BRB No. 96-1574

EARL LAWRENCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVENS SHIPPING COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

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

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (93-LHC-0213) of Administrative Law Judge John C. Holmes 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 are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On January 16, 1991, claimant suffered an injury during the course of his employment with employer when the loading truck he was driving was struck by another vehicle, causing his knees to bang and twist against the dashboard. Claimant was initially diagnosed with a neck and back strain and contusions of the right shoulder and knee. Employer voluntarily paid claimant temporary total disability compensation from January 29, 1991 through April 4, 1991, 33 U.S.C. §908(b), and temporary partial disability compensation from April 4, 1991 through April 16, 1991. 33 U.S.C. §908(e). Claimant returned to work in May 1991 and worked until March 1992, when he stopped due to

complaints of pain.

Dr. Friedman, an orthopedic surgeon, diagnosed a torn meniscus and on June 8, 1992, claimant underwent a left knee arthroscopy and partial medial meniscectomy. In September 1992, Dr. DuBois opined that claimant suffered from myositis, an inflammation of the paraspinal muscles, possibly due to an aggravation of claimant's previous back problems. In January 1993, Dr. DuBois diagnosed myofascial pain syndrome, and opined that claimant is permanently and totally disabled. Claimant, who suffered previous injuries to his back and left wrist, sought permanent total disability benefits under the Act due to continued pain in his back and knee.

In his initial Decision and Order, issued on March 21, 1994, the administrative law judge found that claimant suffered a work-related knee injury, and awarded permanent partial disability compensation under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). Finding that no medical rating had been given for claimant's left knee impairment, the administrative law judge rated it as 10 percent, 5 percent based on pain and 5 percent due to surgery, and awarded benefits accordingly. However, the administrative law judge discredited claimant's complaints of back pain and found that claimant did not sustain a work-related back injury. Thereafter, claimant and employer filed petitions for modification. Claimant based his petition on the June 8, 1994 report of Dr. Friedman, wherein that physician opined that claimant had a 17 percent impairment rating to the left lower extremity. Additionally, claimant urged the administrative law judge to award permanent total disability benefits, based on the 1996 opinion of Dr. DuBois that claimant suffered from myofascial pain syndrome and fibromyalgia, and the finding of total disability of a Social Security Administration (SSA) administrative law judge. Citing *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), employer sought reversal of the administrative law judge's permanent partial disability award, arguing that the administrative law judge improperly based his causation finding on the true doubt rule.

In his Decision and Order on modification, the administrative law judge reaffirmed his Section 8(c)(2) award for a 10 percent permanent partial disability to claimant's left leg. In so doing, the administrative law judge rejected Dr. Friedman's report, finding that it was "suspiciously taken" two months after the initial decision and added no new information relative to claimant's left knee injury. With regard to claimant's back injury contention, the administrative law judge rejected the findings of the SSA administrative law judge as not binding. The administrative law judge further rejected Dr. DuBois's opinion that claimant was totally disabled as a result of his back condition, as Dr. DuBois could not directly relate this condition to claimant's work injury. Lastly, the administrative law judge declined to reverse his permanent partial disability award, stating that it was not based on the "true doubt" rule. Thus, the administrative law judge denied both claimant's and employer's petitions for modification.

On appeal, claimant contends that the administrative law judge erred in failing to increase claimant's permanent partial disability rating under Section 8(c)(2) from 10 to 17 percent. In addition, claimant contends that the administrative law judge erred in not

finding that claimant suffers from a work-related permanently disabling back condition. Employer responds, urging affirmance of the administrative law judge's Decision and Order on modification.

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*, 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, 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 record from the prior hearing is thus also before the administrative law judge. *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). *See also Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, No. 96-272, 1997 U.S. Lexis 3864 (U.S. June 19, 1997). 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. For the reasons that follow, we vacate the administrative law judge's denial of claimant's petition for modification and remand the case to the administrative law judge for reconsideration.

We first address claimant's contentions regarding the administrative law judge's Section 8(c)(2) award. In support of his petition for modification, claimant submitted, *inter alia*, the June 8, 1994, report of Dr. Friedman. That report, which was based on Dr. Friedman's examination of claimant on May 2, 1994, states that claimant suffered from a 17 percent impairment to the left lower extremity and that no further treatment was planned for claimant's left knee at that time. In his decision on modification, the administrative law judge did not consider this report new evidence as Dr. Friedman had treated claimant prior to the initial decision. Rather, after stating that this report was "suspiciously taken" two months after the initial decision was issued, the administrative law judge found that his 10 percent left leg disability rating was "as reasonable as Dr. Friedman's" conclusion. *See* Decision and Order at 4.

Although credibility determinations are generally within the purview of the administrative law judge, we hold that it was patently unreasonable for the administrative law judge to cast suspicion on Dr. Friedman's medical report merely because it was authored two months after the entry of the administrative law judge's initial Decision and Order, and then to substitute his own medical conclusion for that of a medical examiner. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert.*

denied, 440 U.S. 911 (1979). Moreover, in his decision on modification, the administrative law judge did not fully discuss the evidence of record, including the additional reports of Dr. Friedman, submitted by claimant, which, if credited, establish that claimant has developed further problems with regard to his left knee.[1] An administrative law judge's failure to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion is a violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). *See, e.g., Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993)(Brown, J., dissenting on other grounds); *Cotton v. Newport News Shipbuilding & Dry Dock* Co., 23 BRBS 380 (1990). Accordingly, we vacate the administrative law judge's decision regarding the extent of claimant's impairment to his left lower extremity, and we remand the case for the administrative law judge to fully consider whether claimant has suffered a change in condition with regard to his left knee in light of all the evidence of record, including the reports of Dr. Friedman.

With regard to claimant's back injury, the administrative law judge on modification relied on the May 16, 1996, report of Dr. DuBois in reaffirming his previous decision that claimant did not suffer a work-related totally disabling back condition, as this condition could not be connected to the claimant's January 16, 1991, work accident. In his initial decision, however, the administrative law judge found that claimant suffered from some type of back condition. *See* Decision and Order - Granting Benefits at 7. In his Decision and Order on modification, the administrative law judge did not consider whether claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). In order to establish his *prima facie* case for invocation of the statutory presumption, claimant is not required to prove that his working conditions in fact caused the harm; under Section 20(a), it is presumed in the absence of substantial evidence to the contrary that the harm demonstrated is related to the proven work events. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Sam v. Loffland Bros.*, 19 BRBS 288 (1987). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). If the administrative law judge finds that the

[1]In his May 14, 1996 report, Dr. Friedman recommended that claimant undergo a second arthroscopy and partial meniscectomy.

Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In his Decision and Order on modification, the administrative law judge, without specifically addressing Section 20(a) of the Act, gave great weight to Dr. DuBois' statement in his May 16, 1996 report that it was difficult to determine whether claimant's myofascial disorder and fibromyalgia can be directly related to the January 16, 1991 work accident, and thus concluded that Dr. DuBois' diagnosis could not be rationally connected to claimant's work accident. As set forth *supra*, however, claimant need not prove that his condition is work-related in order to invoke the Section 20(a) presumption. *See Sinclair*, 23 BRBS at 178. Moreover, Dr. DuBois additionally stated in his May 16, 1996 report, as well as his earlier report of September 8, 1992, that claimant's January 16, 1991 accident may have aggravated his previous back problems. *See* Cl. Ex. 17. This statement supports a finding of a causal nexus.

In addition, in his Decision and Order on modification, the administrative law judge incorporated his earlier finding that, assuming claimant had a back condition, employer rebutted the presumption, a conclusion which is not supported by the record. In his initial decision, the administrative law judge based his conclusion on findings that Dr. McAdams could not relate claimant's degenerative spondylosis to claimant's work accident, and that Dr. Thompson, in his March 13, 1991 report, related claimant's condition to his prior automobile accidents. *See* Decision and Order - Granting Benefits at 7. A review of Dr. Thompson's March 13, 1991 report reveals that the physician diagnosed mild degenerative arthritis, and did *not* relate claimant's back condition to previous car accidents. *See* Emp. Ex. 7. Moreover, neither Dr. Thompson's report nor Dr. McAdams' x-ray report, *see* Cl. Ex. 14, is sufficient to establish rebuttal, as neither report severs the causal link between claimant's work accident and his back condition. *See, e.g., Bridier*, 29 BRBS at 89-90; *Konno v. Young Brothers, Ltd.*, 28 BRBS 57, 62 (1994). Accordingly, we vacate the administrative law judge's conclusion that claimant's back condition is not causally related to his employment with employer; on remand, the administrative law judge must consider whether claimant is entitled to invocation of the Section 20(a) presumption of causation with regard to claimant's back injury, and if so, whether employer has established rebuttal of the presumption.[2] If the administrative law judge finds a causal relationship between claimant's back condition and his work injury, he must then consider the nature and extent of claimant's disability. We note that if the administrative law judge finds permanent partial

[2]Claimant concedes that the SSA administrative law judge's decision is not binding on the administrative law judge herein, but argues that this decision should be given proper weight. How much weight, if any, should be given to this decision is within the sole discretion of the administrative law judge. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

disability due to a loss of wage-earning capacity as a result of claimant's back condition under Section 8(c)(21), claimant may receive a concurrent award for permanent partial disability under Section 8(c)(2) for his knee injury.[3] *See Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

Accordingly, the Decision and Order of the administrative law judge on modification is vacated, and the case is remanded to the administrative law judge for further consideration in accordance with the decision herein.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]If the administrative law judge determines that claimant's back condition has resulted in permanent total disability, claimant cannot receive a concurrent permanent partial disability award under Section 8(c)(2). The Board and the courts have held that an award under the schedule contained in Section 8(c)(1)-(19), 33 U.S.C. §908(c)(1)-(19), may not coincide with an award for total disability because total disability presupposes the loss in all wage-earning capacity. *See Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1953); *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992).