BRB No. 01-0266

WILLIE B. WILKES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: Nov. 15, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Decision of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Willie B. Wilkes, Moss Point, Mississippi, *pro se*.

Paul B. Howell (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Granting Employer's Motion for Summary Decision (00-LHC-2286) of Administrative Law Judge Richard D. Mills 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). In an appeal by a claimant who is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law; if they are they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a "cable man" pulling wires for employer when he was injured on December 19, 1989. He strained his neck and back when he slipped and fell while pulling cable. He was treated conservatively and released with a five percent impairment and light duty limitations. He sought benefits under the Act and, in a decision dated October 20, 1994,

was awarded permanent partial disability benefits based on the difference between his post-injury wage-earning capacity of $170, which was based on suitable alternate employment paying minimum wage, and his pre-injury average weekly wage of $376.40. Claimant appealed this decision to the Board, but the decision was administratively affirmed on September 12, 1996.[1]

Subsequently, claimant began work as a school counselor on July 12, 1999, with a salary of $31,627.06 per year. As a result, employer filed a petition for modification based on a change in claimant's economic condition. *See* 33 U.S.C. §922. On June 13, 2000, employer filed a Requests for Admission, to which claimant failed to respond. Since it was undisputed that claimant was employed at a higher salary, employer filed a Motion for Summary Decision. Claimant responded, contending that his appeal of the average weekly wage finding was still pending and thus that he would not participate in the proceeding before the administrative law judge.

The administrative law judge initially found that his earlier average weekly wage determination was final. He also found that claimant sustained a change in economic condition for the better, as he was hired as a school counselor on July 12, 1999, earning $31,627.06 per year. He thus granted employer's motion for summary decision. The administrative law judge determined that claimant's entitlement to permanent partial disability benefits ceased as of July 12, 1999.

Claimant, without legal representation, appeals this decision, primarily contending that the administrative law judge erred in his determination of claimant's average weekly wage and his post-injury wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision.

Section 22, 33 U.S.C. §922, provides the only means for changing otherwise final compensation orders. Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. A request for modification need not be formal in nature. It simply must be a writing which indicates an intention to seek further compensation. *See Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989). While it is not disputed that employer filed a petition for modification based on a change in claimant's

[1]Claimant's appeal was administratively affirmed on September 12, 1996, pursuant to Public Law 104-304 (Omnibus Appropriations for Fiscal Year 1996).

economic condition, we hold that claimant's response to employer's motion for summary decision also constituted a request for modification based on a mistake in fact inasmuch as claimant specifically urged the administrative law judge to consider awarding benefits based on a higher average weekly wage. Contrary to the administrative law judge's statement, his previous calculation of claimant's average weekly wage is not "*res judicata*," inasmuch as Section 22 displaces traditional notions of *res judicata*. *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1981). The fact-finder has broad discretion to correct any 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); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968).

In the present case, however, any error by the administrative law judge in failing to reconsider his determination of claimant's average weekly wage is harmless, as there is no basis for finding a mistake in fact in his initial determination. Claimant was originally employed by Ingalls Shipbuilding as an accountant, a position he held with increasing levels of responsibility for around fifteen years. However, he subsequently was laid off, and was rehired as a material expediter in 1986. After another lay off, claimant was hired as a cable puller in 1987, but was again laid off. He was called back to work as a cable puller on November 12, 1989 and worked in this position until the injury of December 12, 1989.

Under Section 10, 33 U.S.C. §910, computation of average annual earnings must be made pursuant to subsection (c) if subsection (a) or (b) cannot be reasonably and fairly applied. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The administrative law judge is accorded broad discretion in determining claimant's annual earning capacity under Section 10(c). *See, e.g., Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). In his original Decision and Order, the administrative law judge found that Section 10(a), 33 U.S.C. §910(a), could not be applied to determine claimant's pre-injury average weekly wage as claimant did not work substantially the whole of the year preceding the injury. Applying Section 10(c), 33 U.S.C. §910(c), the administrative law judge found that claimant's hourly rate at the time of injury, $9.41, multiplied by a 40 hour week yields an average weekly wage of $376.40. This finding is rational and supported by the evidence. *See generally Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999). In a letter dated August 13, 2000, claimant urged the administrative law judge to consider the amount of overtime he worked in 1988 in determining his average weekly wage prior to the December 1989 injury. However, the administrative law judge rationally considered claimant's wages for the position he returned to in November 1989 as a cable puller, in which claimant worked 40 hour weeks with no overtime. Moreover, claimant's salary at a different position in 1984 is not relevant

to the inquiry of claimant's average weekly wage at the time of the December 1989 injury.[2] Therefore, we hold that the administrative law judge did not err in failing to modify his previous determination of claimant's average weekly wage.

With regard to claimant's current post-injury wage-earning capacity, we affirm the administrative law judge's finding that claimant has had an increase in his wage-earning capacity, and thus affirm the granting of employer's Motion for Summary Decision as it is based on undisputed facts. Section 8(c)(21), 33 U.S.C. §908(c)(21), is designed to compensate injured employees for the amount of wage-earning capacity lost as a result of the injury. Thus, physical impairment alone will not entitle a claimant to benefits; rather, economic disability must be shown. *See* *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968); *Freiwillig v. Triple A South*, 23 BRBS 371 (1990). Under Section 8(c)(21), compensation is based on the difference between claimant's average weekly wage at the time of injury, determined under Section 10, 33 U.S.C. §910, and his wage-earning capacity after the injury, determined under Section 8(h), 33 U.S.C. §908(h). Under Section 8(h), claimant's actual earnings equal his wage-earning capacity unless he shows that such earnings do not fairly and reasonably represent his earning capacity.

In the present case, the administrative law judge found that claimant is currently earning $31,627.06, and that this job would have paid $24,582.80 at the time of injury in 1989, or $472.75 weekly. *See Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986). As this amount exceeds claimant's pre-injury average weekly wage, the administrative law judge found that claimant no longer has a loss in wage-earning capacity and denied further permanent partial disability benefits. *See Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995). There is no evidence that these actual earnings do not represent claimant's wage-earning capacity; claimant has not shown that he cannot perform his job as a guidance counselor or that there is a risk of his losing this job. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990). Moreover, whether claimant would have been qualified to perform this job at the time of his work-related injury is not relevant to a consideration of claimant's current wage-earning capacity. Therefore, as the administrative law judge's findings are supported by substantial evidence, we affirm the denial of continuing permanent partial

[2]Likewise, the salary for a position that claimant was considered for, but was not employed at, is not relevant in determining claimant's annual earning capacity at the time of injury.

disability benefits.

Accordingly, the Order on Motion for Summary Decision of the administrative law judge denying continuing benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge