BRB No. 93-1123

ROY M. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Keith W. Donahoe (Koonz, McKenney, Johnson & Regan, P.C.), Washington, D.C., for claimant.

Michael D. Dobbs (Mell and Brownell), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Modification (92-DCWC-14) of Administrative Law Judge Frederick D. Neusner 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (1973) (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).

Claimant sustained injuries to his back, neck, eye and left leg when he was assaulted by a

passenger on March 2, 1982 during the course of his employment with employer, which left claimant unable to perform his usual duties as a station manager.[1] Employer voluntarily paid benefits for temporary total disability from March 2, 1982 until November 27, 1986, and then voluntarily paid benefits for temporary partial disability from November 28, 1986 until March 12, 1988. Employer supported the reduction in benefits by producing a labor market survey which indicated that there were a number of jobs that claimant could perform.

Based upon the parties' stipulations, which he found were supported by the labor market survey, Administrative Law Judge Edward J. Murty determined that claimant is entitled to permanent partial disability benefits commencing on September 3, 1982, to reflect a loss of wage-earning capacity of $305.99 per week, plus appropriate medical expenses. Addressing employer's motion for Section 8(f), 33 U.S.C. §908(f), relief, Judge Murty found that employer is liable for 104 weeks of permanent disability compensation from September 3, 1982 and that, thereafter, liability for said compensation falls to the Special Fund.[2]

In light of his worsening physical condition[3] and his inability to find any employment within his limitations,[4] claimant requested modification of Judge Murty's Decision and Order pursuant to Section 22, 33 U.S.C. §922, of the Act. In his Decision and Order Granting Modification dated December 15, 1992, Administrative Law Judge Frederick D. Neusner (the administrative law judge) found that claimant demonstrated a change in his condition sometime between November 5, 1987 and May 13, 1992, the dates of claimant's hearings on his claim. The administrative law judge additionally determined that claimant established that he is temporarily totally disabled from the performance of the duties of his usual employment. The administrative law judge further found that employer failed to sustain its burden proving that suitable alternate employment is available to

---

[1]Claimant previously suffered injuries to his back, head, neck and shoulder when the hood of his bus fell on his back in the course of his employment with employer on March 5, 1976. In light of those injuries, claimant was transferred from his position as a bus operator to that of a station manager.

[2]Judge Murty specifically determined that Section 8(f) relief was warranted based upon his findings that claimant suffered from a permanent partial disability as a result of his March 5, 1976 accident, that claimant's disability therefrom was manifest to employer and that claimant's present disability was not due solely to the injury suffered on March 1, 1982.

[3]In January 1988, claimant's left knee condition severely worsened. Upon examination on February 22, 1988, Dr. Jackson opined that claimant is suffering from gradual deterioration of his knee due to patellar-femoral malalignment, which arose from his work-related accident.

[4]Claimant also maintained that despite employer's labor market survey, he was completely unable to find employment, noting that with the exception of the calendar year 1989, when claimant earned $1,370 managing his sons' summer employment, he has been unable to earn any wages. During this time, claimant alleges that he has applied for over 150 jobs, including all of those listed on employer's labor market survey, but has failed to obtain any employment.

claimant. Consequently, the administrative law judge granted claimant's request for modification and modified Judge Murty's decision to reflect that claimant is entitled to compensation for temporary total disability at the rate of $462.56 per week from March 2, 1982, the date of injury, plus appropriate medical expenses, with a credit for compensation already paid. Moreover, the administrative law judge ordered employer to reimburse the Special Fund for all payments under the Act that the Special Fund disbursed to or for the benefit of claimant after March 2, 1982.

On appeal, employer contests the administrative law judge's decision to grant modification and to modify the determinations of Judge Murty. Claimant responds, urging affirmance. Alternatively, claimant requests that the case be remanded to the administrative law judge with instructions to enter an order granting claimant permanent total disability benefits. The Director, Office of Workers' Compensation Programs has not responded to this appeal.

MODIFICATION

Employer contends the administrative law judge denied it due process by digressing from the issues presented in claimant's motion for modification. Specifically, employer contends that claimant sought modification only from February 22, 1988,[5] and therefore, the administrative law judge erred in retroactively modifying the award of compensation without providing notice he would do so. Employer also contends that inasmuch as the Decision and Order of Judge Murty was not appealed, claimant should be barred by the doctrine of collateral estoppel from using Section 22 proceedings to relitigate issues previously decided.

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 of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144 (1995); *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 party requesting modification due to a change in condition has the burden of showing the change in condition. *See*, *e.g., Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). Additionally, 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 v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

---

[5]Employer focuses its argument on March 22, 1988, stating that in requesting modification from February 22, claimant appeared to have confused the month in which Judge Murty's decision was filed, as that decision was filed on March 22, 1988. However, February 22, 1988, is the date Dr. Jackson, whose opinion was credited in finding a change in condition, examined claimant and is the date claimant referenced in seeking modification. *See* discussion, *infra*.

Modification proceedings are intended to replace traditional notions of *res judicata* and allow the fact-finder to consider newly submitted evidence or to further reflect on the evidence initially submitted. *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984). Thus, contrary to employer's contention, the doctrine of collateral estoppel does not bar reconsideration of the issues presented. Upon making the requisite finding of a change in condition or a mistake in fact, the administrative law judge has the discretion to issue a new compensation order

> which may terminate, continue, reinstate, *increase*, or decrease such compensation, or award compensation. Such new order shall not affect compensation previously paid, except that *an award increasing the compensation rate may be made effective from the date of the injury* . . . .

33 U.S.C. §922 (emphasis added). In the instant case, claimant relied on two factors to establish a change in condition under his request for modification: first, that at the time of the 1987 hearing, the full extent of claimant's loss of wage-earning capacity was unknown; and second, that claimant's work-related left knee condition has deteriorated from the time of the 1987 hearing.

In weighing the medical evidence regarding claimant's condition, the administrative law judge credited the opinion of claimant's treating physician, Dr. Jackson, who examined claimant on February 22, 1988, and opined at that time and in subsequent reports that claimant has had a slow worsening of his left knee from 1982, when the injury occurred, over the contrary opinion of Dr. Gordon, because Dr. Jackson had a more thorough understanding of the physical exertions associated with claimant's employment as a station manager. Based on this evidence, the administrative law judge found claimant was unable to return to work as a station attendant, thus establishing a *prima facie* case of total disability. Consequently, the administrative law judge rationally determined that claimant established a change in his condition, *Wynn*, 21 BRBS at 290, and thus, properly found a basis for modification under Section 22. Employer's argument that the administrative law judge erred in considering modification of Judge Murty's disability findings is thus rejected.

Employer's argument that the administrative law judge erred in not providing notice that he would address the period prior to February 22, 1988, has merit. Claimant stated at the informal conference and both hearings before the administrative law judge that he was seeking modification from February 22, 1988. *See* April 24, 1992 HT at 20; May 13, 1992 HT at 6, 12; Claimant's Brief to the administrative law judge at 16; Ex. J- 1. Since the claim sought increased benefits from February 22, 1988, employer should have been notified that the entire period from the date of injury was at issue. *See* 20 C.F.R. §§702.338-702.339. Moreover, February 22, 1988 is the date of the medical examination which established a basis for change in condition, and the administrative law judge found the change in condition occurred between the 1987 initial hearing and the 1992 hearings on modification. While the Act permits retroactive modification premised on a mistake in fact where it is in the interest of justice, and claimant did raise mistake in fact as a basis for modification below, the administrative law judge must make the requisite findings regarding a mistake in fact in Judge Murty's decision. *See O'Keeffe*, 404 U.S. at 254. Inasmuch as the administrative law judge did not provide notice that the period prior to February 22, 1988, was at issue, or adequately explain his decision to alter the award prior to this date, we vacate his modification of Judge Murty's award for partial disability prior to February 22, 1988, and remand this case for reconsideration.[6]

EXTENT OF DISABILITY

Employer next contends the administrative law judge erred in finding claimant is totally disabled from February 22, 1988. 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). To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to a work-related injury. If claimant meets this burden, employer must establish the existence of realistically available 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 New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In the instant case, the administrative law judge found that claimant could not return to his usual employment based on the credible opinion of Dr. Jackson that claimant was unable to return to his employment as a station manager and that any attempt to work in this capacity would worsen claimant's symptoms because it involved walking, sitting and stair climbing. Consequently, we affirm the administrative law judge's finding that claimant is unable to perform his usual job after February 22, 1988, as it is based on substantial evidence. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

If employer shows the availability of suitable alternate employment, claimant nevertheless

[6]On remand, the parties should be given an opportunity to submit additional evidence regarding this period of time, notably regarding the nature and extent of claimant's disability prior to February 22, 1988, so that the requirements of due process are met. *See* 20 C.F.R. §§702.338-702.339.

can establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). In the case at hand, the administrative law judge found that although employer has shown the existence of suitable alternate employment, claimant's uncontradicted testimony establishes that, in spite of his diligent efforts, he was unable to secure any such employment. Decision and Order at 12; HT at 50. As these findings are supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant is entitled to benefits for total disability. Consequently, we affirm the administrative law judge's finding that claimant is totally disabled from February 22, 1988, and hold that the administrative law judge did not err in modifying Judge Murty's award for partial disability from that date forward.

NATURE OF DISABILITY

Employer lastly argues that the administrative law judge's finding that claimant's disability is still temporary eleven years after his accident is not supported by substantial evidence. Employer asserts that it is clear from all of the medical evidence of record that claimant's disability has been lengthy, indefinite in duration, and lacking a normal healing period and, thus, requests the Board to hold that claimant's condition is permanent in nature. Employer's contention has merit.

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Moreover, a condition may be considered to be permanent if the employee is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). The possibility that claimant might undergo treatment that may alleviate his disability may be too speculative to foreclose an award for permanent disability. *See Watson,* 400 F.2d at 654; *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985).

In the instant case, the administrative law judge found that claimant's condition remains temporary based upon Dr. Jackson's opinion that claimant has not reached maximum medical improvement. *See* Decision and Order at 8. However, the treatment that Dr. Jackson prescribes, notably physical rehabilitation and if necessary surgery, admittedly "has a slight chance of increasing -- or slowing down his degenerative change, his arthritic change as a result of his injury back in 1982." Employer's Exhibit 16, Deposition at 64. Additionally, Dr. Jackson notes that "neither one [of the two options for treatment] may work significantly." *Id.* Based upon this uncontroverted evidence that the benefits of further treatment are speculative, we hold that claimant's disability is permanent because it has continued for a lengthy period of time and appears to be indefinite in nature. *See Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115

(CRT)(D.C. Cir. 1984); *Watson*, 400 F.2d at 654; *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). We therefore reverse the administrative law judge's finding that claimant's condition is temporary. As the date of permanency is primarily a question of fact based on medical evidence, we remand this case to the administrative law judge for a determination as to the date upon which claimant's condition became permanent. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Upon rendering a finding as to permanency, the administrative law judge must consider the effect of his determination on the application of Section 8(f) relief and, if relevant, any liability owed the Special Fund by employer. *See generally Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), *vacated on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*).

Accordingly, the administrative law judge's modification of Judge Murty's award of benefits prior to February 22, 1988, is vacated, as are the finding that claimant's disability is temporary and the Order that employer reimburse the Special Fund, and the case is remanded for further consideration of these issues consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge