No. 12-60222

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ISLAND OPERATING COMPANY,
LOUISIANA WORKERS' COMPENSATION CORPORATION,
Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
and
MARTIN B. TAYLOR, JR.,
Respondents

On Petition for Review of an Order of the Benefits Review Board,
United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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The Director does not object to the Petitioner's request for oral argument.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case arises from a claim filed by Martin B. Taylor, Jr., for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("Longshore Act" or "Act"), as extended by the Outer Continental Shelf Lands Act

("OCSLA"), 43 U.S.C § 1331-1356a.[1] The Administrative Law Judge ("ALJ") had jurisdiction to hear the claim pursuant to Sections 19(c) and (d) of the Longshore Act.[2] On June 16, 2009, the ALJ issued an order awarding benefits. On January 8, 2010, within the one-year period provided by Section 22, Taylor filed a petition to modify the award, which was granted by the ALJ in a decision that was filed in the office of the District Director on April 18, 2011. On May 3, 2011, within the thirty-day period provided by Section 21(a) of the Act, Island Operating Company, Inc., and its insurer, Louisiana Workers' Compensation Corporation (collectively, "Island Operating"), filed a Notice of Appeal with the Benefits Review Board ("Board"). This appeal invoked the Board's review jurisdiction pursuant to Section 21(b)(3) of the Act.

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[1] OCSLA makes the remedies of the Longshore Act applicable to employees disabled or killed as a result of an employer's operations on the Outer Continental Shelf. 43 U.S.C. § 1333(b).

[2] Unless otherwise noted, all statutory references are to the Longshore Act, with "Section xx" referring to 33 U.S.C. § 9xx.

The Board issued its Decision and Order affirming the ALJ's decision on February 8, 2012. Island Operating filed its Petition for Review with this Court on March 28, 2012, within the sixty-day period prescribed by Section 21(c) of the Act. The Board's order is final, as required by Section 21(c), because it completely resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (*en banc*). This Court has jurisdiction of the appeal because Taylor sustained his injury on the Outer Continental Shelf off the Louisiana coast and the claim was filed in Louisiana. 33 U.S.C. §§ 921(c), 939(b); 43 U.S.C. § 1333(b); August 7, 2007 Hearing Transcript ("2007 HT") at 17.[3]

[3] This case has gone to hearing twice before the ALJ, on August 7, 2007 and January 18, 2011. A hearing transcript, and sets of Claimant's Exhibits, Island Operating's Exhibits and Joint Exhibits were created at each hearing. Therefore, in identifying particular hearing transcripts and exhibits, we will include the corresponding hearing year.

STATEMENT OF THE ISSUE

Section 22 of the Longshore Act permits an ALJ to reopen and modify an otherwise-final decision "because of a mistake in a determination of fact[.]" 33 U.S.C. § 922. The Supreme Court has interpreted Section 22 as vesting the ALJ with broad discretion to correct factual errors, whether discovered by "wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The question presented is: whether the ALJ erred in reopening Taylor's case on the basis of evidence that was available to Taylor at the time of the prior decision?[4]

STATEMENT OF THE CASE

On April 15, 2011, the ALJ issued a decision awarding permanent partial disability benefits to Taylor. This decision modified a pervious order awarding Taylor only temporary

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[4] The Director addresses only the legal issue of whether the ALJ properly reopened the case. He takes no position on the question of whether the ALJ's decision to award ongoing disability benefits to Taylor after reopening the case was supported by substantial evidence.

benefits.[5] Island Operating appealed to the Benefits Review Board, arguing that the ALJ had exceeded his authority under Section 22. The Board disagreed and affirmed the ALJ's decision on February 8, 2012. This appeal followed.

STATEMENT OF THE FACTS

A. Legal background

The Longshore Act was enacted in 1927 to establish a federal workers' compensation system for workers disabled or killed in the course of maritime employment. 33 U.S.C. §§ 903(a), 908-909; *see generally Northeast Marine Terminal Co.*

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[5] The Longshore Act provides compensation for four different categories of disability: permanent total, temporary total, permanent partial and temporary partial. 33 U.S.C. 908(a)-(e); *see also Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 273-74 (1980). In summary terms, the "total/partial" axis measures the extent of a disability while the "temporary/permanent" axis describes its nature. A disability that eliminates a claimant's earning capacity is "total," while one that merely reduces that capacity is partial. A disability is "temporary" if the claimant's medical condition is improving and becomes "permanent" when it reaches "maximum medical improvement" -- *i.e.*, when the condition "has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994) (quoting *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968)).

v. Caputo, 432 U.S. 249, 256-258 (1977) (discussing history). It has been expanded to apply to several additional categories of workers, including those injured "as the result of operations on the Outer Continental Shelf[.]" 43 U.S.C. § 1333(b); *see Pacific Operators Offshore v. Valladolid*, --- U.S. ---, 132 S.Ct. 680, 691 (2012).

The Act contains a generous reopening prevision, Section 22, which provides in pertinent part:

> 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 determination of fact by the deputy commissioner, the deputy commissioner may . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. § 922.[6] Modification can be sought even after the prior decision awarding or denying benefits has become final

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[6] The title "deputy commissioner" has been replaced by "district director." 20 C.F.R. § 701.301(a)(7). While many of the deputy commissioners' former powers were transferred to district directors, most of their adjudicative duties were instead transferred to administrative law judges. *See* 33 U.S.C. § 919(d). Applications for modification, therefore, are normally adjudicated by an administrative law judge, as was

(in the sense of non-appealable), so long as it is requested "prior to one year after the date of the last payment of compensation . . . [or] the rejection of a claim[.]" *Id.*

Modification requests are adjudicated "in accordance with the procedure prescribed in respect to claims in section 19." *Id.* Thus, once a party requests modification, it is entitled to the same procedures available in an original claim, including a *de novo* evidentiary hearing before an administrative law judge subject to review by the Benefits Review Board and the federal courts of appeals. 33 U.S.C. §§ 919, 921; 20 C.F.R. § 702.373; *see Newport News Shipbuilding and Dry Dock Co. v. Firth*, 363 F.3d 311, 315 (4th Cir. 2004).

B. Proceedings prior to Taylor's modification request.

Taylor filed a claim for benefits under the Act in May 2006 for a knee injury which occurred in January of that year while Taylor was working on an offshore oil platform for Island Operating. 2007 HT at 17, 20. The ALJ initially denied the

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Taylor's application here. *See generally Eifler v. Director, OWCP,* 926 F.2d 663, 665-669 (7th Cir. 1991); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

claim, finding that that Taylor's knee condition had been caused by pre-existing arthritis rather than a traumatic injury. ALJ's November 29, 2007 Decision and order ("ALJ1") at 13. The Board reversed and remanded, explaining that proof of a traumatic injury was unnecessary because pre-existing conditions that are aggravated by a claimant's work are covered by the Act.[7] BRB's September 25, 2008 Decision and Order at 4.

On remand, the ALJ awarded Taylor temporary disability benefits for two periods prior to September 16, 2006. On that date, he was released to work by Dr. Fairbanks after arthroscopic knee surgery and reached maximum medical improvement. ALJ's June 16, 2009 Decision and Order

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[7] "[T]he aggravation rule is a doctrine of general workers' compensation law which provides that, where an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986). It "has been consistently applied by this Court in longshoremen cases." *Id.* Island Operating does not challenge the Board's application the rule below.

("ALJ2") at 2; ALJ's April 15, 2011 Decision and Order ("ALJ3") at 2 and n.2; *see* n.5, *supra*. The ALJ determined that Taylor was not totally disabled after that date because Island Operating had established that suitable alternative employment was available. ALJ2 at 2-3 and n.3. Observing that none of the orthopedic experts, including Dr. Fairbanks, offered an impairment rating for Taylor's knees (which could have supported a scheduled permanent partial disability award for a leg impairment), the ALJ ruled that Taylor was not entitled to compensation after September 16, 2006.[8] ALJ2 at

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[8] Claimants who have lost the use of a body part listed in Section 8(c) of the Act are automatically entitled to permanent partial disability benefits for the number of weeks set forth in the statutory schedule. 33 U.S.C. § 908(c)(1-20). "When these types of scheduled injuries occur, a claimant simply proves the relevant physical injury and compensation follows for a finite period of time." *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291, 296 (1995) (citations omitted). Relevant to this case, Section 8(c)(2) awards 288 weeks of compensation for the complete loss of use of a leg. Where there is only a partial loss of use to a scheduled body part, the number of weeks of compensation payable is determined by multiplying the percentage loss of use – the "impairment rating" - by the number of weeks of compensation allowed for the loss of the body part. 33 U.S.C. § 908(c)(19).

4. Taylor did not appeal this award, issued June 16, 2009, to the Board.

C. Modification proceedings

On January 8, 2010, Taylor filed an application to modify the award under Section 22. CX 1 (2011). The only issue contested at the hearing was whether, and to what extent, Taylor's legs were impaired after he reached maximum medical improvement on September 16, 2006. ALJ3 at 2. Two doctors gave written opinions on the issue, both of which supported Taylor's claim.

Dr. Fairbanks, in a letter dated February 23, 2010, stated that the surgery had not eliminated Taylor's knee symptoms, and that Taylor has a 25% impairment of both legs based on the AMA Guides to the Evaluation of Permanent Impairment. CX 6 (2011). Because Dr. Fairbanks had not treated or examined Taylor since September 2006, his opinion was based on Taylor's treatment records. *Id.*; ALJ3 at 4.

Taylor also submitted the opinion of Dr. Murphy, an orthopedic surgeon who had not given an opinion in the prior proceedings. Dr. Murphy examined Taylor on October 12,

2010, and reviewed some portion of Taylor's medical records. CX 2 (2011). Dr. Murphy agreed that Dr. Fairbanks's 25% impairment rating for each leg was reasonable. *Id.* Dr. Murphy attributed only 5% of that impairment to the January 2006 work injury, and the remaining 20% to a degenerative condition that occurred "over a period of many years associated with [Taylor's] obesity and strenuous work conditions." *Id.*; CX 8 (2011) (November 16, 2010 Deposition of Dr. Murphy) at 48-49.

After a hearing, the ALJ issued a decision and order on April 15, 2011, granting Taylor's modification petition. Island Operating argued that Taylor had not established grounds for modification because the evidence he submitted could have been developed for the earlier hearing. ALJ3 at 4. The ALJ acknowledged that "the impairment ratings . . . were arguably available at the time of the original hearing[.]" *Id.* But this fact was irrelevant in light of his conclusion that "modification may be granted based upon previously available evidence." *Id.* Based on the unrefuted disability ratings submitted by Drs. Fairbanks and Murphy, the ALJ concluded

that each of Taylor's legs had a disability rating of 25%.[9] *Id.* Accordingly, the ALJ modified his previous decision to award Taylor scheduled permanent partial disability benefits for each leg commencing on September 16, 2006.[10]

Island Operating appealed the ALJ's decision to the Board, which affirmed. Remarking that Section 22 evinces the Act's preference for accuracy and displaces traditional notions of finality, the Board held that the ALJ properly modified his previous compensation order under Section 22 based on a mistake in fact, despite the fact that the evidence Taylor presented in support was available prior to the initial hearing. BRB's February 8, 2012 Decision and Order at 3. The Board also affirmed, as unchallenged on appeal, the ALJ's award of

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[9] The ALJ held that Dr. Murphy's opinion that only 5% of Taylor's 25% disability was due to the January 6, 2006 incident was irrelevant because of the aggravation rule. *See* n. 7, *supra.* Island Operating does not challenge this ruling on appeal.

[10] The ALJ awarded a total of 144 weeks of compensation, ALJ3 at 5. This was determined by taking 25% (the uncontested impairment rating for each of Taylor's legs) of 288 (the number of weeks awarded for complete loss of a leg by Section 8(c)(2)) and multiplying the result by two (to account for both legs. *See* n. 8, *supra.*

permanent partial disability compensation based on Dr. Fairbanks' opinion.

SUMMARY OF THE ARGUMENT

Congress designed Section 22 to be a generous reopening provision that allows orders to be modified when a factual mistake is made or when an injured employee's condition or circumstances change over time. Section 22, like similar provisions in many other workers' compensation schemes, promotes justice by providing a means of correcting inaccurate compensation decisions. The Supreme Court has construed Section 22 broadly as allowing a fact-finder to correct mistakes based on wholly new evidence, cumulative evidence or merely further reflection on the evidence submitted in the initial claim proceeding.

The ALJ's decision granting Taylor's modification request is consistent with the scope of Section 22, as demonstrated by its unqualified terms and as interpreted by the Supreme Court. Island Operating's argument that modification cannot be granted on the basis of evidence available at the time of the previous hearing is contrary to the law of this Circuit and

inconsistent with the Supreme Court's interpretation of Section 22. Accordingly, the Court should affirm the ALJ's decision to reopen this case.

ARGUMENT

A. Standard of Review

In cases under the Longshore Act, the Board considers appeals from ALJ decisions "raising a substantial question of law or fact," and must affirm the ALJ's decision if it is "supported by substantial evidence in the record considered as a whole" and is in accordance with law. 33 U.S.C. § 921(b)(3). This Court reviews Board decisions to correct errors of law and to determine whether the Board properly deferred to the ALJ's fact-finding. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 224 (5th Cir. 2001).

The Board's holding that the ALJ correctly applied Section 22 in reopening Taylor's claim is a question of law subject to plenary review by this Court. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1992). In interpreting the Longshore Act, the Court "afford[s] deference to the Director's interpretations . . . [Citations omitted.] [T]he precise amount

of deference that [the Court] owes to any given interpretation by the Director 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Pool Co. v. Cooper*, 274 F.3d 173, 177 (5th Cir. 2001) (quoting *United States v. Mead Corp.*, 523 U.S. 218, 228 (2001), in turn quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

B. Section 22 gives administrative law judges broad power to correct mistakes of fact.

Since 1938, Section 22 has provided that decisions awarding or denying benefits can be reopened "because of a mistake in a determination of fact[.]" 33 U.S.C. § 922.[11] The Supreme Court has interpreted this expansive language literally, "find[ing] nothing in [Section 22's] legislative history to support the . . . argument that a 'determination of fact' means only some determinations of fact and not others." *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459,

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[11] *See generally Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459, 465 (1968) (detailing Section 22's history).

465 (1968). *Banks,* a death benefits claim, was initially denied because the survivor-claimant had failed to prove a causal connection between the worker's fatal fall at home and a particular workplace injury. *Id.* at 460. The survivor filed another claim two months later, arguing that the fall had been caused by a separate workplace injury that had not been addressed in the previous hearing. *Id.* at 461. Overturning the court of appeals, which had denied the claim on res judicata grounds, the Court held that the deputy commissioner had properly awarded the claim on modification. *Id.*

The Supreme Court revisited Section 22 in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The *O'Keeffe* claimant suffered from a disabling lung condition, but his Longshore Act claim was initially denied for failure to prove that the condition was work-related. The deputy commissioner later reopened the proceedings and "concluded, contrary to his initial determination, that the disabling condition had been materially hastened by the circumstances of employment," and granted benefits under Section 22. *Id.* at

406. The court of appeals reversed, holding that Section 22 "simply does not confer authority upon the Deputy Commissioner to receive additional but cumulative evidence and change his mind." *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 442 F.2d 508, 513 (5th Cir. 1971).

The Supreme Court unanimously disagreed, reasoning that "[n]either the wording of [Section 22] nor its legislative history supports this narrowly technical and impractical construction." (citation omitted). 404 U.S. at 255. Observing that Section 22's text contains no "limitation to particular factual errors, or to cases involving new evidence or changed circumstances[,]" the Court explained that it "vest[s an ALJ] with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Id.* at 255-256 (citations and internal quotations omitted).[12]

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[12] The Supreme Court has given Section 22's clause allowing modification based on a "change in conditions" a similarly broad construction. *See Rambo I*, 515 U.S. at 296.

As a leading scholar in the field has observed, this "broad Supreme Court interpretation superimposed on a broad statutory provision" makes Section 22 "perhaps the most permissive 'mistake' reopening rule on record." 8 Larson, *Larson's Workers' Compensation Law* § 131.05[2][b], at 131-51 (2009 & Supp. 2012). The courts of appeals have repeatedly echoed Professor Larson's assessment. *See*, *e.g.*, *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 539 ("Both these terms [change in conditions and mistake in fact] have been interpreted broadly by the Supreme Court.")[13]; *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 175 (2d.

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[13] *Old Ben Coal* involved a claim under the Black Lung Benefits Act -- also administered by the Director -- which incorporates much of the Longshore Act, including Section 22. 30 U.S.C. § 932(a). Black lung case law construing Section 22 applies equally to Longshore Act claims. Island Operating suggests that *Old Ben* is inapplicable to Longshore Act cases because the court's interpretation of Section 22 was influenced by the Black Lung Benefits Act's "expressed purpose of . . . insuring future adequate benefits to coal miners and their dependents." Pet. br. 22-23 (citing 30 U.S.C. § 901(a)). But this alleged influence could have had no effect on the outcome. In *Old Ben*, the ALJ and Board refused to consider an employer's request to reopen an award. 292 F.3d at 537-538. The Seventh Circuit reversed, thereby putting the claimant's benefits at risk. *Id.* at 548.

2000) ("the authority of an ALJ to modify existing orders based on mistakes in fact . . . is broad"); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001) (Section 22 "is a broad reopening provision that is available to employers and employees alike."); *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497 (4th Cir. 1999) ("Th[e] modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings. . . . *any* mistake of fact may be corrected, including the ultimate issue of benefits eligibility.") (citations omitted); *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995) (The modification provision should be broadly construed to allow "an ALJ to reconsider the evidence in determining whether there was a mistake of fact, even the ultimate fact of entitlement.").

Fighting against this broad interpretation of Section 22, Island Operating argues that the ALJ was forbidden from reopening Taylor's case because (1) Taylor did not make a threshold evidentiary showing that a mistake was made, and (2) Taylor submitted evidence that was available at the time of the previous award. These arguments are without merit.

C. Section 22 imposes no threshold evidentiary requirement.

Island Operating's first issue statement asks whether the ALJ and Board "erred in concluding that claimant was entitled to modification under 33 U.S.C. § 922 in the absence of establishing the threshold requirements of . . . mistake in determination of fact[.]" Pet. br. at 2. For the most part, however, it does not develop this point separately from its principal argument that modification cannot be based on previously available evidence. *See* § D, infra. To the extent Island Operating suggests that some threshold evidentiary showing is required before a modification request can be entertained, the argument is undermined by *O'Keeffe's* holding that Section 22 empowers ALJs to correct mistakes of fact based merely on "further reflection on the evidence initially submitted[.]" 404 U.S. at 255-256.[14] *See also Jensen*

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[14] Indeed, a party seeking modification does not need to plead mistake-in-fact, change-in-condition, or even Section 22. *See Old Ben Coal*, 292 F.3d at 541 ("Once a request for modification is filed, no matter the grounds stated, if any, the deputy commissioner has the authority, if not the duty, to reconsider all the evidence of any mistake of fact or change in

v. Weeks Marine, Inc., 346 F.3d 273, 276-77 (2d Cir. 2003) ("the Board's language . . . may be read to imply that a Section 22 movant must make some 'threshold' proffer of new evidence before it is entitled to a review of the entire record. This impression would be error."); *Jessee*, 5 F.3d at 725 (a petitioner "may simply allege the ultimate fact . . . was mistakenly decided, and the deputy commissioner may . . . modify the final order on the claim. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence").

D. Modification can be granted on the basis of previously available evidence

Island Operating's primary argument is that the ALJ's award on modification should be overturned because it was based on evidence – two medical opinions that Taylor remained partially disabled after September 16, 2006 – that

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conditions."); *Banks,* 390 U.S. at 465 (claimant's additional claim treated as modification request); *Stansfield v. Lykes Brothers Steamship Co.*, 124 F.2d 999, 1000 n.3, 1004 (5th Cir. 1941) (affirming modification on mistake-in-fact grounds "after a hearing called and conducted throughout on the ground of a change in conditions").

Taylor could have developed and submitted during the original hearing in 2007. Pet. br. 20, 21-22, 26, 27. This argument has at least two crippling flaws.

First, it is contrary to the broad construction of mistake-in-fact modification adopted in *Banks*, *O'Keeffe*, and their progeny.[15] Indeed, while the *O'Keeffe* court did not explicitly discuss the issue, the modification award it upheld was based primarily, if not exclusively, on evidence that was available to the claimant at the time of the initial hearing. *See Aerojet-General Shipyards, Inc. v. O'Keeffe*, 442 F.2d 508, 510-512 (5th Cir. 1971) *rev'd*, *O'Keeffe*, 404 U.S. 254. Applying the logic of *Banks* and *O'Keeffe*, the Seventh and Second Circuits have explicitly and correctly rejected the idea that modification cannot properly be based on previously-available evidence. *See Old Ben Coal Co.*, 292 F.3d at 547 ("We . . . hold that, given the unique command of this statute, a modification request cannot be denied solely because it contains argument or evidence that could have been presented at an earlier stage

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[15] Island Operating does not even attempt to identify a textual basis for its proposed rule.

in the proceedings[.]"); *Jensen*, 346 F.3d at 277 (The employer "was not required to show that the evidence it had developed was not available before the first hearing in order to secure a modification hearing."). That logic applies with equal force here.

Second, Island Operating's proposed limitation is inconsistent with this Court's decision in *Stansfield v. Lykes Brothers Steamship Co.*, 124 F.2d 999 (5th Cir. 1941). The claimant in *Stansfield* suffered a left shoulder injury, including a dislocated clavicle. *Id.* at 1001. He was initially awarded permanent disability benefits based on "an agreed statement of facts in which the parties in effect agreed that the plaintiff has suffered a compensable injury . . . and a 15% permanent partial disability of the left arm[.]" *Id.* At the time of the first proceeding, the claimant knew that the dislocated bone interfered with his breathing when his arm was raised at or above shoulder height. *Id.* at 1001-1002. He did not, however, inform the deputy commissioner of this fact. Nor was this breathing impairment mentioned in the agreed statement. He later filed a Section 22 petition to modify the

award to account for this additional impairment. The deputy commissioner, finding that his earlier decision was based on a mistake of fact, modified the award to increase the claimant's disability rating to 25%. *Id.* at 1000, 1005.

The district court set aside the modified award, concluding that "the case comes neither within the letter nor the spirit of Section 922" because the claimant had withheld facts from the deputy commissioner during the initial proceeding. 124 F.2d at 1002 (quoting district court decision).[16] This Court disagreed, rejecting arguments that the claimant's failure to raise the issue in the initial proceeding and his agreement to stipulated facts barred him from seeking Section 22 modification. *Id.* at 1004-1005. Explaining that the deputy commissioner "found, that because of the fact that evidence of the pressure on the trachea was not before him, he mistakenly found the fact as to claimant's disability" and that

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[16] Prior to 1972, the Benefits Review Board did not exist and compensation orders were challenged by filing suit to enjoin the deputy commissioner's decision in district court. *See* 33 U.S.C. § 921(b)(1970).

"the re-award in question here was made to correct that mistake[,]" the Court reversed the district court, effectively reinstating the modified award. *Id.* at 1005.[17]

Stansfield wholly undermines Island Operating's argument that Section 22 modification cannot be based on evidence available at the initial hearing. Indeed, this is an easier case because Taylor never stipulated to the ALJ's initial conclusion that he was not disabled after September 16, 2006. *Stansfield's* holding has not been eroded by subsequent decisions by this Court or the Supreme Court.[18] It therefore

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[17] This Court reached a similar result in an unpublished decision issued over 50 years later. *Franko v. Director, OWCP, and Ingalls Shipbuilding, Inc.*, No. 96-60657, 1997 WL 304391 (5th Cir. May 22, 1997). Franko's initial claim was denied for failure to demonstrate a connection between his employment and his hearing loss. *Id.* at *1. He sought modification, substantiated by a new affidavit from an expert who had testified in the earlier proceeding. The ALJ denied modification, reasoning that "Franko should have been able to present the supplemental affidavit at the original trial." *Id.* at *2. This Court reversed, finding instead that the claimant's modification request "was a good faith attempt to address the ALJ's evidentiary concerns[.]" *Id.* at *2-3.

[18] Some of *Stansfield's* limiting dicta is arguably inconsistent with *Banks* and *O'Keefe*. Compare *Stansfield*, 124 F.2d 1003-1004, with *Banks*, 390 U.S. at 465, and *O'Keeffe*, 400 U.S. at

remains good law and should be followed here. *See Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 985 (5th Cir. 2010) ("It is a well–settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by statutory amendment, or the Supreme Court, or our en banc court.") (citation omitted).

Against these authorities, Island Operating cites only one court of appeals decision, *General Dynamics Corporation v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982), to support its claim that modification cannot be based on previously-available evidence. Pet. br. 19. *General Dynamics* does contain language suggesting that finality is an important -- indeed, a "paramount" -- consideration in deciding whether to grant modification. 673 F.2d at 25-26. But the great weight of authority points in the opposite direction. *See, e.g.*, *Old Ben*

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256. But this merely shows that Section 22 has been interpreted even more broadly since *Stansfield* was decided. If Taylor is entitled to modification under *Stansfield* – and he is – then he is certainly entitled to modification under *Stansfield* as modified by *Banks* and *O'Keeffe*.

Coal Co., 292 F.3d at 541 (Section 22 evinces an "interest in accuracy [that] trumps the interest in finality."); *Jessee*, 5 F.3d at 725 ("the 'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits."); *Rambo I*, 515 U.S. at 300 (argument that lack of finality under Section 22 will lead to frequent litigation is "better directed at Congress or the Director in her rulemaking capacity than at the courts.") (citations omitted).

General Dynamics's actual holding -- that a party who did not raise a particular affirmative defense initially cannot raise that defense in a modification proceeding -- is more modest.[19] As the Seventh and Second Circuits have recognized, *General Dynamics* should not be extended beyond that context. *Old Ben Coal Co.*, 292 F.3d at 545 (noting that

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[19] In the initial hearing, the employer in *General Dynamics* failed to raise Section 8(f), which limits an employer's disability payments to 104 weeks in certain circumstances where an employee with a preexisting permanent partial disability becomes more impaired. 33 U.S.C. § 908(f). This is designed to encourage employers to hire partially disabled workers without fear of incurring additional liability. Where Section 8(f) is properly invoked, remaining benefits are paid by the Longshore Special Fund established by 33 U.S.C. § 944.

General Dynamics's language "emphasiz[ing] finality interests cannot easily be squared with the language of the statue, the holdings of the Supreme Court, or the holdings of other circuits that have emphasized the preference for accuracy over finality in Section 22 adjudications."); *Jensen*, 346 F.3d at 277 (observing that *General Dynamics* "contains some language about finality," but that "it is better to resist reading the *General Dynamics* dicta too broadly.").[20]

Island Operating also seeks support in several Benefits Review Board decisions. Pet. br. 20-23. "[T]he Benefits Review Board is not a policymaking agency; its interpretation of the [Longshore Act] is therefore not entitled to any special deference from the courts." *Potomac Elec. Power Co.*, 449 U.S. at 279 n.18. To the extent that these decisions stand for the proposition that modification cannot be based on previously-available evidence, they are unpersuasive for the same reasons

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[20] *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 779-780 (11th Cir. 1985), another Section 8(f) modification case, essentially adopted the reasoning of *General Dynamics.* Consequently, it is unpersuasive for the same reasons.

that *General Dynamics* is unpersuasive. Moreover, the Board has apparently abandoned that position, as demonstrated by its affirmance in this case.

E. The ALJ properly reopened this case under Section 22

As demonstrated above, modification is an extremely broad remedy. No threshold evidentiary showing is necessary to reopen a case under Section 22, and modification can be granted on the basis of evidence available during the prior proceeding. The right to seek modification nevertheless has limits. The most obvious is Section 22's explicit one-year limitations period from the date of the previous decision or last payment of benefits. 33 U.S.C. § 922. This requirement gives Longshore decisions, particularly those denying benefits, substantial finality. It was unquestionably satisfied here.[21]

Modification may also be denied where the moving party has engaged in particularly egregious conduct amounting to an abuse of the adjudicatory system, *McCord v. Cephas*, 532

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[21] The ALJ's initial award was issued on June 16, 2009. ALJ2. Taylor requested modification on January 8, 2010. CX 1 (2011).

F.2d 1377, 1381 (D.C. Cir. 1976) (modification petition could be denied based on employer's "recalcitrance," "callousness towards the processes of justice," and "self-serving ignorance"), 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 ALJ has the discretion to deny an otherwise meritorious request because allowing modification will not render "justice under the Act." *O'Keeffe*, 404 U.S. at 255.[22] Taylor's good-faith claim to additional compensation under the Longshore Act -- compensation to which the ALJ ultimately found Taylor entitled -- is a far cry from the contemptible behavior at issue in *McCord*. The ALJ's decision to reopen the claim was correct.

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[22] Because the standard is justice *under the Act* rather than an unvarnished "interest of justice" standard, an ALJ's discretion is cabined 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*, 292 F.3d at 547.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court affirm the Board's affirmance of the ALJ's decision to reopen Taylor's claim under Section 22.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C) because it contains 5,724 words and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (14-point Bookman Old Style) using Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2012, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and on the following:

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