BRB Nos. 97-1169
and 98-0193

DOMINIC LOMBARDI	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order, Order Denying Motion to Reconsider, and Denial of Motion for Modification of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, Order Denying Motion to Reconsider, and Denial of Motion for Modification (96-LHC-1089) of Administrative Law Judge Ralph A. Romano 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 30, 1994, while working for employer as a holdman, claimant was injured when he slipped and fell. Claimant subsequently underwent surgery to repair a compound fracture of his right elbow sustained as a result of this work accident. Claimant has not worked since the time of his injury. Employer voluntarily paid claimant compensation under the Act for temporary total disability from June 1, 1994 to October 27, 1995. 33 U.S.C. §908(b). Claimant thereafter sought permanent total disability benefits for injuries to his right elbow, right shoulder, and back arising out of his May 30, 1994 accident.

At the formal hearing, the parties stipulated that claimant sustained work-related injuries to his right elbow, right shoulder and chest; employer disputed, however, the work-relatedness of claimant's back condition. *See* Tr. at 5-7. While conceding that the work injury resulted in a permanent impairment to claimant's right elbow, employer contended that such impairment did not prevent claimant from performing his usual work as a holdman. In support of this contention, employer defended the case at the hearing and in its written closing argument solely on the theory that claimant could perform his pre-injury work. In this regard, employer's counsel stated at the hearing that if the administrative law judge were to rule that claimant could not perform his usual work, employer would then seek to perform vocational rehabilitation and to present evidence of suitable alternate employment on modification. Moreover, in response to the administrative law judge's inquiry as to whether employer wished to leave the record open for vocational evidence, employer's attorney responded that it would not be appropriate to leave the record open at that time. *See* Hearing Tr. at 7-8.

In his Decision and Order, the administrative law judge determined that claimant established, on the basis of his work-related right elbow impairment alone, that he is unable to perform his usual job. As employer had presented no evidence of suitable alternate employment, the administrative law judge awarded claimant temporary total disability benefits from June 1, 1994 to January 17, 1995, and permanent total disability benefits thereafter. Employer thereafter moved for reconsideration, requesting that the administrative law judge address the issues set forth in employer's closing argument that the administrative law judge did not reach in his Decision and Order. The administrative law judge summarily denied employer's Motion for Reconsideration on April 21, 1997.

Following an appeal to the Board of the administrative law judge's Decision and Order and Order Denying Motion to Reconsider, BRB No. 97-1169, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, with the administrative law judge; the Board subsequently granted employer's request to remand the case for the administrative law judge to consider its motion for modification, subject to reinstatement on the Board's docket. In support of its request for modification based on a change in condition,

employer submitted a new medical report by Dr. Nehmer and vocational evidence regarding the availability of suitable alternate employment. In his Order denying employer's request for modification, the administrative law judge ruled that there was no support for a change in condition under Section 22 of the Act. Specifically, the administrative law judge found that the new medical report of Dr. Nehmer fails to establish a change in claimant's condition, and that employer could not show a change in condition with evidence of suitable alternate employment which was being submitted for the first time on modification, when employer had specifically declined at the initial hearing to present vocational evidence in support of an alternate defense that claimant could perform suitable alternate employment.

Employer thereafter appealed the administrative law judge's decision on modification and sought reinstatement of its earlier appeal. BRB No. 98-0193. By Order dated November 28, 1997, the Board reinstated employer's appeal of the administrative law judge's initial Decision and Order and Order Denying Motion to Reconsider, BRB No. 97-1169, and consolidated both appeals for purposes of decision.

On appeal, employer contends that the administrative law judge, in his initial Decision and Order, erred in finding that claimant is unable to return to his previous work and in failing to reach all the issues set forth in employer's closing argument. Employer additionally contends that the administrative law judge erred in summarily denying its motion for reconsideration. Lastly, employer appeals the administrative law judge's denial of modification, contending that employer had demonstrated a change in condition. Claimant responds, urging affirmance of the administrative law judge's decisions.

We first address employer's contention that the administrative law judge erred in finding, in his initial Decision and Order, that claimant is incapable of performing his usual employment duties. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In finding that claimant had established a *prima facie* case of total disability, the administrative law judge credited claimant's testimony regarding his job duties with employer[1] and Dr. Corollo's medical opinion over the testimony of Stanley Lysick,

[1]The administrative law judge, while acknowledging based on Mr. Lysick's testimony that some of a holdman's functions have changed since claimant last worked, noted that claimant's description of his warehouse duties was not contradicted by Mr. Lysick's testimony.

employer's safety and health manager, and Dr. Nehmer. The administrative law judge credited Dr. Corollo on the basis of his status as claimant's treating orthopedic surgeon, and relied on Dr. Corollo's opinion in concluding that claimant is unable to perform his usual occupational duties with employer. Dr. Corollo, in deposition testimony, stated that claimant's right elbow impairment prevents him from performing his usual longshore work. *See* CX 8 at 20, 44-45, 48-49, 51-52, 55-56. It is well-established that an administrative law judge is not bound to accept the opinion of any particular witness but rather, is entitled to weigh the credibility of all witnesses, including doctors, and draw his own inferences from the evidence. *See 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); *Anderson*, 22 BRBS at 20. In this instance, the administrative law judge could rationally credit claimant's description of the range of job duties required in his employment with employer. Moreover, the credited medical opinion of claimant's treating orthopedic surgeon constitutes substantial evidence in support of the administrative law judge's determination that claimant's right elbow impairment prevents him from performing his usual employment duties. We hold, accordingly, that the administrative law judge committed no error in relying on Dr. Corollo's opinion, in conjunction with claimant's testimony regarding his job requirements, rather than the testimony of Dr. Nehmer and Mr. Lysick,[2] to find that claimant established a *prima facie*

[2]In light of our holding that Dr. Corollo's opinion and claimant's testimony, credited by the administrative law judge, constitute substantial evidence in support of a finding of total disability, employer's specific contentions regarding the administrative law judge's evaluation of the testimony of Dr. Nehmer and Mr. Lysick need not be addressed at length. We note, however, that the inferences drawn from the evaluation of these witnesses' testimony are neither inherently incredible nor patently unreasonable, and, thus, are affirmed. *See generally Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978); *Todd Shipyards Corp. v.*

case for total disability. *See Anderson,* 22 BRBS at 22; *Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989); *Clophus v. Amoco Production Co.,* 21 BRBS 261 (1988).[3] We therefore affirm the administrative law judge's determination that claimant cannot return to his usual employment duties with employer and, thus, has established a *prima facie* case of total disability.

Donovan, 300 F.2d 741 (5th Cir. 1962).

[3]Our review of the administrative law judge's Decision and Order reveals that the administrative law judge properly assigned the burden of establishing the nature and extent of disability to claimant. *See* Decision and Order at 4-5, 7. The absence of a citation to the decision in *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT)(1994), does not reflect an erroneous application of the burden of proof scheme on the part of the administrative law judge in the case at bar.

Employer next assigns error to the administrative law judge's failure, both in the initial Decision and Order and on reconsideration,[4] to address each of the arguments advanced by employer in its closing argument. We conclude, however, that none of the issues raised by employer required resolution by the administrative law judge. An administrative law judge is required to resolve all factual and legal issues necessary to an award. *See* 33 U.S.C. §919(d); 5 U.S.C. §557. *See generally Marko v. Morris Boney Co.*, 23 BRBS 353, 362 (1990). Because the administrative law judge found that claimant is totally disabled by his elbow injury alone, he did not need to address claimant's shoulder and back conditions insofar as the disability award was concerned. Findings regarding the shoulder and back conditions would have been necessary only if there was a dispute regarding medical benefits under Section 7 of the Act, 33 U.S.C. §907. Employer, however, has identified no issue concerning contested past or future medical expenses. Moreover, as noted by claimant, claimant elected not to appeal the administrative law judge's decision not to reach issues regarding claimant's shoulder and back conditions. Accordingly, we hold that the administrative law judge committed no reversible error in declining to address these issues.

We next address employer's contention that the administrative law judge erred in denying its request for modification based on a change in claimant's condition. 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). 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

[4]We review the administrative law judge's denial of reconsideration to determine if there was an abuse of discretion. *Duran v. Interport Maintenance Corp.,* 27 BRBS 8, 13 (1993). In light of our conclusion, *infra,* that the issues raised both in employer's closing argument and its motion for reconsideration did not require resolution, we hold that the administrative law judge acted within his discretion in summarily denying reconsideration.

BRBS 428 (1990).[5]

We reject employer's contention that the holding of the Supreme Court in *Rambo* that a disability award may be modified pursuant to Section 22 where there is a change in the employee's wage-earning capacity compels the conclusion that employer has demonstrated such a change in condition in the case at bar. 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. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1, 8 (1994); *Blake v. Ceres Inc.*, 19 BRBS 219, 221 (1987). Such evidence, however, must demonstrate that there was, in fact, a change in the claimant's economic condition from the time of the award to the time modification is sought. In the present case, employer has presented no evidence that suggests that there was, in fact, a change in claimant's economic condition from the time of the administrative law judge's initial award of benefits to the time modification was sought. In this regard, we note that, at the initial hearing, employer's counsel made a tactical decision not to argue that claimant was capable of performing suitable alternate employment and unequivocally declined the opportunity to hold the record open for submission of evidence regarding such employment. *See* Hearing Tr. at 7-8. Employer now seeks to present for the first time, on modification, evidence of suitable alternate employment in support of its allegation of a change in claimant's condition.

[5]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,* 515 U.S. at 296, 30 BRBS at 3 (CRT); *Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 204 (1998); *Vasquez,* 23 BRBS at 431.

On the facts presented, employer has not demonstrated a change in claimant's economic condition from the time of the administrative law judge's award to the time employer requested modification; rather, employer simply now possesses evidence of suitable alternate employment which it did not choose to develop at the time of the hearing. It is well-established that 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 v. Cephas,* 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); *Delay,* 31 BRBS at 204. Nor are parties "permitted to invoke §22 to correct errors or misjudgments of counsel, nor to present a new theory of the case...." *General Dynamics Corp. v. Director, OWCP [Woodberry],* 673 F.2d 23, 25, 14 BRBS 636, 639 (1st Cir. 1982). *See also Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155 (CRT)(11th Cir. 1985). In the case at bar, employer has set forth no indication as to why, in preparation for the hearing, it did not develop vocational evidence in support of an alternative defense that claimant could perform suitable alternate employment, in the event he should be found unable to return to his usual work.[6] We note, in this regard, that inconsistent and alternative claims or defenses are a well-accepted feature of legal practice, *see, e.g., Verderane,* 772 F.2d at 778-779, 17 BRBS at 157 (CRT). Thus, in contrast to previous cases decided by the Board, we are not presented here with the existence of circumstances which excuse the employer from submitting evidence of suitable alternate employment at the initial hearing. *Cf., Delay,* 31 BRBS at 205 n. 14; *Lucas,* 28 BRBS at 1; *Blake,* 19 BRBS at 219. We conclude, therefore, that, on the particular facts of this case, employer's vocational evidence fails to show a change in claimant's economic condition and, thus, does not support Section 22 modification.

We further hold that employer has identified no reversible error in the administrative law judge's determination that the new medical report of Dr. Nehmer fails to demonstrate a change in claimant's physical condition. The administrative law judge rationally concluded that the newly submitted medical report does not reflect any change in claimant's medical condition between the time of the award and the time of the modification request that would support modification. *See generally Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983). Accordingly, we affirm the administrative law judge's denial of employer's request for Section 22 modification.

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[6]Employer asserts on appeal that claimant refused to cooperate with its attempt at vocational assessment. *See* Brief in Support of Petitioners' Petition for Review at 26, n. 4. The record indicates, however, that employer first attempted such an assessment in June 1997, subsequent to the issuance of the administrative law judge's Decision and Order.

Lastly, we address claimant's counsel's request for an attorney's fee for work performed before the Board. Claimant's attorney has submitted a petition for an attorney's fee before the Board for services rendered between May 27, 1997 and January 26, 1998, for $1,762.50, representing 11.75 hours of services at an hourly rate of $150. Employer has not filed an objection to claimant's fee request. We therefore award counsel the requested fee of $1,762.50, which we view as reasonable for the necessary work done before the Board in defending against employer's appeals. *Mikell v. Savannah Shipyard Co.,* 24 BRBS 100 (1990), *aff'd on recon.,* 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell,* 14 F.3d 58 (11th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order, Order Denying Motion to Reconsider, and Denial of Motion for Modification are affirmed. Claimant's counsel is awarded a fee of $1,762.50 for work performed before the Board, payable directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge