BRB Nos. 94-137,
94-137A and 95-1438

RAYMOND S. GORDON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Denying Employer's Motion for Reconsideration and Granting Claimant's Motion for Correction of Fact, and Decision and Order on Section 22 Modification of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

D.A. Bass Frazier (Huey & Leon), Mobile, Alabama, for claimant.

Douglas L. Brown (Armbrect, Jackson, DeMouy, Crowe, Holmes & Reeves, L.L.C.), Mobile, Alabama, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits and employer appeals the Order Denying Employer's Motion for Reconsideration and Granting Claimant's Motion for Correction of Fact, and the Decision and Order on Section 22 Modification (92-LHC-490) 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). 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 October 23, 1986, claimant sustained an injury to his back and buttocks while working for employer. Claimant ceased working for employer after the accident, and held

several other short-term positions between June 1988 and May 1991, including employment as a repairman in a bicycle shop, and a maintenance man in a trailer park. In May 1991, claimant began working as a pants presser in the Eglin Air Force Base laundry, where he is currently employed. Employer voluntarily paid claimant temporary total disability benefits from October 23, 1986 to June 21, 1990, and temporary partial disability benefits from June 22, 1988 to September 8, 1990. Claimant sought additional disability compensation under the Act, alleging that he sustained a loss in his wage-earning capacity due to the effects of the subject work injury and his resultant depression, as well as past and future medical benefits.

In his Decision and Order, the administrative law judge found that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer failed to establish rebuttal of that presumption by establishing that claimant's subsequent work and recreational activities were intervening causes of his disability. The administrative law judge also determined that claimant established a *prima facie* case of total disability, and that his current employment in the Eglin Air Force Base laundry constitutes suitable alternate employment which reasonably represents his post-injury wage-earning capacity. Accordingly, claimant was awarded temporary total disability compensation from October 23, 1986 until December 12, 1988, the stipulated date of maximum medical improvement, and permanent partial disability compensation thereafter, based upon the difference between claimant's stipulated average weekly wage of $418.18, and the $274 weekly earnings paid in claimant's post-injury laundry job at the time of claimant's injury.[1]

In an Order Denying Employer's Motion for Reconsideration and Granting Claimant's Motion for Correction of Fact, the administrative law judge reconsidered the relevant evidence but reaffirmed his prior causation findings. In addition, pursuant to claimant's request, he amended his prior decision, consistent with the

[1]In the body of the administrative law judge's initial Decision and Order at 9, he states that claimant is entitled to temporary partial disability benefits from June 22, 1988 until December 12, 1988, while in the Order portion of this decision he awards temporary total disability benefits from October 23, 1988 until December 12, 1988. Although there is an obvious discrepancy in these findings, the award of benefits prior to the date of maximum medical improvement is not before us on appeal.

record evidence, to reflect that claimant's post-injury wage-earning capacity was actually $270 rather than $274.

Employer appeals the administrative law judge's determination that the repeated strenuous work and personal activities claimant engaged in post-injury in violation of the recommendations of his treating physician, Dr. Witkind, did not constitute intervening causes sufficient to sever the nexus between the work injury and claimant's disability. BRB No. 94-137. Claimant cross-appeals, contending that the administrative law judge erred in finding that his award of permanent partial disability benefits was to commence as of December 12, 1988, the date of maximum medical improvement, inasmuch as suitable alternate employment was not shown to be available until May 25, 1991, when he obtained his job at the laundry on his own initiative. BRB No. 94-137A.

While the aforementioned appeals were pending before the Board, employer sought modification pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting a change in claimant's economic condition.[2] Citing the decision of the United States Court of Appeals for the Ninth Circuit's decision in *Rambo v. Director, OWCP*, 28 F.3d 86, 28 BRBS 54 (CRT) (9th Cir. 1994), *rev'd sub nom. Metropolitan Stevedores v. Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995) as well as other case authority from the United States Courts of Appeals for the Fifth and Eleventh Circuits, the administrative law judge denied employer's request for modification, finding that modification could be granted only based on a change in claimant's physical condition. Employer appeals the denial of modification, arguing that modification may properly be based on a change in claimant's wage-earning capacity. BRB No. 95-1438.

[2]By Order dated November 30, 1994, the Board dismissed employer's appeal, BRB No. 94-137, and held claimant's cross-appeal, BRB No. 94-137A, in abeyance pending the issuance of the decision in the modification proceedings. After the administrative law judge issued his decision on modification, by Order dated July 10, 1995, the Board reinstated employer's appeal, lifted the abeyance on claimant's cross-appeal, and consolidated the aforementioned appeals with employer's appeal of the administrative law judge's denial of modification, BRB No. 95-1438.

Initially, we affirm the administrative law judge's determination that employer failed to meets its burden on rebuttal of establishing that claimant's post-injury recreational activities and the March 13, 1991, work injury were intervening causes of his disability because employer failed to introduce any evidence sufficient to establish that claimant's disabling condition was caused by his subsequent activities. *See Bass v. Broadway Maintenance*, 28 BRBS 11, 15-16 (1994). The only record evidence to address the causal effect of claimant's engaging in horseback riding, baseball, and heavy work duties is the deposition testimony of claimant's treating physician, Dr. Witkind. He opined that as of the last time he examined claimant in late 1990, claimant's activities had not changed his underlying condition, and that the level of his impairment remained the same. Cx. 16 at 36. Although Dr. Witkind, who did not examine claimant subsequent to the alleged March 13, 1991, injury, conceded in response to a hypothetical question describing this injury that it is possible that such an injury could aggravate claimant's underlying condition, *id.* at 39, such equivocal testimony is insufficient to meet employer's burden on rebuttal. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988) Moreover, in reweighing the evidence relevant to the intervening cause issue in his Order on reconsideration, the administrative law judge rationally found, based on his crediting of claimant's testimony, Tr. at 42, that the March 13, 1991, incident merely represented one of many flare-ups of the 1986 work injury. Accordingly, we affirm the administrative law judge's conclusion that claimant's disabling condition is causally related to his October 23, 1986, work injury. *See James v. Pate Stevedoring Co.*, 22 BRBS 271, 273, 274 (1989); *see also Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64 (CRT) (7th Cir. 1992); *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir.), *modified on reh'g*, 657 F.2d 665, 13 BRBS 851 (1981).

Turning to claimant's cross-appeal, we agree with claimant that the administrative law judge erred in commencing the award of permanent partial disability compensation as of the date of maximum medical improvement. A showing of suitable alternate employment may not be automatically applied retroactively to the date the injured employee reached maximum medical improvement; rather, the injured employee's total disability becomes partial on the earliest date that suitable alternate employment becomes available. *Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1992); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). The administrative law judge in the present case determined that claimant commenced working in his current position as a pants presser at the Eglin Air Force Base laundry in May 1991, and claimant asserts on appeal that May 25, 1991 is the

precise date. Inasmuch, however, as the relevant inquiry is when suitable alternate employment is shown to be available, rather than when claimant begins working, we vacate the administrative law judge's finding with regard to the commencement date for the award of permanent partial disability compensation and remand for him to determine the date that suitable alternate employment was shown to be available.

Finally, we agree with employer that the administrative law judge's denial of modification cannot be affirmed in light of the decision of the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS at 1 (CRT) (1995), *rev'g Rambo v. Director, OWCP*, 28 F.3d 86, 28 BRBS 54 (CRT) (9th Cir. 1994), which was issued subsequent to the administrative law judge's decision denying modification in this case. In *Rambo*, the Court held that a disability award may be modified under Section 22 where there is a change in an employee's wage-earning capacity, even in the absence of any change in the employee's physical condition, directly contrary to administrative law judge's findings in the present case. Inasmuch as the Supreme Court's decision in *Rambo* is dispositive of the issue which employer raises on appeal, we vacate the administrative law judge's denial of modification and remand for him to consider whether modification is warranted based upon a change in claimant's economic condition.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration and Granting Claimant's Motion for Correction of Fact are vacated with regard to the date of onset of claimant's permanent partial disability, and the case is remanded for further consideration. In all other respects, these decisions are affirmed. BRB Nos. 94-137 and 94-137A.[3] The administrative law judge's Decision and Order on Section 22 Modification is vacated, and the case is remanded for consideration of employer's petition for modification consistent with the Supreme Court's decision in *Rambo*. BRB No. 95-1438.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[3]Claimant's request to maintain this appeal before the Board for a period of 60 days beyond September 12, 1996, is rendered moot by our disposition of this case.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge