BRB No. 96-1464

GEANETT A. TYLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Alan D. Sundburg (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (85-DCW-0284) of Administrative Law Judge Charles P. Rippey 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, 502 (1973) (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a busdriver, sustained injuries during the course of her employment with employer on March 15, 1976, when her bus hit a curb and stopped abruptly. Following a

complicated procedural history,[1] claimant was awarded permanent total disability compensation and medical benefits.

Employer thereafter filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, contending that there had been a change in claimant's physical and economic condition. In his Decision and Order, the administrative law judge found that employer's submission of medical evidence in support of its contention that claimant no longer suffers a physical disability preventing claimant from returning to her pre-injury work or to suitable alternate employment was merely an attempt to re-litigate the original case and that any evidence of suitable alternate employment could not be considered because employer failed to submit evidence regarding the wages paid by the identified positions at the time of claimant's injury in 1976.

On appeal, employer challenges the administrative law judge's denial of its motion for modification. Claimant has not responded to this appeal.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing

[1]On January 9, 1987, Administrative Law Judge Feldman issued a Decision and Order in which he denied claimant compensation based upon his finding that she failed to meet her burden in establishing that her condition was causally related to her employment injury; the Board affirmed this decision by Order dated December 30, 1988. On appeal, the United States Court of Appeals for the District of Columbia Circuit held that the administrative law judge erred in failing to fully inquire into the relevant evidence regarding causation and remanded the case for further proceedings. On remand, Judge Feldman awarded claimant permanent partial disability compensation. On appeal, the Board vacated the award, modified the administrative law judge's decision to reflect claimant's entitlement to permanent total disability compensation, and remanded the case for consideration of claimant's right to reasonable and necessary medical care. On August 22, 1994, Administrative Law Judge Rippey issued his Decision and Order Following Remand awarding claimant medical benefits.

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*, 515 U.S. 291, 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 (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 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, employer asserts that the administrative law judge erred in rejecting its medical evidence regarding claimant's current physical ability to perform her usual employment duties with employer, as well as his failure to consider employer's evidence regarding the availability of suitable alternate employment. We agree. In his Decision and Order, the administrative law judge rejected the medical evidence submitted by employer in support of its contention that claimant's present physical condition permits her to perform either her usual pre-injury job as a busdriver or the suitable alternate employment positions identified by employer. Although the administrative law judge conceded that such evidence may support a finding that claimant's condition had improved to the point that she could return to work, *see* Decision and Order at 2, he refused to consider the evidence because he found that it was merely an attempt to re-litigate the case. However, any opinion Dr. Collins may have expressed on causation does not detract from his opinion regarding claimant's current physical condition and capabilities. Accordingly, the administrative law judge's finding that the medical evidence merely attempts to re-litigate prior issues is vacated, and the case is remanded for the administrative law judge to re-consider the evidence of record regarding the issue of claimant's current physical condition.

Next, employer contends that the administrative law judge erred in refusing to consider its evidence regarding the availability of suitable alternate employment which claimant is capable of performing because employer failed to submit into evidence the wages paid by the identified positions at the time of claimant's injury. We agree. In cases where a claimant is unable to return to her usual employment as a result of her injury, the burden of proof shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If an employer

satisfies this burden, the wages which the new job would have paid at the time of claimant's injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury; specifically, subsections 8(c)(21) and 8(h) of the Act, 33 U.S.C. §908(c)(21), (h), require that a claimant's post-injury wage-earning capacity be adjusted to represent the wages that the post-injury job paid at the time of claimant's injury in order to neutralize the effects of inflation. *See generally Sproull v. Stevedoring Services of America*, 26 BRBS 100, 108-110 (1991)(Brown, J. dissenting on other grounds), *aff'd in pert. part on recon. en banc*, 28 BRBS 271 (1994). The Board and the courts have not required employers to establish the exact wages paid at the time of a claimant's injury by the positions identified as constituting suitable alternate employment. The Board has affirmed an administrative law judge's use of the percentage change in the national average weekly wage as an appropriate method for adjusting a claimant's post-injury earnings to a level equal to the wages paid at the time of claimant's injury. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

We hold, therefore, that the administrative law judge erred in declining to address employer's evidence regarding the availability of suitable alternate employment based solely upon his determination that employer submitted no evidence to support a finding as to what any of the identified positions paid at the time of claimant's injury in 1976 since any such calculation does not become necessary until employer in fact establishes the availability of suitable alternate employment . Accordingly, on remand, the administrative law judge must fully address all of the evidence submitted into the record by employer regarding this issue, adequately detail the rationale behind his decision, and specify the evidence upon which he relied. *See* 5 U.S.C. §557(c)(3)(a); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Accordingly, the administrative law judge's Decision and Order denying employer's motion for modification is vacated, and the case remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge