BRB NO. 96-1394

BENJAMIN GLOVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PUERTO RICO MARINE SHIPPING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Benford L. Samuels and Mark K. Eckels (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (93-LHC-1397/1398/1797; 95-LHC-1711) of Administrative Law Judge Edward J. Murty, Jr., 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).

Claimant, a mechanic, sustained multiple injuries during the course of his

employment with this employer. Employer has paid compensation for temporary total disability for various periods of time following each of these accidents. At the time of the first hearing before Administrative Law Judge E. Earl Thomas, claimant sought compensation for a permanent total disability and medical benefits. Judge Thomas awarded medical benefits, but found claimant entitled to no further disability compensation than that already paid.

Claimant thereafter filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, contending that there had been a mistake of fact as to his condition. In his Decision and Order, Administrative Law Judge Murty (hereafter, the administrative law judge) found that neither the new evidence submitted by claimant nor reconsideration of the evidence previously submitted altered the conclusions previously reached by Judge Thomas. The administrative law judge thus concluded that claimant had failed to establish either a mistake of fact or a change in condition. Accordingly, claimant's motion for modification was denied.

On appeal, claimant challenges the administrative law judge's denial of his motion for modification.[1] Employer responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon 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, 30 BRBS 1 (CRT)(1995). Under 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 Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). When considering a motion for modification, the administrative law judge is permitted to have before him the record from the prior hearing. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). 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). It is well-established that the party

[1]We note claimant's allegation that the administrative law judge erred in failing to grant his motion to reopen the record for the submission of additional evidence. However, as claimant failed to state the basis, if any, for such an allegation, we decline to address it. *See Collins v. Oceanic Butler, Inc.,* 23 BRBS 227 (1990); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Moreover, the Board has held that the standard for determining disability is the same during Section 22 modification proceedings as it is during the initial adjudicatory proceedings under the Act. *Vasquez*, 23 BRBS at 431.

In the instant case, claimant asserts that the administrative law judge erred in reaching his findings that claimant established neither a mistake of fact or a change in condition, but offers no legal argument in support of this contention of error. Merely restating the evidence, or the interpretation of the evidence favorable to claimant's position, without more, is insufficient to provide a basis for the Board to review an administrative law judge's decision. The Board is authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees arising under the Act. *See* 33 U.S.C. §921(b)(3). The findings of fact in the administrative law judge's decision "shall be conclusive if supported by substantial evidence in the record as a whole." *Id.* The circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address that decision and demonstrate why substantial evidence does not support the result reached. The Board's Rules of Practice and Procedure further provide that a party's petition for review to the Board shall list the specific issues to be considered on appeal and be accompanied by a supporting brief specifying the issues to be addressed, an argument with respect to each issue, and the precise result the party advocates on each issue. 20 C.F.R. §802.211. Thus, where a party is represented by counsel, mere assignment of error is not sufficient to invoke Board review. *See generally Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990).

Moreover, contrary to claimant's contentions, a physical impairment to claimant alone is insufficient to support a finding of total disability. Rather, in order to establish a *prima facie* case of total disability, claimant must establish that he is incapable of returning to his regular or usual employment due to his work-related injury. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, however, claimant unequivocally testified, and the administrative law judge found, that he continues to perform his regular job duties full-time with employer at his regular salary. Based upon this finding, the administrative law judge reasonably concluded that claimant did not establish a mistake of fact or a change in condition. As the administrative law judge's denial of modification is rational and in accordance with law, it is affirmed.[2] *See generally General Dynamics Corp.*

[2]We note that claimant additionally alleges that he may not be receiving the medical benefits ordered by Judge Thomas in his original Decision and Order; Section 18(a) of the Act, 33 U.S.C. §918(a), addresses the issue of enforcement proceedings. *See Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145 (CRT)(5th Cir. 1992).

v. Director, OWCP, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge