BRB No. 12-0090

ROBERT BUTTERMORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 11/06/2012
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Special Fund Relief and the Order Denying the OWCP Director's Motion for Reconsideration of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

David N. Neusner (Embry and Neusner), Groton, Connecticut, for claimant.

Peter D. Quay, Taftville, Connecticut, for self-insured employer.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Special Fund Relief and the Order Denying the OWCP Director's Motion for Reconsideration (2010-LHC-01056) of Administrative Law Judge Jonathan C. Calianos 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his back, neck, shoulders, arms, and hands during the course of his employment with employer. He last worked for employer on September 13, 2000, at which time his work-related injuries prevented him from performing his employment duties.[1] CX 1. Claimant sought benefits under the Act and, relevant to this appeal, employer filed an application for Section 8(f) relief, 33 U.S.C. §908(f). JX 1 at 5; *see also* ALJX 4 (January 30, 2002 hearing). On January 30, 2002, a hearing was held before Administrative Law Judge David W. DiNardi. JX 1. On May 14, 2002, claimant and employer submitted stipulations and a proposed order. MX 2. Specifically, the parties stipulated that claimant was totally disabled as of September 14, 2000. *Id.* at 5. Although the parties did not specify that claimant's total disability was permanent in nature, their proposed order included a provision for the payment of annual cost-of-living adjustments.[2] In a Decision and Order issued on July 2, 2002, Judge DiNardi accepted the parties' stipulations and awarded claimant total disability compensation commencing

[1]Unless otherwise specified, references to the transcript and exhibits pertain to the hearing held before Judge Calianos on September 14, 2010, and to the exhibits admitted into evidence during that hearing and in subsequent proceedings regarding the applicability of Section 8(f), 33 U.S.C. §908(f). In an Order issued on April 8, 2011, the administrative law judge granted employer's Motion to Offer Additional Documents and admitted Motion Exhibits (MX) 1 through 7.

[2]Awards of permanent total disability benefits are subject to annual cost-of-living adjustments under Section 10(f) of the Act, 33 U.S.C. §910(f). Section 10(f) adjustments do not apply to awards of temporary total disability benefits. *See Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT) (2d Cir. 1990). In this case, claimant's counsel's cover letter dated May 14, 2002, enclosing the parties' stipulations and proposed order, explicitly states that the parties were not stipulating to permanency and that counsel anticipated that the issue of permanency would be raised at a future date.

September 14, 2000, including annual cost-of-living adjustments. MX 3 at 8, 11. Thereafter, in a timely motion for reconsideration, employer averred that an award of cost-of-living adjustments was not appropriate as the parties had not stipulated that claimant's disability was permanent. In an Amended Decision and Order issued on July 11, 2002, Judge DiNardi deleted the provision for annual cost-of-living adjustments pursuant to the parties' request.[3] MX 4.

On October 5, 2009, claimant filed a Request for Section 19 Order and Modification. ALJX 1; *see* 33 U.S.C. §§919, 922. Specifically, claimant requested that Judge DiNardi's Decision and Order be modified to reflect that claimant became permanently totally disabled on September 14, 2000, and therefore is entitled to Section 10(f) adjustments from that date. On December 29, 2009, employer filed a renewed application for Section 8(f) relief in view of claimant's claim of permanency. ALJX 2. Following the district director's denial of employer's request for Section 8(f) relief, the case was assigned to Administrative Law Judge Calianos (the administrative law judge). ALJXs 4, 5, 7, 8; MXs 5, 7. At a hearing held on September 14, 2010, claimant and employer submitted documentary evidence in support of their respective positions and, on November 17, 2010, the parties filed stipulations. In this regard, the parties stipulated, *inter alia*, that claimant's total disability became permanent on September 14, 2000. In a Decision and Order Awarding Benefits issued on November 29, 2010, the administrative law judge awarded claimant permanent total disability benefits commencing September 14, 2000. 33 U.S.C. §908(a). The administrative law judge deferred consideration of employer's entitlement to Section 8(f) relief until the parties had the opportunity to file briefs on that issue. In a Decision and Order Awarding Special Fund Relief (Section 8(f) Order) issued on October 12, 2011, the administrative law judge granted employer's request for Section 8(f) relief, finding the elements therefor satisfied and thus that employer's liability for permanent total disability benefits is limited to the period of 104 weeks commencing September 14, 2000. He ordered the Special Fund to reimburse employer for any payments employer made to claimant, including interest, after the 104-week period ended, and to pay claimant ongoing benefits as of the date employer made its last payment. The administrative law judge denied the Director's motion for reconsideration of the award of Section 8(f) relief.

On appeal, the Director challenges the commencement date for the award of Section 8(f) relief. Specifically, the Director contends that the administrative law judge erred by modifying claimant's award of temporary total disability benefits issued on July

[3]Because Judge DiNardi did not award claimant permanent disability benefits, he did not consider the issue of employer's entitlement to Section 8(f) relief. 33 U.S.C. §908(f)(1); *Nathenas v. Shrimpboat, Inc., Inc.*, 13 BRBS 34 (1981); *see also Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985).

11, 2002 to reflect that payment for permanent total disability compensation should commence prior to July 11, 2002.[4] The Director asserts that because claimant's permanent total disability award was based on a change in condition, benefits cannot commence before July 11, 2002. Both claimant and employer have filed response briefs, urging affirmance of the administrative law judge's Order. The Director has filed a reply brief, responding to the arguments in claimant's response brief.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The fact that the administrative law judge's prior decision became final for purposes of appeal to the Board cannot bar a petition for modification, as Section 22 displaces traditional notions of finality and, indeed, provides the parties' only recourse where a prior decision has become final. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). An award based on the parties' stipulations is subject to modification in cases where the administrative law judge finds there has been a mistake in a determination of fact or a change in condition. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83, 84 (1999); *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1, 6 and n.5 (1994).

The Director argues on appeal that, since the administrative law judge granted modification based on a change in condition in the permanency of claimant's disability, he erred in modifying the award retroactive to September 2000.[5] In support of her position on appeal, the Director relies on the holding of the United States Court of Appeals for the Second Circuit,[6] in *Jarka Corp. v. Hughes*, 299 F.2d 534, 536 (2d Cir. 1962), that modification based on the ground of a change in condition refers to "a change from the condition at the time of the award which is being modified." We reject the Director's assignment of error as we do not agree with the Director's assertion that the

[4]We note that the Director does not contest the administrative law judge's determination that employer established the elements for entitlement to Section 8(f) relief. 33 U.S.C. §908(f)(1); *Bomback v. Marine Terminals Corp.*, 44 BRBS 95, 99 n.8 (2010).

[5]In his reply brief, however, the Director appears to concede that the administrative law judge based his award of modification on the ground of a mistake in fact. *See* Director's reply brief at 4 n.3.

[6]The case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit. 33 U.S.C. §921(c).

administrative law judge's grant of Section 22 modification was based on a change in claimant's condition. To the contrary, our review of the administrative law judge's decisions reflects that he modified the prior finding regarding the nature of claimant's disability based on a mistake of fact. The administrative law judge accepted the private parties' stipulation that claimant's condition became permanent on September 14, 2000. The administrative law judge also thoroughly addressed the medical evidence regarding the date claimant reached maximum medical improvement, and he concluded that the credited evidence established that claimant's condition was permanent as of September 14, 2000.[7] *See* Section 8(f) Order at 16-18; *see, e.g., Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 24 (1999). Moreover, the administrative law judge stated:

> looking at the case at the time of Judge DiNardi's decision, permanency was difficult to establish because of the conflicting medical evidence. Only recently, and with the benefit of hindsight can it be said that Buttermore's disability was permanent sometime in September 2000.

Section 8(f) Order at 16 n.5; *see also id.* at 10-11 n.3. Thus, the administrative law judge clearly identified the mistake of fact in the prior decision and corrected the mistaken determination of fact after evaluating the medical evidence regarding the date claimant's condition became permanent. *See* Section 8(f) Order at 16-18 and n.5; *O'Keeffe,* 404 U.S. at 256 (Under Section 22, the administrative law judge has broad authority to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *R.V. [Vina] v. Friede Goldman Halter,* 43 BRBS 22 (2009). Moreover, as recognized by the Second Circuit in *Jarka Corp.,* where the administrative law judge grants modification retroactively to a date prior to the order being modified, "it necessarily follows that he believes that the prior determination of condition was incorrect and based upon a mistake of fact, and he cannot be making the new order because of a change of condition." 299 F.2d at 537.

The Director expressly concedes that Section 22 modification based on the ground of a mistake of fact in a case where the claimant's compensation is being increased may

[7]The Director does not aver that she was improperly bound by the private parties' stipulations or contest the administrative law judge's finding that claimant reached maximum medical improvement on September 14, 2000. *See generally Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). The administrative law judge's determination that claimant reached maximum medical improvement on September 14, 2000 is therefore affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2006).

be made retroactive to the date of the claimant's injury. *See* Director's reply brief at 5 n.4; *Universal Maritime Service Corp. v. Spitalieri,* 226 F.3d 167, 172, 34 BRBS 85, 88(CRT) (2d Cir. 2000), *cert. denied,* 532 U.S. 1007 (2001); *Jarka Corp.,* 299 F.2d at 536. Nonetheless, she contends that in this case the doctrine of judicial estoppel precludes modification on the ground of a mistake in fact.[8] The Director avers in this regard that because claimant and employer stipulated in 2002 that claimant's disability was not yet permanent, and Judge DiNardi accepted that stipulation, they cannot now contend that Judge DiNardi's factual determination was mistaken. We disagree. As previously noted, a determination based on stipulations is subject to Section 22 modification based on grounds of either a change in condition or a mistake of fact. *Lucas,* 28 BRBS at 7 n. 5. Section 22 modification, which reflects a statutory preference for accuracy, displaces equitable doctrines of finality such as judicial estoppel. *See generally O'Keeffe,* 404 U.S. 254; *Banks v. Chicago Grain Trimmers Ass'n, Inc.,* 390 U.S. 459 (1968); *Vina,* 43 BRBS 22. As the Second Circuit explained in *Jensen,* Section 22 expressly mandates that modification proceedings are *de novo,* that the administrative law judge is not bound by any previous fact-finding, and that after a motion for modification has been made, the administrative law judge has the "authority, if not the duty, to reconsider all of the evidence for any mistake of fact or change in conditions." *Jensen,* 346 F.3d at 277, 37 BRBS at 101-102(CRT) (internal quotations and citation omitted).

In this case, the administrative law judge properly exercised his authority under Section 22 in modifying Judge DiNardi's decision, which rested on a mistaken determination of fact regarding the nature of claimant's disability. *See Jensen*, 346 F.3d at 273, 37 BRBS 99(CRT); *Vina,* 43 BRBS 22. The administrative law judge stated that it was only with the benefit of hindsight that the parties realized that claimant's condition had, in fact, been permanent in September 2000. Section 8(f) Order at 16 n.5. Under

[8]Judicial estoppel is a common-law, equitable doctrine invoked at a court's discretion and is designed to protect the integrity of the judicial process by preventing a party from asserting one position in a legal proceeding and then asserting an inconsistent position in a second proceeding. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *DeRosa v. Nat'l Envelope Corp.,* 595 F.3d 99 (2d Cir. 2010); *Uzdavines v. Weeks Marine, Inc.,* 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005); *Sparks v. Service Employees Int'l, Inc.,* 44 BRBS 11, *aff'd on recon.,* 44 BRBS 77 (2010). The Second Circuit limits application of the judicial estoppel doctrine to situations in which a party takes a position that is inconsistent with one taken in a prior proceeding and has had its earlier position adopted by the court in the first proceeding. The Second Circuit further limits application of the doctrine to "situations where the risk of inconsistent results with its impact on judicial integrity is certain." *DeRosa,* 595 F.3d at 103 (internal citations and quotations omitted).

these circumstances, the administrative law judge's grant of modification to correct a mistake in fact renders justice under the Act, *see Banks*, 390 U.S. at 464; *Jensen*, 346 F.3d at 276, 37 BRBS at 101(CRT), and is not barred by the equitable doctrine of judicial estoppel. *See generally DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99 (2010); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005). We therefore affirm the administrative law judge's determination that, as employer is entitled to Section 8(f) relief, its liability is limited to 104 weeks of permanent total disability benefits commencing on September 14, 2000, and that the Special Fund is liable for benefits thereafter, including reimbursement to employer for benefits paid.

Accordingly, the administrative law judge's Decision and Order Awarding Special Fund Relief and the Order Denying the OWCP Director's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge