JOSEPH M. DODD	)	BRB Nos. 93-2342
	)	and 93-2342A
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
JOSEPH M. DODD	)	BRB No. 95-1617
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:______________
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Theodor P. von Brand, and appeal of the Decision and Order on Second Remand of Lawrence E. Gray, Administrative Law Judges, United States Department of Labor.

William S. Sands, Jr. (Duncan & Hopkins, P.C.), Alexandria, Virginia, for claimant.

James M. Mesnard and Jonathan H. Walker (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and the Order Denying Motion for Reconsideration of Administrative Law Judge Theodor P. von Brand, and employer appeals the Decision and Order on Second Remand (84-LHC-1289) of Administrative Law Judge Lawrence E. Gray 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).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has a complex procedural history, and this is the third time it has come before the Board. To reiterate, claimant injured his back while attempting to lift a manhole cover on October 12, 1981, during the course of his employment. Employer voluntarily paid temporary total disability benefits from October 13, 1981, through May 23, 1982, when claimant failed to report to his light duty assignment at employer's facility. Claimant filed a claim for continuing disability benefits, and employer controverted the claim.

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[1]By Order dated January 31, 1996, the Board dismissed claimant's cross-appeal, BRB No. 1617A, at his request.

In a decision dated December 20, 1985, Administrative Law Judge Bradley rejected the parties' average weekly wage stipulation, determined that the Section 20(a), 33 U.S.C. §920(a), presumption had been rebutted, and concluded, citing Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), that claimant's unreasonable refusal to undergo back surgery broke the causal link between claimant's injury and any disability he may have. Consequently, he denied benefits. The Board vacated the decision, stating that the administrative law judge erred in rejecting the stipulation without giving notice to the parties, improperly applying Section 20(a), and using Section 7(d)(4) to sever the connection between claimant's injury and his employment before determining whether claimant is entitled to any compensation.[2] Accordingly, the Board vacated Judge Bradley's decision and remanded the case for further consideration of causation and of whether claimant's refusal to undergo surgery was unreasonable and unjustified. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

On August 30, 1990, Administrative Law Judge Gray[3] issued his decision on remand. He found that employer failed to rebut the Section 20(a) presumption and that claimant's refusal to undergo surgery was not unreasonable or unjustified. However, the administrative law judge denied benefits because he found that claimant sustained no loss of wage-earning capacity as employer established the availability of suitable alternate employment by offering claimant a position in its facility at his pre-injury wage. The Board vacated Judge Gray's decision and remanded the case for him to consider all the medical evidence in analyzing claimant's ability to perform light duty work and to determine whether the position at employer's facility constitutes suitable alternate employment. Further, the Board stated that Judge Gray must give the parties the opportunity to present evidence concerning claimant's average weekly wage as of the date of his injury. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 91-126 (May 24, 1993) (unpublished).

Prior to issuance of the Board's 1993 decision, claimant filed a motion pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking modification of Judge Gray's 1990 decision. Claimant did not notify the Board of this action. The case was assigned to Administrative Law Judge von Brand, and he held a formal hearing on the matter on March 20, 1992. In his decision, issued July 30, 1993, Judge von Brand found that the facts establish that claimant has been permanently totally disabled since May 1982, but he denied benefits because claimant sought only temporary total disability benefits at the modification hearing. For the same reason, Judge von Brand denied reconsideration.

On remand from the Board's 1993 decision, in a decision issued on May 18, 1995, Judge

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[2]The Board held that Section 7(d)(4) is properly used to suspend payments of benefits if an employee unreasonably refuses medical treatment. This section may be invoked if employer establishes that claimant has unreasonably refused to undergo medical treatment and claimant fails to establish circumstances which justify his refusal. The section, however, may not be invoked to terminate payments made prior to employer's raising the issue. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245, 248-249 (1989).

[3]Judge Bradley had retired.

Gray accepted the parties' original stipulation concerning claimant's average weekly wage, discussed the medical evidence of record, credited the opinions of Drs. Bourgard and Hipol, and concluded that claimant is unable to perform even light duty work. Consequently, he awarded claimant permanent total disability benefits from May 23, 1982, the date claimant's condition reached maximum medical improvement. Because of claimant's numerous other medical problems, Judge Gray awarded employer Section 8(f), 33 U.S.C. §908(f), relief.

Claimant appeals and employer cross-appeals Judge von Brand's decision on the motion for modification. BRB Nos. 93-2342/A. Employer appeals Judge Gray's decision on second remand. BRB No. 95-1617. Each responds to the other accordingly.

Initially, claimant contends Judge von Brand erred in denying benefits on the motion for modification after finding claimant to be permanently totally disabled. Employer responds, urging affirmance of the ultimate denial of benefits and arguing that claimant is attempting to raise on appeal an issue he specifically withdrew at the modification hearing.[4] Additionally, employer argues in its cross-appeal that it was not in the interest of justice to hold a modification hearing in this case because doing so duplicated the process which was already in progress. Moreover, it challenges Judge von Brand's fact-finding which ignored previous findings, *i.e.*, on witness credibility, of Judges Bradley and Gray.

To reopen an award under Section 22, the moving party must allege and prove a mistake of fact or a change in conditions, economic or physical. The administrative law judge must then determine whether modification would render justice under the Act. *Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). Although it is not necessary to assign proceedings on modification to the administrative law judge originally assigned to the case, the case is best reviewed by the original administrative law judge if there are decisive witness credibility issues involved. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). In this case, Judge Bradley, who conducted the original hearing, was not available to consider the case on either remand or modification. Judge Gray, to whom the case was assigned on remand, reviewed the case on the record only. Judge von Brand, who denied employer's request to transfer the modification proceedings to Judge Gray, held a hearing on the motion for modification, accepted new evidence, and rendered a decision based on his interpretation of the evidence.

As employer argues, Judge von Brand's refusal to transfer the case to Judge Gray fractured this case so that proceedings have run concurrently before two administrative law judges. Nonetheless, we need not address the parties' contentions with regard to Judge von Brand's credibility determinations and findings, as Judge Gray's decision on second remand is dispositive of the merits of this case.

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[4]Claimant specifically withdrew any claim for permanent benefits, stating that he sought only an award of temporary total disability benefits on modification. Tr.II at 19-20.

In its appeal of Judge Gray's decision on second remand, employer contends that Judge Bradley's original decision regarding the applicability of Section 7(d)(4) is supported by substantial evidence. Claimant states in response that he did not refuse to undergo surgery. We reject employer's Section 7(d)(4) argument, as that issue was raised and addressed in the Board's first decision and is considered the law of the case. *Dodd*, 22 BRBS at 249-250; *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

Employer also asserts that Judge Gray's award of permanent total disability benefits is not in accordance with law. On second remand, Judge Gray re-evaluated the medical evidence of record. Specifically, he credited the opinions of Drs. Bourgard and Hipol, both of whom believed surgery would be necessary before claimant could return to work, but because of other medical problems, the risks of surgery outweighed the possible rewards. Decision and Order on Second Remand at 3-4. Additionally, he discredited Dr. Markham's 1982 release for claimant to return to light duty work, categorizing it as a "manipulative tactic engaged in for the physician's potential benefit." *Id.* at 4. Therefore, based on the opinions of Drs. Bourgard and Hipol, Judge Gray determined that claimant cannot return to even light duty work and is permanently totally disabled. *Id.*; *see also* Cl. Exs. 2, 6; Bourgard dep. at 36-37.

Employer concedes that claimant's condition is permanent. However, it argues it established the availability of suitable alternate employment, thereby making claimant's disability, at most, partial. We reject this contention, as the administrative law judge found that both Drs. Bourgard and Hipol credibly stated that claimant is not physically able to return to any work.[5] As in the case before us, when an administrative law judge finds, based on medical opinions, that a claimant cannot perform any employment, the employer has not established the availability of suitable alternate employment. *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Therefore, we affirm Judge Gray's decision awarding permanent total disability benefits from the date of maximum medical improvement, as the award is supported by substantial evidence.

Accordingly, Judge von Brand's decision on modification is vacated, and Judge Gray's decision on second remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[5]Dr. Bourgard testified that without surgical intervention, claimant could do further neurological damage to his back by returning to work. Cl. Ex. 6; Bourgard dep. at 37.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge