BRB No. 89-3372

CARSON R. COATS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Upon Remand and Supplemental Decision and Order Upon Remand of Victor J. Chao, Administrative Law Judge, United States Department of Labor.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor, Carol DeDeo, Associate Solicitor, Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Remand and Supplemental Decision and Order Upon Remand (79-LHC-1440) of Administrative Law Judge Victor J. Chao 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).

This is the second time that this case has come before the Board. Claimant was exposed to asbestos during the course of his approximately forty years of employment with employer. In early 1978, while claimant was still employed, an x-ray revealed changes consistent with asbestosis. In November 1978, claimant was diagnosed as having histiocytic lymphoma (*i.e.*, cancer of the lymph system) for which he underwent a prolonged period of chemotherapy. Claimant thereafter sought benefits under the Act, alleging he was permanently totally disabled by work-related asbestosis. In 1981, Judge Lawrence E. Gray awarded claimant compensation for a one percent permanent partial disability as a result of his work-related asbestosis. 33 U.S.C. §908(c)(21). In a Supplemental Decision and Order, Judge Gray granted employer's request for relief under Section 8(f), 33 U.S.C. §908(f), based on his determination that claimant's permanent partial disability stemmed, at least in part, from claimant's "pre-existing partial disability of histiocytic lymphoma." Neither of Judge Gray's decisions was appealed to the Board.

In 1983, claimant sought modification under Section 22 of the Act, 33 U.S.C. §922, based on his contention that his work-related disability had increased, forcing him to stop working due to his deteriorating health. Employer informed the Office of Administrative Law Judges that since claimant's benefits were being paid by the Special Fund, employer no longer possessed any interest in the case. Employer, along with the Director, Office of Workers' Compensation Programs (the Director), nevertheless participated in the modification hearing before Administrative Law Judge Chao. Judge Chao stated at the beginning of the hearing that he considered the applicability of Section 8(f) to be in dispute, but neither employer nor the Director presented any evidence on that issue during the modification proceedings.

In his Decision and Order, dated November 1984, Judge Chao found that claimant was permanently and totally disabled as a result of both his lymphoma, which had arisen from claimant's on-the-job exposure to asbestos, and the effects of the extensive chemotherapy which claimant had received for this condition. Accordingly, Judge Chao awarded claimant permanent total disability compensation pursuant to 33 U.S.C. §908(a). In addition, Judge Chao determined that Section 8(f) was inapplicable to the award of permanent total disability compensation and that employer was thus liable for paying the entire award. Employer appealed this decision to the Board. *See Coats v. Newport News Shipbuilding and Dry Dock Co.*, 21 BRBS 77 (1988). The Board held that the administrative law judge possessed the authority to reach the issue of Section 8(f) applicability during the modification proceedings brought by claimant in this case. However, the Board agreed with employer that the administrative law judge erred in failing to provide the parties with an adequate opportunity to present evidence and arguments pertaining to the Section 8(f) issue once he apprised them that he intended to address it. Therefore, the Board vacated the administrative law judge's determinations regarding Section 8(f) and remanded the case for reconsideration of this issue. 21 BRBS at 80-81.

On remand, the administrative law judge initially addressed the issue of whether Judge Gray's Section 8(f) determination contained a mistake of fact and found that because Judge Gray had relied on claimant's lymphoma as the pre-existing disability when in actuality that condition had been diagnosed after claimant's work-related asbestosis and, therefore, could not constitute a "pre-existing permanent partial disability" as required for Section 8(f) relief, a mistake in fact did occur. In addressing employer's contention that claimant's 25 per cent hearing disability, diagnosed in 1974,

constituted a pre-existing permanent disability on which to base Section 8(f) relief, the administrative law judge reiterated his earlier finding, which he stated had not been appealed, that claimant was totally disabled due to his lymphoma and the necessary treatment for it. Thus, the administrative law judge concluded that because claimant's permanent total disability is the result of his work injury alone (*i.e.*, lymphoma and chemotherapy), Section 8(f) relief could not be granted to employer. In a Supplemental Decision and Order, the administrative law judge addressed employer's argument that based on his cancer alone, claimant could perform suitable alternate employment, *i.e.*, telephone solicitor, but for his hearing impairment, and found that the opinion of Dr. Harmon was insufficient to overcome the finality of the administrative law judge's previous conclusion that claimant's lymphoma was in and of itself totally disabling. Accordingly, the administrative law judge denied employer relief under Section 8(f).

Employer now appeals, arguing that the administrative law judge erred: (1) in allowing the Director to modify the prior Section 8(f) determination without initiating his request before the district director;[1] (2) in failing to place the burden of proving a mistake of fact on the Director; and (3) in failing to properly evaluate the evidence submitted on remand. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Section 22 provides, in pertinent part, that the administrative law judge may issue a new compensation order based on a mistake of fact or change of condition.[2] Modification of a prior decision is permitted at any time prior to one year after the last payment of compensation or the rejection of a claim, based on a mistake of fact in the initial decision or where claimant's physical or economic condition has improved or deteriorated. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd* 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Finch*

[1] Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

[2] Section 22, 33 U.S.C. §922 (1988), states, in pertinent part:

> Upon his own initiative, or upon the application of any party in interest..., on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the day of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case...in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation.

33 U.S.C. §922 (1988)

v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989). Accordingly, to reopen the record under Section 22, the moving party must allege a mistake of fact or change of condition, and assert that evidence to be produced or of record would bring the case within the scope of Section 22. *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52-53 (1989). To determine whether to grant modification, if the evidence is sufficient to so warrant, the administrative law judge must decide whether modification would render justice under the Act. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Craig v. United Church of Christ*, 13 BRBS 567, 571-572 (1982).

Initially, employer argues that the administrative law judge did not have the authority to address the Section 8(f) issue in the initial modification proceeding because the Director did not follow proper procedure by requesting modification by the district director. This argument was raised, addressed, and decided when this case was previously before the Board. In *Coats*, 21 BRBS at 77, the Board specifically found:

> ...The case was before Administrative Law Judge Chao by virtue of a modification petition, however, and Section 22 displaces traditional notions of *res judicata*. *See Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984). Administrative Law Judge Chao therefore possessed the authority to correct all mistakes in fact contained in Administrative Law Judge Gray's previous decisions, including those not specifically alleged by claimant.

Coats, 21 BRBS at 81. Thus, this issue was fully addressed and resolved by the Board in the prior appeal of this case, and our prior decision constitutes the law of the case. We, therefore, decline to consider this issue again.[3] *See Doe v. Jarka Corporation of New England*, 21 BRBS 142 (1988); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983).

Employer additionally argues that the administrative law judge erred in not placing the burden of proving a mistake of fact upon the Director. While it is correct that the party requesting modification has the burden of showing the mistake of fact or change in condition, *see generally Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990), employer contends that the administrative law judge erred in not requiring the Director to show that modification was in the interest of justice. As the Director responds, however, the "interest of justice" factor, first articulated in *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C.Cir. 1976), is neither included in the statute nor a separate threshold element required of a party seeking modification; rather it is

[3]Additionally, we note that modification proceedings in this case were undertaken by claimant, not the Director. Thereafter, the administrative law judge, as is permitted pursuant to Section 22, on his own motion reopened the issue of Section 8(f) relief. *See, e.g., O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied* 404 U.S. 1053 (1972); 33 U.S.C. §922; 20 C.F.R. §702.373(a). *See generally Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

within the discretionary purview of the administrative law judge in extraordinary cases. In the instant case, employer does not contend that the mistake of fact addressed by the administrative law judge was in error. Thus, as proper application of the Act implicitly renders justice, we reject employer's contention of error and affirm the administrative law judge's decision to address the applicability of Section 8(f).

Lastly, employer challenges the administrative law judge's determination that it is not entitled to relief pursuant to Section 8(f). Employer, in support of its allegation of error, contends that it is entitled to Section 8(f) relief based on two pre-existing disabilities: 1) claimant's pre-existing asbestosis, and 2) claimant's pre-existing hearing impairment. Section 8(f) of the Act provides that the Special Fund will assume responsibility for compensation payments after 104 weeks in a case where a claimant is permanently totally disabled if employer establishes that the employee suffers from a manifest pre-existing permanent partial disability which combines with a subsequent work-related injury to result in his permanent total disability. *See* 33 U.S.C. §908(f); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989). In order to obtain Section 8(f) relief, the courts and the Board have generally required that an employer present credible medical evidence which establishes that claimant's total disability following the second injury is due to a combination of the pre-existing disability and subsequent injury. *See John T. Clark & Son of Maryland, Inc. v. BRB*, 622 F.2d 93 n.5, 12 BRBS 229 n.5 (4th Cir. 1980).

On remand, the administrative law judge, citing *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983), concluded that because he had found in his 1984 decision that claimant was totally disabled by his work injury alone, *i.e.*, his lymphoma and chemotherapy treatments, a finding which the administrative law judge stated was not appealed by employer, Section 8(f) could not be applied. *See* Decision and Order Upon Remand at 3. The administrative law judge then noted that employer had submitted evidence on remand from Dr. Harmon in support of its Section 8(f) contentions, but that Dr. Harmon's evidence "comes nearly five years after I made my findings on this issue." He thus reiterated that, as his prior finding had not been appealed, it is now final. *Id.* at 3-4. Thereafter, the administrative law judge issued a supplemental decision in which he specifically rejected Dr. Harmon's opinion that claimant's asbestosis and hearing loss contributed to his total disability since 1) Dr. Harmon is not a vocational expert; 2) Dr. Harmon relied upon a medical report which ultimately reached a conclusion different than his own; and 3) Dr. Harmon's conclusion is contrary to the medical evidence previously relied upon by the administrative law judge in finding that claimant is permanently totally disabled due to his lymphoma and chemotherapy alone. *See* Decision and Order Upon Remand at 2-3.

Initially, we note that the administrative law judge erred on remand in concluding that his prior finding of no contributing factor regarding claimant's total disability had not been appealed. Employer, in its first appeal to the Board, specifically appealed this finding. *See* Employer's Brief on Appeal of Judge Chao's Decision and Order at 37. Additionally, the Board's initial decision to remand this case so that the parties would have an opportunity to submit evidence regarding the issue of Section 8(f) applicability contemplated the consideration of Section 8(f) in its entirely. *See*

Coats, 21 BRBS at 81.

Next, employer argues that the administrative law judge erred in his evaluation of the medical evidence of record when considering its eligibility for Section 8(f) relief. Specifically, employer contends that the administrative law judge erred in rejecting the opinion of Dr. Harmon. 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 initially submitted." *See O'Keeffe*, 404 U.S. at 254; *see also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'd denied*, 391 U.S. 929 (1968). Thus, during modification proceedings, the administrative law judge should have considered both newly submitted evidence as well as the previously submitted exhibits to evaluate the evidence in the record as a whole. *See generally Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

In the instant case, the administrative law judge's rationale for rejecting Dr. Harmon's opinion is problematic, and we hold that the case must be remanded for reconsideration. Employer submitted the opinion of Dr. Harmon in support of its contention that claimant, though capable of performing sedentary work, was unable to perform that work because of his pre-existing hearing loss. Contrary to the administrative law judge's statement, a physician need not be a vocational expert in order to render an opinion as to whether a claimant can perform proffered jobs based on his physical infirmities; rather, it is only necessary that the physician be aware of the physical requirements of the position and the physical abilities of the claimant to perform them. *See generally Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1988). Additionally, the administrative law judge rejected Dr. Harmon's opinion because he relied upon the report of Dr. Sieker who, the administrative law judge determined, did not reach the same conclusion as Dr. Harmon. Dr. Sieker, however, opined that he could not reach a conclusion because he had not seen claimant since 1979, three years prior to the time of his retirement in 1981. *See* E-31. Moreover, Dr. Sieker stated "...I have no reason to disagree with the letter that Dr. Harmon wrote... ." *Id.*. We hold that the administrative law judge's credibility determination regarding Dr. Harmon's testimony lacks a reasoned analysis. We, therefore, vacate the administrative law judge's finding that employer has failed to establish entitlement to Section 8(f) relief, and we remand the case for the administrative law judge to rationally evaluate all of the medical evidence of record regarding this issue. *See Dobson*, 21 BRBS at 174.

Accordingly, the administrative law judge's Decision and Order Upon Remand and Supplemental Decision and Order Upon Remand are vacated, and the case is remanded to the administrative law judge for reconsideration of the issue of Section 8(f) relief, consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge