FURNELL D. SEVERIN	)	BRB No. 89-2288
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXXON CORPORATION	)	
	)	
and	)	
	)	
PETROLEUM CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
FURNELL D. SEVERIN	)	BRB No. 89-6041
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:_____
	)	
EXXON CORPORATION	)	
	)	
and	)	
	)	
PETROLEUM CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION AND ORDER

Appeals of the Decision and Order on Modification and the Decision and Order Denying Respondent's Motion to Modify Original Award of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

C. Joseph Murray, New Orleans, Louisiana, for claimant.

Ira J. Rosenzweig (Phelps, Dunbar, Marks, Claverie & Sims), New Orleans, Louisiana, for employer/carrier.

BEFORE: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.
PER CURIAM:

Claimant appeals the Decision and Order Modifying Previous Award and employer appeals the Decision and Order Denying Respondent's Motion to Modify Original Award (87-LHC-526) of Administrative Law Judge C. Richard Avery 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 the law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a senior operator, sought permanent total disability compensation under the Act for injuries he sustained on September 18, 1985, when he slipped on a patch of drilling mud pooled on the deck of employer's ship while attempting to clean up a spill. Employer voluntarily paid claimant temporary total disability compensation from December 11, 1985 to April 15, 1986.

In a Decision and Order issued November 9, 1987, the administrative law judge awarded claimant permanent total disability compensation, finding that claimant was unable to perform his usual work and that the vocational evidence submitted by the employer demonstrating the general availability of suitable light duty work was insufficient to meet employer's burden of establishing the availability of suitable alternate employment. Thereafter, employer sought modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that claimant was not totally disabled as suitable alternate employment was available, and that claimant's permanent partial disability should be compensated under the schedule rather than Section 8(c)(21), 33 U.S.C. §908(c)(21). A modification hearing was held on February 14, 1989, at which time employer offered the testimony of rehabilitation counselor, Nancy Favalora, identifying the availability of suitable alternate work that claimant was able to perform. The administrative law judge determined that employer had met its burden of establishing suitable alternate employment based on this testimony and accordingly modified his original decision and order to reflect that claimant was partially, rather than totally, disabled. The administrative law judge awarded claimant compensation under Section 8(c)(21) based on his loss of wage-earning capacity.

In his decision, the administrative law judge further requested that the parties submit briefing on the second issue raised by employer's request for modification, *i.e.*, whether claimant sustained an unscheduled injury to his hip or a scheduled injury to his leg. In a subsequent Decision and Order, the administrative law judge, relying on *Grimes v. Exxon Co., USA*, 14 BRBS 573, 576 (1981), and *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985), held that the schedule was not applicable in this case because the situs of claimant's injury was his hip, an unscheduled body part, even though the injury had resulted in disability to claimant's leg.

Claimant appeals the Decision and Order granting modification of the total disability award, arguing that modification was improper on the facts presented in this case. Employer responds, urging affirmance. BRB No. 89-2288. Employer appeals the administrative law judge's third Decision and Order which denied its request that benefits be awarded under the schedule, asserting that compensation should be awarded based on the situs of claimant's disability rather than the situs of his injury and that, in any event, the administrative law judge's determination that claimant sustained a unscheduled hip injury is not supported by substantial evidence. Claimant responds, urging that the administrative law judge's determination that he sustained an unscheduled hip injury compensable under Section 8(c)(21) be affirmed. BRB No. 89-6041.

Initially, we reject claimant's contention that the administrative law judge abused his discretion in granting modification in this case based on employer's evidence of suitable alternate employment. Section 22 of the Act provides that upon his or her own initiative, or upon the request of any party, on the ground of a change in condition or because of a mistake in a determination of fact, the factfinder may, at any time prior to one year after the denial of claim or the last payments of benefits, reconsider the terms of any award or denial of benefits. *See* 33 U.S.C. §922. The standard for determining disability is the same during Section 22 modification proceedings as it is during the initial adjudicatory proceedings under the Act. *See generally Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428, 431 (1990). Specifically, if claimant establishes a *prima facie* case of total disability by demonstrating that he is unable to perform his pre-injury work, the burden shifts to employer to establish the availability of suitable alternate employment. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1992).

In the present case, on modification employer attempted to establish through the testimony of its vocational expert, Nancy Favalora, that because suitable alternate work was available, the administrative law judge erred in finding that claimant was totally disabled.[1] Ms. Favalora testified at the modification hearing that she first met claimant in March 1988[2] and that after interviewing him and reviewing the medical reports and depositions of Drs. Cracco, Brown, Antin, and Parnell, she was able to identify 16 available positions which she felt claimant could perform. Tr. 18-45. Based on this vocational evidence, the administrative law judge determined that employer had met its burden of establishing suitable alternate employment by demonstrating the availability of at least 9 jobs which claimant was able to perform. The jobs which the administrative law judge found suitable for claimant paid between $3.75 and $4.65 per hour and included assembly type work, work as a baggage claim clerk, driving positions, cashier work, shipping and receiving clerk and supervisor positions, and a management trainee position.

Modification is available based on a change in economic condition, *see Fleetwood v.*

[1]Employer did not dispute that claimant was unable to perform his pre-injury job.

[2]Ms. Favalora testified that employer first contacted her in November 1987, three months after the initial hearing.

Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985), or where a finding is based on a mistake in fact. The testimony of Ms. Favolora establishing the availability of suitable alternate employment provides substantial evidence from which the administrative law judge could rationally conclude that his finding in his original Decision and Order that claimant was totally disabled was based on a mistaken determination of fact. Thus, even if, as claimant asserts, employer did not establish that claimant's economic condition changed since Ms. Favalora conceded that the same or similar type jobs would have been available at the time of the initial hearing, that fact is immaterial given the scope of modification. Modification need not be based solely on newly discovered evidence which was not reasonably available or ascertainable at the time of the initial hearing. *See Jourdan v. Equitable Equipment Co.,* 25 BRBS 317 (1992)(Dolder, J., dissenting).[3] Rather, Section 22 was intended to displace traditional notions of *res judicata* and to allow the factfinder "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially 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, 461-462, *reh'g denied*, 391 U.S. 929 (1968). Inasmuch as reopening the case on the facts presented was necessary to render justice under the Act, we hold that the administrative law judge did not abuse his discretion in granting modification in this case. *See McCord v. Cephas,* 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); *Jourdan*, 25 BRBS at 325. The administrative law judge's Decision and Order on Modification finding that claimant was partially rather than totally disabled is, accordingly, affirmed.

Employer's assertion that the administrative law judge erred in denying its motion to modify the award under Section 8(c)(21) to one for a scheduled injury also must fail. Employer argues that the administrative law judge erred in relying on *Long v. Director, OWCP*, 767 F.2d at 1578, 17 BRBS at 150, to conclude that disability should be awarded based on the site of the injury rather than the resulting disability. Employer reasons that *Long* is contrary to the language in Section 8 of the Act, 33 U.S.C. §908, which provides that compensation is to be paid for disability. Employer further asserts that *Long* is contrary to the United State Supreme Court's recognition in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 273 (1980), that the character of the disability determines the method of compensation and to numerous other state and federal court cases. Employer's arguments have previously been considered and are rejected for the reasons stated in *Andrews v. Jeffboat, Inc.*, 23 BRBS 169, 173 (1990). Contrary to employer's assertions, the Section 8(c) schedule is not applicable where, as here, the actual injury is to a part of the body not specifically listed in the schedule, even if the injury results in disability to a part of the body which is listed. *See, e.g., Grimes v. Exxon Company, U.S.A.*, 14 BRBS at 576.

Although employer also argues on appeal that there is no evidence in the record sufficient to support the administrative law judge's finding that claimant had a hip injury rather than a leg injury, we disagree. In the Decision and Order Denying Respondent's Motion to Modify Original Award at 2-3, the administrative law judge sequentially discussed the medical evidence. He noted that

[3]An administrative law judge abuses his or her discretion when he or she fails to consider new evidence submitted in a modification hearing. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174, 176 (1988).

claimant initially complained of pain in his left groin which caused a limp which Dr. Cracco attributed to a strained muscle in the area extending from the lumbar region to the thigh. The administrative law judge further noted that Dr. Brown, employer's own expert, found claimant to have pain in his hip area, observed that claimant walked with a limp and demonstrated a slight restriction of motion in his left hip and tenderness in his left thigh, and initially attributed these findings to a strain of the abductors of the left hip. Finally, the administrative law judge stated that although Dr. Brown was unable to explain claimant's complaints by his final visit, he noted resisted motion of claimant's left hip. As the aforementioned testimony provides substantial evidence to support the administrative law judge's finding that claimant sustained a hip rather than a leg injury, his determination that claimant sustained a non-scheduled injury compensable under Section 8(c)(21) is affirmed. *See McDevitt v. George Hyman Construction Co.*, 14 BRBS 677 (1982).

Accordingly, the administrative law judge's Decision and Order on Modification and the Decision and Order Denying Respondent's Motion to Modify Original Award are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge