

LEROY HOWARD)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>10/29/99</u>
)	
ELLER AND COMPANY)	
)	
and)	
)	
GEORGIA INSURERS INSOLVENCY)	
POOL)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum, (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Thomas J. Schetelich (Ferguson, Schetelich & Heffernan, P.A.), Baltimore, Maryland, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (82-LHC-1560) 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the third time. To briefly recapitulate, on July 1,

1981, claimant sustained injuries to his arm, neck and back while in the course of his employment as a longshoreman. In a decision dated September 7, 1983, Administrative Law Judge Feirtag awarded claimant permanent total disability compensation based upon his determination that claimant was unable to return to his usual work as a longshoreman due to his work-related psychological condition and his complaints of pain, and employer's failure to establish the availability of suitable alternate employment. Employer thereafter sought modification of this decision pursuant to Section 22 of the Act, 33 U.S.C. §922 . In seeking modification, employer alleged that there had been a change in both claimant's medical and economic conditions after the entry of Judge Feirtag's award of benefits. In his Decision and Order, Administrative Law Judge Lawrence found that the evidence presented by employer failed to establish a change in claimant's medical or economic condition; Judge Lawrence, therefore, denied employer's modification petition.

On appeal of that decision, the Board affirmed the administrative law judge's finding that claimant's psychological condition had not changed since the entry of the award of benefits in 1983. *Howard v. Eller & Co.*, BRB No. 91-1839 (Nov. 30, 1992). In addition, the Board affirmed the administrative law judge's finding that employer failed to carry its burden of proof in establishing the availability of suitable alternate employment. Thus, the Board affirmed the administrative law judge's decision denying modification.

Employer appealed the Board's decision to the United States Court of Appeals for the Eleventh Circuit. *Eller & Co. v. Director, OWCP*, No. 93-8095 (11th Cir. March 27, 1995). The court concluded that the Board erred in affirming the administrative law judge's denial of the petition for modification as there had been a change in both claimant's physical condition and economic condition. Specifically, the court held that the evidence demonstrated that claimant had overcome his fear of working in general, and that there was a demonstrated wage-earning capacity as claimant held some jobs following the entry of Judge Feirtag's award. Thus, the court remanded the case to the administrative law judge with instructions to ascertain the limitations due exclusively to claimant's fear of returning to work as a longshoreman. In addition, the court instructed the administrative law judge to consider claimant's residual wage-earning capacity, if he determined that he remained unable to return to longshore work.

On remand, Administrative Law Judge Fath found that claimant had not demonstrated that he suffered a disabling psychological injury as the result of the accident on July 1, 1981, and he therefore denied benefits. On appeal, the Board held that Judge Fath exceeded the scope of the remand order by the Eleventh Circuit; the Board therefore vacated the denial of benefits and the case was remanded to the administrative law judge for further consideration of whether claimant remains unable to return to his former longshore work as a result of his psychological condition, and what is claimant's residual wage-earning capacity if that issue is reached. *Howard v. Eller & Co.*, BRB No. 96-642 (Feb. 12, 1997).

In her Decision and Order on Remand, Administrative Law Judge Torkington (the administrative law judge) found that claimant no longer has a psychological fear of returning to longshore employment. Alternatively, the administrative law judge found that claimant's residual earning capacity equals or exceeds his pre-injury earning capacity. Thus, she concluded that claimant is no longer disabled within the meaning of the Act, and granted modification.

On appeal, claimant contends that the administrative law judge erred in finding that claimant did not have a psychological injury. In addition, claimant contends that the administrative law judge erred in the determination of his residual wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision.

Initially, we reject claimant's contention that the administrative law judge erred in finding that claimant did not suffer from a work-related psychological injury, as she did not so find. Rather, as will be discussed, the administrative law judge found claimant is no longer disabled by such an injury. Thus, we reject claimant's additional contention that there is a presumption of compensability inasmuch as the Section 20(a) presumption, 33 U.S.C. §920(a), does not aid claimant in establishing the nature and extent of his disability. *See Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

The Eleventh Circuit held that employer successfully established a change in claimant's condition and remanded the case for consideration of the extent of claimant's disability, if any. *See Eller & Co.*, slip op. at 7-9; 33 U.S.C. §922. Once the moving party shows a change in condition, as here, the standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *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 his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

On modification, employer submitted the report of Dr. Cole who opined that "Mr. Howard's medical records do not give sufficient evidence to support a diagnosis of continuing incapacitating conversion disorder as of March 26, 1991, and continuing to the present time, and originating from the 1981 accident." Emp. Ex. 2. The administrative law judge found that Dr. Cole's conclusion was supported by Dr. Routon's opinion of July 22, 1987, which stated that claimant would have difficulty returning to work due to lack of motivation. *See Ex. J.* Importantly, claimant has submitted no evidence that he continues to suffer from a psychological condition that would prevent him from returning to his former longshore work. Therefore, inasmuch as substantial evidence supports the administrative law

judge's finding that as of March 26, 1991, claimant could return to his former longshore employment from a psychological standpoint, we affirm the administrative law judge's grant of modification and denial of continuing permanent total disability benefits.¹ *See generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1400 (9th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order on Remand granting modification and denying continuing permanent total disability benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹Thus, we need not address claimant's contentions regarding his residual wage-earning capacity.