BRB Nos. 92-0675
and 92-0675A

LEROY FERGUSON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
RYAN WALSH, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS CASUALTY COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Denying Modification and Supplemental Order Denying Attorney's Fee Award on Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Alan D. Toporek (Uricchio, Howe, Krell, Jacobson, Toporek & Theos, P.A.), Charleston, South Carolina, for claimant.

Richard P. Salloum and Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Modification and claimant cross-appeals the Supplemental Order Denying Attorney's Fee Award on Modification (86-LHC-1690) of Administrative Law Judge Jeffrey Tureck 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 F.2d 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, on March 16, 1984, injured his back while working for employer as a

longshoreman. Claimant attempted to return to work in April 1984, but could only work for one hour due to complaints of pain. Claimant was subsequently diagnosed as having degenerative disc disease, aggravated by the work-injury, and was informed by Dr. Gilmore in December 1985 that the likelihood of his return to heavy work was poor. Employer voluntarily paid claimant temporary total disability compensation from March 17, 1984 through July 20, 1984. 33 U.S.C. §908(b). Claimant thereafter filed a claim under the Act seeking permanent total disability compensation.

In his Decision and Order, the administrative law judge relied upon the opinion of Dr. Gilmore, an independent examining physician, and the supporting medical report of Dr. Brilliant, in determining that claimant was totally disabled from either longshore or other heavy work. After further finding that the reports and testimony of J. Adger Brown, employer's vocational expert, failed to establish the availability of suitable alternate employment since Mr. Brown stated that claimant had few transferable skills and that claimant's age and lack of education rendered him non-competitive, the administrative law judge awarded claimant temporary total disability compensation from March 16, 1984 through December 19, 1985, the date claimant reached maximum medical improvement, and permanent total disability compensation thereafter. 33 U.S.C. §908(a), (b). In a Decision and Order on Reconsideration dated August 7, 1987, the administrative law judge found that employer had satisfied all elements necessary for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f); thus, the administrative law judge modified his decision to limit employer's liability for permanent total disability compensation to a period of 104 weeks, commencing on December 20, 1985.

On April 30, 1990, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. In seeking modification, employer contended that there had been a change in claimant's economic condition. At a formal hearing held on August 15, 1991, employer submitted into evidence vocational reports by Patricia Bell which set forth several available light duty jobs which she opined claimant could perform, 1990 and 1991 medical reports by Dr. Gilmore which stated that claimant would be at risk if required to do repetitive lifting, stooping or bending, but should be capable of work which did not require those activities, and Dr. Gilmore's certification of certain employment descriptions set forth by Ms. Bell. Lastly, employer questioned claimant regarding his post-injury purchase of a limousine and his subsequent efforts to hire out that vehicle.[1] In his Decision and Order Denying Modification, the administrative law judge, after determining that neither claimant's physical nor economic conditions had changed, denied employer's petition for modification.

Claimant's counsel thereafter submitted a fee petition for work performed before the

[1]At the hearing, employer indicated that it was seeking a credit for the overpayment of benefits commencing January 1990, at which time it allegedly established the availability of suitable alternate employment. *See* 1991 Transcript at 8. Since, pursuant to the administrative law judge's Decision and Order on Reconsideration dated August 7, 1987, the Special Fund commenced paying claimant's benefits in December 1987, employer's relief in seeking modification, if successful, would apparently be a reduction in its assessment to the Special Fund. *See* 33 U.S.C. §944.

administrative law judge regarding the modification proceedings. Employer filed objections to the fee petition. In a Supplemental Order Denying Attorney's Fee on Modification, the administrative law judge denied claimant's counsel a fee payable by employer pursuant to Section 28(b), 33 U.S.C. §928(b), since claimant's benefits did not increase as a result of the denial of employer's petition for modification.

On appeal, employer challenges the administrative law judge's denial of its petition for modification, contending that it had submitted into evidence sufficient documentation to establish a change in claimant's post-injury wage-earning capacity. Claimant responds, urging affirmance of the administrative law judge's denial of modification.

In his cross-appeal, claimant challenges the administrative law judge's denial of his request for an attorney's fee payable by employer, contending that the successful defense of employer's petition for modification constituted a successful prosecution under Sections 28(a) and (b) of the Act, 33 U.S.C. §928(a), (b). Employer responds, urging affirmance.

We first address employer's contention that the administrative law judge erred in denying its request for modification. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification of a prior decision is permitted, at any time prior to one year after the last payment of compensation or the rejection of the claim, based on a mistake in 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.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). A request for modification pursuant to Section 22, therefore, may be based upon a change in a claimant's wage-earning capacity. *See Fleetwood*, 776 F.2d at 1225, 18 BRBS at 12 (CRT). It is well-established that the party requesting modification has the burden of showing the change in condition. *See, e.g., Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). Moreover, the Board has held that the standard for determining disability is the same during Section 22 modification proceedings as it is during initial adjudicatory proceedings under the Act. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Where, as in the instant case, it in uncontroverted that claimant is incapable of returning to his former employment duties, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographical area where claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions, is realistically able to secure and perform. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

In the instant case, employer, in support of its petition for modification, submitted to the administrative law judge reports authored by Dr. Gilmore, and the testimony and reports of Ms.

Bell.[2] Ms. Bell, although conceding that claimant's age, lack of education, and chronic back pain were barriers to his re-employment, set forth light duty positions which she believed were available to claimant. In denying employer's petition for modification, the administrative law judge, after acknowledging Ms. Bell's testimony, implicitly rejected that testimony, finding that the medical evidence submitted by employer failed to establish a change in claimant's physical condition,[3] that there was no evidence of a change in claimant's educational level, that claimant is five years older, that there was no evidence in the record to support a finding that claimant's ability to secure a job had increased, and that no change in the job market had been established. *See* Decision and Order Denying Modification at 2, 4. The administrative law judge's determination supports the conclusion that employer failed to demonstrate a reasonable likelihood, given claimant's age, education, and vocational background, that he could secure and perform any of the positions identified by Ms. Bell. *See Lentz*, 852 F.2d at 131, 21 BRBS at 112 (CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). The administrative law judge's findings in this regard are rational and supported by substantial evidence; we therefore affirm the administrative law judge's implicit finding that employer, on modification, failed to establish the availability of suitable alternate employment.

Employer additionally contends that a change in claimant's post-injury wage-earning capacity is demonstrated by the income claimant received as a result of his purchase of a limousine. We disagree. The Board has held that while income from a business owned by an employee should not be used to reduce liability compensation, if the employee performs such extensive services for the business that the income represents salary rather than profits, the income should be considered in determining wage-earning capacity. *See Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). In the instant case, claimant's testimony indicated that he purchased a limousine for approximately $10,000, that he drove the limousine for business purposes only five times, that he claimed $1,000 in income from this activity in 1990 while paying $1,362 in maintenance and $538 in insurance, and that this venture operated at a loss. *See* August 15, 1991 transcript at 51-54, 111. Following claimant's testimony at the formal hearing, the administrative law judge stated that claimant's limousine venture did not constitute suitable alternate employment and, furthermore, that this work did not demonstrate that claimant has a post-injury wage-earning capacity. *See id.* at 165. We therefore reject employer's contention that income claimant received from his limousine venture increased his post-injury wage-earning capacity. Based on the foregoing, we hold that the administrative law judge committed no reversible error in determining that employer failed to satisfy

[2]Although the administrative law judge, in denying employer's petition, stated that "it would be unjust to reopen the record," *see* Decision and Order Denying Modification at 4, we note that a formal hearing on employer's petition for modification was held on August 15, 1991, at which time four witnesses testified and evidence was submitted into the record. *See* August 15, 1991 transcript. Employer thus had been allowed to produce evidence in support of its modification petition. *See Blake v. Ceres Inc.*, 19 BRBS 219 (1987).

[3]Employer conceded at the hearing that claimant's physical condition had not changed. *See* August 15, 1991 transcript at 158.

its burden of proof on modification. We therefore affirm the administrative law judge's denial of employer's petition for modification. *See generally O'Keeffe*, 380 U.S. at 359.

In his cross-appeal, claimant challenges the administrative law judge's denial of his request for an attorney's fee payable by employer. Specifically, claimant contends that the successful defense of employer's motion for modification constituted a successful prosecution of his claim under Section 28(a) and (b) of the Act, 33 U.S.C. §928(a), (b). Claimant therefore argues that employer should be liable for his counsel's fee.

The administrative law judge, in his Supplemental Order Denying Attorney's Fee Award on Modification, stated that while it would be consistent with the purposes of Section 28 to have employer pay claimant's counsel's fee, Section 28 is inapplicable in the instant case since claimant is receiving the same amount of benefits following the denial of modification as he was prior to employer's filing of its petition. Specifically, the administrative law judge noted that although the services of claimant's attorney helped prevent claimant from losing anything, "he did not increase his compensation or obtain anything additional as a result." *See* Supplemental Order at 2. Thus, the administrative law judge determined that, under Section 28, a case in which the status quo is maintained is not one in which payment of claimant's attorney's fee can be imposed on employer; accordingly, the administrative law judge denied claimant's counsel a fee payable by employer.

Under Section 28(a) of the Act, if an employer declines to pay compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by employer. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we need not address claimant's arguments with respect to employer's liability under Section 28(a), inasmuch as it is uncontroverted that first employer, then the Special Fund, were paying claimant benefits prior to the filing of employer's petition for modification; thus, the case at bar is governed by Section 28(b). Specifically, when employer filed its petition for modification in April 1990, it is accurate to state that a controversy developed over additional compensation due claimant, since employer was effectively controverting claimant's entitlement to future, ongoing permanent total disability benefits. Claimant, thereafter, was forced to utilize the services of an attorney in order to ensure that his compensation was not reduced; although counsel's services resulted in claimant's retaining his permanent total disability award, those services effectively resulted in claimant retaining "greater" compensation than that sought by employer in its petition for modification.

The situation presented in the instant case is analogous to the situation which occurs when an employee, having been awarded compensation benefits by an administrative law judge, is required to utilize the services of counsel in order to defend against an appeal of the award filed by an employer with the Board. It is well-established that where claimant's counsel is successful in defending such an appeal, employer is liable for claimant's attorney's fee for work performed before the Board. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992); 33 U.S.C. §928; 20 C.F.R. §802.203. Similarly, in *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980), the Board held that where employer was still disputing the extent of the claimant's disability in an additional hearing, and the legal services provided at this additional hearing were necessary to protect the claimant's interest, employer was liable for claimant's attorney's fee for work performed at the second hearing. *See also Landrum v. Air America, Inc.*, 1 BRBS 268 (1975). We hold therefore that since claimant's counsel's services were necessary to protect claimant's entitlement to ongoing payments of permanent total disability compensation, and those services resulted in the successful defense of employer's petition for modification which sought to reduce those benefits, thereby guaranteeing claimant's entitlement to ongoing payments of compensation greater than those asserted by employer, employer is liable for claimant's attorney's fee under Section 28(b) of the Act. The administrative law judge's denial of an attorney's fee payable by employer is thus reversed, and the case remanded for consideration of claimant's counsel's fee request pursuant to Section 28(b) and Section 702.132 of the regulations, 20 C.F.R. §702.132.

Accordingly, the Decision and Order Denying Modification of the administrative law judge is affirmed. The Supplemental Order Denying Attorney's Fee Award on Modification of the administrative law judge is reversed, and the case is remanded for the administrative law judge to consider claimant's counsel's fee request consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge