BRB No. 00-0498

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| RICHARD FELD | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| GENERAL DYNAMICS CORPORATION | ) | DATE ISSUED: Aug 22, 2000 |
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| Self-Insured Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-In-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Modifying Award and Order Granting Motion for Reconsideration of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Modifying Award and Order Granting Motion for Reconsideration (99-LHC-991) 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back in November 1981 when he fell 20 feet down a ladder in the

course of his employment. He worked off and on for two years, and then was forced to quit due to pain. In the initial adjudication of claimant's claim, Administrative Law Judge Di Nardi found that claimant established he could not return to his usual work due to his back injury, and that employer did not offer any evidence of suitable alternate employment. Thus, claimant was awarded continuing permanent total disability benefits. 33 U.S.C. §908(a). In addition, employer was awarded relief from continuing liability for compensation pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In 1996 or 1997, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a change in claimant's economic condition. *See* 33 U.S.C. §908(f)(4). Employer attempted to establish that claimant was operating a wood-working business out of his home, or alternatively, that it established suitable alternate employment by virtue of a labor market survey dated September 11, 1998. Administrative Law Judge Holmes (the administrative law judge) found that employer did not establish that claimant is operating a wood-working business out of his home, but he did find that employer established the availability of suitable alternate employment through its labor market survey, and thus a change in claimant's economic condition. He further found that claimant has an earning capacity of $168.40, as discounted to 1983 wage rates. The administrative law judge also found that there was a mistake in a determination of fact in Judge Di Nardi's decision, in that the medical evidence in existence at the time of the first decision does not establish that claimant was incapable of any employment. Thus, the administrative law judge modified claimant's permanent total disability award to one for permanent partial disability as of the date of the labor market survey.

On appeal, claimant contends the administrative law judge erred in modifying his award, as employer's evidence is legally insufficient to establish a change in his economic condition and as the administrative law judge erred in finding a mistake in fact in Judge Di Nardi's decision. Neither employer nor the Director, Office of Workers' Compensation Programs, has responded to this appeal.[1]

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[1]By Order dated March 31, 2000, the Board advanced this case on its docket. By Motion dated May 15, 2000, claimant moved to preclude employer from participating in his appeal, as employer did not file a response brief within the allotted time. Claimant's motion is moot, as employer has not attempted to file a brief. 20 C.F.R. §802.218(a).

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. *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 30 BRBS 1 (CRT)(1995). 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., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997)*; Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990). The Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment.[2] *See, e.g., Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guaranty Ass'n,* 28 BRBS 1, 8 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52 (1989); *Blake v. Ceres Inc.,* 19 BRBS 219, 221 (1987). An employer, however, is not entitled to modification as a matter of course merely because it offers evidence of suitable alternate employment. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). The evidence offered must demonstrate that there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. *Compare Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998) *with Delay*, 31 BRBS at 204, *Moore,* 23 BRBS at 52, and *Blake*, 19 BRBS at 220-221. 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). 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). Section 22 is not intended as a method for a party "to correct errors or misjudgments of counsel." *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 26, 14 BRBS 636, 640 (1st Cir. 1982)*; see also Lombardi*, 32 BRBS at 86-87; *Delay*, 31 BRBS at 204.

Claimant first contends the administrative law judge erred in finding a change in his

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[2]Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo I,* 515 U.S. at 296, 30 BRBS at 3 (CRT); *Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197 (1998); *Vasquez,* 23 BRBS at 431.

economic condition by virtue of employer's 1998 labor market survey. In this regard, claimant maintains the administrative law judge erred in finding this case distinguishable from *Lombardi v. Universal Maritime Service Corp.,* 32 BRBS 83 (1998). In *Lombardi*, the administrative law judge found that the claimant established his inability to perform his usual work due to his injury, and that he was entitled to permanent total disability benefits as employer did not offer any evidence of suitable alternate employment. The employer specifically declined the offer to leave the record open post-hearing so that it could introduce vocational evidence. The employer then sought modification and introduced a labor market survey into evidence. The administrative law judge found that the employer did not establish a change in the claimant's economic condition due to its decision not to offer evidence of suitable alternate employment at the initial proceeding.

The Board affirmed the administrative law judge's decision denying modification, holding that the employer did not establish a change in the claimant's economic condition from the time the first award was entered, but merely now possessed vocational evidence that it tactically decided not to develop at the first hearing. *Lombardi*, 32 BRBS at 86-87. The Board explained that Section 22 is not intended for a basis for trying issues that could have been raised in the initial proceeding or for correcting litigation tactics, citing *Woodberry*, 673 F.2d at 25, 14 BRBS at 639, and *McCord,* 532 F.2d at 1377, 3 BRBS at 37. The Board further stated that the case did not present the situation wherein the employer was prevented from submitting evidence of suitable alternate employment at the first hearing; rather, its litigation strategy was to attempt to establish that claimant was not disabled at all. *Lombardi*, 32 BRBS at 87.

The administrative law judge in the instant case found *Lombardi* distinguishable, and thus not controlling in the case before him, on three bases. First, he found that, along with its labor market survey, employer submitted medical evidence supportive of a finding that claimant can work, whereas no such medical evidence was offered in *Lombardi*.[3] Second, unlike the employer in *Lombardi*, employer herein did not overtly decline to offer vocational evidence at the initial proceeding, but was merely silent on the issue of suitable alternate employment. Lastly, and in conjunction with his second finding, the administrative law judge found that employer had no real incentive to mitigate claimant's award to partial at the time it was first adjudicated, as it was awarded Section 8(f) relief, and as the assessment formula under Section 44 of the 1972 Act, 33 U.S.C. §944 (1982) (amended 1984), did not take into account the number of claims any one employer placed into the Special Fund. The administrative law judge found, however, that after the 1984 Amendments and its implementing regulations were promulgated, employer had an incentive to mitigate the total

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[3]The administrative law judge noted, however, that employer was not attempting to modify the award based on an improvement in claimant's physical condition.

award to partial as its assessment is now directly tied to its use of the Special Fund. *Compare* 33 U.S.C. §944 (1982) *with* 33 U.S.C. §944 (1998) and 20 C.F.R. §702.146 (1984) *with* 20 C.F.R. §702.146 (2000). The administrative law judge stated that until the amendment was enacted, employer was not aware of the true ramifications of its decision not to introduce evidence of suitable alternate employment.

We reverse the administrative law judge's finding that employer established a change in claimant's economic condition, as the administrative law judge's attempts to distinguish *Lombardi* are not legally supportable. The medical evidence employer submitted on modification, although supportive of a finding that claimant is not physically incapable of any work, does not establish a change in claimant's economic condition. Some of the medical evidence relied on by Judge Di Nardi similarly did not demonstrate claimant's total incapacity for work,[4] but claimant was found totally disabled based on the absence of evidence of suitable alternate employment. The presence of medical evidence supportive of claimant's ability to work, moreover, begs the question of whether employer is entitled to rely on a 1998 labor market survey to establish a change in claimant's economic condition.

Turning to this issue, therefore, we hold that employer's mere silence as to its litigation strategy, as opposed to the more overt action of the employer in declining to submit evidence in *Lombardi*, is an insufficient ground by which the cases can be distinguished. As the Board explained in *Lombardi*, 32 BRBS at 86, Section 22 is not intended to be a back door for retrying or litigating an issue which could have been raised in the initial proceedings. *See McCord*, 532 F.2d at 1377, 3 BRBS at 371; *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999). Moreover, parties are not "permitted to invoke §22 to correct errors or misjudgments of counsel, nor to present a new theory of the case... ." *Woodberry*, 673 F.2d at 25, 14 BRBS at 639; *see also Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT) (11th Cir. 1985). The administrative law judge recognized that silence may be a waiver in appropriate circumstances, but found that the pre-1984 Amendments assessment formula of Section 44 of the Act provided employer no incentive to offer evidence of suitable alternate employment at the initial proceeding, and thus employer's silence should not be viewed as a waiver in this case.

This finding is erroneous for several reasons. First, employer was not assured at the time of the initial proceeding that it would be awarded relief pursuant to Section 8(f). In order to reduce its liability to the fullest extent possible in the event that Section 8(f) relief was not awarded, employer should have presented evidence of suitable alternate employment. Instead, employer relied merely on medical evidence that claimant was less than totally physically incapacitated to attempt to establish that claimant was partially disabled. This is just as clearly a litigation strategy as if the employer relied solely on

[4]Dr. Zeppieri, the physician relied upon by Judge Di Nardi, released claimant to work on December 22, 1983, with restrictions against lifting more than 40 pounds, repetitive bending, and climbing ladders. CXS 14, 15, 18 (1984).

medical evidence that the claimant was physically capable of performing his pre-injury employment to establish the absence of any disability at all, as did the employer in *Lombardi*.

Moreover, contrary to the administrative law judge's finding, there is no extenuating circumstance here that would permit a "correction" of this litigation strategy by way of a Section 22 proceeding. In *Delay*, 31 BRBS at 204-205, the employer sought to introduce evidence of suitable alternate employment following the claimant's introduction of new medical evidence concerning his physical condition. The Board held that the administrative law judge's exclusion of employer's vocational evidence was in error, as its evidence could not have been developed earlier as the medical evidence on which it was based was not previously available. The Board thus remanded the case for the administrative law judge to determine whether there was a mistake in fact or change in condition regarding the extent of the claimant's disability. In *Lucas*, 28 BRBS at 6-8, the Board held that the administrative law judge erred in summarily denying the modification petition of the Louisiana Insurance Guaranty Association (LIGA), which became liable for the claim upon the insolvency of employer and its carrier after the initial adjudication. LIGA sought to introduce evidence of suitable alternate employment in the Section 22 proceeding, even though none had been introduced by the employer/carrier in the initial proceeding. The Board held that the administrative law judge erred in denying modification on the bases that LIGA was bound by the prior carrier's stipulations and that it submitted no new evidence. The Board remanded the case for the administrative law judge to conduct a modification proceeding under Section 22.

In *Lucas,* LIGA was not involved in the initial proceedings or the decision to enter stipulations on disability. Moreover, stipulations are subject to modification. *See generally Ramos v. Global Terminal & Container Services, Inc.,* BRBS , BRB No. 99-0134 (Oct. 7, 1999). In contrast, in the instant case, as in *Lombardi*, the employer now possesses evidence of the kind it chose not to develop at the initial hearing, and there are no circumstances that would have prevented it from submitting evidence of suitable alternate employment at the initial hearing. *Cf. Jensen*, 33 BRBS at 97; *Moore,* 23 BRBS at 49; *Blake*, 19 BRBS at 219 (evidence of suitable alternate employment offered at initial hearing was found insufficient). Moreover, employer offers no evidence or argument that claimant's employability has changed since the time of the initial proceeding; there is no indication, for example, that evidence of suitable alternate employment was not offered before because no jobs were available. Thus, there is no evidence to suggest that employer's decision to now present evidence is the result of an actual change in claimant's economic position, rather than just a change in employer's prosecution of the case. Given these facts, *Lombardi* cannot be distinguished.

Finally, we note that the administrative law judge's use of the change in the Section 44 assessment formula as a basis for permitting modification rests on a change in law.[5] Although the change in law itself is not the basis for the modification petition, *cf. Ring v. I.T.O. Corp. of Virginia*, 31 BRBS 212 (1998); *Ryan v. Lane & Co.*, 28 BRBS 132 (1994) (recalculations of awards not permitted under Section 22 based on new case law), the passage of more than 10 years between the 1984 Amendments and employer's modification petition certainly forecloses a finding that it is in the interest of justice to modify claimant's award, assuming, *arguendo,* that this is a proper basis for modification. *See generally McCord*, 532 F.2d at 1377, 3 BRBS at 371. Under the administrative law judge's rationale, employer should have been aware of the ramifications of its decision not to offer evidence of suitable alternate employment soon after the enactment of the 1984 Amendments in September 1984. In sum, therefore, we find no valid basis for distinguishing this case from *Lombardi*. Employer herein, as in *Lombardi*, offered only evidence of the type it chose not to offer at all in the initial proceeding. There are no extenuating circumstances which permit employer to correct its initial litigation strategy, and we therefore reverse the administrative law judge's finding that employer established a change in claimant's economic condition.

Claimant also contends that the administrative law judge erred in finding a mistake in fact in Judge Di Nardi's decision. The administrative law judge found that the medical evidence in existence at the time of the first decision does not establish that claimant was incapable of any employment, and thus that Judge Di Nardi erred in awarding claimant total disability benefits. We reverse this finding as well.

As discussed above, Judge Di Nardi's award of total disability was premised on the absence of suitable alternate employment and not on claimant's total physical incapacitation. Judge Di Nardi relied primarily on the "well-reasoned" opinion of Dr. Zeppieri, who released claimant to work on December 26, 1983, with restrictions against lifting more than 40 pounds, repetitive bending, and climbing ladders. 1985 Decision and Order at 4, 6; CXS 14,

[5]We note that employer appears not to have alleged the change in the assessment formula as a basis for claiming modification.

15, 18 (1984).[6] Moreover, that claimant is found to be capable of working in some capacity does not render a claimant partially disabled in the absence of suitable alternate employment:

- Once [claimant] established that he had sustained a work-related injury which prevented him from returning to his pre-injury employment -- a proposition which is undisputed -- he remained "totally" disabled until his employer establishes the availability of suitable alternative employment.

*Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1041, 31 BRBS 84, 88(CRT) (2[d] Cir. 1997). Thus, there was no mistake in fact either in terms of Judge Di Nardi's interpretation of the medical evidence regarding claimant's physical capabilities, or in his ultimate finding of fact, *i.e.,* that claimant is totally disabled.

Accordingly, the administrative law judge's Decision and Order Modifying Award and Order Granting Motion for Reconsideration are reversed, and the award of permanent total disability benefits is reinstated.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]Judge Di Nardi also noted the opinion of Dr. Barrera that claimant was totally disabled from his back injury until he undergoes corrective surgery, EX 5 (1984), and he gave less weight to the opinion of Dr. Goodman that claimant has a 20 percent impairment to his back. EX 1 (1984).

JAMES F. BROWN
Administrative Appeals Judge