MATT T. SPILLERS	)	BRB No. 95-1167
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
	)	
MATT T. SPILLERS	)	BRB No. 97-571
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Denying Motions for Reconsideration, and Decision and Order on Section 22 Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

D.A. Bass-Frazier (Huey & Leon), Mobile, Alabama, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, and Order Denying Motions for Reconsideration, and employer appeals the Decision and Order on Section 22 Modification (93-LHC-1718, 2788) 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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On October 17, 1991, claimant sustained a concussion during the course of his employment for employer when a welding torch caused an explosion. Claimant did not lose any time from work as a result of this incident, but subsequently complained of frequent headaches, sleep loss, and dizziness. On August 12, 1992, claimant sustained at second injury at work when he fractured his left knee after he stepped on a pile of angle iron. Employer voluntarily paid claimant temporary total disability benefits for this injury from August 14, to November 1, 1992, November 16, 1992, and from November 30, 1992, to March 29, 1993. 33 U.S.C. §908(b). Claimant returned to modified duty at employer's tool room on March 29, 1993; however, on April 19, 1993, claimant was terminated and has since been unemployed.

In his initial Decision and Order, the administrative law judge accepted employer's stipulation that claimant's October 17, 1991, head injury and August 12, 1992, left knee injury are work-related. The administrative law judge next found that claimant did not sustain any temporary disability from the date of his head injury until he reached maximum medical improvement on November 1, 1993; in support of this finding, the administrative law judge credited, *inter alia,* evidence that claimant's head injury did not cause claimant to miss any time from work. Next, the administrative law judge determined that claimant's knee reached maximum medical improvement on March 19, 1993, and he awarded claimant temporary total disability benefits from August 13, 1992, to March 19, 1993, and permanent total disability benefits from March 20, 1993, to March 28, 1993, since claimant did not return to work after reaching maximum medical improvement until March 29, 1993. The administrative law judge also found that the knee injury prevents claimant from returning to his usual employment as a machinist; however, he found that employer established the availability of suitable alternate employment from the date of claimant's termination. Claimant was therefore awarded compensation for a 5 percent impairment of his left knee. 33 U.S.C. §908(c)(2), (19). Claimant was further awarded past medical benefits for his head injury and future medical benefits and neuropsychological treatment for depression related to post-concussive syndrome from the head injury.

The administrative law judge next addressed claimant's average weekly wage. He found that Section 10(a), 33 U.S.C. §910(a), provides the best method for determining claimant's average weekly wage as claimant worked full-time during the year prior to each injury. The administrative law judge determined that claimant's average weekly wage was $427.75 at the time of his October 17, 1991, head injury and $483.50 at the time of his August 12, 1992, knee injury.

Claimant and employer filed motions for reconsideration. Claimant requested, *inter alia*, reconsideration of the administrative law judge's average weekly wage findings, arguing that his average weekly wage should be based on an 8 hour work day. In his Order Denying Motions for Reconsideration, the administrative law judge denied claimant's motion for reconsideration; employer's motion was granted insofar as the Decision and Order did not provide employer a credit for compensation previously paid claimant. In all other respects, employer's motion for reconsideration was denied.

Claimant appealed the administrative law judge's average weekly wage findings to the Board. BRB No. 95-1167. He subsequently requested modification pursuant to Section 22 of the Act, 33 U.S.C. §922; by Order dated September 18, 1995, the Board granted claimant's motion to remand the case for modification proceedings. In support of his petition for modification before the administrative law judge, claimant contended that he is temporarily totally disabled due to neuropsychological problems which were not completely diagnosed until after the original hearing. Employer, which had denied neuropsychological treatment to claimant until the administrative law judge ordered such treatment in his Decision and Order, responded that claimant could have obtained this evidence prior to the hearing and that, therefore, modification was improper as there had not been a change of condition. Alternatively, employer argued that claimant's condition is not disabling and that any disability is related to his refusal to obtain suitable alternate employment rather than to the head injury.

In his Decision and Order on Section 22 Modification, the administrative law judge initially found that claimant's request for modification was appropriate in order to determine the nature and extent of claimant's psychological disability. The administrative law judge next found that claimant's psychological problems are related to claimant's knee injury, that claimant requires further neuropsychological treatment, and that claimant is temporarily totally disabled as a result of this condition. The administrative law judge further found that claimant's psychological disability did not commence until May 1, 1995, when Dr. Koch opined that claimant's disability prevented his return to work. Employer appeals the administrative law judge's findings on modification. BRB No. 97-571. On January 27, 1997, at claimant's request, the Board reinstated his appeal of the administrative law judge's initial Decision and Order, BRB No. 95-1167, and consolidated that appeal with employer's appeal of the administrative law judge's Decision and Order on Section 22 Modification.

BRB No. 95-1167

On appeal, claimant concedes that the administrative law judge properly used

Section 10(a) to calculate his average weekly wage; however, claimant contends the administrative law judge erred in his computation of claimant's average daily wage under that subsection. Section 10(a) is applicable where the employee has worked "substantially the whole of the year" preceding the injury and aims at a theoretical approximation of what a claimant could ideally have been expected to earn.[1] 33 U.S.C. §910(a); *see Duncan v. Washington Metropolitan Area Transit Authority,* 24 BRBS 133 (1990). In the instant case, the administrative law judge divided claimant's total earnings during the year preceding each injury by 52, then divided that sum 5 to derive an average daily wage.[2] This sum was then multiplied by 260, then divided by 52, to arrive at claimant's average weekly wage at the time of each work-incident. As claimant contends, the administrative law judge's calculation (divide by 52, divide by 5, multiply by 260) results in a null mathematical calculation, as it divides earnings and then multiplies them by the same number. Moreover, it is essentially the identical number as dividing claimant's yearly earnings prior to each work injury by 52. Section 10(a) does not sanction this method. The administrative law judge's calculation is not, therefore, a correct application of Section 10(a), which requires

[1]Section 10(a) requires the administrative law judge to determine the average daily wage claimant actually earned during the preceding twelve months. This average daily wage must then be multiplied by 260, if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then to be divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. *See* 33 U.S.C. §910(a); *SGS Control Services v. Director, OWCP,* 86 F.3d 438, 30 BRBS 57 (CRT) (5th Cir. 1996); *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978).

[2] $22,241.85 ÷ 52 weeks = $427.73 ÷ 5 days = $85.55 per day.
$25,141.37 ÷ 52 weeks = $483.49 ÷ 5 days = $96.70 per day.

an average daily wage based on the actual time claimant worked in the year prior to injury.[3] As the administrative law judge's method of computing claimant's average daily wage is not a correct application of Section 10(a), it cannot be affirmed. *See Duncan,* 24 BRBS at 136.

[3]The administrative law judge's average daily wage calculation assumes claimant, a five-day per week employee, worked each and every weekday during the year preceding his injuries, taking no time off. This computation thus penalizes claimant by proportionally reducing claimant's average weekly wage for any days claimant did not work and was not paid during the year preceding each injury.

Pursuant to Section 10(a), 33 U.S.C. §910(a), claimant's average daily wage is best calculated by dividing claimant's earnings during the year prior to the work injury by the actual number of days claimant worked during the year preceding the work injury. *See Matthews v. Jeffboat, Inc.,* 18 BRBS 185 (1986). In the instant case, this method is unavailable, as there is no evidence of the actual number of days claimant worked.[4] However, the number of hours actually worked by claimant preceding his injury is in the record, and the number of days may rationally be derived by dividing by 8 the total number of hours claimant worked during the year preceding each injury. *See Diosdado v. Newpark Shipbuilding & Repair, Inc.,* 31 BRBS 70, 75 (1997).[5] In the instant case, claimant worked 1,809.9 hours in the year prior to his October 17, 1991, injury; by dividing these hours worked by 8, it can be determined that claimant worked 226.24 days prior to his October 17, 1991, injury. Similarly, when the 1,982.8 hours claimant worked in the year preceding his August 12, 1992, injury are divided by 8, the result indicates that claimant worked 247.8 days in the year preceding that injury. Thus, claimant's average daily wage based on claimant's total earnings for the years preceding each injury is as follows: $22,241.85 ÷ 226.24 = $98.31; $25,141.37 ÷ 247.8 = $101.46, respectively. Accordingly, we hold that claimant's average daily wage at the time of his October 17, 1991, head injury was $98.31 and claimant's average daily wage at the time of his August 12, 1992, knee injury was $101.46.

To calculate the amount a claimant who worked substantially the whole of the year preceding the injury could ideally expect to earn, Section 10(a) next directs multiplying the average daily wage by 260 for a five-day a week worker. *See* 33 U.S.C. §910(a). In this case, claimant's average annual earnings for the October 17, 1991, head injury are $25,560.60 (260 x $98.31) and for the August 12, 1992, knee injury, claimant average annual earnings are $26,379.60 (260 x $101.46). Finally, pursuant to Section 10(d)(1), 33 U.S.C. §910(d)(1), claimant's average weekly wage is calculated by dividing claimant's average annual earnings by 52. In this case, claimant's average weekly wage for the October 17, 1991, head injury is $491.55 ($25,560.60 ÷ 52), and his average weekly wage for the August 12, 1992, knee injury is $507.30 ($26,379.60 ÷ 52). Accordingly, we vacate and modify the administrative law judge's average weekly wage determination for each injury to provide for an average weekly wage of $491.55 for the October 17, 1991, injury and an average weekly wage of $507.30 for the August 12, 1991, injury.

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[4]We note that employer refused claimant's discovery request to provide this information. *See* CX 12 at 3-4.

[5]We note claimant's uncontradicted testimony that he normally worked 8 hours a day, 5 days a week. Tr. at 27.

Employer appeals the administrative law judge's award on modification of temporary total disability compensation commencing on May 1, 1995. Initially, employer contends that modification is improper as claimant presented evidence regarding his psychological condition which he could have obtained prior to the initial formal hearing. We disagree.

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*, 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'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 Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). In order to obtain modification based on a mistake of fact, moreover, the modification must render justice under the Act. *See McCord v. Cephas,* 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). It is well-established that the party requesting modification bears the burden of proof. *See, e.g., Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 31 BRBS 54 (CRT) (1997). Once the initial burden of proving a change in condition or mistake in fact is met, the same standards apply as in the initial adjudicatory proceedings. *Id.*

Employer initially contends that the administrative law judge should have applied the doctrine of *res judicata* in the instant case in order to prevent claimant from relitigating the issue of his disability. The administrative law judge found that claimant was unable to receive a neuropsychological evaluation before the initial formal hearing because employer refused authorization for such an evaluation, notwithstanding the recommendation of Dr. Fleet, claimant's treating physician, for such an evaluation. Accordingly, the administrative law judge concluded that for justice to be rendered under the Act, a review of the medical evidence generated post-hearing pursuant to his Decision and Order was appropriate. We affirm the administrative law judge's rejection of employer's contention, as the administrative law judge acted in accordance with law. Initially, it is well-established that Section 22 displaces traditional notions of *res judicata. See Hudson v. Southwestern Barge Fleet Services, Inc.,* 16 BRBS 367 (1984), *citing Banks,* 390 U.S. 459; *O'Keeffe,* 404 U.S. at 255-256. In this case, claimant alleged a mistake of fact and offered new evidence to substantiate his allegation. *See Duran v. Interport Maintenance Corp.,* 27 BRBS 8, 13-15 (1993). Moreover, employer's contention that claimant could have produced the evidence prior to the formal hearing is rejected in view of the administrative law judge's finding that claimant was unable to receive the appropriate exam prior to his order. The administrative law judge, moreover, is entitled to consider wholly new evidence, cumulative evidence or merely reflect on the evidence initially submitted when modification is sought. *O'Keeffe,* 404 U.S. at 256.

Employer next contends the administrative law judge's finding that claimant's psychological condition is due to the knee injury is not supported by substantial evidence. Rather, employer asserts that any psychological disability experienced by claimant is solely due to claimant's lack of diligence in obtaining suitable alternate employment. In addressing the issue of causation, the administrative law judge accorded determinative weight to the opinion of Dr. Maggio, who examined claimant twice at employer's request, finding him "highly credentialed." Decision and Order on Section 22 Modification at 11. Dr. Maggio first examined claimant on September 30, 1994, and opined at that time that claimant has an "adjustment disorder ... which seems to be causally related to his injury of August 12, 1992 and his inability to be returned to the productive work force." EX 1. He reevaluated claimant on June 30, 1995, at which time he opined that claimant is unable to work because he can't function psychologically. *See Lopez v. Southern Stevedores,* 23 BRBS 295 (1990). As a claimant's condition need only be related in part to the work injury and as Dr. Maggio's opinion constitutes substantial evidence in support of a finding that claimant's psychological condition is related at least in part to his employment with employer, we affirm the administrative law judge's finding that claimant's psychological condition is related to his August 1992 knee injury.

Lastly, employer, citing Dr. Maggio's September 30, 1994, report in which he opined that claimant is not mentally incapacitated from working, contends that claimant's neuropsychological condition is not disabling. However, in his subsequent report of August 12, 1995, Dr. Maggio stated that claimant is incapable of work. EX 1. On modification, the administrative law judge credited Dr. Maggio's August 12, 1995, opinion, as well as the opinion of claimant's treating physician, Dr. Koch. Decision and Order on Section 22 Modification at 12. Dr. Koch unequivocally testified that claimant cannot return to work. CX 1 at 40-42.[6] The administrative law judge's finding that claimant is totally disabled due to a neuropsychological condition based on the medical opinions of Drs. Maggio and Koch is thus supported by substantial evidence and rational. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *aff'g* 4 BRBS 284 (1976), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm this finding.

[6]The administrative law judge found that claimant's total disability commenced on May 1, 1995, when Dr. Koch first opined that claimant is unable to work due to his neuropsychological condition.

Accordingly, the administrative law judge's calculation of claimant's average weekly wages is vacated, and his decision modified to reflect an average weekly wage of $491.55 at the time of claimant's October 17, 1991, head injury and an average weekly wage of $507.30 at the time of claimant's August 12, 1992, knee injury. In all other respects, the administrative law judge's Decision and Order Awarding Benefits, Order Denying Motions for Reconsideration, and Decision and Order on Section 22 Modification are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge