed to establish a change in condition in either August or December 2007, the administrative law judge credited Ms. Edwards's testimony that claimant applied for work with employer in August 2007 as a new hire and thus was not eligible to participate in employer's return-to-work program for employees with restrictions due to a work-related injury. Decision and Order at 6, 8, 10 (Sept. 29, 2008); Tr. at 86 (June 27, 2008 hearing). Ms. Edwards further testified that when work within claimant's physical restrictions subsequently became available, employer hired claimant in October 2007 as a new hire with restrictions employer was willing to accommodate at that time. Tr. at 89-90 (June 27, 2008 hearing); CX 33. Ms. Edwards contrasted claimant's status as a new hire, where employer had no obligation to continue to provide him with work within his restrictions, with the status of employees enrolled in employer's return-to-work program for employees returning to work with work-injury related restrictions where employer did have such an obligation. Tr. at 86-90, 98-100, 115, 117-118 (June 27, 2008 hearing); CX 32. Ms. Edwards specifically testified that, in December 2007, when claimant told her that his work activities were outside of his work restrictions, she was under no obligation to find him work within his restrictions as he was not part of the return-to-work program. Tr. at 91-92; 97-99 (June 27, 2008 hearing); *see also* CXs 32-33.

The administrative law judge rationally credited Ms. Edwards's testimony regarding the distinction between claimant's employment status as a new hire and the status of employees enrolled in employer's return-to-work program. *See generally Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT). Thus, the administrative law judge rationally

[10]In his Order Granting Motion for Summary Decision, the administrative law judge reiterated his finding that employer had met its burden of establishing the availability of suitable alternate employment by offering claimant a suitable job in August 2006, and thereafter was under no continuing obligation to offer claimant work within his restrictions once claimant failed to report to work. Order at 8 (March 31, 2010); *see also* Order Denying Motion for Reconsideration at 2 (April 15, 2010).

found that evidence that work within claimant's restrictions was not available when he reapplied for employment in August 2007 or after December 13, 2007, does not establish a change in conditions under Section 22 because the work injury is not the basis for any loss in wage-earning capacity claimant sustained. Order at 9 (March 31, 2010); Order at 2 (April 15, 2010). It is critical to note, in this regard, the distinction between claimant's employment status as a new hire and the status he would have had as a participant in employer's return-to-work program if he had timely reported to work in September 2006. The evidence relied upon by claimant regarding the unavailability of work within his restrictions in August 2007, and again, as of December 13, 2007, demonstrates only that such work was not available to him in his capacity as a new hire. Claimant's evidence does not establish that the suitable work offered to him as part of employer's return-to-work program in August 2006 would not have remained available to him as of either August or December 2007, had he timely accepted employer's prior offer of a modified job and been part of employer's return-to-work program. Thus, this evidence does not establish a change in claimant's economic condition as of either of those dates. *Cf. Del Monte Fresh Produce,* 563 F.3d 1216, 43 BRBS 21(CRT); *Vasquez,* 23 BRBS 428 (1990). Consequently, as a mistake in fact or a change in condition has not been established, the administrative law judge's September 29, 2008 and October 27, 2008 decisions denying claimant's requests for modification and reconsideration are affirmed. BRB No. 09-0176. Furthermore, as claimant has not established a mistake in fact or a change in condition nor has he raised a genuine issue of material fact, *see generally Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006), the administrative law judge's March 31, 2010 and April 15, 2010 orders granting employer's motion for summary decision and denying claimant's request for modification as well as his request for reconsideration are affirmed. BRB No. 10-0470.

Accordingly, the administrative law judge's Decision and Order Denying Claimant's Motion for Modification dated September 29, 2008, Decision and Order Denying Motion for Reconsideration and Motion to Strike the Testimony of Michelle

Edwards dated October 27, 2008 (BRB No. 09-0176), Order Granting Motion for Summary Decision dated March 31, 2010, and Order Denying Motion for Reconsideration dated April 15, 2010 (BRB No. 10-0470) are 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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REGINA C. McGRANERY
Administrative Appeals Judge