BRB No. 95-1337

EUGENE L. BEYNUM	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Eric M. May, Washington, D.C., for claimant.

Charles P. Monroe (Mell, Brownell & Baker), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-DCW-7) of Administrative Law Judge Reno E. Bonfanti 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (1973)(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).

Claimant, a bus driver, sustained a work-related back injury on December 29, 1978. As a result of his injury, a laminectomy was performed by Dr. Norman Horwitz on January 18, 1979. In his report dated April 9, 1980, Dr. Horwitz opined that claimant had reached maximum medical improvement and was released to return to work with restrictions.[1] Claimant, however, never returned to work.[2] In his Decision and Order dated June 17, 1981, Administrative Law Judge Frank J. Marcellino determined that claimant was entitled to compensation for temporary total disability benefits from December 30, 1978 until May 5, 1980, and that thereafter, claimant was entitled to compensation for temporary partial disability benefits. Specifically, Judge Marcellino's award of partial disability benefits was based upon his finding that employer had established the availability of suitable alternate employment as a security guard. On May 28, 1986, the district director issued an Order modifying Judge Marcellino's award to reflect that claimant was entitled to permanent partial disability benefits from April 20, 1981. The district director also found that employer was entitled to Section 8(f), 33 U.S.C. §908(f), relief.[3]

Claimant remained symptomatic following his laminectomy, such that claimant's treating physician, Dr. Talaat Maximous, recommended a decompressive laminectomy and discectomy at L4/5 with bilateral fusion of the transverse processes in 1988. The surgery was performed by Dr. Maximous on February 1, 1989. Dr. Michael Dennis subsequently found that claimant reached maximum medical improvement after his second back surgery as of January 16, 1990, with a twenty-four percent whole-man impairment. Dr. Dennis also recommended that claimant be referred for vocational rehabilitation for placement in a light-to-sedentary job. In subsequent reports dated February 15, 1990, May 17, 1990, April 9, 1991, May 25, 1994 and June 6, 1994, Dr. Dennis indicated that there had been no change in claimant's condition. In contrast, Dr. Hampton Jackson, in a series of reports from March 12, 1993 to March 11, 1994, opined that claimant was not fit for employment and recommended that additional back surgery be undertaken.

Asserting that his physical condition has deteriorated, claimant sought permanent total disability benefits from June 2, 1988. *See* 33 U.S.C. §922. In addition, claimant sought

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[1]Dr. Horwitz specifically stated that he did not think claimant's disability for the body as a whole exceeds twenty-five percent. Additionally, Dr. Horwitz noted that claimant may not do any kind of work that requires him to sit for more than two hours at a time or stand for more than two hours at a time, nor should he be expected to lift in excess of 30 lbs or assume awkward positions.

[2]The record establishes that employer recognized that claimant could no longer work as a bus driver. In light of this fact, employer identified four alternate employment positions: three as a security guard and one as a telephone solicitor. Claimant worked one half day as a telephone solicitor in 1979, before quitting because his back pain was too severe. Claimant has not been employed since that time.

[3]Employer paid permanent partial disability benefits for the requisite 104-week period from April 20, 1981 through April 17, 1983. As of April 18, 1983, the Special Fund assumed payment of benefits.

reimbursement for a scooter he purchased because of his difficulty in getting around as a result of his December 29, 1978 injury. In his Decision and Order dated March 16, 1995, Administrative Law Judge Reno E. Bonfanti (the administrative law judge) determined that claimant has not established any change in condition because he had a twenty-four percent whole man impairment rating before and after the 1989 surgery. Accordingly, the administrative law judge determined that claimant is not entitled to benefits for permanent total disability. Additionally, the administrative law judge found that the evidence does not establish that claimant's work-related injury warrants a scooter and, thus, denied his claim for reimbursement. The administrative law judge concluded that claimant remained entitled to permanent partial disability benefits.

On appeal, claimant challenges the administrative law judge's denial of permanent total disability benefits. Employer responds, urging affirmance.

Claimant argues that the administrative law judge's summary of the medical evidence and corresponding analysis regarding the issue of whether claimant has established a change in condition pursuant to Section 22 do not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §554 (APA). Claimant asserts that the administrative law judge failed to address whether the back injury and second surgery constituted a change in condition that rendered claimant permanently and totally disabled. In addition, claimant maintains that the administrative law judge did not thoroughly discuss the relevant medical opinions of Drs. Maximous, Jackson, and Horwitz, and did not provide any rationale for crediting the medical reports of Dr. Dennis over the contrary reports of Drs. Maximous and Jackson.

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 of fact in the initial decision or a change in claimant's economic or physical condition. *See Metropolitan Stevedore Co. v. Rambo,* ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(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).

The evidence of record in the instant case clearly shows that as a result of the degeneration of his work-related back condition, claimant underwent a second surgery in February of 1989. In a series of medical reports from May 31, 1988 through December 16, 1988, Dr. Maximous stressed claimant's need for additional surgery, notably a decompression laminectomy, facetectomy and foraminotomy as well as a fusion of his lower back with bone graft, in order to relieve claimant's increasing spinal stenosis with bulging discs and facet joint arthropathy. In his report dated August 16, 1988, Dr. Dennis similarly found that claimant's back condition had progressively deteriorated from his previous surgery to the point where he concurred with Dr. Maximous' assessment that surgery was a reasonable consideration in order to alleviate claimant's significant spinal stenosis. While the administrative law judge recognized that claimant underwent extensive surgery in 1989,

he did not explicitly consider whether this surgery, in and of itself, constituted a change in condition. As claimant suggests, the administrative law judge did not specifically discuss the medical reports of Dr. Maximous which follow the progression of claimant's back condition culminating in the 1989 surgery, or address Dr. Dennis' 1988 opinion that claimant's back condition deteriorated, which is contrary to the administrative law judge's finding that Dr. Dennis indicated in his opinions in 1988, 1989, 1990, 1991 and 1994 that claimant had no change in his condition. In this regard, the administrative law judge's decision does not comport to the requirements of the APA. *See generally Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). We must, therefore, vacate the administrative law judge's denial of claimant's petition for modification and remand the case for a determination, based on all relevant evidence, of whether a change in claimant's physical condition has been established.[4] *See Rambo*, 115 S.Ct. at 2144, 30 BRBS at 1 (CRT).

Moreover, the administrative law judge's analysis of the evidence does not include consideration of whether claimant has had a change in his economic condition sufficient to warrant modification of the award of permanent partial disability benefits in this case. *Id.* In this regard, while the administrative law judge compared the similar impairment assessments of Dr. Horwitz in 1980 and Dr. Dennis in 1990 to find no change in condition, this evidence does not preclude a finding that claimant's economic condition has changed to the point where he is now permanently and totally disabled. *Id.* In particular, the record includes evidence on the issue of claimant's economic condition subsequent to the award of partial disability benefits which the administrative law judge has not addressed, most notably the opinions of Dr. Jackson, who opined that claimant is not fit for any employment, and Dr. Dennis, who pronounced that claimant was fit for sedentary to light occupations and recommended vocational rehabilitation, as well as claimant's own testimony regarding his inability to do any work since 1982. Consequently, we remand this case for consideration of whether the evidence of record is sufficient to establish that claimant is entitled to benefits for a permanent and totally disabling back condition. On remand, the administrative law judge must discuss all of the evidence relevant to claimant's back condition prior to and after his 1989 surgery, including the opinions of Drs. Maximous, Jackson and Dennis, and claimant's testimony, in order to resolve the issue of whether claimant's economic condition has changed to the extent that modification of the award of permanent partial disability benefits to permanent total disability benefits is warranted in this case.[5] *See generally Vasquez v. Continental Maritime of San*

[4]In this regard, claimant may, at a minimum, be entitled to temporary total disability benefits for a recuperative period following the back surgery.

[5]We further agree with claimant's contention that the administrative law judge erred in determining that he is not entitled to reimbursement of costs associated with a scooter. The administrative law judge's denial of reimbursement is based on his finding that the evidence does not establish that claimant needs a scooter because of his work-related injury. The administrative law judge, however, failed to address the March 14, 1994, opinion of Dr. Jackson, wherein he states that claimant's request for a scooter is necessary to keep him mobile in light of the pain he suffers in his hips, knees and spine as a result of his 1978 work-related injury. We thus vacate the administrative law judge's finding that claimant is not entitled to reimbursement of costs associated with the scooter, and instruct the administrative law judge, on remand, to reconsider this issue in light of all

Francisco, Inc., 23 BRBS 428 (1990); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

Accordingly, the administrative law judge's Decision and Order denying claimant's permanent total disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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of the relevant evidence of record.