BRB Nos. 88-2278,
88-2278A, 91-1893
and 91-1893A

FRED A. TWILLEAGER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BUNGE CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor, and the Decision and Order Modifying Benefits of James J. Butler, Administrative Law Judge, United States Department of Labor.

Michael D. Royce (Royce, Swanson & Thomas), Portland, Oregon, for claimant.

Mildred J. Carmack and Karen O'Kasey (Schwabe, Williamson, Wyatt, Moore & Roberts), Portland, Oregon, for employer/carrier.

Samuel J. Oshinsky, Counsel for Longshore, and Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor); Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer and carrier (employer) appeal and claimant cross-appeals the Decision and Order on Remand of Administrative Law Judge Robert J. Brissenden, and the Decision and Order Modifying Benefits (84-LHC-2086) of Administrative Law Judge James J. Butler awarding benefits 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 judges 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).

I. Procedural History

This case has a lengthy procedural history, and is before the Board for the second time. Claimant, on August 26, 1982, sustained a work-related injury, specifically a hernia, while moving a 55 gallon barrel from a forklift to a platform when the barrel slipped. He suffered from both chest and abdominal pains while lifting heavy objects later that afternoon. That evening, claimant continued to suffer pain and was hospitalized. On claimant's discharge on August 31, 1982, Dr. Thongouthaithip diagnosed possible angina pectoris with ventricular arrhythmia. Thereafter, claimant continued under the care of Dr. Thongouthaithip and her partner, Dr. Siqueira, through August 1985. In December 1982, approximately three months after his work-related accident, claimant additionally began to suffer from severe pain in his left calf which Dr. Thongouthaithip diagnosed as thrombophlebitis. To date, claimant has continued to suffer from his hernia, chest pains, thrombophlebitis and obesity. He has not worked since his hernia injury.

At the initial formal hearing, employer and claimant stipulated and Administrative Law Judge Brissenden found that claimant suffered a hernia while working for employer as an oiler on August 26, 1982. Judge Brissenden also found that, among other medical problems, claimant suffered from chest pains and from thrombophlebitis in his left leg, but that these conditions did not arise from claimant's employment. The administrative law judge further found that claimant had not reached maximum medical improvement, based on Dr. Battaglia's recommendation that claimant undergo surgery to repair the hernia. He therefore awarded claimant temporary total disability benefits for the hernia from August 27, 1982, through September 17, 1985, and temporary partial disability benefits thereafter. 33 U.S.C. §908(b), (e). The administrative law judge also held employer liable for all medical expenses attributable to claimant's treatment "for all conditions, including chest pains, thrombophlebitis and hernia, up to the time of the hearing [September 11, 1985]," and thereafter for medical expenses attributable solely to treat claimant's hernia. Further, the administrative law judge found that since he had determined that claimant's hernia condition was not permanent, Section 8(f), 33 U.S.C. §908(f), was inapplicable.

Employer appealed and claimant cross-appealed this decision to the Board. *See Twilleager v. Bunge Corp.*, BRB Nos. 86-1396/A (March 31, 1987) (unpublished). The Board held that Judge

Brissenden erred in finding that claimant's chest pains and thrombophlebitis did not arise from claimant's employment, and remanded the case for the administrative law judge to reconsider the evidence regarding the cause of these conditions, taking into consideration the Section 20(a), 33 U.S.C. §920(a), presumption of compensability. *See id.*, slip op. at 4-5. Additionally, the administrative law judge was instructed to reconsider claimant's entitlement to medical expenses for these conditions, whether the evidence establishes that surgery for claimant's hernia is anticipated, and, if so, whether claimant's hernia condition is temporary. Moreover, the administrative law judge was instructed to consider, if appropriate, employer's entitlement to Section 8(f) relief. The Board next reversed the administrative law judge's finding that claimant is partially disabled, and held that, since employer failed to present any evidence of actual part-time job openings for one with claimant's restrictions, claimant is totally disabled. Finally, the Board reinstated $900 of an attorney's fee which the administrative law judge deducted in his Decision and Order. Thereafter, in an Order on Motion for Reconsideration dated August 10, 1987, the Board clarified its Decision and Order to instruct the administrative law judge on remand to reconsider the medical evidence connecting claimant's sedentary lifestyle to his thrombophlebitis.

In his Decision and Order on Remand, Judge Brissenden found that employer rebutted the presumption that claimant's chest pains and thrombophlebitis are work-related, and that these conditions were not caused or aggravated by the work-related hernia injury. Nonetheless, the administrative law judge reinstated his award of medical benefits for treatment of claimant's chest pains and thrombophlebitis prior to the date of the formal hearing. Next, Judge Brissenden determined that claimant and his physicians acted in good faith to consider these conditions and claimant's hernia interrelated from a physical, rather than legal, standpoint. Crediting the deposition testimony of Dr. Siqueira, he next determined that claimant's hernia condition reached maximum medical improvement, and was thus permanent, on November 21, 1984. Judge Brissenden next denied employer's request for Section 8(f) relief because the medical testimony submitted into evidence by employer failed to sufficiently specify the nature of any pre-existing permanent partial disability and its relative contribution to claimant's overall permanent disability. Finally, Judge Brissenden reinstated his prior award of partial disability compensation, stating that claimant had a loss of wage-earning capacity of $650.80 due to the hernia injury, "[o]n the basis of my original assessment of residual work capacity." *See* Decision and Order on Remand at 8.

Employer thereafter appealed and claimant cross-appealed Judge Brissenden's Decision and Order on Remand to the Board. BRB Nos. 88-2278/A. While these appeals were pending, employer and claimant sought modification of Judge Brissenden's Decision and Order on Remand. Pursuant to these requests for modification, the Board, in an Order dated April 28, 1989, dismissed employer's appeal, BRB No. 88-2278, and held in abeyance claimant's cross-appeal, BRB No. 88-2287A, pending resolution of the parties' petitions for modification.

A formal hearing was held before Administrative Law Judge Butler on November 8, 1990, at which time employer produced evidence in support of its contention that claimant's hernia condition had improved, that a change of condition thus occurred, and that consequently claimant's residual wage-earning capacity had increased. In his Decision and Order Modifying Benefits, Judge Butler

modified claimant's award to provide benefits for total disability from the January 31, 1989, date of employer's medical report. *See* 33 U.S.C. §908(a). Judge Butler found that employer's medical evidence is consistent with the other medical reports of record, which preclude heavy lifting due to claimant's hernia, and that this evidence as well as employer's vocational evidence established that claimant is totally disabled due to his overall physical condition. Next, Judge Butler declined to disturb Judge Brissenden's denial of employer's request for Section 8(f) relief. Similarly, Judge Butler let stand Judge Brissenden's findings regarding causation, stating that although the evidence before Judge Brissenden "could support a finding of causation for claimant's chest pains and thrombophlebitis," only the Board may reverse Judge Brissenden's findings.

Employer thereafter appealed, and claimant cross-appealed, Judge Butler's Decision and Order Modifying Benefits. BRB Nos. 91-1893/A. By Order dated March 20, 1992, the Board reinstated employer's prior appeal of Judge Brissenden's Decision and Order on Remand, BRB No. 88-2278, and consolidated that appeal for purposes of decision with claimant's appeal, BRB No. 88-2278A, and BRB Nos. 91-1893/A.

II. Issues Raised on Appeal

In BRB No. 88-2278, employer challenges Judge Brissenden's denial of its request for Section 8(f) relief, his award of pre-hearing medical benefits for treatment of claimant's chest pains and thrombophlebitis, and the date of maximum medical improvement of claimant's hernia. In his cross-appeal, claimant challenges the administrative law judge's findings that his chest pains and thrombophlebitis are not work-related, the administrative law judge's denial of post-hearing medical treatment for these conditions, and the administrative law judge's finding that his condition has reached maximum medical improvement. Finally, claimant challenges the administrative law judge's finding of residual wage-earning capacity and the resultant award of benefits for partial, rather than for total, disability. BRB No. 88-2278A. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in finding that claimant's chest pains and thrombophlebitis are not work-related, and in finding that claimant's work-related disability is partial. The Director further urges the Board to affirm the administrative law judge's findings regarding Section 8(f) relief, maximum medical improvement, and employer's liability for claimant's medical expenses relating to his pre-hearing treatment for chest pain and thrombophlebitis.

In BRB No. 91-1893, employer challenges Judge Butler's award of permanent total disability compensation to claimant. Claimant cross-appeals the commencement date of the award, as well as Judge Butler's refusal to modify Judge Brissenden's findings that his chest pains and thrombophlebitis are not work-related. BRB No. 91-1893A. The Director, in a response brief, asserts that once the Board reverses Judge Brissenden's finding of partial disability, employer's appeal of Judge Butler's decision on modification will be moot. The Director additionally supports claimant's contention that the Board should reverse Judge Butler's findings and hold that claimant's chest pains and thrombophlebitis are related to claimant's employment.

III. Causation

Claimant initially contends that, on remand, Judge Brissenden erred in finding that his chest pains and thrombophlebitis are unrelated to his August 26, 1982, work injury; specifically, claimant argues that employer failed to submit into the record evidence sufficient to rebut the Section 20(a) presumption that those conditions are work-related. BRB No. 88-2278A. Claimant additionally contends that Judge Butler erred in finding that any error committed by Judge Brissenden in addressing this issue is a matter of law that must be appealed to the Board. BRB No. 91-1893A.

Claimant bears the burden of proving that he has sustained a harm or pain, and that working conditions existed or an accident occurred which could have caused the harm or pain. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1990). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a) presumption applies to link the harm or pain with claimant's employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). An employment injury need not be the sole cause of a disability; rather, if the employment aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Upon invocation of the presumption, the burden shifts to employer to present specific and comprehensive evidence sufficient to sever the casual connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the causation issue on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

A. Chest Pains

In its initial decision, the Board held that Judge Brissenden, after finding the Section 20(a) presumption to have been invoked, erred by finding the presumption rebutted on the basis that claimant does not have angina pectoris; specifically, the Board held that the evidence of record could support a finding of causation based on work-related causes of claimant's chest pain symptomatology other than angina. Accordingly, the Board remanded the case for the administrative law judge to determine whether employer established that claimant's chest pains were not caused or aggravated by his employment with employer. *See Twilleager*, slip op. at 4.

On remand, Judge Brissenden first determined that Dr. Trelsted's testimony indicating a possible connection between claimant's chest pains and the work injury "does not warrant" changing his prior determination that employer successfully rebutted the presumption. Next, Judge Brissenden discredited Dr. Siqueira's opinion that emotional stress from the work injury may have triggered claimant's chest pains because that physician attributed claimant's chest pains to angina and because no other physician opined that claimant's chest pains were caused by either a musculoskeletal injury or nervous reaction. Judge Brissenden subsequently concluded that the above evidence rebutted the presumption and that the evidence of record, considered without the benefit of the presumption, also established that claimant's chests pains are not related to his August 26, 1982, work injury. *See* Decision and Order on Remand at 3.

This was error as employer did not present specific and comprehensive evidence that claimant's chest pains are not work-related. Specifically, Dr. Trelsted's testimony regarding a possible relationship between claimant's chest pains and his hernia injury renders his testimony insufficient to rebut the presumption. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding, Inc. v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Dr. Siqueira's testimony also does not rebut the presumption because he opined that claimant's angina could be due to his hernia injury. *Id.* Lastly, Dr. Battaglia, a consulting physician, stated that claimant's initial chest pains may have been caused by an emotional overreaction to the hernia injury. Since employer has submitted no evidence sufficient to rebut the Section 20(a) presumption, we reverse the administrative law judge's finding that a causal connection had not been established between claimant's chest pains and his employment, and we hold that causation is established as a matter of law.[1] *See Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

B. Thrombophlebitis

Claimant also challenges Judge Brissenden's determination that his thrombophlebitis is not work-related. BRB No. 88-2278A. On remand, after setting forth the medical evidence of record, Judge Brissenden found that the testimony of Drs. Battaglia and Siqueira was sufficient to rebut the Section 20(a) presumption and that, based upon the record as a whole, employer had established the lack of a causal relationship between claimant's thrombophlebitis and his employment with employer. Dr. Battaglia, who initially stated that claimant's thrombophlebitis is not related to his hernia injury because claimant did not complain of leg pain until several months after his injury, opined that claimant's thrombophlebitis "in all probability is related to his obesity." *See* JXS 139, 146. Dr. Siqueira testified that, absent any leg trauma, total immobilization is required to trigger acute thrombophlebitis. As the testimony of Dr. Battaglia constitutes substantial evidence to support a finding that claimant's thrombophlebitis is unrelated to his employment, we affirm Judge Brissenden's determination that the Section 20(a) presumption was rebutted. *See Neeley v. Newport*

[1]Pursuant to our disposition of this issue, we need not address claimant's contentions regarding Judge Butler's refusal on modification to address the cause of claimant's chest pains. BRB No. 91-1893A.

News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986). Moreover, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it and that he is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It was, therefore, within Judge Brissenden's discretion to credit the opinions of Drs. Battaglia and Siqueira that claimant's thrombophlebitis is not related to his employment with employer. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, we affirm Judge Brissenden's determination on this issue.[2]

In BRB No. 91-1893A, claimant contends that Judge Butler erred in refusing on modification to address his evidence that his thrombophlebitis is work-related. We agree. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification of a decision is permitted based on a change in condition or mistake of fact. *See, e.g., Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). 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." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (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).

[2]We note claimant's contention on appeal that his thrombophlebitis was gradually caused by heavy-duty longshore employment prior to the hernia injury. Claimant, however, never testified that working conditions had caused leg pain or swelling; moreover, there is no medical testimony indicating a possible connection between claimant's daily working conditions and his thrombophlebitis. Accordingly, claimant failed to proffer substantial evidence to invoke the Section 20(a) presumption linking his post-injury acute thrombophlebitis to his pre-injury working conditions. *See Stevens v. Tacoma Boatbuilding, Inc.*, 23 BRBS 191, 193-195 (1990). Claimant's contention is therefore rejected.

In the instant case, Judge Butler declined to reconsider the evidence previously submitted by claimant, stating:

> I believe record evidence could support a finding of causation for claimant's chest pains and thrombophlebitis, but what claimant labels a "material mistake of fact" is not. It is a legal error that is properly before the Board on appeal. If Judge Brissenden's conclusions are erroneous, only the Board may reverse them. The claimant's request for modification based on mistake of fact is therefore denied and he should, if he desires, resurrect his appeal.

Decision and Order at 6.

We hold that Judge Butler erred by finding that Judge Brissenden's conclusion that claimant's thrombophlebitis is not work-related is "legal error" subject to review by the Board. Rather, the cause of claimant's thrombophlebitis is a factual determination subject to modification pursuant to Section 22 based on a mistake of fact. *See Wynn v. Clevenger Corp.*, 21 BRBS 290, 292-293 (1988). Accordingly, we vacate Judge Butler's denial of claimant's motion for modification and remand this case for the administrative law judge to consider claimant's motion.

IV. Medical Expenses

Employer next contends that Judge Brissenden erred by awarding claimant pre-hearing medical expenses. In support of its allegation of error, employer asserts that claimant's chest pains and thrombophlebitis are not work-related conditions, that there is no evidence that treatment of claimant's hernia, chest pains and thrombophlebitis are interrelated, and that claimant never received any treatment for his hernia. BRB No. 88-2278. In his cross-appeal, claimant asserts that he is entitled to continuing medical benefits for his work-related chest pains and thrombophlebitis. BRB Nos. 88-2278A

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to reimbursement of medical expenses, but requires only that the injury be work-related. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In the instant case, although he determined that claimant's chest pains were not related to his employment with employer, Judge Brissenden on remand concluded that claimant is entitled to medical treatment for his chest pains and thrombophlebitis up to the date of the formal hearing since claimant and his physician acted in good faith in considering the hernia, chest pains and thrombophlebitis to be interrelated from a physical standpoint. Pursuant to our determination that claimant has established a causal connection between his chest pains and his employment as a matter of law, we vacate Judge Brissenden's decision terminating employer's liability for the medical expenses associated with claimant's chest pains as of the date of the formal hearing, and modify that decision to reflect employer's ongoing liability for claimant's medical expenses related to that

condition.

Moreover, we hold that Judge Brissenden committed no error in determining that the treatment of claimant's hernia, chest pains and thrombophlebitis were interrelated, based upon the testimony of claimant's treating physician, Dr. Siqueira. Based on his unconfirmed diagnosis of coronary artery disease, which was indicated by claimant's chest pains, Dr. Siqueira deferred surgery on claimant's hernia and treated claimant's acute thrombophlebitis, reasoning that alleviating claimant's thrombophlebitis would permit definitive testing to determine if claimant has coronary artery disease, would allow using claimant's leg veins should he require a coronary bypass, and would enable the eventual surgical repair of claimant's hernia injury. We therefore affirm the Judge Brissenden's finding that treatment of claimant's thrombophlebitis is interrelated with the treatment of claimant's work-related chest pains and hernia, as this determination is supported by substantial evidence.

V. Maximum Medical Improvement

Employer appeals Judge Brissenden's finding that claimant's hernia condition reached maximum medical improvement as of November 21, 1984. BRB No. 88-2278. Specifically, employer asserts that claimant's condition was permanent from the date of injury because he has never had the hernia surgically repaired, and Dr. Siqueira's medical records do not indicate that claimant complained of pain from his hernia. Claimant, in his cross-appeal, avers that his hernia-related disability remains temporary because there is substantial evidence that surgery was anticipated by claimant and Dr. Siqueira as of the date of the formal hearing. BRB No. 88-2278A.

The date of maximum medical improvement is primarily a question of fact based on medical evidence. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Evidence that claimant's condition has stabilized supports a finding that claimant has reached maximum medical improvement. *See Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989). In the instant case, Dr. Siqueira, claimant's treating physician, stated at his November 21, 1984, deposition that claimant's hernia was not bothering him at that time, and that claimant had experienced more discomfort in the past. JX 142 at 21. Judge Brissenden credited this testimony as an indication of improved symptomatology in finding that claimant's hernia condition reached maximum medical improvement and thus became permanent on November 21, 1984. We hold that Judge Brissenden acted within his discretion as fact-finder in crediting Dr. Siqueira's testimony that claimant's hernia had improved and stabilized. We therefore affirm Judge Brissenden's finding that claimant's hernia reached maximum medical improvement on November 21, 1984, as that determination is supported by substantial evidence. *See Seidel*, 22 BRBS at 403.

VI. Extent of Claimant's Injury

In his initial Decision and Order, Judge Brissenden concluded that claimant's disability is partial, rather than total, since claimant could perform part-time work. The Board, however, reversed this finding, noting that as employer had failed to present any evidence of actual part-time job openings available to claimant, claimant is totally disabled due to his work-related condition. *See Twilleager*, slip op. at 6-7. On remand, Judge Brissenden, *sua sponte*, addressed the issue of the extent of claimant's disability and reinstated his prior award of benefits for partial disability. Thereafter, on modification, employer submitted additional evidence to establish the availability of suitable alternate employment.[3] Judge Butler, after finding employer's evidence to be consistent with the existing record, modified Judge Brissenden's award of benefits for partial disability and found that claimant is entitled to permanent total disability compensation commencing on January 31, 1989.

On appeal, claimant challenges Judge Brissenden's *sua sponte* modification of the Board's holding that he is totally, rather than partially, disabled. BRB No. 88-2278A In BRB Nos. 91-1893/A, employer and claimant both challenge Judge Butler's modification of Judge Brissenden's partial disability award to total disability. Employer asserts that Judge Butler was without authority to award benefits for total disability absent any evidence of a change in claimant's hernia condition; alternatively, employer challenges Judge Butler's crediting of non-compensable physical restrictions that post-date the work injury and other non work-related impairments to support his conclusion of total disability. Claimant, in his cross-appeal, contends that Judge Butler erred by failing to correct Judge Brissenden's *sua sponte* modification of the Board's holding that claimant is entitled to benefits for total disability from the date of injury.

Initially, we note that the well-established doctrine of law of the case provides that issues once decided by the Board will be similarly decided on remand or if the issues are reraised in a subsequent appeal. *See Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989); *see also* 20 C.F.R. §802.405(a). In his Decision and Order on Remand, Judge Brissenden did not follow the holding of the Board that claimant is totally, rather than partially, disabled. We therefore vacate Judge Brissenden's award of benefits for partial disability, and we reinstate the Board's prior holding that claimant is entitled to benefits for total disability from the date of injury.[4]

---

[3]Employer presented the testimony of John Lipnicki; however, employer did not proffer any evidence of part-time employment.

[4]We note the Director correctly asserts that the reversal of Judge Brissenden's partial disability award renders moot employer's appeal of Judge Butler's finding of total disability on modification insofar as employer challenges Judge Butler's authority to amend Judge Brissenden's partial disability award absent a change in condition. Our prior holding that claimant is entitled to benefits for total disability is the law of the case. *See Janusziewicz*, 22 BRBS at 383. Moreover, claimant's cross-appeal regarding the commencement of benefits for total disability is moot. We also note that claimant is entitled to benefits for permanent total disability from the date Judge Brissenden found that his hernia reached maximum medical improvement on November 21, 1984. *See Stevens v.*

We additionally affirm Judge Butler's determination on modification that claimant remains totally disabled. Judge Butler, relying on claimant's age, nervous condition, chest pains, hernia, thrombophlebitis and diabetes, the Orthopedic Consultants' report, which stated that claimant is probably not capable of employment due to his age and poor physical condition, and statements of employer's vocational consultant, John Lipnicki, that claimant's employment prospects are not good and that placement would be very difficult given his physical condition, concluded that claimant is totally disabled. We hold that Judge Butler committed no error in considering claimant's age, experience, mental and physical capacities, as well as physical restrictions due to the work injury, in determining that claimant is totally disabled. *See, e.g., Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). Moreover, Judge Butler properly considered claimant's chest pains, which we have determined to be causally related to his employment with employer as a matter of law, and other related medical conditions, in addressing the extent of claimant's disability. Accordingly, we affirm Judge Butler's finding that claimant is totally disabled, as that determination is supported by substantial evidence. *See Cordero*, 580 F.2d at 1335, 8 BRBS at 747.

VII. Section 8(f)

Lastly, employer appeals Judge Brissenden's denial of its request for Section 8(f) relief. Employer contends that Judge Brissenden erred in discrediting its medical and vocational witnesses which, it asserts, establishes its entitlement to Section 8(f) relief. We disagree.

Section 8(f) of the Act limits, in certain instances, the liability of an employer for disability payments under the Act. To be entitled to Section 8(f) relief, employer must establish 1) that the employee had an existing permanent partial disability prior to the employment injury; 2) that the disability was manifest to employer prior to the employment injury; and 3) that the current disability is not due solely to the most recent injury. *See Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991).

Judge Brissenden, after noting that the record contains evidence of various pre-existing conditions, specifically declined to credit the testimony of Drs. Trelsted and Battaglia, stating that those physicians, although opining that claimant's present disability is due to the combined effect of his work injury and pre-existing conditions, failed to indicate to which conditions they were referring. Thus, Judge Brissenden concluded, employer failed to establish the contribution requirement of Section 8(f). In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, we hold that Judge Brissenden could decline to infer from the testimony of Drs. Trelsted and Battaglia which specific pre-existing and present conditions these physicians were referencing when they affirmatively answered employer's question whether claimant's current disability is a result of the combined effect of his pre-existing disabilities and residual disability from his August 26, 1982, work injury. Thus,

---

Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991).

Judge Brissenden rationally discredited the testimony of Drs. Battaglia and Trelsted because they failed to specify which of claimant's numerous pre-existing disabilities contribute to claimant's current permanent disability. *See Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 17 BRBS 146 (CRT)(D.C. Cir. 1985). Accordingly, we affirm Judge Brissenden's finding that employer failed to establish the contribution requirement of Section (f), and his consequent denial of Section 8(f) relief to employer.

Accordingly, Judge Brissenden's determination that claimant's chest pains were not caused by his employment is reversed, his award of partial disability benefits to claimant is vacated and modified to reflect claimant's entitlement to benefits for total disability and continuing medical benefits from the date injury for claimant's chest pains and thrombophlebitis. In all other respects, Judge Brissenden's Decision and Order on Remand is affirmed. BRB Nos. 88-2278/A. The Decision and Order Modifying Benefits of Judge Butler is vacated and remanded for the administrative law judge to address claimant's request for modification regarding the cause of his thrombophlebitis. In all other respects, the Decision and Order Modifying Benefits is affirmed. BRB Nos. 91-1893/A.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge