BRB No. 97-1241

ROBERT CARTER	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: _____
	)	
v.	)	
	)	
	)	
TRAILER MARINE TRANSPORT CORPORATION	)	
	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein, Miami, Florida, for claimant.

Robert L. Teitler (Walton, Lantaff, Schroeder & Carson), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (93-LHC-1565) of Administrative Law Judge Donald W. Mosser 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 the 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 January 19, 1987, claimant injured his shoulder, his right leg, and

purportedly his neck while working for employer. Employer voluntarily paid claimant temporary total disability compensation for various time periods, and in addition scheduled permanent partial disability compensation for a 14 percent loss of use of the right leg under Section 8(c)(2) and (19) of the Act, 33 U.S.C. §908(c)(2) and (19). Claimant sought additional compensation under the Act. In a Decision and Order issued November 20, 1991, Administrative Law Judge E. Earl Thomas concluded that, as claimant's shoulder and neck injuries were temporary and had resolved rather quickly, the only permanent impairment he suffered was that involving his right knee. Inasmuch as claimant conceded his ability to perform alternate work as a self-employed auto mechanic, the administrative law judge determined that claimant was not totally disabled and was thus limited to an award under the schedule. Crediting the 14 percent impairment rating of Dr. Burgess, claimant's most recent treating physician, the administrative law judge found that claimant was not entitled to any additional compensation beyond that which employer had voluntarily paid him. This decision was subsequently affirmed by the Board. *Carter v. Trailer Marine Transport Corp.*, BRB No. 92-0707 (Nov. 5, 1992)(unpublished).

Claimant thereafter requested modification under Section 22 of the Act, 33 U.S.C. §922, asserting a change in his condition subsequent to the issuance of the initial Decision and Order based on additional injuries to his left knee and back as a result of his altered gait due to his prior right knee injury. In addition, following surgery on both knees on February 24, 1995, claimant alleged that he suffered increasing back pain while using a cane or crutches after his surgery, and as a result, was unable to perform his previous alternate work.

On May 8, 1997, Administrative Law Judge Donald W. Mosser issued a Decision and Order granting modification.[1] Relying upon the opinions of Drs. Reilly and Blumberg, he concluded that claimant successfully established a change in his condition in that subsequent to the issuance of the initial Decision and Order, he suffered injuries to his left knee and back which were the natural and unavoidable result of his altered gait due to his right knee injury. Based on the medical opinions of Drs. Levitt and Reilly that claimant can perform only sedentary work and Dr. Blumberg's opinion that claimant was unable to perform any work as of January 11, 1995, the administrative law judge further found that claimant established a *prima facie* case of total disability due to his knee and back condition. The administrative law judge further determined that claimant was not entitled to additional disability compensation prior to January 11, 1995, when Dr. Blumberg examined him and

[1]There were two hearings held on modification in this case; one before Administrative Law Judge Robert G. Mahony on April 12, 1995, and one before Judge Mosser on April 4, 1996.

found that he was unable to do any work due to his back problems. Crediting Dr. Blumberg's opinion that claimant's condition had not yet reached maximum medical improvement, the administrative law judge thus awarded claimant temporary total disability compensation commencing January 11, 1995,[2] and various past and future medical expenses for treatment rendered by Drs. Reilly and Blumberg pursuant to Section 7 of the Act, 33 U.S.C. §907.[3]

Employer appeals, contending that the administrative law judge erred as a matter of law in determining that claimant's modification claim was not barred by the doctrine of *res judicata* because the issue of claimant's entitlement to compensation for his left knee and lower back was ripe and was litigated in the initial proceeding. Employer asserts that the back and left knee conditions claimed in the modification proceedings are the same conditions claimed in the initial proceedings and thus, regardless of the evidence that claimant has produced on the issue of causation, there has been no change in claimant's condition between the initial claim and the modification claim. Claimant responds, urging affirmance, arguing that no claim for compensation had been made for injuries to his left knee and back prior to the modification proceeding, and that, in any event, the administrative law judge

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[2]Regarding the left knee injury, the administrative law judge found that claimant suffered a 12 percent permanent impairment to the left knee, but noted that claimant was precluded from receiving permanent partial disability benefits under the schedule during the period when he was receiving total disability compensation.

[3]Claimant also sought medical benefits for the chiropractic treatment rendered by Dr. Gorenberg, which were denied by the administrative law judge. Claimant argues in his response brief that he is entitled to medical benefits for Dr. Gorenberg's chiropractic treatment. We will not address this argument, as it should have been raised in a timely filed cross-appeal. *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989).

rationally concluded based on the medical opinions of Drs. Reilly, Blumberg, and Gorenberg that claimant had established a change in his condition.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification of a prior decision is permitted at any time prior to one year after the last payment of compensation or the rejection of the claim, based on a mistake in 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, 115 S.Ct. 2144 (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.,* 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Finch v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 196 (1989). A party requesting modification due to a change in condition has the burden of showing the change in condition. *See*, *e.g., Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984). Additionally, 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 initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

We affirm the administrative law judge's decision to grant claimant's motion for modification. Employer argues initially that the administrative law judge erred as a matter of law in determining that claimant's claim for modification was not barred by the doctrine of *res judicata* because the issue of claimant's entitlement to compensation for injuries to his left knee and back had previously been litigated and held non-compensable in the initial proceedings. Initially, we note that modification proceedings under Section 22 of the Act are intended to replace traditional notions of *res judicata* and thus allow the fact-finder to consider newly submitted evidence or to further reflect on the evidence initially submitted. *Duran v. Interport Maintenance Corp.,* 27 BRBS 8 (1993); *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984). Thus, contrary to employer's contention, the doctrine of *res judicata* does not bar consideration of the issues presented in claimant's motion for modification.

In any event, employer's argument that the administrative law judge erred in finding that claimant demonstrated a change in his condition because the lower back and left leg conditions claimed on modification are the same conditions for which compensation had been claimed in the initial proceedings is without merit. The record reflects that the claim for compensation in the initial proceeding was limited to claimant's neck, shoulder, and right knee injuries. In contrast, in his petition for modification, claimant asserted that subsequent to the entry of the original Decision, he began to experience progressively worsening back pain which

two doctors, Drs. Gorenberg, a chiropractor, and Dr. Blumberg, an orthopedic surgeon, related to aggravation of his pre-existing back condition by his altered gait resulting from his 1987 right knee injury. In addition, claimant asserted that in February 1995, he was diagnosed as having a meniscus tear and degenerative thinning of the patellar articular cartilage of the left knee which Dr. Reilly, one of Dr. Blumberg's associates, felt was secondary to his work-related right knee injury because claimant would tend to put more weight on the knee that was least traumatized by the accident. CX 10 at 15.

In weighing the medical evidence regarding claimant's condition, the administrative law judge rationally found that inasmuch as Drs. Reilly and Blumberg both determined that claimant's left knee and back could have been caused by his altered gait resulting from his work-related right knee injury, claimant was entitled to invocation of the Section 20(a) presumption of the Act, 33 U.S.C. §920(a). *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). He also properly determined that as employer had not proffered any medical evidence to rebut the Section 20(a) presumption, claimant successfully established that his left knee and back conditions are work-related. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. America v. U.S. Dept. of Labor,* 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 1253 (1993). Based on Dr. Blumberg's assessment that claimant was unable to perform any work due to his back condition as of January 11, 1995, and while he was recovering from his November 17, 1995, back surgery, the administrative law judge awarded him temporary total disability compensation as of January 11, 1995. The administrative law judge rationally determined based on the evidence submitted on modification that claimant established a change in his condition under Section 22. *See Wynn,* 21 BRBS at 290. Employer's arguments that the administrative law judge erred in entertaining claimant's motion and in granting modification are thus rejected, and the award of disability compensation and medical expenses, which is not otherwise challenged, is affirmed.

Accordingly, the administrative law judge's Decision and Order granting claimant's motion for modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge