

MARTIN B. TAYLOR, JR.)	
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Claimant-Respondent)	
)	
v.)	
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ISLAND OPERATING COMPANY, INCORPORATED)	DATE ISSUED: 02/08/2012
)	
and)	
)	
LOUISIANA WORKERS' COMPENSATION CORPORATION)	
)	
Employer/Carrier- Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., W. Jared Vincent and V. Jacob Garbin (Law Offices of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Modification (2010-LHC-1619) of Administrative Law Judge C. Richard Avery 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 which are rational, supported by substantial evidence and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case has previously been before the Board. To briefly recapitulate the procedural history, claimant sought continuing disability and medical benefits under the Act for injuries sustained to his knees when he allegedly stepped over pipes while working for employer. In a Decision and Order dated November 29, 2007, the administrative law judge, after concluding that claimant failed to establish a causal relationship between his reported work incident and his injuries, denied the claim. Claimant appealed this decision to the Board, which reversed the administrative law judge's finding that claimant's knee conditions are not work-related, vacated the administrative law judge's denial of benefits, and remanded the case for the administrative law judge to address the nature and extent of claimant's disability, as well as claimant's entitlement to medical treatment. *M.T. [Taylor] v. Island Operating Co., Inc.*, BRB No. 08-0284 (Sept. 25, 2008).

In a Decision and Order on Remand dated June 16, 2009, the administrative law judge awarded claimant temporary partial disability benefits from January 6 until May 12, 2006, and temporary total disability benefits from August 9 until September 16, 2006, when claimant's condition reached maximum medical improvement. The administrative law judge further found that, as the evidence of record did not contain an impairment rating with regard to claimant's knees, claimant was not entitled to any benefits after September 16, 2006.

Claimant subsequently filed a timely motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. In support of his motion, claimant submitted reports authored by Drs. Fairbanks and Murphy, each of whom addressed the issue of the degree of impairment sustained to claimant's knees. In his Decision and Order Granting Modification, the administrative law judge credited the report of Dr. Fairbanks in determining that claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), for a 25 percent impairment to each leg, commencing September 16, 2006.

On appeal, employer challenges the administrative law judge's granting of claimant's motion for modification. Claimant responds, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief.

Employer contends that claimant failed to establish sufficient grounds to justify the modification of the administrative law judge's June 16, 2009, Decision and Order on Remand. Specifically, employer asserts that, since the evidence submitted on modification by claimant in support of a finding that he has impairments to his knees was available at the time of both the original hearing and the hearing on remand, the administrative law judge erred in finding that his decision was subject to modification.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). 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'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Section 22 of the Act displaces traditional notions of finality and evinces the Act's preference for accuracy; the intent of Section 22 is to render "justice under the Act." See *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009).

We reject employer's contention that the administrative law judge erred in awarding claimant scheduled benefits pursuant to claimant's motion for modification. Contrary to employer's contention, modification may be granted despite the fact that the evidence presented in support of the request for modification was available prior to the initial hearing. *Jensen*, 346 F.3d 273, 37 BRBS 99(CRT); *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT); see also *Banks*, 390 U.S. 459. Moreover, claimant's claim for permanent partial disability benefits comes within "mistake in fact" modification, as it demonstrates that claimant was impaired after the date the administrative law judge terminated benefits on September 16, 2006. See generally *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); see also *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (3^d Cir. 1994) (a party need not specifically plead "change in condition" or "mistake in fact"). Given the Act's preference for accuracy over finality, employer has not established that the administrative law judge erred in reopening the case on modification. See *Vina*, 43 BRBS 22 (appropriate to modify total award to partial); see also *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). Additionally, as employer does not challenge the administrative law judge's decision to rely on the opinion of Dr. Fairbanks in finding that claimant sustained a 25 percent impairment to each leg, the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(2) is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge