

LEROY HOWARD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELLER & COMPANY)	DATE ISSUED:
)	
and)	
)	
GEORGIA INSURERS' INSOLVENCY)	
POOL)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand of George A. Fath, Administrative Law Judge,
United States Department of Labor.

Leroy Howard, Wilmington, North Carolina, *pro se*.

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

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order on Remand (82-LHC-1560) of Administrative Law Judge George A. Fath 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).

This case is before the Board for the second time. 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 and Order 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, which

was a fear of returning to work for fear of being re-injured, and his complaints of pain of a psychological origin, and employer's failure to establish the availability of suitable alternate employment. 33 U.S.C. §908(a). Employer, in 1991, sought modification of Judge Feirtag's Decision and Order 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 Denying Modification, Judge Glenn 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 has not changed since the initial entry of an 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. *Howard*, slip op. at 4. 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 holding that Judge Lawrence properly relied on Dr. Routon's 1987 report to find that claimant continued to experience the same psychological difficulties that Judge Feirtag found to be disabling in 1983. The court held that Dr. Routon's findings do not support a conclusion that claimant was in fear of returning to work in 1987, but rather reflect that claimant enjoyed being on disability and had no motivation to change his lifestyle. Further, the court held that it "is evident that claimant has overcome his fears of returning to work *in general*," by virtue of his self-employment and work at a restaurant, slip op. at 7, (emphasis original), but noted the evidence presented by employer that claimant was in fact able to work at other employment is not material to the issue of whether claimant still has the fear of returning to work as a longshoreman and his concomitant fear of another injury. Thus, the court found a change in claimant's psychological condition and instructed the administrative law judge on remand to ascertain the limitations due exclusively to claimant's fear of returning to work as a longshoreman.

In addition, the court reversed the administrative law judge's finding that employer had not met its burden of showing a change in claimant's economic condition because it showed the existence of jobs which claimant can obtain. Thus, the court found that the administrative law judge's decision that employer had not met its burden of proof to show a change in economic conditions was not supported by substantial evidence. Consequently, as a result of the court's decision, claimant would be found to be at most permanently partially disabled on remand, or no longer disabled at all, depending on whether the administrative law judge found claimant could return to his usual work as a longshoreman.

On remand, Administrative Law Judge Fath found that he could not credit the conclusions of Drs. Monahan and Tillinger, rendered before Judge Feirtag's decision, that claimant was fearful of returning to work as a longshoreman, as the opinions are not based on medical fact, there is no description of exactly what claimant is fearful of, and neither physician knew what claimant's duties were as a longshoreman. The administrative law judge concluded that claimant was never disabled by a psychological injury as the result of the accident on July 1, 1981, and that he fabricated his complaints in order to obtain compensation. He therefore denied all benefits back to the date of

injury.

Since claimant appeals the administrative law judge's decision without representation, we will review the decision in order to ascertain whether it is rational, supported by substantial evidence, and in accordance with law. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Modification based on a change in condition may be granted where the claimant's physical condition has improved or deteriorated following entry of the award or where there has been a change in claimant's economic condition. *Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). The standard for determining disability is the same for a Section 22 modification proceeding as it is for an initial proceeding under the Act. See *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

In the present case, the Eleventh Circuit has held that employer successfully established a change in economic conditions by showing the existence of jobs in the economy which claimant can obtain. Specifically, the court cited the evidence that claimant ran a cosmetics business out of his home for three years, and he began to work in 1987 as a manager trainee at Cracker Barrel until he suffered an injury there. Thus, at a minimum, claimant's permanent total disability benefits would be reduced to permanent partial disability on modification, and the court instructed the administrative law judge on remand to consider claimant's residual wage-earning capacity if this issue is reached. However, in order to be entitled to partial disability benefits, claimant must show that he still cannot return to his regular or usual employment due to his work-related injury, *i.e.*, whether he still has a fear of returning to work as a longshoreman and pain of a psychological origin. *Carroll v. Hanover Bridge Marine*, 17 BRBS 176 (1985).

We hold that the administrative law judge exceeded the scope of the court's remand order in holding that claimant has never been disabled by a psychological injury, as the petition for modification was based on a change in condition rather than a mistake in fact. While the Board has held that the "law of the case" doctrine does not preclude an administrative law judge from reopening a previously decided issue where the case is before him pursuant to a request for modification, the parties must be given an adequate opportunity to address this issue. See *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988). Here, the administrative law judge was instructed by the Eleventh Circuit to determine the extent of claimant's remaining disability as of the date of the change in condition. Moreover, the administrative law judge did not give the parties notice that he would determine disability back to 1981 under a mistake in fact rationale. Thus, we hold that the administrative law judge improperly considered whether claimant suffered from a disability from the time of the accident. See generally *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993).

As the administrative law judge exceeded the scope of the remand order by the court, we vacate the denial of benefits and remand the case to the administrative law judge for further

consideration of whether claimant was unable to return to his former longshore work as a result of his psychological disability as of the date employer sought modification based on the change in condition. As the court held that employer has established the existence of jobs which claimant can obtain, in order to obtain permanent partial disability benefits on remand, claimant has the burden of proving that his injury continues to prevent him from returning to his prior employment. *See generally Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991). In addition, as the court found that employer met its burden of showing the existence of alternate jobs which claimant could obtain, if the administrative law judge finds that claimant cannot return to longshore work on remand, the administrative law judge is also instructed on remand to render findings as to claimant's residual wage-earning capacity. 33 U.S.C. §§908(c)(21), 908(h), 910; *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge