BRB No. 97-1371

TERRY W. CAMPBELL	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION	)	
	)	
and	)	
	)	
RICHARD FLAGSHIP SERVICES INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Section 22 Modification of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr., and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Section 22 Modification (94-LHC-822) of Administrative Law Judge Richard K. Malamphy 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).

On May 2, 1987, claimant sustained a broken cheek bone and compressed jaw bone during the course of his employment with employer while taking a front cover off of a boat davit casing. Claimant thereafter was diagnosed with a cervical strain and vascular headaches; in October 1992, Dr. Suter, claimant's treating physician, limited claimant to part-time light-duty work with no heavy lifting and no use of hand-held equipment. Employer voluntarily paid claimant temporary total disability compensation, 33 U.S.C. §908(b), and temporary partial disability compensation, 33 U.S.C. §908(e), for various periods of time between May 1987 and January 1993. Claimant was terminated by employer on January 9, 1993, due to excessive absenteeism. Thereafter, claimant filed a claim for benefits under the Act seeking temporary total disability compensation. In addition, claimant alleged that employer violated the provisions of Section 49 of the Act, 33 U.S.C. §948a, by terminating him.

In his initial Decision and Order, the administrative law judge found that employer did not violate Section 49 of the Act when it terminated claimant. Next, having found that claimant established causation and a *prima facie* case of total disability, the administrative law judge determined that employer established the availability of suitable alternate employment by virtue of claimant's return to a light-duty position with employer, and, as claimant was terminated for violating a company rule, the administrative law judge denied claimant's claim for temporary total disability compensation. Claimant filed a motion for reconsideration with the administrative law judge, contending that the administrative law judge failed to consider whether he was entitled to temporary partial disability benefits. In an order issued on June 12, 1995, the administrative law judge, relying on *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), denied claimant's motion. Claimant thereafter filed a motion for modification alleging both a change in condition and a mistake of fact and seeking permanent total disability compensation.

In his decision addressing claimant's motion for modification, the administrative law judge found that a mistake of fact had not been made regarding the nature and extent of claimant's condition, and that Dr. Suter's 1996 deposition was insufficient to compel modification based on a change in condition, since Dr. Suter testified that claimant's condition had not changed in the previous three or four years. The administrative law judge further found that Dr. Suter's testimony regarding the extent of claimant's disability was inconsistent. Thus, the

administrative law judge denied claimant's motion for modification.

On appeal, claimant contends that the issue of permanent total disability was not specifically before the administrative law judge in the initial hearing, and that, based on Dr. Suter's 1994 and 1996 opinions, claimant is now permanently and totally disabled from any employment. Claimant additionally alleges a mistake of fact, asserting that the administrative law judge's initial finding that claimant was capable of performing the light duty position at employer's facility was in error. Employer responds, contending that the administrative law judge's findings are supported by substantial evidence, and that the matter on modification is barred by the doctrine of *res judicata*.

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 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). *See also Rambo*, 515 U.S. at 291, 30 BRBS at 1 (CRT). Moreover, the applicable legal standards are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act.[1] *See Rambo*, 515 U.S. at 296, 30 BRBS at 3 (CRT); *Delay v. Jones*

[1]Employer's argument that this matter should be barred by the doctrine of *res judicata* is rejected, as it is well-settled that Section 22 displaces traditional notions

Washington Stevedoring Co., 31 BRBS 197 (1998); *Vasquez*, 23 BRBS at 431.

We initially reject claimant's assertion that the administrative law judge erred in concluding that claimant did not establish a change in his condition. In rendering his decision, the administrative law judge found that Dr. Suter, in his 1996 deposition, stated that claimant's condition had not changed in the previous three or four years. *See* Cl. Ex. 1A at 14. The administrative law judge thus concluded that claimant failed to establish a change in his condition based upon this physician's testimony. As the administrative law judge's finding regarding this issue is rational and supported by substantial evidence, it is affirmed. *See generally General Dynamics Corp. v. Director, OWCP,* 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

We agree with claimant, however, that the administrative law judge erred in his evaluation of the evidence of record when discussing claimant's assertion that a mistake in fact had occurred. In his initial decision, the administrative law judge, in discussing the extent of claimant's disability, acknowledged that claimant's light-duty post-injury job involved disassembling broken lamp guards by using a hand-held electrical drill and lifting heavy drop cords, even though claimant was restricted by Dr. Suter from both heavy lifting and the use of hand-held equipment. *See* Emp. Exs. 2 at 35, 6 at 16. The administrative law judge further noted claimant's uncontradicted testimony that he had trouble performing this light-duty position, and that he suffered from headaches due to the lifting, bending and stooping which he was required to perform. *See* Decision and Order at 10, 17. The administrative law judge concluded, however, that since claimant filed a grievance with regard to his having to work outside his restrictions but failed to attend the hearing, and since claimant never complained about the physical requirements of this position to his supervisor, the light-duty position which claimant was performing post-injury constituted suitable alternate employment since claimant was able to perform this job for employer and the job did not constitute sheltered employment.

In support of his motion for modification, claimant submitted into evidence the 1996 deposition of his treating physician, Dr. Suter. In October 1992, Dr. Suter released claimant to work part-time, three to four hours a day, three days a week, in a light-duty position, with the restrictions of no heavy lifting and no use of hand-held

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of *res judicata*. *See Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984), *citing Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968).

equipment. *See* Emp. Exs. 2 at 35, 6 at 16. Claimant subsequently complained of headaches and physical discomfort. As a result of these ongoing complaints, Dr. Suter re-evaluated claimant's condition and opined, in a September 1994 report, that claimant's vascular headaches rendered him disabled from any work, either sedentary or physically active. Cl. Ex. 2A. Dr. Suter deposed in 1994 that claimant was physically unable to handle employer's light duty position because of his headaches and the medication he was taking, that claimant is not fitted for any job in the regular market due to his physical complaints and lack of education, and that claimant is permanently disabled from any type of employment. Emp. Ex. 6 at 23-24. At his 1996 deposition, Dr. Suter reaffirmed his 1994 opinion, commenting only that prior to 1994 he had released claimant for part-time work with physical limitations. Cl. Ex. 1A at 14.

The administrative law judge, on modification, determined that Dr. Suter's testimony was not sufficient to compel modification since, he concluded, Dr. Suter has rendered inconsistent opinions regarding the extent of claimant's disability. Contrary to the administrative law judge's statement, Dr. Suter's testimony is not inconsistent; rather, Dr. Suter's change of opinion in 1994 regarding claimant's ability to work, and his restatement of that opinion in 1996, takes into consideration his ongoing treatment of claimant and reflects the progression of this diagnoses of claimant's condition subsequent to his work-injury. Accordingly, the administrative law judge's finding that Dr. Suter's testimony is inconsistent is vacated, and the case is remanded for the administrative law judge to re-consider the totality of the evidence of record regarding the issue of claimant's ability to perform the light-duty position at employer's facility.[2] *See* 5 U.S.C. §557(c)(3)(A); 33 U.S.C. §919(d);

[2]We note that the administrative law judge on modification additionally failed to consider the May 6, 1994, report of Dr. Dvorak, which is supportive of Dr. Suter's opinion regarding the extent of claimant's disability. On Remand, the administrative law judge must address this report in considering this issue. In addition, if claimant is not totally disabled, the administrative law judge must determine whether claimant is entitled to partial disability benefits, either permanent or temporary, as a claim for total disability benefits includes any lesser degree of disability. *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985). In this regard, if claimant's job at employer's facility was suitable, an award of partial disability must be based on a comparison of claimant's average weekly wage and his wage-earning capacity in the job at employer's facility; since claimant lost this post-injury job due to his violation of a company rule, under *Brooks*, if the job was suitable, employer does not bear the renewed burden of proving suitable alternate employment after the termination. However, any loss in wage-earning capacity in that job continues. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10, 17 (1980).

Cotton v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 380 (1990).[3]

Thus, in view of the fact that this position was part-time and as employer was making voluntarily payments of temporary partial disability benefits, it appears that claimant may have had a loss in wage-earning capacity in the alternate job provided, and the administrative law judge must consider whether claimant remains entitled to partial disability benefits. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

[3]If, on remand, the administrative law judge determines that claimant suffers from a compensable permanent disability, he must address whether employer is entitled to Section 8(f) relief.

Accordingly, the Decision and Order Denying Section 22 Modification is vacated, and the case is remanded for reconsideration consistent with the opinion herein.[4]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[4]Employer's request for Section 26 penalties was made in a response brief, not a cross-appeal, and thus, such a request is not ordinarily considered on appeal. *See Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). In any event, employer's request is rejected, as neither the Board nor an administrative law judge has the authority to award fees and costs under Section 26 of the Act. *See Boland v. Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993); *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997).