BRB Nos. 96-0477
and 96-0477A

BERNARDO PEREZ	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LOCKHEED SHIPBUILDING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Granting Modification of Christine M. Moore, Administrative Law Judge, United States Department of Labor.

Bernardo Perez, Seattle, Washington, *pro se*.

Thomas Owen McElmeel, Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals, and employer cross-appeals, the Decision and Order Granting Modification (94-LHC-3165) of Administrative Law Judge Christine M. Moore 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] In an appeal by a claimant without representation, the Board will review the administrative law judge's findings of fact and conclusions of law to determine whether they are rational, supported by substantial evidence, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

[1]Claimant's attorney filed a notice of appeal with the Board on December 14, 1995. Subsequently, on December 22, 1995, he filed a motion to withdraw as counsel. In an Order dated March 22, 1996, the Board granted the motion and acknowledged claimant as a *pro se* appellant.

Claimant, on September 12, 1973, injured his back while working for employer as a welder. After missing approximately two weeks of work, claimant returned to work for employer in a light duty position, and continued in this employment until August 27, 1974. Claimant thereafter filed a claim under the Act seeking permanent total disability compensation.

In his Decision and Order, Administrative Law Judge Edward C. Burch relied on the opinions of Dr. Gray, an orthopedist, and Dr. Orenstein, a psychiatrist, in determining that claimant was totally disabled from his usual employment. Judge Burch thus awarded claimant permanent total disability compensation commencing on August 27, 1974, and awarded employer relief under Section 8(f) of the Act. 33 U.S.C. §§908(a), (f).

Subsequent to this decision, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. In seeking modification, employer contended that there was a mistake of fact in the prior decision, and that there had been a change in claimant's physical condition. At a formal hearing held on April 11, 1995, before Administrative Law Judge Christine M. Moore, employer submitted into evidence the May 14, 1979 medical report of an orthopedic panel consisting of Drs. Cramer, Chaplin and Grisham, as well as reports by Drs. Sawyer, Thorner and Schultz. In addition, employer introduced the testimony of Ms. Jamie Scalise and Mr. William Harms, each of whom testified that claimant has remained active as a social and exhibition dancer.

In her Decision and Order Granting Modification, the administrative law judge determined that employer had established both a mistake of fact and a change in claimant's condition. She then found that claimant failed to establish a continuing inability to perform his usual employment duties as a welder. Thus, the administrative law judge granted employer's motion for modification and terminated claimant's permanent total disability compensation as of the issuance date of the decision, November 9, 1995.

On appeal, claimant, representing himself, challenges the administrative law judge's termination of benefits. Employer responds, urging affirmance.[2]

[2]Employer filed a cross-appeal in the instant matter on December 20, 1995. BRB No. 96-0477A. On September 20, 1996, the Board ordered employer to show cause why this appeal should not be dismissed for failure to file a Petition for Review and brief. *See* 20 C.F.R. §§802.211, 802.218. Employer responded to the Board's Order on September 24, 1996, stating that if claimant's appeal is not dismissed for failure to file a Petition for Review and brief, then employer should be treated in the same fashion. In an Order dated October 4, 1996, the Board accepted employer's Response to Show Cause Order, but ordered employer to file a Petition for Review and brief within 10 days of receipt of the Order. Due to the contention of employer's counsel that he had not received the Board's October 4, 1996 Order, a facsimile of this Order was sent to employer on November 5, 1996, and this date was considered the date of employer's receipt of the Order. As employer has not filed a Petition for Review and brief in its appeal, this appeal, BRB No. 96-0477A, is dismissed as abandoned. 20 C.F.R. §§802.218(b), 802.402(a).

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 only 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,* U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). When considering a motion for modification, the administrative law judge is permitted to have before her the record from the prior hearing. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In order to obtain modification for a mistake of fact, however, the modification must render justice under the Act. *See McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). 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 BRBS 428 (1990). Moreover, the Board has held that the standard for determining disability is the same during Section 22 modification proceedings as it is during the initial adjudicatory proceedings under the Act. *Vasquez*, 23 BRBS at 431.

In the instant case, the administrative law judge credited the opinions of Drs. Cramer, Chaplin, Grisham, Sawyer and Thorner, as well as the testimony of Ms. Scalise and Mr. Harms, in concluding that employer established both a mistake of fact and a change in claimant's condition, specifically that claimant suffers from no continuing disability. In this regard, the May 14, 1979 opinion of the orthopedic panel stated that claimant exhibited no evidence of any restriction or permanent physical impairment, Emp. Ex. 4, while Drs. Sawyer and Thorner opined that claimant is fully capable of gainful employment. Emp. Ex. 5. Similarly, the testimony of Jamie Scalise and William Harms indicated that claimant was able to perform extensive physical dancing and housework without complaint. Tr. at 83, 132-134, 141, 154, 168-169, 194-208. In adjudicating a claim, the administrative law judge is required to evaluate the credibility of witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *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). As these opinions constitute substantial evidence in support of the administrative law judge's finding that employer established both a mistake of fact and a change in claimant's condition, and her consequent finding that claimant is able to perform his usual employment as a welder, we affirm the determination that claimant is not disabled as a result of his September 12, 1973 work accident. *See generally General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).[3]

[3]Claimant's former attorney filed a fee petition with the Board for work performed before the administrative law judge. Employer filed an objection to this fee request. An attorney's fee petition

must be filed before the tribunal for whom services were performed. 20 C.F.R. §702.132. As the Board is without authority to grant a fee for work performed before the administrative law judge, claimant's counsel's fee petition is dismissed. *See Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989).

Accordingly, the administrative law judge's Decision and order Granting Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge