BRB No. 97-0691

DALLAS DELAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JONES WASHINGTON STEVEDORING COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits, Order Denying Employer's Motion for Reconsideration and Directing Parties To Submit Additional Evidence, and Decision and Order on Modification of Christine S. McKenna, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler Douglas Drachler & McKee), Seattle, Washington, for claimant.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for the self-insured employer.

Joshua T. Gillelan II (Marvin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits, the Order Denying Employer's Motion for Reconsideration and Directing Parties To Submit Additional Evidence, and the Decision and Order on Modification (93-LHC-960) of Administrative Law Judge Christine S. McKenna 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).

On June 24, 1992, while working for employer as a delasher in the Port of Seattle, claimant was injured when an 80-pound, 20-foot long heavy metal bar came loose from a socket. The next day, he consulted Dr. Perkins, who diagnosed a "strain - partial tear biceps muscle, right arm and shoulder." CX 28. Thereafter, Dr. Perkins referred claimant to Dr. Dunn, an orthopedic surgeon, due to his neck and right shoulder pain. While performing an acromioplasty and excision of the right bursa on March 26, 1993, Dr. Dunn observed evidence of prominent spurring or calcification along the acromonial process.[1] Dr. Dunn diagnosed an impingement syndrome, and released claimant to return to work on September 15, 1993. Although claimant attempted to return to work for employer on September 22, 1993, and September 29, 1993, he alleged that he had to quit both times after about an hour due to extreme pain. On December 14, 1993, Dr. Peterson diagnosed a "SLAP" lesion,[2] for which claimant underwent surgery on May 9, 1994. Claimant, alleging that he had injured his shoulder in the June 24, 1992, work accident, sought temporary total disability compensation under the Act from June 24, 1992, until July 6, 1992, and from July 13, 1992, until February 2, 1995, with the exception of the two days on which he tried to work, and permanent total disability compensation thereafter.

In her initial Decision and Order dated November 14, 1995, after finding that claimant's SLAP lesion was caused by his June 24, 1992, work accident and that he had reached maximum medical improvement on February 2, 1995, the administrative law judge awarded claimant the temporary and permanent total disability benefits claimed. Employer's request for relief under Section 8(f) of the Act, 33 U.S.C.§908(f), was denied.

[1]Dr. Dunn believed that the calcific spur was rendered symptomatic by the June 1992 injury.

[2]SLAP stands for "superior labrum anterior posterior," a condition where the biceps tendon has been pulled loose from its attachment to the shoulder blade inside the joint. Dr. Peterson Depo. I at 9; Depo. II at 48-49.

Employer thereafter moved for reconsideration and to reopen the record. The administrative law judge denied reconsideration, but, treating employer's motion as a motion for modification, agreed to reopen the record for evidence on the issues of maximum medical improvement and extent of disability. She informed the parties, however, that they were precluded from offering any evidence on modification which could have been introduced at the formal hearing, and ordered claimant to submit the results of a physical capacities evaluation (PCE), which had been administered several weeks before the formal hearing, but had not previously been disclosed by claimant. After receiving the PCE from claimant, employer submitted two additional depositions. Employer also submitted a report from its vocational expert, Mr. Tomita, who had testified at the formal hearing. In this supplemental opinion, he addressed claimant's employability based on the PCE, the new depositions, and the report of Mr. Windsor, an expert on the design, construction and proper method of climbing ships' ladders.[3]

Claimant thereafter filed several motions. Relevant to the current appeal, the administrative law judge granted claimant's motion to strike the labor market survey addressing jobs outside the longshore industry from Mr. Tomita's supplemental report because of its untimely submission, as well as a portion of employer's supplemental brief in which it argued that claimant at most had sustained a scheduled injury under Section 8(c)(1), 33 U.S.C.§908(c)(1). On January 2, 1997, the administrative law judge issued a Decision and Order on Modification, reaffirming her original Decision and Order, but granting employer Section 8(f) relief.

On appeal, employer contends that the administrative law judge erred in finding that claimant's SLAP lesion was caused by the June 24, 1992, accident, in concluding that claimant reached maximum medical improvement on February 2, 1995, and in determining that he cannot perform any longshoring work which requires climbing. Employer further argues that the administrative law judge erroneously failed to address its argument that claimant's arm injury was a scheduled injury. Finally, employer asserts that in the modification proceedings, the administrative law judge erred in refusing to allow employer to present its evidence of suitable alternate employment available on the open market outside the longshore industry. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds, agreeing with employer that the administrative law judge erred in refusing to consider the new evidence of suitable

[3]Claimant also filed a motion for reconsideration which is not relevant to this appeal. ALJ Exs. 42-44.

alternate employment which employer proffered in the modification proceedings. Employer replies, reiterating its previous arguments. The Board held oral argument in this case on September 17, 1997, in Seattle, Washington.[4]

[4]By Order dated August 19, 1997, the Board advised the parties that the record forwarded by the district director was missing certain evidence. The parties did not respond to this Order by providing the missing documents, and we conclude that they are not necessary to our review.

We initially reject employer's argument that the administrative law judge erred in concluding that claimant's SLAP lesion, diagnosed by Dr. Peterson in December 1993, was caused by his June 1992 accident. Based on claimant's testimony that his right arm was jerked downward from the impact of the bar that fell on him the day of the accident and that his right shoulder was throbbing the following day, the fact that he filed an accident report documenting the accident, and Dr. Perkins's diagnosis of a right biceps muscle injury, the administrative law judge rationally found that claimant was entitled to the Section 20(a) presumption, as he established a harm which could have been caused by his June 14, 1992 work accident. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). In addition, in invoking the Section 20(a) presumption, she noted that following claimant's March 1993 acromioplasty, Dr. Dunn opined that the work accident had aggravated a preexisting calcific spur, and that Dr. Peterson concluded that it was likely that claimant's SLAP lesion was the result of the June 1992 work accident.

Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers,* 296 U.S. 280 (1935). In the present case, the administrative law judge found that employer did not rebut the Section 20(a) presumption because it did not produce any medical opinion which severs the presumed causal link between claimant's SLAP lesion and his work- related accident. On appeal, employer argues that the administrative law judge erred in concluding that claimant's SLAP lesion was caused by the June 1992 work accident rather than by something occurring after September 15, 1993.

In support of this argument, employer relies on the facts that the lesion was first diagnosed by Dr. Peterson in December 1993, that Dr. Dunn's chart notes from September 1993 indicate that claimant could raise his arm virtually completely at that time, and that he was released to return to work without restrictions on September 15, 1993. In addition, employer cites portions of Dr. Peterson's testimony which it alleges indicate that Dr. Peterson would not have expected Dr. Dunn to have opined that claimant had reached maximum medical improvement and released him to return to work without restrictions if claimant had an unrecognized SLAP lesion. Depo. ll at 56. In addition, employer argues that activities claimant performed between the fall of 1992 and the fall of 1993, *i.e.*, helping his family do construction-type work, working as a wrestling referee, and digging a trench 18 inches deep and 60 feet long, would have produced intractable pain if claimant had had the SLAP condition.[5] Moreover, employer points out that Dr. Peterson initially stated on

[5]Employer maintains that Dr. Dunn's findings cannot be reconciled with Dr. Peterson's deposition testimony that persons with SLAP lesions have persistent pain when they do a palm up forward flexion lifting motion, as opposed to a thumb down forward flexion motion, and that such pain is chronic and not relieved by subacromial injections. Dr. Peterson Depo. ll at 24, 34.

February 10, 1994, that he did not know if the SLAP lesion was caused by claimant's industrial injury, and asserts that it was only after talking with claimant that he later stated in a chart note and letter of October 6, 1994, that the lesion was definitely related to the June 1992 incident.

We affirm the administrative law judge's finding that claimant's SLAP lesion was work-related. In making this determination, the administrative law judge specifically considered and rationally rejected employer's arguments, noting that despite Dr. Peterson's testimony regarding Dr. Dunn's chart notes, on two separate occasions he did not recant his conclusion that claimant's SLAP lesion arose out of his June 1992 injury. She also noted that this conclusion was corroborated by Dr. Perkins's initial diagnosis of a torn biceps muscle, and by claimant's testimony that he felt pain during Dr. Dunn's treatment, which was itself corroborated by Dr. Perkins's August 24, 1993, chart note which states that claimant had felt pain at the full range of motion. Decision and Order at 20; Cl. Ex. 28. In contrast, the administrative law judge noted that employer had not produced a single medical opinion to rebut Dr. Peterson's conclusion that the SLAP lesion arose out of this accident. The Section 20(a) presumption is not rebutted where employer does not provide concrete evidence but merely suggests alternate ways that claimant's injury might have occurred. *See Sinclair v. United Food and Commercial Workers,* 23 BRBS 148 (1989); *Williams v. Chevron U.S.A., Inc.,* 12 BRBS 95 (1980). Inasmuch as the administrative law judge's finding that claimant's SLAP lesion is causally related to his 1992 work injury is rational and supported by substantial evidence, we affirm this determination.[6] *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

Employer next argues that the administrative law judge erred in finding that claimant reached maximum medical improvement on February 2, 1995. Employer maintains that inasmuch as claimant testified at the hearing that his shoulder and arm have continued to improve since February 2, 1995, and Dr. Peterson provided testimony that claimant's shoulder was still improving and that he generally has fewer physical restrictions involving his right shoulder than he did in February 1995, claimant's condition has not reached permanency. Employer further maintains that the administrative law judge erroneously determined that claimant's condition extended "beyond the normal period for healing," because the surgical procedure Dr. Peterson performed for claimant's SLAP lesion was

[6] We also note that on the facts presented, regardless of whether claimant's SLAP lesion is work-related, claimant nonetheless sustained a work-related shoulder injury; employer does not challenge the administrative law judge's finding that the calcific spur for which claimant underwent surgery on March 26, 1993, is causally-related to his 1992 work injury. *See* Decision and Order at 19-20.

novel and without a determined healing period, Dr. Peterson acknowledged that claimant was a slow healer, and it was not until the date of his deposition, on April 30, 1996, that Dr. Peterson assigned claimant a 4-5 percent arm impairment rating. Dr. Peterson Depo. ll at 56.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence and is not dependent on economic factors. *See Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Trask v. Lockheed Shipbuilding and Construction Co*., 17 BRBS 56, 60-61 (1985). Permanent disability includes a disability that has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654, *petition for rehearing denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 976 (1969).

The administrative law judge's finding that claimant reached maximum medical improvement as of February 2, 1995, is affirmed because it is rational, in accordance with applicable law, and supported by Dr. Peterson's opinion to that effect in an April 25, 1995, letter. *See O'Keeffe*, 380 U.S. at 359. In her initial Decision and Order, the administrative law judge specifically considered and rejected employer's argument that Dr. Peterson's finding of maximum medical improvement was premature. She also reaffirmed this finding on modification, noting that in February 1995 and April 1996 Dr. Peterson gave an unequivocal opinion that to the extent claimant's condition continued to improve after February 1995, it progressed slowly at best and beyond the normal period of healing. Moreover, she credited Dr. Peterson's testimony that claimant had reached maximum medical improvement by February 2, 1995, based on his belief that claimant would not benefit from further treatment even though his shoulder continued to improve slowly. Emp. Ex. 113 at 59. The administrative law judge also found that any incremental improvement after this date was minimal and did not affect his physical restrictions. *Id.* at 44-48; 58-59. As her finding regarding permanency is supported substantial evidence, it is affirmed.

Employer next challenges the administrative law judge's finding that claimant is totally disabled. Citing the testimony of Mr. Knarnofski, the physical therapist who performed the PCE, and Dr. Peterson's testimony in his second deposition, employer argues that the administrative law judge erred in finding that claimant was incapable of performing all longshore jobs that required climbing to any degree and in failing to find that it established the availability of suitable alternate employment based on the alternate longshore work identified by Mr. Tomita. In addition, employer alleges that in concluding that claimant was incapable of performing the alternate longshore jobs identified by Mr. Tomita, the administrative law judge erred in failing to independently review Mr. Tomita's videotape to determine their suitability.

To establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment due to his work-related disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). If claimant succeeds in establishing

that he is unable to perform his usual work duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant could perform considering his age, education, background, work experience, and physical restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993); *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

In her initial Decision and Order, the administrative law judge noted that prior to his June 1992 work accident, claimant's usual work involved primarily four categories of longshore employment: holdman, lasher, clerk, and foreman. She then determined that following his accident, claimant would not have been able to perform the duties of a holdman, lasher, or clerk at any time prior to February 2, 1995, because these jobs required lifting, climbing, and/ or overhead work which was not compatible with claimant's restrictions. With regard to the clerk job, the administrative law judge further noted that this work only constituted 5 percent of claimant's pre-injury employment and was hard for him to obtain. As for the foreman work, she determined that claimant was unable to perform the duties of a ship-based foreman as this job requires climbing ladders as high as five feet in violation of Dr. Dunn's restrictions. Accordingly, she concluded that at best, claimant would have been able to perform the lighter duties of a dock-based foreman. Crediting claimant's testimony, however, that he would have difficulty finding dock-based foreman work because he is not a member of the foreman's Local 98, the administrative law judge concluded that claimant established that he could not return to his usual duties from the date of his accident until February 2, 1995, the date he reached maximum medical improvement.

The administrative law judge further found that claimant remained incapable of performing his usual work duties upon reaching maximum medical improvement, noting that Dr. Peterson's restrictions precluded his performing work involving repetitive lifting or reaching, lifting more than five to ten pounds at any one time overhead, lifting more than 40-50 pounds at shoulder level, and climbing ladders. In so concluding, she relied on the revised opinion of Mr. Tomita, employer's vocational expert, finding that although he initially opined that the positions of holdman, clerk, and ship-based foreman which claimant performed pre-injury remained suitable, he changed his opinion upon learning that Dr. Peterson had restricted claimant from climbing ladders. She also determined that claimant could not perform the work of a dock-based clerk, even if this position was representative of his pre-accident employment, as the requirements of this position exceeded his ability to perform clerical tasks, including reading and recording numbers under pressure and in a timely and accurate manner. Moreover, based on claimant's testimony that he generally avoided such duty and had considerable difficulty performing this job,[7] the administrative

[7]One of claimant's high school teachers, Frederica Denton, testified at the hearing that she believed that claimant was learning disabled with regard to his reading skills and

law judge found that claimant's learning disability would effectively preclude him from performing the clerk job in a full-time capacity. Inasmuch as the administrative law judge's finding that claimant has been unable to perform his usual work since the time of his June 1992 accident is rational and supported by substantial evidence, we affirm her finding that claimant established a *prima facie* case of total disability. *See Merrill,* 25 BRBS at 140.

Inasmuch as claimant established his *prima facie* case of total disability, the burden shifted to employer to establish the availability of suitable alternate employment. In the present case, employer attempted to meet this burden through the vocational testimony of Mr. Tomita, who identified both non-longshore and alternate longshore work which he considered suitable for claimant. In her first decision, the administrative law judge rejected employer's argument that claimant could perform alternate work as a dock-based foreman on a more frequent basis than he had done previously, noting that employer failed to explain how the claimant might secure such alternate employment in the future, given that this type of work only comprised five percent of his pre-injury work and claimant did not anticipate being admitted to the foreman's union in the near future.[8] She further found that employer failed to establish that any of the other alternate longshore positions which Mr. Tomita identified were realistic alternatives. Although Mr. Tomita opined that claimant could work as a sling man and frontman, and Dr. Peterson agreed with this conclusion after viewing Mr. Tomita's videotape, the administrative law judge found that neither of these jobs were within claimant's physical capacity based on contrary testimony provided by Mr. Hansen, chairman of the safety committee for the union. The administrative law judge also considered several other alternate longshore jobs which Mr. Tomita considered to be suitable, but concluded such work was not realistically available to claimant.

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that he suffers from dyslexia. Ms. Denton further testified that she believed claimant would have difficulty performing a job which required him to work with numbers due to these problems.

[8]Employer argues that in 1995 alone there were 2,766 hours of work available as dock supervisor to "casuals," claimant's category. RX 108. Employer does not specify, however, how many of those hours would be available to claimant. Also, the administrative law judge found that this type of work only comprised five percent of claimant's overall work prior to his injury, and employer does not challenge this finding or argue that more work would be available to claimant.

In her Decision and Order on Modification, after considering Dr Peterson's supplemental deposition, Mr. Tomita's supplemental vocational opinion, and a report submitted by employer on the ergonomics of ladder climbing, the administrative law judge rejected employer's argument that claimant's climbing restrictions would not preclude him from working as a ship foreman, and reaffirmed her finding that claimant could not work as a dock foreman for the reasons stated in her initial Decision and Order. In addition, she noted that the other longshore jobs identified by Mr. Tomita were identical to the jobs he had identified previously, and determined that even if they were shown to be available, they were beyond claimant's restrictions.

Contrary to employer's assertions on appeal, in her Decision and Order On Modification the administrative law judge rationally found that claimant was precluded from performing all longshore work requiring climbing based on Dr. Peterson's supplemental deposition testimony that claimant was not to climb or descend any ladder more than six feet in height because his repaired right shoulder is susceptible to injury if he loses his grip or slips, and that recurrent pain could cause him to lose his grip and fall. RX 113 at 44-48, 58-59. In addition, she noted that Dr. Peterson did not want claimant to repeatedly use his right arm in a forward lifting motion, such as is required to unlock containers. Peterson Depo. ll at 38, 41-44. While employer introduced a supplemental report from Mr. Tomita in the modification proceeding in which he opined that claimant would be able to perform the work of a ship foreman despite Dr. Peterson's restrictions regarding climbing, because the manner in which the ladders are designed do not require overhead reaching, the administrative law judge also acted within her discretionary authority in rejecting this testimony in the face of contrary evidence. Based on the testimony of claimant, Jim Bulis, a casual longshore foreman, and Al Barnes, Mike Hebblethwaite, and Bill Kendall, three ship foremen, who testified that such work would require climbing vertical ladders 14-18 feet and overhead reaching and pulling, the administrative law judge rationally found that the work of a ship foreman was not suitable.[9] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, she also rationally found that even on the dock, a foreman may encounter conditions, such as inexperienced stevedores, which would require him to demonstrate a task requiring exertion beyond his capacity, such as occurred when claimant returned to work on June 2,

[9]Employer argues that the administrative law judge failed to address why the 5 percent of dock-based foreman work which claimant performed prior to his injury did not constitute suitable alternate employment. Inasmuch as the administrative law judge found that the dock foreman work was not suitable, it could not meet employer's burden of establishing suitable alternate employment. Decision and Order on Modification at 10.

1995, and injured his left arm while trying to protect his right one. In addition, the administrative law judge noted that there was nothing to refute the testimony of Mr. Berg, claimant's vocational expert, that claimant's learning disability, dyslexia, would pose problems for his performing the paperwork required for any foreman position, on ship or dock.

Employer argues on appeal that in finding that claimant was incapable of performing the alternate longshore jobs, the administrative law judge erred in failing to independently review Mr. Tomita's videotape regarding various waterfront jobs he considered suitable. We hold that any error she may have made in this regard is harmless, as she acted rationally in crediting and relying on the expertise of Mr. Hansen, chairman of the union's safety committee, who testified that Mr. Tomita's tape did not accurately portray all of the physical requirements of the sling man and frontman positions.[10] The administrative law judge's finding that the positions of semi-tractor driver, lift truck operator, and straddle carrier were not shown to be suitable and/or available is likewise supported by the record. *See generally Price,* 20 BRBS at 98. Inasmuch as the administrative law judge's findings that claimant was not capable of performing either his pre-injury longshore work or the alternate longshore work which Mr. Tomita identified are rational and supported by substantial evidence, we affirm these determinations. *See MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

[10]Mr. Hansen testified that the tape prepared by Mr. Tomita did not accurately portray the overhead work and ladder climbing required in the slingman position, or the heavy lifting above shoulder level required in the frontman position.

We next address employer and the Director's argument that the administrative law judge abused her discretion in refusing to consider the alternate non-longshore jobs which Mr. Tomita identified in a post-hearing labor market survey in the modification proceedings.[11] In her Decision and Order on Modification,[12] the administrative law judge noted that in his supplemental report Mr. Tomita identified eleven non-longshore jobs on the open market which he considered suitable for claimant. Of those, she noted that eight were of the same kind as those he mentioned in his prior hearing testimony, *i.e.*, six were dispatcher positions and two were cashier jobs, while three were new. The three new job possibilities included work as a windshield repair technician, sales associate in jewelry, and a telephone interviewer. Mr. Tomita's survey lists job openings in November 1995, February 1996, and May 1996. Citing *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 157-159 (1996), and *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 157 (1993), the administrative law judge declined to address the suitability of any of these positions, however, because she determined that allowing untimely evidence by way of a modification proceeding would not serve the interests of justice, given the relative unfairness to others affected. She found it within her discretion to refuse to consider post-hearing evidence when the party requesting such consideration should have anticipated the issue prior to the hearing yet failed to exercise diligence, and especially when the moving party waited until after the issuance of an adverse decision.

On appeal, employer and the Director contend that the administrative law judge's ruling that this labor market survey is untimely and should have been anticipated evidences a misperception of the kind of evidence which may be considered in a Section 22 modification proceeding, as Section 22 includes consideration of not only new evidence but also cumulative evidence or further reflection upon the evidence initially submitted. Moreover, they maintain that inasmuch as Mr. Tomita's post-hearing report identifying suitable alternate employment outside the longshore industry was based on the PCE, the deposition of Mr. Karnofski, the physical therapist who administered it, and the second deposition of Dr. Peterson, all of which were not available to employer prior to the hearing,

[11]While the case was before the administrative law judge on modification, claimant moved to strike the non-longshore market survey in the supplemental vocational report of Mr. Tomita on the ground that it violated that part of the administrative law judge's order prohibiting the introduction of evidence which could have been produced, with due diligence, prior to the close of the hearing. ALJ Ex. 55. Claimant alleged that all the jobs existed at or before the hearing. Claimant later corrected himself, stating that the jobs listed existed after the hearing. In her Decision and Order on Modification, the administrative law judge granted the motion on the ground that it exceeded the scope of her Order Denying Employer's Motion for Reconsideration and Directing Parties to Submit Additional Evidence. ALJ Ex. 56.

[12]The parties waived an oral hearing and agreed that the administrative law judge's decision would be based on documentary evidence. ALJ Ex. 53.

the administrative law judge erred in refusing to consider this evidence.[13] The Director also argues that inasmuch as the purpose of Section 22 is to render justice under the Act by arriving at the most accurate possible decision and this interest is greater than that regarding finality, the administrative law judge's rationale for excluding the disputed vocational evidence is improper. Claimant responds, urging the Board to affirm the administrative law judge's refusal to consider this evidence. Employer replies that in the context of a modification proceeding neither new nor old evidence can be ignored merely because it addresses an issue previously raised and decided adversely to the offering party, a position with which the Director also agrees.

Section 22 provides that upon his own initiative or at the request of any party, on the grounds of a change in condition or mistake in a determination of fact, the factfinder may, at any time prior to one year after the denial of a claim or the last payment of benefits, reconsider the terms of an award or denial of benefits. Section 22 was intended to displace traditional notions of *res judicata* and to allow the factfinder broad discretion to correct mistakes of fact whether demonstrated 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, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 295-296, 30 BRBS 1, 2-3 (CRT) (1995) [*Rambo I*];*Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting). Once the moving party submits evidence of a change in condition or mistake in fact, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo,* 515 U.S. at 296, 30 BRBS at 3 (CRT); *Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990). An employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment. *Blake v. Ceres Inc.,* 19 BRBS 219, 221 (1987). In deciding whether to reopen a case under Section 22, a court must balance the need to render justice against the need for finality in decision making. *General Dynamics Corp. v. Director, OWCP,* 673 F.2d 23, 25 (1st Cir. 1982); *McCord v. Cephas*, 532 F.2d

[13]Employer appears to argue that the fact that the administrative law judge found that claimant reached maximum medical improvement only three months before the hearing has a bearing on why employer waited to produce evidence of suitable alternate employment in the open market. Employer, however, can establish suitable alternate employment before claimant reaches permanency, as the same standards apply where claimant is temporarily disabled. *See Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989).

1377, 3 BRBS 371 (D.C. Cir. 1976).

We agree with employer and the Director that on the facts presented the administrative law judge erred in declining to consider employer's evidence regarding the availability of suitable employment on the open market in the modification proceedings. In the present case, the administrative law judge essentially denied modification based on her determination that employer should have produced its evidence regarding suitable alternate employment at the initial hearing. It is correct that Section 22 is not intended to be a back door for retrying or litigating an issue which could have been raised in the initial proceedings. *See McCord,* 532 F.2d at 1377, 3 BRBS at 371; 3 A. Larson, *The Law of Workmen's Compensation* §81; *Stokes v. George Hyman Construction Co.*, 19 BRBS 110, 113 (1986). In this case, however, the vocational evidence which employer sought to introduce was not, contrary to the administrative law judge's determination, available as of the date of the initial hearing. Rather, after reviewing the previously unavailable PCE and Mr. Karnofski's and Dr. Peterson's post-hearing deposition testimony, Mr. Tomita conducted labor market surveys in November 1995, February 1996, and May 1996, after the issuance of the administrative law judge's initial Decision and Order. On these facts, it was an abuse of discretion for the administrative law judge to fail to consider the evidence submitted during the modification proceeding. *See Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174, 176 (1988).[14] We therefore vacate her exclusion of employer's newly

[14]The administrative law judge's attempt to distinguish the cases relied upon by employer, such as *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986), and *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994), based on the fact that in those cases there were extenuating circumstances which excused employer's not presenting late-submitted evidence at the hearing, is not persuasive. This case also presented extenuating circumstances; claimant's failure to provide employer with the PCE during discovery precluded employer from obtaining a copy until the administrative law judge ordered it disclosed after the hearing. Employer based its latest vocational evidence on this information as well as Mr. Karnofski's and Dr. Peterson's most recent deposition testimony. (cont.)

The administrative law judge's reliance on *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996), to support her decision not to consider the non-longshore vocational survey is also misplaced. In that case, the issue was whether the administrative law judge abused his discretion in refusing to reopen the record regarding the applicability of Section 33(g)(1), 33 U.S.C.§933(g)(1)(1994), in light of the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992), where such request was made after the issuance of the administrative law judge's Decision and Order. The Board held that pursuant to 20 C.F.R. §702.336, a new issue can only be raised prior to issuance of the administrative law judge's Decision and Order. By contrast, in the present case, employer is not attempting to raise a new issue post-hearing: it is attempting to introduce new evidence which was not available at the initial hearing which can be submitted pursuant to a motion for modification. *See generally Kellis v. Newport News Shipbuilding and Drydock Co.,* 17 BRBS 109, 112 (1985).

developed vocational evidence and remand this case for further consideration. On remand, the administrative law judge must admit Mr. Tomita's vocational survey into evidence and determine whether this evidence establishes a mistake in fact or a change in condition in her original findings regarding the extent of claimant's disability. *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1, 8 (1994).

Finally, we reject employer's argument that the administrative law judge erred in failing to address its contention that claimant's injury was a scheduled arm injury under Section 8(c)(1), rather than an unscheduled shoulder injury under Section 8(c)(21). In her Decision and Order on Modification, the administrative law judge granted claimant's Motion to Strike employer's Section 8(c)(1) argument on the rationale that it was a new argument which employer should have anticipated prior to the hearing, noting that both parties had proceeded on the assumption that claimant's injury fell within Section 8(c)(21).[15] We hold that the administrative law judge's refusal to consider this untimely raised issue was a proper exercise of her discretionary authority. Employer concedes that it raised the issue of claimant's sustaining only a scheduled injury for the first time in its post-hearing brief. Under 20 C.F.R. §702.336(b), the administrative law judge has the discretion to consider a new issue at any time prior to the filing of the compensation order. *Lewis v. Todd Pacific Shipyards*, 30 BRBS 154, 158 (1996). As this issue was raised after the issuance of her compensation order, the administrative law judge properly declined to address it. *See Pimpinella*, 27 BRBS at 158.

[15]As the administrative law judge found claimant totally disabled, in her initial Decision and Order she concluded that pursuant to *Potomac Electric Power Co*. *v. Director, OWCP,* 449 U.S. 268, 277 n.17 (1980), it was not necessary for her to consider employer's argument that claimant is limited to permanent partial disability under the schedule at Section 8(c)(1). Decision and Order at 28 n.24.

Accordingly, the administrative law judge's exclusion of employer's newly developed vocational evidence on modification is vacated, and the case is remanded for further consideration of the extent of claimant's disability pursuant to Section 22 consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Granting Benefits, Order Denying Employer's Motion for Reconsideration and Directing Parties To Submit Additional Evidence, and Decision and Order on Modification are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge