BETTY JEAN JOHNSON	)	BRB No. 96-1679
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERMARINE, USA	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL ADMINISTRATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
BETTY JEAN JOHNSON	)	BRB No. 93-0953
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERMARINE, USA	)	
	)	
and	)	
	)	
SIGNAL MUTUAL ADMINISTRATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Final Order Denying Petition for Modification of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Herbert J. Chestnut, Marietta, Georgia, for claimant.

Edward T. Brennan (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Final Order Denying Petition for Modification (92-LHC-2052) 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.* (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 crew leader/laminator mixer, injured her right knee on October 18, 1990, during the course of her employment. She was thereafter terminated on April 25, 1991, for excessive absenteeism. In his Decision and Order - Award of Benefits, issued January 5, 1993, the administrative law judge awarded claimant permanent total disability compensation from October 18, 1990, and continuing, found employer had violated Section 49, 33 U.S.C. §948a, of the Act, ordered claimant reinstated to her former position and fined employer $5000. The Board affirmed the administrative law judge's decision, but remanded the case to the administrative law judge for consideration of employer's petition for modification. *Johnson v. Intermarine, USA*, BRB No. 93-0953 (Apr. 6, 1996)(unpublished). The Board's decision was affirmed by the United States Court of Appeals for the Eleventh Circuit. *Intermarine, USA v. Johnson,* No. 96-8675 (11th Cir. Apr. 28, 1997). On August 1, 1996, the administrative law judge issued his Final Order, denying employer's petition for modification.

On appeal, employer challenges the administrative law judge's denial of its motion for reconsideration. Claimant responds, urging affirmance; claimant's attorney has also filed a fee petition for work he performed before the Board subsequent to its decision in BRB No. 93-0953.

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 (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). 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).

Employer initially contends that the administrative law judge erred in failing to consider the medical evidence it proffered to support its petition for modification. We agree. In his decision, the administrative law judge stated that there was no new medical evidence submitted by employer. However, although the medical evidence submitted by employer consisted of the opinions of physicians who had previously examined claimant, the new reports were based upon examinations and treatment rendered to claimant subsequent to the original hearing. It is an abuse of discretion for the administrative law judge not to consider new evidence submitted in a modification proceeding. *See generally Williams v. Nicole Enterprises*, 19 BRBS 66 (1986). Moreover, in considering a motion for modification, the administrative law judge is permitted to consider the record from the prior hearing. *See Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). The administrative law judge erred, therefore, in failing to reconsider both the previously submitted evidence and the post-hearing medical reports offered into evidence by employer. *See Aerojet-General Shipyards, Inc*., 404 U.S. at 256. An administrative law judge's failure to 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., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Accordingly, we vacate the administrative law judge's findings that no new medical evidence has been submitted by employer, and we remand the case for the administrative law judge to fully consider all the evidence of record regarding the issue of claimant's present physical condition.

Next, employer contends that the administrative law judge erred in refusing to consider its evidence regarding the availability of suitable alternate employment. The standard for determining disability is the same during Section 22 modification proceedings as it is during initial adjudicatory proceedings under the Act. *See Vasquez*, 23 BRBS at 428. Thus, where, as in the instant case, 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); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 874 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See Turner*, 661 F.2d at 1031, 14 BRBS at 156. If employer establishes the availability of suitable alternate employment , claimant nevertheless can prevail in her quest to establish total disability if she demonstrates that she diligently tried and was unable to secure such employment. *See Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *Roger's Terminal & Shipping Corp.*, 784 F.2d at 687, 18 BRBS at 79 (CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In the instant case, we hold that the administrative law judge erred in declining to consider employer's evidence regarding the availability of suitable alternate employment because employer did not establish that the jobs identified were not previously available. Employer may attempt to modify a total disability award by offering evidence regarding the availability of suitable alternate employment, *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994), and the labor market survey conducted by employer is dated after the initial award of benefits in this case. Where employer presents evidence of employment opportunities, the administrative law judge must apply the standards for establishing the availability of suitable alternate employment. *See generally Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989); *Blake v. Ceres, Inc.*, 19 BRBS 219 (1987). Accordingly, on remand, the administrative law judge must fully consider employer's evidence regarding the availability of suitable alternate employment and render a finding consistent with law.[1]

Lastly, claimant's counsel has requested a supplemental fee of $2,512.50, representing 16.75 hours of services at $150 per hour, for services allegedly rendered before the Board in connection with a motion for reconsideration in BRB No. 93-0953. Counsel was previously awarded $2,593.75 in connection with the defense of employer's appeal in BRB No. 93-0953. Employer has filed objections to counsel's supplemental fee petition averring that it did not file a motion for reconsideration in BRB No. 93-0953. A review of the Board's records regarding BRB No. 93-0953 reveals no petition for reconsideration filed on behalf of employer nor a decision on reconsideration issued by the Board. Counsel's supplemental request for a fee is thus denied.[2]

[1]Contrary to the administrative law judge's statement, employer is not required to prove a material change in condition in order to establish modification pursuant to Section 22. *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

[2]We note that requests for services rendered subsequent to September 13, 1996, may be related to counsel's work regarding employer's appeal in BRB No. 96-1679.

Accordingly, the administrative law judge's Final Order Denying Petition for Modification is vacated, and the case is remanded for further consideration consistent with this opinion. BRB No. 96-1679. The supplemental fee request is denied. BRB No. 93-0953.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge