BRB Nos. 00-0633
and 00-1090

WILLIAM E. STEPP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Decision and Order Denying Modification of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Robert H. Madden (Madden & Crockett, LLP), Seattle, Washington, for self-insured employer.

Julia Mankata (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision and Order Denying Modification (98-LHC-2278, 2279) of Administrative Law Judge Anne Beytin Torkington 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 July 17, 1996, claimant, a winch driver, injured his left leg at work. Claimant previously injured his right leg at work for a different employer on October 19, 1987. Employer voluntarily paid claimant temporary total disability benefits from July 20, 1996, through April 11, 1997, and a 17 percent scheduled award for permanent partial disability benefits. Claimant did not return to work and sought permanent total disability benefits. Claimant is a Vietnam veteran who was honorably discharged from the Marines after injuring his right knee during the war. Claimant is a recipient of the Purple Heart, the Vietnamese Cross of Gallantry, and the Combat Action Ribbon. Claimant suffers from post-traumatic stress disorder as a result of the war. The administrative law judge found that claimant established his *prima facie* case of total disability, that employer did not establish the availability of suitable alternate employment, and that claimant reached maximum medical improvement with regard to both knees on June 23, 1999. Thus, the administrative law judge awarded claimant temporary total disability benefits from July 20, 1996, through June 22, 1999, and permanent total disability benefits from June 23, 1999, and continuing. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on the absolute bar contained at Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3).

Employer appealed the administrative law judge's award to the Board, BRB No. 00-0633, and thereafter requested modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a change in conditions or a mistake in a determination of fact in the administrative law judge's award. The Board dismissed employer's appeal in BRB No. 00-0633 and advised employer that it could seek reinstatement of this appeal after the administrative law judge considered its request for modification. The administrative law judge denied employer's request for modification. Subsequently, employer appealed the administrative law judge's denial of its request for modification to the Board, BRB No. 00-1090, and requested reinstatement of its appeal of the administrative law judge's award of benefits, BRB No. 00-0633.[1]

[1]By Order dated August 30, 2000, the Board reinstated employer's prior appeal,

BRB No. 00-0633, and consolidated it for purposes of decision with employer's appeal of the administrative law judge's Decision and Order Denying Modification, BRB No. 00-1090.

On appeal, employer contends that the administrative law judge erred in awarding claimant total disability benefits and in denying its requests for Section 8(f) relief and modification. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief based on the absolute bar, to which employer replies.[2]

Employer first contends that the administrative law judge erred in awarding claimant total disability benefits after finding that it did not establish the availability of suitable alternate employment based on the jobs of hydraulic crane operator, retail gun shop employee, rental car shuttle driver, and security guard. Once, as here, claimant succeeds in establishing that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant could perform considering his age, education, background, work experience, and physical and mental restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

[2]We accept employer's reply brief, which was filed out of time, as part of the record. 20 C.F.R. §§802.213, 802.217.

With respect to the jobs of retail gun shop employee and security guard, the administrative law judge found them not suitable because they involved at least some public contact which claimant is to avoid because of his post-traumatic stress disorder.[3] With respect to the job of hydraulic crane operator, the administrative law judge found that it was not realistically available to claimant because no specific job was identified; claimant was to report to a union hiring hall to find work. With respect to the job of rental car shuttle driver, the administrative law judge found that employer did not meet its burden of establishing that the job is suitable because if it required close supervision, it would not be within claimant's mental restrictions. As the administrative law judge acted within her discretion in concluding that the above jobs are not suitable or available to claimant and her findings are rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. *See Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT)*; Bumble Bee*, 629 F.2d 1327, 12 BRBS

[3]The administrative law judge's finding that the security guard positions involved some public contact is based upon employer's failure to provide a more specific description about these jobs. Contrary to employer's contention, the administrative law judge could rationally find that Dr. Berman's testimony that claimant should work by himself or with minimal supervision or with a small team supports the inference that claimant should avoid public contact, particularly when considered with Mr. Peterson's opinion that it was inappropriate for claimant to have public contact and Dr. Brzezinski-Stein's opinion that claimant has difficulty dealing with and being around people. *See* Peterson Dep. at 10-11; Tr. at 164, 327-328.

660; Decision and Order Awarding Benefits at 13-14, 16; Tr. at 136-137, 164, 327-328, 382-447; GPD (Gary Peterson's Deposition) at 10-11. Consequently, we affirm the administrative law judge's award of total disability benefits.[4] *See Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT)(9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *see also Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996).

We next address employer's contention that the administrative law judge erred in denying its request for modification without providing it more time to fully respond to her show cause order and to submit new evidence. Section 22 provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT)(1995); *see also Jensen v. Weeks Marine, Inc.*, 33 BRBS 147 (2000). The Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1, 8 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52 (1989); *Blake v. Ceres Inc.*, 19 BRBS 219, 221 (1987). An employer, however, is not entitled to modification as a matter of course merely because it offers evidence of suitable alternate employment. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). The evidence offered must demonstrate that there was, in fact, a change in claimant's physical or economic condition from the time of the initial award to the time modification is sought. *Compare Lombardi v. Universal Maritime Corp.*, 32 BRBS 83 (1998) *with Delay*, 31 BRBS at 204, *Moore*, 23 BRBS at 52, and *Blake*, 19 BRBS at 220-221. Under

[4]We affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment based on the alternate reasons given by the administrative law judge. Thus, we need not consider whether she properly determined that the jobs are not suitable for claimant because employer did not inform the prospective employers that claimant has post-traumatic stress disorder. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Decision and Order Awarding Benefits at 13-14, 16.

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 Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). In order to obtain modification for a mistake of fact, however, the modification must render justice under the Act. *See McCord v. Cephas* , 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976)*; Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.,* 238 F.3d 414 (4th Cir. 2000)(table). Section 22 is not intended as a method for a party "to correct errors or misjudgments of counsel." *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 26, 14 BRBS 636, 640 (1st Cir. 1982); *see also Lombardi*, 32 BRBS at 86-87; *Delay*, 31 BRBS at 204.

The administrative law judge issued a show cause order on June 29, 2000, as to why employer's request for modification should not be denied. Employer's response was due on July 9, 2000. Employer timely responded on July 7, 2000, that it could not respond more fully to the administrative law judge's show cause order because of the unavailability of both employer's counsel, Mr. Madden, and its vocational expert, Mr. Skilling, until August 2000. However, employer did continue that if its modification request was granted, Mr. Skilling would show the availability of specific hydraulic crane operator jobs and clear up his testimony concerning the jobs he identified as suitable alternate employment including those of security guard, rental car shuttle driver, and retail gun shop employee. Employer also stated that it planned to conduct further discovery regarding claimant's past and current psychological condition and to have claimant seen by its psychological expert, Dr. Berman, which it was unable to do prior to the hearing. The administrative law judge denied employer's request for modification after a brief review of some of the previously admitted medical and vocational evidence and concluding that employer was attempting to re-try the case to correct the litigation mistakes it made below with respect to the issue of suitable alternate employment.

We hold that, based on the facts of this case, the administrative law judge abused her discretion in denying employer's request for modification without allowing employer to submit new evidence and argument in support of its request for modification. *See generally Jensen*, 34 BRBS 147; *Delay*, 31 BRBS 197*; cf. Kinlaw*, 33 BRBS 68 (Board affirmed the administrative law judge's denial of employer's request for modification after a consideration of the new evidence as within her discretionary authority because employer could have developed its evidence earlier; Board noted that Section 22 was not intended as a back door route to re-try a case); Decision and Order Denying Modification at 2, 5; ALJ Exs. A-F. The administrative law judge could not rationally determine whether employer's request for modification should

be granted without allowing employer the opportunity to submit evidence and state how it believes the evidence meets its burden of proving a physical or economic change in claimant's condition or a mistake in a determination of fact.[5] Accordingly, we vacate the administrative law judge's denial of employer's request for modification and remand this case to the administrative law judge to permit employer to submit evidence and argument in support of its motion for modification.

Employer lastly contends that the administrative law judge erred in denying it Section 8(f) relief with regard to claimant's pre-existing knee injuries and post-traumatic stress disorder based on the absolute bar found at Section 8(f)(3). Section 8(f)(3) provides:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3)(1994). Moreover, the regulations provide that a request for Section 8(f) relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute, which could occur when benefits are first paid for permanent disability or at an informal conference held to discuss the permanency of claimant's condition. 20 C.F.R. §702.321(b). Employer is required to raise its Section 8(f) claim if the permanency of claimant's condition is known prior to the time the district director "considers" the claim for compensation. *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT)(9th Cir. 1991); *Rice v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 102 (1998). The regulations also mandate that if a claim for permanency has been raised by the date the case is referred to the Office of Administrative Law Judges, employer's "failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund" unless employer could not have reasonably anticipated the liability of

[5]In asserting a basis for finding a mistake in fact, employer must also demonstrate that it developed its evidence in a timely manner in order to show modification will render justice, consistent with the cases cited above.

the fund while the claim was before the district director. 20 C.F.R. §702.321(b)(3).

In the instant case, the administrative law judge found that employer could have reasonably anticipated the liability of the Fund with respect to claimant's pre-existing knee injuries while the case was pending before the district director and therefore found that employer was not entitled to Section 8(f) relief based on the absolute bar. The administrative law judge based her conclusion on three events which occurred while the case was pending before the district director: 1) claimant repeatedly asserted a claim for permanent disability benefits; 2) employer paid permanent disability benefits to claimant; and 3) the district director set a deadline for a different employer to submit a Section 8(f) application with respect to a different injury which was copied to employer. As the administrative law judge's reasoning comports with the regulatory definition of permanency, we affirm her finding that employer could have reasonably anticipated the liability of the Fund with respect to claimant's pre-existing knee injuries as it is rational and supported by substantial evidence. *See Gross*, 935 F.2d 1544, 24 BRBS 213 (CRT); Decision and Order Awarding Benefits at 20-22; Dir. Exs. A-P; Emp. Ex. 1. Thus, we affirm the administrative law judge's denial of Section 8(f) relief based on the absolute bar at Section 8(f)(3) with respect to claimant's pre-existing knee injuries.[6]

With regard to claimant's pre-existing post-traumatic stress disorder, employer asserts that it was not aware of this pre-existing injury until after the case was referred to the Office of Administrative Law Judges and thus could not have reasonably anticipated the liability of the Fund based on this injury. Specifically, employer asserts that the case was referred to the Office of Administrative Law Judges in December 1998 but that it did not become aware of claimant's post-traumatic stress disorder until January 1999. The Director concedes that the administrative law judge did not determine whether employer could not have reasonably anticipated the liability of the Fund based on claimant's pre-existing post-traumatic stress disorder. However, the Director responds that the

[6]Contrary to employer's contention, the Director is not estopped from asserting the absolute bar at Section 8(f)(3) based on a statement that "permanency is not an issue" in a letter to claimant's counsel and copied to employer from a Department of Labor claims examiner dated April 16, 1998, as the administrative law judge properly found no affirmative misconduct, *i.e.,* an ongoing misrepresentation or a pattern of misconduct. *See Office of Personnel Management v. Richmond*, 110 S.Ct. 2465, 2470 (1990); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Rouse]*, 976 F.2d 934, 26 BRBS 107(CRT)(5th Cir. 1992); *Mukkherjee v. Immigration & Naturalization Service*, 793 F.2d 1006, 1008 (9th Cir. 1986); Decision and Order Awarding Benefits at 22; Dir. Ex. J; Emp. Ex. 1.

administrative law judge was not required to make this determination as employer waived its right to raise this argument on appeal before the Board because it did not raise this theory before the administrative law judge.

Contrary to the Director's assertion, we hold that employer sufficiently alleged below that it could not have reasonably anticipated the liability of the Fund with respect to claimant's post-traumatic stress disorder. Employer asserted in its pre-hearing statement that,

> The 'absolute bar,' which will apparently be asserted by the Director, has no application in this case because: Claimant had not articulated a claim for PTD based on the combined effects of his left knee and his post-traumatic stress disorder by the time this case was referred by the District Director to the OALJ (such an allegation was not made until January, 1999); . . . . Accordingly, Jones had no duty to submit a fully documented §8(f) application to the District Director before this claim was referred to the OALJ, and, in fact, submission of such an application at that time would have been futile in view of claimant's medical condition.

Emp. Pre-Trial Statement at 2 (ALJ Ex. 2). We therefore remand this case to the administrative law judge to determine whether employer could have reasonably anticipated the liability of the Fund with respect to claimant's post-traumatic stress disorder. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Dillard]*, 230 F.3d 126, 34 BRBS 100(CRT)(4th Cir. 2000); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT)(4th Cir. 1998); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998)(decision on reconsideration); ALJ Ex. 2. If the administrative law judge finds that employer could not have reasonably anticipated the liability of the Fund based on claimant's post-traumatic stress disorder, employer is entitled to Section 8(f) relief as the Director's position below was that all elements of Section 8(f) relief are met if employer's claim for Section 8(f) relief is not precluded by the absolute bar at Section 8(f)(3). *See generally Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes],* 913 F.2d 1426, 24 BRBS 25(CRT)(9th Cir. 1990); Decision and Order Awarding Benefits at 4 Stipulation 13; Tr. at 8.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated with respect to the administrative law judge's denial of Section 8(f) relief based on the absolute bar at Section 8(f)(3), and the case is remanded to the administrative law judge for a determination of whether employer could not have reasonably anticipated the liability of the Fund with respect to claimant's pre-existing post-traumatic stress disorder.

In all other respects, the administrative law judge's award of benefits, including her denial of Section 8(f) relief based on the absolute bar at Section 8(f)(3) for claimant's pre-existing knee injuries, is affirmed. The administrative law judge's Decision and Order Denying Modification is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge