BRB Nos. 01-0542
and 01-0542A

DOMINGOS SEGURO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: March 18, 2002
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Order Granting Partial Summary Decision of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor, and of the Decision and Order, the Order Granting Motion for Reconsideration and Modifying Previous Decision and Order, and the Order Granting Employer's Motion for Reconsideration and Clarification of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order Granting Partial Summary Decision of Administrative Law Judge Ainsworth H. Brown, and claimant appeals and employer cross-appeals, the Decision and Order, the Order Granting Motion for Reconsideration and Modifying Previous Decision and Order, and the Order Granting Employer's Motion for Reconsideration and Clarification (87-LHC-735) of Administrative Law Judge Paul H. Teitler rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation

Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and 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 was employed as a longshoreman from 1969 to the date he was injured, April 27, 1981. On that date, claimant injured his knee, which subsequently required two operations. He has not returned to work since the injury, and he sought benefits under the Act. While the claim was initially before the district director, employer agreed that claimant was permanently totally disabled, and it sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer's application for Section 8(f) relief was denied, and the case was transferred to the Office of Administrative Law Judges for adjudication, where it was assigned to Administrative Law Judge Chao. Before Judge Chao, employer stated that the parties stipulated to claimant's permanent total disability and that the only issue for resolution was employer's request for Section 8(f) relief.

In his 1987 Decision and Order, Judge Chao noted the parties' stipulations, but did not incorporate an award of benefits to claimant into his order. He stated that the only disputed issue was Section 8(f) relief, and he found that as employer did not establish that claimant's pre-existing permanent partial disability contributed to claimant's total disability, Section 8(f) relief was denied.[1] On July 27, 1998, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922 , alleging that notwithstanding its earlier stipulation, claimant has been capable of suitable alternate employment since at least January 1, 1985, and thus is limited to a permanent partial disability award under the schedule for an impairment to his right knee. 33 U.S.C. §908(c)(2). Employer also filed a motion for partial summary decision, seeking a ruling that there was no final compensation award contained in Judge Chao's October 30, 1987, Decision and Order. On March, 5, 1999, Administrative Law Judge Ainsworth Brown granted employer's motion, holding that there was no compensation award in place. Employer stopped making payments to claimant on March 10, 1999. Claimant appealed Judge Brown's decision to the Board, which dismissed the appeal as interlocutory. *Seguro v. Universal Maritime Service Corp.*, BRB No. 99-696 (Jan. 24, 2000).

[1]This decision was appealed to the Board, and the Board affirmed the administrative law judge's decision. *Seguro v. Universal Maritime Service Corp.*, BRB No. 87-3680 (Sept. 9, 1992).

A hearing was held on employer's request for modification. In his Decision and Order, Administrative Law Judge Teitler (the administrative law judge) found that Judge Chao's decision effectively served as a compensation order and that the parties stipulated that claimant was permanently and totally disabled. However, the administrative law judge also stated that employer may seek to modify its earlier stipulation pursuant to Section 22 of the Act, 33 U.S.C. §922, provided it can successfully show that there has been a change in claimant's condition. The administrative law judge then found that the opinions of Drs. Nehmer and Magliato that claimant can perform sedentary work from a physical standpoint are entitled to determinative weight. In addition, he credited the opinion of Dr. DaSilva, a clinical psychologist, that claimant could function at an occupation with minimal tasks and with limited demands placed on his need to problem-solve or reason. The administrative law judge reviewed the labor market survey and testimony presented by employer's vocational expert and found that a number of the positions specifically approved by Dr. DaSilva are consistent with the work restrictions placed on claimant by Dr. Magliato and Dr. Nehmer. Therefore, the administrative law judge found that claimant is entitled to permanent partial disability benefits based on a wage-earning capacity of $246.80 per week, based on an average of the hourly rates of the suitable alternate positions.

In an Order granting employer's motion for reconsideration, the administrative law judge amended his prior decision to reflect claimant's entitlement to an award under the schedule. He found claimant's disability changed from permanent total to permanent partial on July 27, 1998, the date employer sought modification, even though evidence of suitable alternate employment compiled in 1999 showed jobs existed as early as 1985-1986. In addition, he found that employer is entitled to a credit for permanent total disability payments it made from July 27, 1998 to March 10, 1999. In a second Order granting employer's motion for reconsideration, the administrative law judge clarified his previous orders to reflect that claimant is entitled to a scheduled award for a fifteen percent impairment of his lower extremity. In addition, the administrative law judge denied claimant's motion for reconsideration, rejecting the contentions that he erred in determining the onset of the scheduled award and in finding that employer is entitled to a credit for overpayment of permanent total disability benefits against its liability for partial disability benefits.

On appeal, claimant initially contends that Judge Brown erred in granting employer's motion for summary decision on the issue of whether Judge Chao's decision constitutes a "final" award of permanent total disability benefits. Claimant contends that Judge Teitler correctly viewed the case as a Section 22 modification case. However, claimant contends that Judge Teitler erred in finding that employer established a change in claimant's medical and economic conditions, and thus in modifying claimant's entitlement to total disability benefits. As an alternative argument, claimant contends that, assuming, *arguendo*, that modification is appropriate, the administrative law judge erred in finding that employer is

entitled to a credit as claimant is entitled to continuing permanent total disability benefits until the date of modification, at which time he would be entitled to scheduled benefits for permanent partial disability. Moreover, claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment. Claimant also contends that the administrative law judge failed to consider his contention that he is disabled by back and left knee pain as a result of the work injury and thus is entitled to permanent partial disability benefits pursuant to Section 8(c)(21). Lastly, claimant urges the Board to reverse the administrative law judge's award for a fifteen percent impairment and to remand for further fact-finding on the extent of his impairment. Employer responds, urging affirmance of the administrative law judges' findings on these issues. On cross-appeal, however, employer contends that the administrative law judge erred in terminating claimant's permanent total disability benefits on July 27, 1998, rather than on January 1, 1988, as it asserts that it established suitable alternate employment on the earlier date.

Procedural Issues

Initially, we address claimant's contentions regarding the effect of Judge Brown's interlocutory order. In granting employer's motion for summary decision, Judge Brown found, in effect, that Judge Chao's 1987 decision was not a final compensation order that awarded claimant permanent total disability benefits. Nonetheless, Judge Teitler disagreed, and he reviewed the case from the viewpoint of Section 22, finding that "the effect of Employer's voluntary payments to Claimant was in effect a voluntary compensation order...." Decision and Order at 17. Thus, he found that "a modification claim may proceed." It appears from this statement that Judge Teitler may have believed the claim could not proceed unless the modification provision were applicable. However, for the following reasons, we affirm Judge Brown's finding that Judge Chao's 1987 decision did not constitute a final compensation order. Thus, the modification provision of Section 22 of the Act is not applicable, as the initial claim for benefits had never been the subject of a final formal compensation order prior to the adjudication by Judge Teitler.

Prior to the initial consideration of the claim by the district director, the parties agreed that claimant was permanently totally disabled due to his work injury on April 27, 1981. Although the parties agreed that claimant was entitled to permanent total disability benefits, the district director did not issue a compensation order pursuant to 20 C.F.R. §702.315. The case was transferred to the Office of Administrative Law Judges for adjudication of employer's claim for Section 8(f) relief. In his decision, Judge Chao noted the parties' stipulations and found that the only issue in dispute was employer's entitlement to Section 8(f) relief. However, he did not incorporate the parties' stipulations into a formal order. Moreover, he addressed only employer's request for Section 8(f) relief in his decision. Nevertheless, employer continued to pay benefits to claimant from the date of injury until it suspended payments on March 10, 1999. *See* 20 C.F.R. §702.321; Emp. Ex. 2.

Contrary to Judge Teitler's conclusion, there is no provision in the Act or the regulations for a "voluntary order" unless the parties' agreement is embodied in a formal order issued by the district director or administrative law judge. *See* 33 U.S.C. §919(c); 20 C.F.R. §§702.315, 702.348; *see generally Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). Moreover, voluntary payments by an employer do not equate to a final order. An order can be issued based on the parties' stipulations, or after the administrative law judge adjudicates a claim, but this did not occur in this case. Judge Chao's decision neither awards nor denies benefits. As no final compensation order was ever issued in this case, the claim before the administrative law judge must be viewed as an initial claim for compensation. *See O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in pert. part on recon.*, 22 BRBS 430 (1989). Therefore, we affirm Judge Brown's interlocutory order granting employer's motion for summary decision on the issue of whether Judge Chao's decision was a final compensation order.

Moreover, the absence of a final compensation order precludes the application of Section 22. *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). Section 22 provides the only means for changing otherwise final compensation orders. In the present case, there was no final compensation order awarding or denying benefits, and therefore there was nothing to modify. As the absence of a formal award or denial of benefits renders Section 22 inapplicable, the threshold requirements for reopening a claim under that section do not apply. Thus, we need not reach claimant's contentions that the administrative law judge erred in finding a change in his condition pursuant to Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

The fact that Section 22 does not apply does not limit Judge Teitler's authority to address the issues raised. Under *Intercounty*, a claim remains open until it is adjudicated and a final order issues. *See O'Berry*, 21 BRBS 355. Thus, this case is procedurally one involving an injury for which employer has voluntarily paid benefits before ultimately controverting further liability. Although Judge Teitler reviewed the case under Section 22, he fully addressed the issues and evidence and the legal standards applicable in a Section 22 case after the threshold requirements are met are the same as those in an initial proceeding. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). We shall therefore treat his decision as the initial adjudication of claimant's pending claim and review the parties' arguments in this context.

Extent of Disability

Claimant contends that the administrative law judge erred in finding that employer

established the availability of suitable alternate employment. Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). In order to meet this burden, employer must show the realistic availability of job opportunities within the geographical areas where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Initially, the administrative law judge found that claimant was physically capable of performing sedentary work based on the opinions of Drs. Nehmer and Magliato. Dr. Nehmer examined claimant five times between February 1998 and May 2000. His conclusions after each examination were consistent, as he found, based on his physical examination and his own observations, that claimant has a ten percent disability of the lower extremity and is capable of sedentary work. Dr. Magliato examined claimant on September 24, 1998, and concluded that claimant would be able to perform some type of sedentary work where he could sit or stand at will. Emp. Ex. 12. In addition, the administrative law judge credited the April 2000 opinion of Dr. DaSilva that claimant has the psychological ability to work, based on Dr. DaSilva's credentials, his ability to converse with claimant in Portugese, and his thorough evaluation of claimant's skills and abilities.

In concluding that employer met its burden of establishing the availability of suitable alternate employment in this case, the administrative law judge also credited the reports and testimony of Sharon Levine, employer's vocational expert. Ms. Levine evaluated claimant and considered the restrictions imposed by Dr. Nehmer; she concluded that claimant was capable of a sedentary position involving light assembly work. After conducting a labor market survey and contacting prospective employers, in her April 27, 1999, report, Ms. Levine identified specific available jobs within these categories, including three that were specifically approved by Drs. Nehmer and DaSilva: a packing position at Fuji Film, a packing position at Zebra Pen Corporation, and a packaging position at Revlon, Incorporated. *See* Emp. Ex. 8a. Contrary to claimant's contention, there is no indication in the record that these positions were not available at the time of the labor market survey. In a subsequent labor market survey conducted a few days prior to the June 13, 2000 hearing, Ms. Levine identified three additional positions which were found to be appropriate by Drs. Nehmer and DaSilva: an assembly position at Liz Claiborne Cosmetics, an assembly position at Givenchy, and an assembly position at a company whose name was withheld by the staffing agency. *See* Emp. Ex. 34. The administrative law judge concluded that Ms. Levine's report was thorough and detailed and that she took into account claimant's physical and mental abilities as well as his inability to speak English.

As the administrative law judge's finding that employer established the availability of

suitable alternate employment based on the testimony of Ms. Levine and the opinions of Drs. Nehmer and DaSilva is rational and supported by substantial evidence, we affirm the administrative law judge's finding. *Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Thus, we affirm the administrative law judge's determination that claimant is only partially disabled and is limited to an award under the schedule for his knee injury. *Potomac Electric Power Co. v. Director, OWCP (PEPCO),* 449 U.S. 268, 14 BRBS 363 (1980).

We reject, however, employer's contention in its appeal that the administrative law judge erred in not finding that it established suitable alternate employment as of January 1988. As the positions identified by Ms. Levine are based on claimant's medical condition as reported by Drs. Nehmer and Magliato in 1998, and were specifically approved by these physicians based on their assessment of claimant's medical condition at that time, we affirm the administrative law judge's finding that suitable alternate employment was established as of July 28, 1998.[2] *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 122 (1998); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). Claimant's total disability benefits thus terminate on that date, and he is entitled to permanent partial disability benefits under the schedule thereafter as compensation for his knee injury. Consequently, we affirm the administrative law judge's finding that employer is entitled to a credit for the overpayment of permanent total disability benefits from July 28, 1998 until March 10, 1999 toward the amount due for claimant's permanent partial disability. 33 U.S.C. §914(j).

Extent of Partial Disability

Claimant also contends that the case should be remanded for the administrative law judge to reconsider the extent of claimant's loss of use of his right leg, as Dr. Magliato reported more severe objective findings in his examination than did Dr. Nehmer. The

[2]Ms. Levine testified that these positions were available in 1985 and thereafter, H. Tr. at 113, but the record lacks evidence as to the suitability of the jobs at that time. While Dr. Kapland opined in 1985 that claimant's disability was permanent and schedulable, he did not discuss claimant's restrictions, and thus his opinion cannot be used to retroactively assess the suitability of the positions identified by Ms. Levine.

administrative law judge stated in his Order Granting Employer's Motion for Reconsideration and Clarification that he specifically credited the report of Dr. Nehmer. Dr. Nehmer found that claimant has a ten percent impairment of his right leg, but the administrative law judge awarded claimant benefits based on a fifteen percent impairment, due to employer's concession to that effect. Dr. Magliato, an independent medical examiner, reviewed claimant's medical records, and a surveillance videotape, and he performed a physical examination of claimant. Dr. Magliato found that claimant had some atrophy, whereas Dr. Nehmer reported none, Dr. Magliato reported claimant's knee to be enlarged and deformed, and Dr. Magliato concluded that claimant has a "marked impairment" of his knee based on objective findings. The physician did not, however, provide an impairment rating.

We reject claimant's contention that the administrative law judge erred in crediting Dr. Nehmer's opinion. In reviewing the medical evidence in his Decision and Order, the administrative law judge discussed Dr. Nehmer's opinion that claimant's responses on examination were inconsistent and exaggerated. He credited Dr. Nehmer's opinion based on the thoroughness of the report and the physician's excellent credentials. Contrary to claimant's contention, Dr. Nehmer recognized that there was some deformity present in claimant's right knee before reaching his conclusion regarding claimant's degree of impairment. Moreover, the Board must defer to the administrative law judge's weighing of the evidence if it is done in a rational manner. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As claimant has not raised any reversible error committed by the administrative law judge in weighing the evidence, we reject claimant's contention that the case must be remanded for further consideration of the extent of claimant's impairment of his right leg. *See generally Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993). Thus, the award for a fifteen percent impairment to the leg is affirmed as it is rational and supported by substantial evidence.

Claimant's Left Knee and Back Condition

Claimant contends that the administrative law judge erred in failing to consider whether claimant's left knee and back condition are causally related to his work-related injury. Claimant contends that Dr. Charko opined that claimant is unable to perform any gainful employment due to a combination of his right knee injury as well as his back and early left knee problems. The administrative law judge did not address the evidence regarding whether claimant had a work-related back and/or left knee condition, and, if so, whether he suffered any residual disability due to these conditions. In his January 18, 2001 Order Granting Motion for Reconsideration and Modifying Previous Decision and Order, the administrative law judge conclusorily stated "[i]n my previous Decision and Order, I found that Claimant's permanent partial disability is limited to his knee." Order at 3. However, a review of the initial Decision and Order does not reveal such a finding.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that he suffered a harm and that an accident occurred, or conditions existed, at work which could have caused the harm. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden*, 135 F.3d 1066, 32 BRBS 59 (CRT). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *See Prewitt*, 194 F.3d 684, 33 BRBS 187 (CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Employer is liable for the resulting sequelae of the original injury. *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

In the present case, the evidence contains the report of Dr. Charko, who stated that claimant complained of left knee pain and low back pain and on examination found tenderness in claimant's lower left lumbar region. He opined that "abnormal gait pattern or abnormal posture in the back can take weight off the right leg and can aggravate the lower lumbar musculatures as well the facet joints in the low back and can account for his low back pain." Cl. Ex. 4. He also opined that "favoring the right knee and depending on the left knee for stair climbing or for bearing more than average weight when standing can aggravate the knee as well." *Id.* Dr. Charko concluded that claimant's "severally arthritic knee as well as his back and early left knee problems prevent him from any gainful employment." *Id.* Drs. Nehmer and Magliato, the physicians specifically credited by the administrative law judge regarding claimant's ability to work, did not address any problems with claimant's back or left knee.[3]

[3]In reviewing the medical records as part of an independent medical examination, Dr. Magliato noted Dr. Charko's opinion, but did not address these findings in his conclusions.

However, he did disagree with Dr. Charko that claimant is not capable of any gainful employment and opined that claimant is capable of working a 40 hour week in a sedentary position. Emp. Ex. 12

While the administrative law judge found that Dr. Charko's opinion regarding the extent of claimant's disability resulting from his right knee is outweighed by the opinions of Dr. Nehmer and Dr. Magliato, he did not reject his opinion entirely. The administrative law judge found that Dr. Charko "possesses excellent credentials," but specifically found that Dr. Charko's opinion regarding claimant's necessity to walk with a cane is not credible given the discrepancies between claimant's testimony and his capabilities demonstrated on the surveillance videotape. Therefore, as the administrative law judge did not address the issue of whether claimant sustained injuries to his left knee or back as a sequelae of the initial work injury, we must remand the case to the administrative law judge. On remand, the administrative law judge must review the evidence and make findings, consistent with Section 20(a), as to whether claimant suffers from a work-related injury to his low back and/or left knee and, if so, whether he suffered any residual disability due to these conditions.

Accordingly, Judge Brown's interlocutory order to the effect that there was no prior final compensation order issued in this case is affirmed; thus, we vacate Judge Teitler's findings that relate specifically to the modification standard pursuant to Section 22. In addition, the case is remanded for the administrative law judge to address claimant's contention that he suffers from work-related back and left knee conditions. The decisions of Judge Teitler are affirmed in all other respects.

SO ORDERED.

NANCY S. DOLDER Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge