BRB No. 98-1180

FRANK KINLAW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVENS SHIPPING AND TERMINAL COMPANY	)	DATE ISSUED: May 17, 1999
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Denial of Petition for Modification, Order on Reconsideration, and Supplemental Decision Awarding Attorney Fees of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Firm, L.L.P.), N. Charleston, South Carolina, for claimant.

Bert G. Utsey, III (Sinkler & Boyd, P.A..), Charleston, South Carolina, for employer/carrier.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Denial of Petition for Modification, Order on Reconsideration, and Supplemental Decision Awarding Attorney Fees (94-LHC-2427) of Administrative Law Judge Vivian Schreter-Murray 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). The Board heard oral argument in this case on January 27, 1999, in Savannah, Georgia.

This case has been before the Board previously. Claimant, a footman/flagman, suffered a work-related back injury on August 1, 1993, which required surgery. A recommendation for a second surgical intervention was declined. Claimant retired on a disability pension in May 1994, following surgery for an unrelated condition, and as of the time of the initial proceeding was working part-time with an undisputed wage-earning capacity of between $5.00 and $6.00 per hour; he sought temporary total and permanent partial disability compensation under the Act.

In her initial Decision and Order, the administrative law judge found that claimant was unable to return to his pre-injury duties with employer as a flagman/ footman. She noted, after reviewing a description of claimant's former job duties prepared by employer, EX-7 at 42, that claimant's treating physician, Dr. Forrest, stated that based on his understanding of the job's requirements, this job was within claimant's physical capabilities. Based, however, on the testimony of claimant and employer's safety man, Mr. LeBlanc, that claimant's pre-injury job required standing most of the time, and that the opportunity to sit or stand was dictated by the work being performed, the administrative law judge determined that Dr. Forrest's understanding of the requirements of claimant's job was faulty. Accordingly, she discredited his testimony. She determined that as claimant could not perform his usual job, and as it was undisputed that claimant had the capacity to earn between $5.00 and $6.00 per hour post-injury, claimant was entitled to permanent partial disability compensation commencing March 14, 1994. On reconsideration, the administrative law judge reaffirmed her conclusions regarding claimant's inability to return to his usual employment duties.

Employer appealed, challenging the administrative law judge's determination that claimant could not return to his pre-injury employment. On appeal, the Board affirmed the administrative law judge's determination that claimant's return to his pre-injury job was

precluded by his physical restrictions and the consequent award of permanent partial disability benefits. *Kinlaw v. Stevens Shipping & Terminal Co.*, BRB No. 97-0225 (Aug. 20, 1997)(unpublished).

Thereafter, on January 23, 1998, employer sought to terminate claimant's permanent partial disability award pursuant to a motion for modification. 33 U.S.C. §922. Employer argued that the administrative law judge's determination that claimant was unable to perform his usual work was premised on a mistaken determination of fact, *i.e.*, that Dr. Forrest's limitations on claimant's sitting and standing were more restrictive than the requirements of the footman/flagman positions. Attached to its modification petition was a letter written by employer's counsel to Dr. Forrest which posed several questions. In responding to these questions, Dr. Forrest stated that after observing footmen and flagmen at the Port of Charleston for about one hour and reviewing a tape of that job, he was of the opinion that the requirements of those jobs were consistent with the restrictions placed on claimant on March 4, 1994.[1] Moreover, when asked whether, based on his understanding of the job's physical requirements, claimant would have the opportunity to sit or stand as frequently as he had deemed necessary in his March 4, 1994, letter, Dr. Forrest answered affirmatively to a reasonable degree of medical certainty. Moreover, he explained that when he stated that claimant needed to alternate sitting and standing as needed, he did not mean that claimant needed to do so immediately; this need could be satisfied within 10-15 minutes, based on his observations, and could probably be accomplished within five minutes. Claimant opposed employer's motion, arguing that the record in this case clearly supports the finding that claimant is no longer able to work as a longshoreman, and that employer's allegation of a mistake in a determination of fact is its attempt to retry the case.

In her decision on employer's petition for modification, the administrative law judge found that reopening the claim would not render justice as employer was seeking to establish claimant's ability to perform his usual work based on evidence that it could have generated previously through discovery and presented at the initial hearing. In addition, she found Dr. Forrest's opinion that claimant could perform his usual work duties was, in any event, unpersuasive in light of claimant's and Mr. LeBlanc's testimony in the prior proceedings to

[1]In a March 4, 1994, letter, Dr. Forrest stated that he had no objection to claimant's returning to the work force, but that claimant would have restrictions of no lifting over 20 pounds, only occasional bending, and would need to sit or stand as needed.

the contrary. Employer's request for reconsideration was denied summarily. In a Supplemental Decision Awarding Attorney Fees, the administrative law judge awarded claimant an attorney's fee of $399 for services rendered in defending against employer's petition for modification.

On appeal, employer challenges the denial of its petition for modification, and also argues that the award of an attorney's fee based on claimant's successful defense of his award should be reversed. The Director, Office of Workers' Compensation Programs (the Director), responds, expressing agreement with the employer. Claimant responds, urging affirmance of the administrative law judge's decisions.

In contesting the denial of its request for modification, employer asserts initially that it is unclear whether the administrative law judge actually considered Dr. Forrest's opinion, which it attached to its petition for modification. Employer alternatively asserts that to the extent the administrative law judge did consider the letter, she erred by not formally admitting it into the record and in not holding a full formal hearing at which time the letter, Dr. Forrest's testimony, and any other evidence could be offered in support of the modification petition. The Director responds, agreeing with employer that the administrative law judge erred by refusing to allow employer to introduce into evidence Dr. Forrest's 1997 opinions and in not conducting a new hearing.

Section 22 of the Act, 33 U.S.C. §922, provides, in 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 a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

Section 22 provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995). It is well-established that the party requesting modification bears the burden of proof. *See, e.g., Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997).

Initially, we reject employer's assertion that it is unclear whether the administrative law judge considered Dr. Forrest's 1997 opinion in denying its request for modification. It is evident from the face of the administrative law judge's decision that Dr. Forrest's opinion was, in fact, considered by the administrative law judge. *See* Denial of Petition for Modification at 3. Given, however, her determination that employer developed this evidence in an untimely manner, and her finding that it conflicted with the testimony of claimant and Mr. LeBlanc, which she found credible, the administrative law judge concluded that reopening the claim would not be in the interest of justice.

Employer's next assertion, that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557, by considering Dr. Forrest's opinion without formally admitting it the record, is technically correct. *See Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 21 (1985). In the present case, however, as the administrative law judge's primary rationale for denying modification was her determination that employer should have anticipated the need to clarify Dr. Forrest's opinion at the initial hearing, a finding which we affirm for the reasons discussed *infra*, any error she may have made in this regard is harmless.[2]

Citing *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972), and *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied,* 391 U.S. 929 (1968), employer and the Director also aver that the fact-finder has broad authority under Section 22 to reopen the claim to correct any mistaken determinations of fact, and that the fault of the party or the party's attorney in failing to adduce sufficient evidence in the original

[2]As employer notes in its brief at page 7 n.3, in denying employer's modification petition, the administrative law judge apparently was under the erroneous impression that after a one hour on-site inspection and his review of a videotape supplied by employer, Dr. Forrest stated for the first time in 1997 that claimant could perform his former job. Denial of Petition for Modification at 3. In fact, Dr. Forrest had rendered a similar opinion in March 1994 which the administrative law judge rejected in her prior Decision and Order in light of claimant's and Mr. LeBlanc's testimony. EX-7 at 42. While such an error might ordinarily justify our remanding the case for the administrative law to reconsider whether modification was warranted, given that the administrative law judge's primary basis for denying modification was her determination that Dr. Forrest's opinion should have been clarified prior to the initial hearing, this error is also harmless.

proceedings cannot serve as a basis for denying modification. The Director contends that the administrative law judge's ascribing controlling weight to the "interest in finality" is contrary to the policy underlying Section 22 as a whole and its "mistake" ground in particular; he maintains that as Section 22 was intended to broadly vitiate ordinary *res judicata* principles, the interest in "getting it right," even if belatedly, will almost invariably outweigh the interest in finality. While recognizing that the language of

Section 22 is permissive,[3] the Director maintains that Section 22 narrowly constrains the administrative law judge's authority to deny reopening the claim where, as here, the result of the original adjudication is alleged to have been in error.[4]

We reject this overly broad construction, as we find that the case law does not support the contention that the administrative law judge *must* reopen a claim when a party alleges a mistake in fact, absent egregious circumstances. The administrative law judge's authority under Section 22 does extend to any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon the evidence initially submitted," *see O'Keeffe*, 404 U.S. at 254; *Banks*, 390 U.S. at 465. The Supreme Court's decisions in *O'Keeffe* and *Banks* make clear that the scope of modification based on a mistake in fact is not limited to any particular kinds of factual

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[3]Section 22 states, in relevant 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 a determination of fact ... the [administrative law judge] *may* ... review a compensation case ....

(emphasis added).

[4]The Director contends that cases do exist in which a party's responsibility for the occurrence of the mistake is extraordinarily blameworthy, such as that presented in *McCord v. Cephas,* 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), where it is within the administrative law judge's discretion to deny modification, but he avers that such cases are the exception rather than the rule.

errors. *See Rambo*, 515 U.S. at 2147, 30 BRBS at 2-3 (CRT); *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1993). Neither *O'Keeffe* nor *Banks*, however, stands for the proposition that the fact-finder *must* reopen the claim when a mistake in fact is alleged; all they state is that the fact-finder has the authority to do so.

Subsequent opinions from various courts of appeals have clarified the scope of modification based on a mistake in fact. The seminal case is *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), in which the United States Court of Appeals for the District of Columbia Circuit discussed at length the "mistake in fact" provision of Section 22. In this case, an award of death benefits was entered in 1972, following four years of administrative proceedings during which time the employer did nothing more than summarily state that the decedent was never one of its employees. Several months after the award was entered, the employer filed a petition for modification alleging a mistake in a determination of fact regarding the employment relationship between the decedent and the employer. The administrative law judge reversed the award to the decedent's widow based upon the evidence presented in the modification proceeding. The Board reversed the denial of benefits, holding that the administrative law judge did not have authority to modify the prior decision based on an alleged mistaken jurisdictional fact, such as the existence of an employment relationship.

The court of appeals vacated the Board's decision. It held that the fact-finder had jurisdiction to reopen the award based on the Supreme Court's decisions in *O'Keeffe* and *Banks* inasmuch "the authority to reopen is not limited to any particular type of facts." *McCord*, 532 F.2d at 1380, 3 BRBS at 375-376. Relevant to the issue raised by the Director herein, moreover, the court made the following pronouncement, which we quote at length in order to stress its significance:

> However, even though there was power to reopen, there is no reason to think that there should be an automatic reopening simply because the Deputy Commissioner or the Administrative Law Judge found a mistake in a determination of fact.
>
> Professor Arthur Larson says, 3 *Larson, Workmen's Compensation Law*, §81.52, "The concept of 'mistake' requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt."
>
> As the Supreme Court made clear in its reference to the legislative explanation for the 1934 broadening of the grounds for

> reopening under §22, the basic criterion is whether reopening will "render justice under the act." *Banks, supra; O'Keeffe, supra*.
>
> The congressional purpose in passing the law would be thwarted by any lightly considered reopening at the behest of an employer who, right or wrong, could have presented his side of the case at the first hearing and who, if right, could have thereby saved all parties a considerable amount of expense and protracted litigation.

McCord, 532 F.2d at 1380-1381, 3 BRBS at 376-377. Thus, it is clear that while the administrative law judge has the authority to reopen a case based on any mistake in fact, the administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice. *See generally Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991). Moreover, despite the egregious nature of the employer's conduct in ignoring the original proceedings in *McCord*, the court did not reverse outright the administrative law judge's decision denying death benefits. Rather, it remanded the case to the Board to determine whether the administrative law judge's decision to modify the award "rendered justice under the act," and if so whether the termination of benefits should be retroactive or prospective only. *McCord,* 532 F.2d at 1381, 3 BRBS at 378.[5]

Subsequent case law, issued by both circuit courts and the Board, have adhered to the standard that modification based on a mistake in fact must render justice, and the decisions in these cases reveal that not always is the resolution one in which the case is, in fact, reopened. *See, e.g., General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *Duran v. Interport Maintenance* Co., 27 BRBS 8 (1993); *see generally McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56 (CRT) (9th Cir. 1990); *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155 (CRT)(11th Cir. 1985); *Lombardi v. Universal Maritime Service Corp.,* 32 BRBS 83 (1998). The Board previously has explicitly rejected the assertion that the interest of justice standard is inapplicable to the inquiry into modification based on a mistake in fact. *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183, 185-186 n.1

[5]On remand from the court, the Board held that the modification of the award did not render justice under the Act, and it reinstated the award of death benefits. *Cephas v. McCord*, 4 BRBS 224 (1976), *aff'd*, 566 F.2d 797 (D.C. Cir. 1977)(table).

(1985).

Moreover, the First Circuit stated in *Woodberry* that "a bare claim of the need to reopen to serve the interests of justice" is not sufficient; a court must balance the need to render justice against the need for finality in decision making. *Woodberry,* 673 F.2d at 25, 14 BRBS at 639-640. This court echoed the reasoning of *McCord:* "parties should not be permitted to invoke §22 to correct errors or misjudgments of counsel." *Id.,* 673 F.2d at 26, 14 BRBS at 640. The holdings of both *McCord* and *Woodberry* belie the Director's assertion that the interest in arriving at the "correct" result always overrides the interest in finality.[6] In sum, the language of Section 22 itself, *see* n. 3, *supra*, and the judicial interpretations of the "mistake in fact" provision clearly demonstrate the discretionary nature of reopening, and that in deciding whether to reopen a case, the administrative law judge should consider whether reopening will render justice under the Act, a consideration which requires a weighing of competing equities.[7] The Board will review the administrative law judge's findings in this regard under the abuse of discretion standard. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Duran,* 27 BRBS at 14; *Dobson v. Todd Pacific Shipyards Corp.,* 21 BRBS 174 (1988).

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[6]The Director does not persuasively demonstrate how the "correct" result would be reached in this case if the administrative law judge were to reopen the case. The administrative law judge would still have the prerogative of weighing conflicting evidence in arriving at her decision.

[7]Citing *Jesse v. Director, OWCP*, 5 F.3d 723, 724, 18 BLR 2-26, 2-29 (4th Cir. 1993), a black lung case arising in the Fourth Circuit wherein the present case also arises, the Director suggests that the principle of finality does not apply at all in longshore and black lung cases. *Jessee* does contain language to that effect. *Id.* Nonetheless, taken as a whole, case law recognizes that in the absence of newly discovered evidence which could not have been introduced previously, *see, e.g., Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197 (1998), the decision as to whether to reopen a case under Section 22 is discretionary, and is contingent upon the fact-finder's balancing the need to render justice against the need for finality in decision making. *See Woodberry,* 673 F.2d at 25, 14 BRBS at 639; *McCord*, 532 F.2d at 1377, 3 BRBS at 371; *Lombardi,* 32 BRBS at 86-87. Moreover, the United States Court of Appeals for the Fourth Circuit recently issued several unpublished decisions recognizing the interest in finality as a factor in the modification inquiry. *Moon Engineering Co. v. Baum*, 139 F.3d 891 (4th Cir. April 3, 1998)(table); *Sullivan v. Newport News Shipbuilding & Dry Dock Co.*, 120 F.3d 262 (4th Cir. July 30, 1997)(table); *but see* U.S. Ct. of App. Rule 36(c) (1998).

Employer's and the Director's assertion that the administrative law judge erred in failing to hold a full formal hearing on modification also fails under similar reasoning. To reopen the record under Section 22, the moving party must allege a mistake of fact or change in condition and assert that the evidence to be produced or of record would bring the case within the scope of Section 22. *See Duran*, 27 BRBS at 14. In the present case, as we will discuss, the administrative law judge rationally found that as employer was attempting to obtain modification based on evidence which it should have developed previously, employer failed to meet its initial burden of establishing that the evidence to be produced would bring the case within the scope of Section 22. Inasmuch as Section 22 should not be allowed to become a back door for correcting tactical errors or omissions, *see McCord,* 532 F.2d at 1381, 3 BRBS at 377; *Stokes v. George Hyman Const. Co.*, 19 BRBS 110, 113 (1986), on the facts presented the administrative law judge rationally found that there was no need to conduct a full hearing. *See generally Williams,* 17 BRBS at 35; *cf*. *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998) (holding that once the district director exercises his discretion to reopen a claim, an administrative law judge must hold a full oral hearing upon the request of a party); *Cunningham v. Island Creek Coal Co.,* 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998); *Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994).

Thus, we now turn to the present case that reopening the claim is not in the interest of justice. The administrative law judge found that reopening is not appropriate as employer should have anticipated the need to develop Dr. Forrest's opinion at the time of the initial hearing. She further found that the basis for employer's proffer on modification is suspect as neither claimant nor his representative was present during Dr. Forrest's tour of the docks. She concluded that to allow employer to reopen the prior decision on the basis of what equates to post-decisional discovery would have the adverse effect of allowing any employer reluctant to finance adequate discovery pre-trial to count on correcting any omissions by way of a petition for modification, which would defeat both the principles of finality and that of judicial efficiency. While employer argues on appeal that it was equally, if not more reasonable, for it to have assumed that this was not necessary given that it was Dr. Forrest's ultimate conclusion that claimant could return to his former work, the fallacy of this argument lies in the fact that doctors' opinions are routinely discredited by administrative law judges where the foundation on which such opinions are based is perceived as questionable.

We find no reversible error in the administrative law judge's determination that employer should have anticipated the need to develop Dr. Forrest's opinion more fully at the time of the initial proceeding. In his March 4, 1994, opinion letter, Dr. Forrest stated that he had no objection to claimant's returning to the work force, but that claimant would have restrictions of no lifting over 20 pounds, only occasional bending, and would need to sit or stand as needed. Thereafter, in this same letter, Dr. Forrest stated that he did not see claimant

ever returning to his previous type of work. Just six days later, however, in a March 10, 1994, letter, after reiterating his prior findings regarding claimant's restrictions, Dr. Forrest stated that based upon the job description employer provided, claimant's former job was within his current capabilities. In so concluding, Dr. Forrest specifically noted that this job only required lifting up to 20 pounds, that bending activities would be infrequent and could be carried out by stooping, and that he had been informed that claimant would be able to sit briefly as needed during the work day. Dr. Forrest next examined claimant on October 5, 1994, after a non work-related auto accident. EX-7 at 31. Dr. Forrest stated that given a recent work capacities evaluation, and but for the auto accident, he would have cleared claimant for working with a weight restriction of approximately 20 pounds, that he would have claimant avoid repetitive bending, reaching, climbing, squatting, and kneeling, and have him alternate sitting and standing, with maximums of each in the 45 minutes to 1 hour range. Dr. Forrest twice thereafter agreed that claimant could work as a footman. EX-7 at 19, 23. Claimant disputed the validity of Dr. Forrest's March 10, 1994, opinion that he could return to work as a footman, arguing that the Waterfront Employers-ILA Pension and Welfare Fund Board found claimant disabled from returning to waterfront work based on medical evidence submitted by three physicians, including Dr. Forrest's partner, Dr. Johnson, an orthopedic surgeon.

Inasmuch as the record reflects that there was an unexplained change in Dr. Forrest's opinion between March 4 and March 10, 1994, that his later opinion conflicted with that of one of his medical partners, and that claimant specifically disputed the validity of Dr. Forrest's March 10, 1994, opinion, the administrative law judge rationally concluded that employer should have anticipated the need to have Dr. Forrest's opinion clarified at the time of the initial proceedings. Specifically, the administrative law judge rationally found that his opinion that claimant would be able to sit and stand briefly as needed was insufficiently precise so as to allow her to determine whether, in fact, claimant was capable of performing his former work in view of the testimony of claimant and Mr. LeBlanc concerning the requirements of the position. Moreover, she rationally concluded that employer could have had Dr. Forrest view the dock areas prior to the initial hearing, at a time when claimant could have been represented, so as to avoid prejudice to the claimant by virtue of the *ex parte* tour. As the party seeking modification, employer bears the burden of proof. *See, e.g., Rambo*, 521 U.S. at 121, 31 BRBS at 54 (CRT). As employer's only explanation for not developing this testimony previously is its erroneous belief that it did not think that it was necessary, and Section 22 is not intended to provide a back-door route to retrying a case, or to protect litigants from their counsel's litigation mistakes, we affirm the administrative law judge's denial of modification on the facts presented as it constitutes a rational exercise of her discretionary authority. *See generally Lombardi,* 32 BRBS at 86.

Finally, we address employer's challenge to the administrative law judge's award of an attorney's fee. Employer maintains that because the administrative law judge erred in denying modification and this fee award was premised on claimant's successful opposition to employer's modification petition, the fee award should be reversed. Inasmuch, however, as we affirm the administrative law judge's denial of modification, we reject employer's argument and affirm the award of an attorney's fee. *See generally Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

Accordingly, the Denial of Petition for Modification, Order on Reconsideration, and Supplemental Decision Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge