BRB No. 10-0504

JOE BORDEAUX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 04/27/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Bruce M. Bender (Axelson, Williamowsky, Bender & Fishman, P.C.), Rockville, Maryland, for claimant.

John Schouest and Phillip M. Davis (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-LDA-00109) of Administrative Law Judge Linda S. Chapman 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Claimant began working for employer as a carpenter in Afghanistan in September 2004. On June 30, 2006, claimant was eating in the mess tent when it was hit by a missile. As a result of this incident, claimant complained of headaches, blurred vision, dizziness, and shoulder and back pain. Claimant returned to the United States for treatment until he obtained a work release in the fall of 2006, and he returned to work in Afghanistan. Claimant was unable, however, to perform his usual work as a carpenter or alternative work as a fuel truck driver due to blurred and double vision, dizziness and headaches. Claimant returned to the United States where he underwent eye surgery in June 2007. Claimant obtained work in the United States on September 7, 2007, with Hassle Free Home Maintenance (HFHM). He continued to suffer from headaches and dizziness and sought compensation under the Act for temporary total disability, 33 U.S.C. §908(b), from November 29, 2006, to September 7, 2007, the date upon which he started his work with HFHM.

In her initial decision, the administrative law judge found that claimant established a *prima facie* case that his head symptoms are related to the June 2006 work injury, that employer failed to rebut the Section 20(a) presumption, 33 U.S.C. §920(a), and that, had employer rebutted the presumption, claimant established, based on the record as a whole, that his vision problems are related to the work injury. The administrative law judge found that claimant also established that he could not return to work for employer as a carpenter or truck driver as of November 29, 2006, and that employer did not present any evidence of suitable alternate employment prior to claimant's starting work for HFHM. The administrative law judge thus concluded that claimant is entitled to compensation for temporary total disability from November 29, 2006 to September 7, 2007.

Claimant subsequently sought Section 22 modification, 33 U.S.C. §922, based on a change of condition because he was laid-off by HFHM on January 5, 2009.[1] The administrative law judge found that claimant established a change in condition as of January 5, 2009, "in that he is unable to obtain employment." Decision and Order at 2. Having reopened the case pursuant to Section 22, the administrative law judge found that claimant remains unable to return to his usual work for employer in Afghanistan[2] and that claimant's lay-off from HFHM renewed employer's burden to establish the availability of

[1]Claimant sought compensation for temporary total disability commencing January 6, 2009, as well as for temporary partial disability, 33 U.S.C. §908(e), for the period he was employed by HFHM from September 7, 2007 through January 5, 2009.

[2]The administrative law judge credited claimant's testimony that he continues to suffer from headaches, dizziness, and blurred vision.

suitable alternate employment. Specifically, the administrative law judge found, in contrast to employer's argument, that claimant's ability to perform light maintenance work with HFHM did not establish the availability of suitable alternate employment after claimant was laid off from that job. Since employer proffered no other evidence of suitable alternate employment, the administrative law judge found claimant entitled to temporary total disability benefits as of January 6, 2009. Additionally, the administrative law judge found that for the period that claimant worked for HFHM his disability was partial in nature, as he was able to obtain and successfully perform that work within his restrictions. She thus awarded claimant temporary partial disability benefits for the period from September 7, 2007 to January 5, 2009.

On appeal, employer challenges the administrative law judge's award of additional compensation benefits on modification. Claimant responds, urging affirmance.

Employer first contends that claimant's motion for modification should have been construed as an untimely request for reconsideration or appeal of the administrative law judge's initial decision rather than a motion for modification. Employer argues that claimant's entitlement to continuing compensation after September 7, 2007, was before the administrative law judge in the initial proceeding and that any claim for additional benefits had to be corrected only through a motion for reconsideration or an appeal.

We reject employer's contention that claimant was precluded from seeking continuing compensation after September 8, 2007. In her decision on modification, the administrative law judge properly found that the only issue before her at the time of her initial decision was claimant's entitlement to benefits for a closed period of temporary total disability from November 29, 2006 through September 7, 2007. Specifically, the administrative law judge found that claimant, at the initial hearing, permissibly amended his original claim for ongoing benefits as of November 29, 2006, to reflect that he was seeking disability benefits only for a closed period of temporary total disability up to the time he obtained work at HFHM. Tr. at 13-14; *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Thus, the administrative law judge correctly found that the doctrine of *res judicata* is inapplicable since claimant's entitlement to compensation after September 8, 2007, was never litigated. *Island-IV, Inc. v. Blue Streak-Gulf Is. Ops.*, 24 F.3d 743 (5th Cir. 1994); *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). Moreover, Section 22 displaces traditional concepts of finality such as *res judicata* such that claimant can seek additional benefits based on a change in condition or a mistake in fact. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1972); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

Therefore, the administrative law judge properly addressed claimant's claim for additional benefits by way of his motion for modification.

Employer next contends that claimant's allegation of a change of condition based on his being laid-off by HFHM on January 5, 2009, cannot support modification because the administrative law judge did not find, in the first instance, that claimant's HFHM work constituted suitable alternate employment. Employer also contends that the administrative law judge erred by retroactively awarding claimant compensation for temporary partial disability while he was employed at HFHM. Employer maintains that, as claimant's work at HFHM was known at the time of the first formal hearing in this case, claimant could not contend on modification that the circumstances of that employment changed such that he is entitled to temporary partial disability benefits while he worked there.

Section 22 of the Act 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)*; 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 factfinder 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*, 404 U.S. at 256; *see also Banks*, 390 U.S. 459; *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 modification process is flexible, easily invoked, and intended to secure "justice under the Act." *Betty B Coal Co.*, 194 F.3d at 497-498; *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009).

In her decision on modification, the administrative law judge properly found that claimant's layoff from his work with HFHM constituted a change in his economic condition pursuant to Section 22 of the Act.[3] *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT);

[3]It is immaterial whether the administrative law judge specifically found in her initial decision that the HFHM job constituted suitable alternate employment, as the loss of a job constitutes a change in economic conditions. *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

see Del Monte Fresh Produce v. Director, OWCP [Gates], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009) (lay-off from a job on the open market that the claimant obtained post-injury renews employer's burden to show the availability of suitable alternate employment); *see also Vasquez*, 23 BRBS 428 (lay-off from a job at employer's facility that constituted suitable alternate employment may serve as a basis for establishing a change of condition). Therefore, the administrative law judge correctly concluded that claimant established a change in condition within the scope of Section 22. Moreover, contrary to employer's contention, the administrative law judge properly addressed claimant's claim for temporary partial disability benefits for the period preceding his layoff as this issue also is properly the subject of modification. *See Jensen*, 346 F.3d at 277, 37 BRBS at 101(CRT); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Vina*, 43 BRBS 22. Therefore, we reject employer's contentions that the issues concerning the extent of claimant's disability were not properly the subject of a modification claim.

Once the proponent of modification has established a change in condition and/or mistake in fact, the standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. *See Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Gates*, 563 F.3d 1216, 43 BRBS 21(CRT); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Vasquez*, 23 BRBS 428. The administrative law judge found claimant entitled to temporary partial disability for the period he worked for HFHM based on a wage-earning capacity of $16 per hour,[4] and to a continuing award of temporary total disability commencing January 6, 2009, the date of his layoff. The administrative law judge properly found that once claimant demonstrated he remained unable to perform his usual work and that he was laid off from his suitable alternate employment position with HFHM, the burden shifted to employer to establish the availability of other suitable alternate employment from that date in order to avoid liability for total disability benefits. *Gates*, 563 F.3d 1216, 43 BRBS 21(CRT); *Vasquez*, 23 BRBS 428; *see generally Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). The administrative law judge found that employer did not offer evidence of any jobs which are reasonably available to claimant and consistent with his vocational profile and medical restrictions. *See generally Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). This finding is supported by substantial evidence. In the absence of any suitable alternate employment, claimant is totally disabled. *Hord*, 193 F.3d 797, 33 BRBS 170(CRT). Therefore, the

[4]Employer does not challenge the administrative law judge's finding on the merits that claimant had a loss in wage-earning capacity while he was employed by HFHM. 33 U.S.C. §908(c)(21), (h). Therefore, this finding is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

administrative law judge's award of temporary partial disability benefits from September 7, 2006, to January 5, 2009, and of ongoing temporary total disability thereafter is affirmed.[5]

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

[5]The parties did not contend before the administrative law judge that claimant's disability is permanent in nature.