September 12, 2003

VIA FACSIMILE AND REGULAR MAIL

U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Centre Street
New York, New York 10007

Re: *Russell Jensen v. Weeks Marine, Inc. and Director, Office of Workers' Compensation Programs, U.S. Department of Labor*
Docket No. 03-4492

Your Honors:

We are submitting this in response to Roseann MacKechnie's August 25, 2003 letter conveying the Court's request that we file a letter brief in this case addressing the procedural requirements of disability determinations and motions for modification under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. We begin by summarizing the procedural history most relevant to these issues.

As the other parties' briefs set out in greater detail, Russell Jensen sustained an injury to his left foot, left hip and right knee during his employment with Weeks Marine, Inc., on July 22, 1991. (Joint Appendix, "A," -169). Weeks Marine voluntarily paid Jensen temporary total disability compensation for a three-year period. Jensen thereafter filed a claim for continuing total disability benefits. (A-169). Although the parties agreed that Jensen could not return to his former employment as a dock builder, Weeks Marine contended that Jensen could perform

suitable alternative employment and, thus, was not entitled to further compensation for a total disability.[1] It introduced vocational evidence in support of its position.

Administrative Law Judge DeGregorio conducted the initial hearing. He issued a decision on March 25, 1996 finding Jensen totally and permanently disabled by his work-related knee injury. (A-167). In reaching his decision, Judge DeGregorio considered Weeks Marine's vocational evidence but concluded that it was insufficient to demonstrate the availability of suitable alternative employment because it did not identify "specific jobs with particular employers, describing the duties to be performed and the physical and mental abilities required." (A-173). Although Weeks Marine contended it was unable to produce specific evidence because Jensen refused to meet with its vocational specialist, Judge DeGregorio determined that Jensen's lack of cooperation did not prevent the Employer from conducting an adequate job search. (A-173). ALJ De Gregorio reaffirmed this determination on May 16, 1996, when he denied Weeks Marine's Motion for Reconsideration. (A-175-77).

Weeks Marine appealed these decisions, but it later asked that its appeal be dismissed so that it could pursue modification under 33 U.S.C. § 922. (A-179-80). Under § 22, a party may seek modification of a compensation decision "on the ground of a change in conditions or because of a mistake in a determination of fact" in that decision. Weeks Marine alleged in its

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[1] Once Jensen reached maximum medical improvement, Weeks Marine voluntarily paid Jensen the compensation it believed was due for Jensen's permanent partial disability. Thus, it paid Jensen for a 4% "scheduled" permanent partial disability to his right knee in accordance with §§ 8(c)(2) and (19) of the Act, 33 U.S.C. §§ 908(c)(2), (19). A scheduled injury, however, "can give rise to an award for permanent total disability under [33 U.S.C. § 90]8(a) where the facts establish that the injury prevents the employee from engaging in the only employment for which he is qualified." *Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, U. S. Dept. of Labor*, 449 U.S. 268, 279 n.17 (1980). An employer may avoid liability under section 8(a) for total disability if it demonstrates that suitable alternative employment is available to the employee in his community. Thus, if the Court affirms the decisions below holding that Weeks Marine established suitable alternative employment and that Jensen is not totally disabled, the employer will have satisfied its current liability for Jensen's partial disability.

modification petition that "the basis for Claimant's initial award of benefits, the absence of suitable alternative employment, *i.e.*, Claimant's total economic disability, has changed in that suitable alternative employment is now available/shown to exist." (A-7). In support, Weeks Marine submitted new vocational evidence (this time obtained with Jensen's cooperation) that included descriptions of specific available jobs and medical testimony regarding Jensen's ability to perform the identified jobs.

On June 5, 1998, Administrative Law Judge Romano (who had now been assigned to hear the claim) denied Weeks Marine's request for modification. (A-179). He found that "there is no evidence in this record on modification that the jobs there proposed as available and suitable to the Claimant's capabilities were not available at the time of the first hearing," a matter of proof Judge Romano found required under the Benefits Review Board's case law precedents. (A-181) (citation omitted). He concluded that Weeks Marine could not use § 22 modification proceedings to correct its failure to adequately develop its evidence in the initial proceeding. (A-182).

Weeks Marine appealed to the Board. In the first of a series of decisions, the Board on June 25, 1999 vacated the ALJ's decision and remanded the case for further fact-finding. (A-183). The Board noted that an employer could modify a total disability award by establishing the availability of suitable alternative employment. But, agreeing with Judge Romano that § 22 could not be used to correct counsel's errors or misjudgments, the Board stated that the employer's evidence "must demonstrate that there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought." (A-187). Finding evidence meeting that standard in the record here, the Board held that Judge Romano had "erred in refusing to reopen the instant case in order to determine whether

modification of the total disability award was warranted." (A-188). The Board also held that Jensen's cooperation with Weeks Marine's vocational experts after the initial hearing "provides a basis for employer's pursuit of modification." (A-188). It reasoned that Jensen's earlier failure to cooperate "should not preclude employer's attempt to improve its evidence of suitable alternate employment. . . as this would permit claimant to benefit through his lack of cooperation." (A-188). Accordingly, the Board concluded that Weeks Marine's modification evidence "is sufficient to bring the claim within the scope of Section 22 by way of a change in claimant's physical and economic condition after the time of Judge DeGregorio's award," and remanded the case to Judge Romano "to determine whether the evidence proffered by employer on modification is sufficient to establish the availability of suitable alternate employment in this case." (A-188-89).

On remand, the ALJ entered a decision granting Weeks Marine's modification petition on October 12, 1999, largely because he believed the Board's remand order compelled him to do so. (A-193). Judge Romano stated that the Board had not addressed the basis for his original order denying modification, namely, that Weeks Marine had not demonstrated that the suitable alternative jobs it identified on modification did not exist at the time of the first hearing. Reviewing the vocational and medical evidence submitted in connection with the § 22 proceeding, Judge Romano found that: 1) Jensen was able to perform seven of the specific jobs identified by Weeks Marine's experts; and 2) the record contained no evidence that Jensen had diligently, but unsuccessfully, pursued alternative employment. (A-193-94).

Jensen appealed, arguing in part that the Board had improperly engaged in a *de novo* review of the evidence in its first decision. On October 24, 2000, the Board issued a decision further clarifying its earlier decision and remanding the case again to the ALJ for review of the

evidence. Its clarification was essentially two fold. First, the Board focused on the nature of modification proceedings. It stated that a party petitioning for modification based on a change in condition must meet "the threshold requirement by offering evidence demonstrating that there has been a change in claimant's condition." (A-199). If this evidence is "sufficient to bring the claim within the scope of Section 22," then the judge "must determine whether modification is warranted by considering all of the relevant evidence of record [under] the standards for determining the extent of disability" used in the initial proceeding. (A-199). The Board noted that the "intent" of its earlier decision was to hold only that Weeks Marine's medical evidence met the "threshold requirement" of showing a change in Jensen's physical condition sufficient to bring the claim within section 22's scope, but that it remained incumbent upon Judge Romano to determine whether the award should be modified after considering all the evidence. (A-200).

Second, the Board "squarely addressed" Judge Romano's finding that Weeks Marine could not correct its litigation errors by submitting additional vocational evidence in a section 22 proceeding. Reviewing its own decisional law, the Board concluded that an employer who does not submit any evidence on the suitable alternative employment issue in the initial proceeding "is not entitled to modification based on evidence of the current availability of jobs" unless it demonstrates extenuating circumstances for not developing sufficient vocational evidence in the initial proceeding or submits evidence "of a *change* in the claimant's economic position." (A-201). Applying these principles here, the Board concluded that the claim fell "within the scope of Section 22" because: 1) Weeks Marine had submitted suitable alternative employment evidence in the initial proceeding; 2) it had developed on modification vocational evidence of an improved job market since the initial proceeding; and 3) Jensen cooperated with the employer's vocational experts in the modification proceeding. (A-202). The Board instructed the ALJ on

remand to consider all of the vocational and medical evidence submitted by the parties under the same standards of proof applied during the initial claim proceeding. (A-202-03).

In his March 2, 2001 Second Decision and Order on Remand, Judge Romano again determined that Weeks Marine had not presented evidence (even with Jensen's cooperation) establishing that the currently available jobs were unavailable at the time of the first hearing. (A-206-07). Accordingly, he denied Weeks Marine's modification request. Weeks Marine subsequently appealed, and on November 30, 2001, the Board once again remanded the case to Judge Romano for further fact-finding. (A-208). In doing so, the Board reiterated its earlier legal analysis and pointed to a variety of evidentiary matters the ALJ had not addressed.

In his Third Decision and Order on Remand, Judge Romano found that "the medical evidence in this record overwhelmingly supports the proposition that Claimant is capable of performing the security guard positions identified by Mr. Steckler. (citation omitted). Employer has thus presented sufficient evidence of the existence of suitable alternative employment." (A-217). Accordingly, he ruled that Jensen was not entitled to ongoing total disability benefits.

On January 15, 2003, the Board rendered its last decision in the case. (A-219). It affirmed the ALJ's determination that Weeks Marine had established the availability of suitable alternative employment. The Board denied Jensen's assertions that it had engaged in prohibited "de novo review" and acted as a finder of fact in its multiple remands to the ALJ, stating that "[e]ach of [the Board's] decisions to remand this case rest[ed] on the administrative law judge's duty to weigh the relevant evidence." (A-224). Jensen now petitions this Court for review of the decisions below.

Discussion

The Board's ultimate conclusion—that Weeks Marine may prove suitable alternative employment in this § 22 modification proceeding—is correct. But in the course of this proceeding, both Judge Romano and the Board erected a variety of procedural hurdles inconsistent with § 22's intent.[2] Specifically, Judge Romano and the Board inquired into whether: 1) Weeks Marine had submitted any evidence of suitable alternative employment in the initial proceeding; 2) the vocational evidence Weeks Marine submitted on modification could have been submitted in the initial proceeding; 3) Weeks Marine submitted medical or vocational evidence documenting a change sufficient to meet a "threshold" inquiry on modification; 4) extenuating circumstances (such as Jensen's cooperation with the employer's vocational experts on modification) allowed adjudication of the modification petition; and 5) Weeks Marine's modification evidence demonstrated that the jobs currently available were not the same jobs available at the time of the initial adjudication. As we demonstrate below, the adjudicators' "'insistence on what seems to us a 'narrowly technical and impractical construction'. . . is inconsistent with the purpose of the statute." *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 172 (2d Cir. 2000) (q*uoting Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 297 (1995)).

A. The courts have uniformly interpreted § 22 to provide exceptionally broad relief from traditional judicial finality concepts and to emphasize accuracy in decision-making over finality.

Section 22 provides, in relevant part:

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[2] Although the Board's errors may not have affected the outcome of the case, we discuss those errors and the appropriate framework for § 22 modification proceedings in order to address the "procedural requirements of disability determinations, and motions for modification," as requested by this Court.

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case. . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. § 922. The Supreme Court, this Court and every other court interpreting § 22 has recognized this provision's extraordinary breadth.

In its brief, Weeks Marine has accurately summarized the Supreme Court's leading decisions interpreting § 22: *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *O=Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); and *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995). (Weeks Marine brief at 18-23). Each of these decisions emphasizes that § 22's broad scope is designed to promote accuracy over finality in decision-making with the goal of rendering justice under the Longshore Act. It is thus easy to understand Professor Larson's observation that the "broad Supreme Court interpretation superimposed on a broad statutory provision" is correctly seen as "endow[ing] the Longshore Act with perhaps the most permissive . . . reopening rule on record." 8 LARSON'S WORKERS' COMPENSATION LAW § 131.05[2][b], at 131-58 (2000).

Following the Supreme Court's lead, this Court and the other federal appellate courts have uniformly held that the authority "to modify existing orders based on mistakes in fact or changes in condition under § 922 is broad." *Universal Maritime Service Corp.*, 226 F.3d at 175. As a result, "the 'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993),

citing Banks, 390 U.S. at 459.[3] Instead, § 22 evinces an "interest in accuracy [that] trumps the interest in finality." *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 541 (7th Cir. 2002). It is designed to "render justice under the Act," *Banks*, 390 U.S. at 464, and to ensure "the accurate distribution of benefits," *Old Ben Coal*, 292 F.3d at 546. As the Fourth Circuit has summarized, "the modification procedure is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Betty B. Coal Co.* v. *Director, OWCP*, 194 F.3d 491, 497-98 (4th Cir. 1999).

This is not to say that there is no limit on a party's right to seek modification. The opportunity to modify may be denied when the moving party has engaged in particularly egregious conduct amounting to an abuse of the adjudicatory system, *McCord v. Cephas,* 532 F.2d 1377 (D.C. Cir. 1976) (refusing to entertain employer's modification petition based on employer's recalcitrance, "callousness towards the processes of justice," and self-serving ignorance it displayed), or in circumstances demonstrating "important reasons grounded in the language and policy of the Act that overcome the preference for accuracy," *Old Ben Coal Co.*, 292 F.3d at 547. In this small set of cases, an administrative law judge has the discretion to deny an otherwise meritorious request because allowing modification will not "render justice under the Act." *Id.*; *Branham v. Bethenergy Mines, Inc.,* 21 Black Lung Rep. 1-79, 1-83 (1998); 1998 WL 169698 (DOL Ben.Rev.Bd.). However, an administrative law judge's discretion in this regard is clearly circumscribed by "the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act." *Old Ben Coal Co.*, 292 F.3d at 547.

The procedures § 22 incorporates match its substantive reach. Once a party requests modification, "no matter the grounds stated, if any, the deputy commissioner has the authority,

[3] The Black Lung Benefits Act, 30 U.S.C. §§ 901-945, incorporates the Longshore Act's procedural provisions, including § 22. 30 U.S.C. § 932(a). Thus, much of the case law construing § 22 has been developed in the black lung benefits claim context.

if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). A modification request is processed and adjudicated in the same manner as an original claim for benefits. *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240, 242 (11th Cir. 1987). Section 22 explicitly provides that modification requests are reviewed "in accordance with the procedure prescribed in respect of claims in section [19, 33 U.S.C. § 919]." Section 19 of the Longshore Act, in turn, provides the procedures for the investigation and development of claims by the district director, and for a hearing before an ALJ upon a party's request. 33 U.S.C. § 919(c). ALJ hearings on modification petitions are *de novo* and result in a new adjudication of the claim. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 498-99 (4th Cir. 1999). Because he is presiding over a *de novo* proceeding, the ALJ is not bound by any prior fact-findings. After the ALJ issues a decision, an aggrieved party may (as the parties did here) seek review by the Board and the federal courts of appeal. *Id*.

Thus, on modification a party may: 1) pursue a new theory of entitlement, *Banks*, 390 U.S. at 465; 2) offer evidence it could have presented in the initial proceeding, *O'Keeffe*, 404 U.S. at 255-56; 3) rely solely on the evidence already in the record, or submit cumulative or new evidence, *id*.; or 4) premise its petition on a change in the employees' physical condition or relevant economic conditions, *Metropolitan Stevedore Co.*, 515 U.S. at 296-97.

B. In adjudicating Weeks Marine's modification petition, Judge Romano and the Board adopted a variety of overly restrictive views of § 22 inconsistent with its intended purpose.

Against this background, it is clear that the procedural hurdles the ALJ and the Board erected in connection with Weeks Marine's modification petition here cannot stand. Judge Romano initially denied the petition because he viewed Weeks Marine's submission of additional evidence as an impermissible attempt to correct its own litigation errors in the initial

proceeding. Citing the First Circuit's decision in *GeneralDynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982), the Board agreed that Weeks Marine could not use modification to correct its litigation errors. But, putting a slightly different twist on the issue, the Board held that the employer could nevertheless pursue modification but only if it demonstrated an actual change in Jensen's physical or economic condition since Judge DeGregorio entered the initial award.

As *Banks* and *O'Keeffe* demonstrate, however, a party may seek modification on a theory it failed to pursue in the initial proceeding or by submitting more evidence pertinent to the theory it did pursue.[4] Here, Weeks Marine introduced more evidence that Jensen is in fact capable of performing suitable alternative employment. Although some of this evidence may have been available earlier, the ALJ could not simply deny the modification request "out of hand. . . on the basis that the evidence may have been available at an earlier stage in the proceeding." *Old Ben Coal Co.*, 292 F.3d at 546. And the Board's imposition of an additional requirement—direct proof of changed physical or economic circumstances—is unwarranted for two reasons. First, as *O'Keeffe* teaches, "neither the statute nor its interpreting case law limits the type of evidence that may justify reopening; an ALJ may reopen 'to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.'" *Id*. (*quoting O'Keeffe*, 404 U.S. at 256). Second, by requiring proof of change, the Board effectively, and improperly, removed from

[4] Based on the fact that Weeks Marine had raised the suitable alternative employment issue in the initial proceeding, the Board distinguished this case from some of its other precedents disallowing modification where the employer either was silent or offered no relevant proof on the suitable alternative employment question in the initial proceeding. *See Feld v. General Dynamics Corp.*, 34 BRBS 131 (2000), 2000 WL 1489547 (DOL Ben.Rev.Bd.); *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 82 (1998), 1998 WL 285569 (DOL Ben.Rev.Bd.). To the extent these decisions flatly prohibit modification, they are inconsistent with *Banks*.

consideration the mistake in fact ground for modification. Once Weeks Marine requested modification, it was entitled to *de novo* review for both changes in condition and mistakes in fact. *Consolidation Coal Co.*, 27 F.3d at 230.

The Board's reliance on the First Circuit's *General Dynamics* case does not rescue its analysis. *General Dynamics* held that a Longshore employer may not raise the affirmative defense allowed by 33 U.S.C. ' 908(f) (the Longshore Act=s "second injury" provision) for the first time in a modification proceeding.[5] Although the decision generally remarks that to allow the late raising of § 8(f) in a modification proceeding would disregard finality and would not render justice under the Act,[6] it is more accurately understood to stand for the proposition that if a particular affirmative defense was not raised—and thus not ruled upon—in the initial proceeding, then there is no mistake to correct. The court's dicta emphasizing finality interests are plainly inconsistent with the language of § 22, and with *Banks* and *O=Keeffe*.[7] Indeed, the

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[5] An employer must timely request relief under § 8(f) or else it loses this defense. 33 U.S.C. § 908(f)(3).

[6] The *General Dynamics* court reasoned that

> reopening would not serve the orderly administration of justice which depends in no small part upon finality of judicial determinations. Parties should not be permitted to invoke ' 22 to correct errors or misjudgments of counsel, nor to present a new theory of the case when they discover a subsequent decision arguably favorable to their position.

673 F.2d at 26. *See also Verderane v. Jacksonville Shipyard, Inc.*, 772 F.2d 775, 780 (11th Cir. 1985) (section 22 cannot "save litigants from the consequences of their counsel=s mistakes").

[7] In addition to *General Dynamics*, the Board cited its own decision in *Kinlaw v. Stevens Shipping & Terminal Co., Inc.*, 33 BRBS 68 (1999), 1999 WL 387253 (DOL Ben.Rev.Bd.) (upholding ALJ's denial of employer's modification request simply because the employer could have and should have obtained and proffered during the initial hearing the medical opinion it later proffered in support of its modification request). The Board's decisions on this point, however, are inconsistent. *See Branham v. Bethenergy Mines, Inc.*, 21 Black Lung Rep. 1-79, 1-83 (1998), 1998 WL 169698 (DOL Ben.Rev.Bd.) (affirming ALJ's order granting employer's modification request

Seventh Circuit has refused to extend *General Dynamics* beyond the § 8(f) context for these very reasons. *Old Ben Coal Co.*, 292 F.3d at 545 (noting that *General Dynamics* language "emphasiz[ing] finality interests cannot easily be squared with the language of the statute, the holdings of the Supreme Court, or the holdings of other circuits that have emphasized the preference for accuracy over finality in § 22 adjudications.").

Accordingly, the facts that Weeks Marine did or did not raise the suitable alternative employment issue in the initial proceeding and did or did not submit on modification evidence it could have produced during the initial proceeding are not, as the ALJ's and Board's decisions imply, fatal (or potentially so) to Weeks Marine's modification request.[8] The same is true of the remaining procedural obstacles Judge Romano and the Board placed in Weeks Marine's path. The Board believed that Weeks Marine could not pursue modification simply by demonstrating current availability of suitable alternative employment. Instead, the Board required the employer to make a "threshold" showing of changed physical and vocational conditions to bring its modification petition within the "scope" of § 22. (A-199; A- 202). The Board found that threshold met here for a variety of reasons: Weeks Marine produced medical evidence showing changes in Jensen's physical condition and vocational evidence attesting to a change in economic conditions after the employer developed its initial vocational evidence, and Jensen cooperated

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supported solely by medical opinions that it could have obtained and proffered during the initial hearing and reasoning that "[o]ne could hardly find a better reason for rendering justice than that it would be unjust or unfair to require an employer to pay benefits to a miner who does not meet the requirements of the Act.").

[8] If Weeks Marine could have submitted persuasive evidence of suitable alternative employment during the initial proceeding but simply chose not to do so, its belated evidentiary development is not without consequence. The employer may not recover any compensation it paid to Jensen before its modification petition was granted. 33 U.S.C. § 922 (a modification order "shall not affect any compensation previously paid"); *see generally Universal Maritime Service Corp.*, 226 F.3d at 172-74 (discussing effect of modification on benefits previously paid and allowing offset only against future benefits payable).

with Weeks Marine's vocational experts during the modification proceedings when he had not initially. On a somewhat related point, both the Board and Judge Romano discounted at least some of Weeks Marine's vocational evidence because it did not establish that the currently available jobs were not available at the time of the initial proceeding (and, thus, did not establish the job market had changed). (A-181; A-206; A-213).

Again, these principles improperly place a "narrowly technical and impractical construction" on § 22 that is flatly inconsistent with its preference for accuracy over finality in decisions rendered under the Longshore Act. To be sure, a party seeking to prove a change in conditions must introduce additional evidence that could, if credited, lead the fact-finder to a different conclusion on the ultimate fact—here, Jensen's entitlement to permanent total disability compensation. To the extent the Board's decisions pertaining to a "threshold" inquiry can be construed in that fashion, we have no quarrel: without facially relevant evidence that could change the result, there is no need for the fact-finder to consider the modification petition further. But the Board's and the ALJ's decisions go further by requiring Weeks Marine to prove that Jensen's physical condition had changed, that the pertinent economic conditions had changed, and that the jobs identified as currently available were not available during the initial proceeding. By requiring such proof, the adjudicators have, at a minimum, eliminated the mistake in fact ground from modification. Evidence of current suitable alternative employment, standing on its own, necessarily demonstrates either that Judge DeGregorio's initial award was factually mistaken (because the identified jobs were available then as well) or that conditions (medical, economic, or both) have changed to the point that Jensen is no longer totally disabled within the meaning of the Longshore Act. *See, e.g.*, *Betty B Coal Co.*, 194 F.3d at 498 (holding that an ALJ may adjudicate entitlement "without first deciding the threshold modification issue--that is,

whether there was a 'mistake of fact' in the prior rejection of the claim--because a decision awarding benefits on modification would necessarily mean that the prior rejection was a mistake of ultimate fact"). A contrary conclusion would have the effect of perpetuating an erroneous decision rather than effectuating § 22's purpose of "ceas[ing] payment "when circumstances so require." *Universal Maritime Service Corp.*, 226 F.3d at 173.

Thus, although the Board ultimately reached the correct result in allowing Weeks Marine to proceed on its modification petition, it got there only after traversing an unnecessary and exceedingly complicated path. Modification is simple: upon a party's request, the ALJ has the duty to conduct a *de novo* review of the existing record and any evidence submitted during the modification proceeding for both factual errors in the initial decision and changes in condition warranting a change in the ultimate findings of fact. While the ALJ has the discretion to grant or deny a request under § 22 in order to render justice under the Act, that discretion must be exercised in light of "the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act." *Old Ben Coal Co.*, 292 F.3d at 547.

C. The ALJ's decision granting Weeks Marine's modification petition may be affirmed if his determination that Jensen can perform available suitable alternative employment is supported by substantial evidence and complies with the Administrative Procedure Act.

Once a claimant has shown that his or her post-injury condition forecloses return to his or her regular pre-injury work, the burden shifts "to the employer to prove the availability of suitable alternative employment in the claimant's community." *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991). If the Employer makes this showing, it will have demonstrated that the claimant's disability is partial, and not total in nature. *Id.*

The job-availability determination should incorporate, however, the specific capabilities of the claimant, considering his or her age, background, employment history and experience as

well as intellectual and physical capacities. *See, e.g., Darden v. Newport News Shipbuilding & Dry Dock, Co.* 11 BRBS 676, 679 (1979). This Court has also recognized a third step in this analysis: "the claimant may rebut his employer's showing of suitable alternate employment--and thus retain entitlement to total disability benefits--by demonstrating that he diligently tried but was unable to secure such employment." *Palombo,* 937 F.2d at 73. The determination as to the diligence of an injured employee to seek out alternative employment "does not displace the employer's *initial* burden of demonstrating job availability." *Id.* at 75 (citations omitted, emphasis in original).[9]

Jensen and Weeks Marine have extensively addressed the relative merits of the record evidence and the ALJ's fact-findings on that evidence. While we will not address those points here, we note that the ALJ's decision must comply with the mandates of the Administrative Procedure Act. The Longshore Act provides that hearings "held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code." 33 U.S.C. § 919(d). Section 554, in turn, incorporates section 557 of the APA. Section 557 requires that all decisions "include a statement of. . . findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record…" 5 U.S.C. § 557.

If the Court determines that the ALJ's decision does not comport with the APA's requirements, and that such failure is not harmless error, then it should remand the case for further fact-finding. On the other hand, if the Court believes the ALJ's decision satisfies the APA, it may affirm his decision granting Weeks Marine's modification petition if, in light of the

[9] The ALJ found "no evidence in the record that Claimant has. . . diligently pursued alternative employment opportunities but was unable to secure a position within the scope of employment identified as suitable." (A-194) (citation omitted).

entire record below, it is supported by substantial evidence. *American Stevedoring Ltd. v. Marinelli,* 248 F.3d 54, 56 (2d Cir. 2001); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (2d Cir.1993).

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