

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 July 2014

CASE NO.: 2013-LDA-403

OWCP NO.: 02-138039

IN THE MATTER OF:

WILLIAM L. MANNING

Claimant

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.

Employer

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
c/o Chartis WorldSource**

Carrier

APPEARANCES:

GARY B. PITTS, ESQ.

For The Claimant

JOHN SCHOUEST, ESQ.
JASON GILLETTE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a modification claim under the Defense Base Act, 42 U.S.C. § 1651, et seq., an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

(herein the Act), brought by Service Employees International, Inc. (Employer) and Insurance Company of the State of Pennsylvania, c/o Chartis WorldSource (Carrier) against William L. Manning (Claimant).

On July 31, 2006, in a decision authored by the undersigned, Claimant was awarded benefits due to injuries to his back, left leg and hip, neck, vision, and hearing, which were sustained on October 4, 2004, while Claimant was working in the course and scope of his employment. He was found to be temporarily and totally disabled. His average weekly wage was calculated to be \$1,579.60. He was also awarded medical benefits for all reasonable, appropriate, and necessary medical expenses.

On March 26, 2013, Employer/Carrier filed for modification and contested causation/compensability of Claimant's COPD and lung complaints.

The issues could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing in Houston, Texas on November 19, 2013. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs. Claimant offered seven exhibits, and Employer/Carrier offered 22 exhibits, all of which were admitted into evidence along with one Joint Exhibit. The record was held open to allow the parties to engage in post-hearing development. On December 19, 2013, Claimant submitted into evidence a letter regarding his employment search efforts, which was received into the record. On December 23, 2013, Employer/Carrier submitted into evidence the depositions of Claimant and William Quintanilla, which were received into the record. The record was closed on January 6, 2014. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Claimant and the Employer/Carrier on the due date of February 3, 2014. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

¹ References to the transcript and exhibits are as follows: Transcript: Tr. _; Claimant's Exhibits: CX-_; Employer/Carrier's Exhibits: EX-_; and Joint Exhibit: JX-_. Depositions are cited as [page]:[line(s)].

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:²

1. That the Claimant was injured on October 4, 2004.
2. That Claimant's injury occurred during the course and scope of his employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.
4. That the Employer was notified of the accident/injury on October 4, 2004.
5. That Claimant's average weekly wage at the time of injury was \$1,579.60 in accordance with the Decision and Order dated July 31, 2006.
6. That Claimant has received temporary total disability benefits in the amount of \$1,047.16 per week.
7. That Claimant reached maximum medical improvement on December 9, 2011.
8. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Employer/Carrier are entitled to modification of the Decision and order issued by the undersigned on July 31, 2006.
2. Whether Claimant retained post-injury earning capacity and, if so, at what amount.
3. Attorney's fees and expenses.

² JX-1. The parties stipulated to MMI at the hearing. (Tr. 14-15).

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified that he has had no employment since his last formal hearing. Since the formal hearing, his back has been sore, and he had treated his back with heat pads. He does not pick up or move anything heavy. His left leg is weak, and his right foot has no pulse. He has a lack of circulation and burning sensation in his legs/feet. (Tr. 16-17).

Claimant turned 70 years old on January 19, 2014. He has recovered shrapnel from his left leg, left hand, and neck. His neck is sore and stiff. (Tr. 17).

Claimant was examined by Dr. Martin Barrash once, four years ago. Dr. Richard Evans has been his treating physician since before the formal hearing and recently. He treats at the VA for his shortness of breath and COPD. (Tr. 17-18).

There have been four jobs identified by Employer/Carrier's vocational consultant. Claimant testified he does not know whether he could successfully hold down a job. He has trouble walking and at times needs an oxygen tank for respiration. He gets fatigued easily. Claimant testified he thought that would cause a problem with keeping a job. He cannot stand or walk for too long. (Tr. 18-19).

On cross-examination, Claimant affirmed that he had had no medical treatment since 2006 until his recent appointment with Dr. Evans in 2013. (Tr. 19-20).

Claimant suffered from shrapnel wounds, a broken arm, shoulder injury, and back injury for which he treats at the VA. The arm healed. He continues to experience residual pains. (Tr. 21-22). Claimant testified he had been a smoker most of his life and now suffers from Chronic Obstructive Pulmonary Disease (COPD). His COPD is unrelated to his work accident blast attack but could be related to his general employment as a sandblaster. He has had respiratory problems for three years. Claimant still has shrapnel embedded in his body. (Tr. 23-26).

The Medical Evidence

Summary of Prior Medical Evidence³

On October 5, 2004, Claimant was treated by MAJ Reagan R. Parr, M.D., an orthopedic surgeon with the 31st Combat Support Hospital at Baghdad, Iraq. He had been struck by mortar fragments in extremities, sustained injuries to his right humerus (fracture), and suffered multiple superficial fragment wounds to the extremities. He underwent irrigation and debridement of his wounds, and his fracture was splinted. He was given medications for pain and infection. The next day, he arrived at Camp Anaconda for treatment en route to Germany. The records show Claimant sustained wounds to his nose, right shoulder, abdomen, right hip, thigh, and calf, and left forearm, wrist, and hand/fingers, and left thigh and calf. Upon arrival at Landstuhl Regional Medical Center in Germany on October 7, 2004, Claimant's wounds were irrigated, debrided, and splinted.

On October 12, 2004, Claimant began treatment at the VA Medical Center in Houston, Texas. X-ray reports revealed fracture of the proximal humeral shaft and metallic densities noted in the soft tissues in the upper arm. He was sent to Prosthetics and fitted with a "Brace arm clamshell." Continuing treatment at the VA Medical Center included the clamshell brace, pain medications, and home exercises to prevent stiffness.

On June 27, 2005, Claimant was evaluated by Dr. Robert Fulford at the request of Employer/Carrier. Dr. Fulford noted that Claimant's right shoulder shows "marked limitation" of internal and external rotation and mild restriction of extension, lateral bending, and rotation of the cervical spine. He noted that Claimant had "painful, retained foreign body in the left index finger, middle phalanx, radial border." Multiple perforations were shown in the forehead, base of the skull, over the shoulder, at the right elbow, above and below the "flexor crease," left thigh, left leg proximal and "mid, as well as right, mid and medial thigh." X-rays revealed a large metallic retained foreign body in the middle upper third of Claimant's right humerus, as well as several surrounding smaller metallic fragments outside the bone.

³ See Decision and Order, 2006-LDA-00033, July 31, 2006, pp. 8-12.

Dr. Fulford recommended Claimant be seen by Ophthalmology and ENT specialists for his vision changes and auditory loss. He opined that Claimant was at maximum medical improvement with respect to his right humerus and that the retained metallic foreign bodies may cause problems and may continue to expel themselves in the future. He further opined that Claimant can be released to return to duties in Iraq.

Dr. Fulford ordered a Functional Capacity Evaluation (FCE) which was accomplished on June 27, 2005, that he interpreted as indicating Claimant could perform heavy work.

Work Status Evaluators performed the FCE on June 27, 2005. Claimant terminated the testing based on complaints of fatigue, excessive discomfort, and an inability to complete the required number of movements while achieving an age-determined target heart rate. Grip strength testing produced reported pain in Claimant's left hand and forearm. In the functional abilities evaluation, Claimant completed the tasks of walking, carrying, pushing/pulling, balancing, crawling, reaching to front, and standing and sitting without any reported symptom complaints or behaviors. It was concluded that Claimant qualified for the heavy work category "within the restricted work plane," but, when considering "competitive unrestricted vertical and horizontal work planes," he qualified for medium work.

On July 27, 2005, Claimant presented to Dr. Richard Evans.⁴ After examination, Dr. Evans's impressions were (1) status-post broken right shoulder; (2) tinnitus; (3) cervical disc disorder without myelopathy; (4) lumbar disc disorder without myelopathy; (5) lumbar radiculitis; and (6) shrapnel injury to left leg. Medications were prescribed, an ENT evaluation for hearing was recommended, and Claimant was placed off work.

Dr. Robert Whitsell performed an independent medical examination of Claimant at the behest of the U.S. Department of Labor on November 15, 2005. Dr. Whitsell opined that Claimant would benefit from a good exercise program for rehabilitation of his right upper extremity. He further opined that Claimant would be at maximum medical improvement for his humerus injury after rehabilitation. Dr. Whitsell withheld an opinion regarding Claimant's return to work until after another FCE. He agreed with the need for an ophthalmology and ENT consult as well as a neurological consultation.

⁴ Neither Dr. Evans's CV nor his credentials are made part of the record.

On November 15, 2005, Claimant underwent a second FCE with MES Solutions. Various testing resulted in the examiner concluding that Claimant gave an inconsistent effort on grip strength testing, exhibited high scores on pain avoidance behavior/beliefs, scored a 58% on a low back pain questionnaire of severe disability, and had a documented 5/5 on the Waddell's Questionnaire, indicative of inappropriate responses suggesting symptom magnification. Although the raw data placed Claimant at the light-medium physical demand level of work, it was concluded that a more consistent effort may have placed him at the medium level. Lifting tasks were terminated by Claimant based on complaints of fatigue, excessive discomfort, fear avoidance, or inability to complete the required number of lifts.

Based on Claimant's description of his former job and his demonstrated performance during the FCE, it was determined that Claimant could not perform the lifting, carrying, standing, and walking requirements of a labor foreman for Employer.

Updated Medical Evidence

Dr. J. Martin Barrash

On October 21, 2009, Dr. Martin Barrash conducted a second medical opinion examination of Claimant on behalf of Employer/Carrier. (EX-15). Dr. Barrash is a board-certified neurologist. (EX-17; EX-20, p. 5:7 - p. 6:1).

Claimant reported his back never completely recovered and he experienced a burning sensation in his legs if he walked for long distances. Physical examination revealed a small amount of atrophy of the proximal lateral right upper extremity. Sensation was intact except for the left medial foot and big toe. Dr. Barrash did not observe back spasm or any difficulty flexing. He noted Claimant was capable of walking on his heels and toes. He did not review or request any diagnostic studies. (EX-15).

Dr. Barrash completed Form OWCP-5, Work Capacity Evaluation, Musculoskeletal Conditions on December 9, 2011.⁵ Dr. Barrash found Claimant's work injury reached MMI and that Claimant could return to his regular job eight hours per day. Claimant's former job with Employer required 12 hours per day, seven days per week. The form also noted Claimant suffered from unrelated cardiovascular problems. (EX-16; EX-20, p. 7:16-25).

⁵ Employer/Carrier indicate that they sent Claimant for a repeat evaluation with Dr. Barrash after November 2011. See Brief, p. 6. However, Dr. Barrash's testimony shows he examined Claimant only once in October 2009.

Prior to his deposition on November 12, 2013, Dr. Barrash briefly reviewed Claimant's testimony regarding his usual job duties. His opinion did not change upon learning that Claimant's usual work involved an 84-hour work week. He testified his opinion relates to his evaluation of Claimant four years earlier, in 2009. Dr. Barrash opined Claimant was capable of working 84 hours per week as of the time of his evaluation, but did not opine whether Claimant could presently perform an 84-hour work week. (EX-20, p. 8:1 - p. 9:13).

Dr. Barrash testified Claimant's work restrictions obviously changed between the date of the first formal hearing (March 8, 2006) and his evaluation of Claimant in October 2009. But, he could not say that Claimant's condition "improved." He pointed to the FCE findings from November 2005 which indicated Claimant was "certainly able to do more than that which he tried to demonstrate." Dr. Barrash had reviewed no other medical records regarding Claimant's condition between the time of the FCE and his evaluation. (EX-20, p. 10:12 - p. 11:17).

Dr. Richard Evans

Dr. Evans evaluated Claimant on November 14, 2013. He noted Claimant is being treated at the VA for COPD. Claimant reported he is unable to walk for more than 200 yards at a time. He has shrapnel that continues to emerge from his hands and legs. Examination revealed Claimant has no pulse in his right foot and weak pulses in the left foot. He was diagnosed with intermittent claudication, a clinical term for muscle pain. Dr. Evans concluded Claimant is not fit to work in a war zone. (CX-7).

The Vocational Evidence

**William Quintanilla
Vocational Rehabilitation Specialist**

On October 22, 2013, William Quintanilla submitted a vocational rehabilitation assessment and labor market survey on behalf of Employer/Carrier. Research was conducted in the Houston area for positions within the sedentary to light physical demand level. (EX-18; EX-22, p. 5:11 - p. 9:2).

Quintanilla reviewed medical records from Drs. Fulford, Evans, Whitsell, and Barrash and the FCEs. He used the work restrictions provided in the last FCE. He conducted his labor market survey of positions using sedentary to light physical

demand level classifications with an upper lifting limit of 20 pounds. He met with Claimant on October 17, 2013. Claimant indicated he was not looking for employment. Quintanilla located four positions—two sedentary and two light. (EX-18, pp. 1-2, 6; EX-22, p. 9:4 - p. 11:24).

The first job, Microchip Operator/Inspector, is a sedentary position with Spiretek International paying \$10.00 per hour for 30 or more hours per week. Quintanilla testified Claimant would not need any specialized training. While the job requires sitting, Claimant would be able to get up if needed. This is a quality control position, which requires that the employee view laser microchips through a magnifier to verify that the components are all in good shape. A sedentary position usually requires no lifting or lifting up to 10 pounds. This job required only lifting of microchips. Claimant would be sitting at a bench but could choose to walk around or stand. (EX-18, p. 6; EX-22, p. 11:25 - p. 13:10).

The second position, Telephone Solicitor for MCS Personnel, is also a sedentary position paying \$10.00 per hour for 30 or more hours per week. The employer would provide training. Quintanilla assumed Claimant could alternate between sitting and standing and use a headset rather than holding a phone. There would be no lifting. (EX-18, p. 6; EX-22, p. 13:11 - p. 14:12).

The third job, Non-Commissioned Security Guard, is a light duty position for Viper Security & Investigation paying \$10.25 per hour for 30 or more hours. The job requires supervising or patrolling industrial and commercial properties. Claimant would maintain a log of activities. The company provides training and uniforms. A light duty job requires some walking and standing. The employee would use a golf cart to circle the patrol area. The job did not list any lifting requirements; but, as a light duty position, any lifting would be less than 20 pounds. Claimant would not be required to carry a weapon or subdue anyone. (EX-18, p. 6; EX-22, p. 14:13 - p. 15:21).

The last job, Prep-Worker in Production for Lincoln Manufacturing, is a light duty job paying \$10.00 per hour. Claimant would apply bond adhesive to parts, transfer numbers to paper, and stamp the part with the numbers. The job requires lifting of less than 20 pounds. The employer would provide training. (EX-18, p. 6; EX-22, p. 15:22 - p. 16:15).

Quintanilla recognized Claimant is at an advanced age and has been out of the work force for a while. He testified that Claimant's age would qualify him for assistance under the Advanced Age Workers program with the Texas Workforce Commission. The program seeks out employers specifically looking for older individuals, provides jobs repetitive in nature that do not require much training, and identifies employers strictly looking for older individuals. Quintanilla recognized Claimant's age disadvantage: "if he had to compete against a lot of younger workers, he probably would not be hired." (EX-22, p. 16:16 - p. 19:6).

The jobs identified in the labor market survey were not labeled as jobs under the Advanced Age Workers program. Quintanilla identified entry-level jobs because Claimant does not have experience in those fields. (EX-22, p. 19:7-24).

Quintanilla testified employers tend to judge an applicant on his appearance. He recognized Claimant appeared older than his age, and his age would be a problem in a guard position if he had to arrest or confront a suspect. The job identified in the labor market survey is not such a job. Quintanilla testified Claimant would be better suited for a stationary position such as gate guard. The identified security company would likely have such a position available, although none was specifically identified. (EX-22, p. 20:14 - p. 22:10).

The Houston job market fared better than others, but unemployment has nonetheless been an issue. Entry-level jobs are usually available since employees tend to advance. There is a large labor pool for entry-level positions, and there are always openings. (EX-22, p. 22:19 - p. 24:1).

Claimant has not worked since 2004, when the accident occurred. According to Quintanilla, being out of the workforce for nine years is "definitely not an advantage," particularly in skilled positions. Returning to the workforce should not be a problem in entry-level positions because entry-level positions provide on-the-job training. (EX-22, p. 24:14 - p. 25:17).

Job Search Efforts

Claimant, through counsel, represented to the undersigned that he applied for the four positions identified in the labor market survey. None offered Claimant a job. (CX-8).

The Contentions of the Parties

Employer/Carrier contend they are entitled to modification of the undersigned's prior Decision and Order which issued on July 31, 2006. They argue the Decision and Order should be modified to reflect that Claimant reached MMI on December 9, 2011. Dr. Barrash placed Claimant at maximum medical improvement four years ago. Claimant has not visited his treating physician since 2005 at which time the FCE revealed he could do medium work. Employer/Carrier have commissioned a new labor market survey. Jobs were identified which were sedentary to light in demand. Claimant's COPD and muscle pain prevent him from returning to a war zone. Employer/Carrier argue, out of an abundance of caution, that the COPD is not compensable.⁶

Claimant is 70 years of age. He has been out of the labor market since October 2004. His work accident affected his lower back, neck, leg, and vision. He still has shrapnel in his body. He contends he cannot return to work. He acknowledges Employer/Carrier's vocational consultant identified four jobs in a labor market survey performed on October 22, 2013, but Claimant could not obtain any of the jobs.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own

⁶ Claimant has not made a claim or argued for the compensability of his COPD or requested reimbursement or compensation for any medical treatment related to the COPD. As this issue is not part of the claim before me, I do not address Employer/Carrier's argument, nor do I award any benefits or make any conclusions regarding the COPD.

inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Applicability of Section 22 Modification

Section 22 of the Act 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 [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act.

The party requesting modification has the burden of proof to show a mistake of fact or change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984).

An initial determination must be made whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine, Incorporated, 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a mistake of fact or a change in physical or economic condition. Id. at 149.

It is well-established that Congress intended Section 22 modification to displace traditional notions of **res judicata**, and to allow the fact-finder to consider any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 92 S.Ct. 405 (1971), reh'g

denied, 404 U.S. 1053 (1972). An administrative law judge, as trier of fact, has broad discretion to modify a compensation order. Id.

A party may request modification of a prior award when a mistake of fact has occurred during the previous proceeding. O'Keefe, supra at 255. The scope of modification based on a mistake in fact is not limited to any particular kinds of factual errors. See Rambo I, supra at 295; Banks v. Chicago Grain Trimmers Association, Inc., supra at 465. However, it is clear that while an administrative law judge has the authority to reopen a case based on any mistake in fact, the exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice. Kinlaw v. Stevens Shipping and Terminal Company, 33 BRBS 68, 72 (1999). A mistake in fact does not automatically re-open a case under Section 22. The administrative law judge must balance the need to render justice against the need for finality in decision making. O'Keefe, supra; see also General Dynamics Corp. v. Director, OWCP [Woodberry], 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Modification based upon a change in conditions or circumstances has also been interpreted broadly. Rambo I, supra at 296. There are two recurring economic changes which permit a modification of a prior award: (1) the claimant alleges that employment opportunities previously considered suitable alternative are not suitable; or (2) the employer contends that suitable alternative employment has become available. Blake v. Ceres, Inc., 19 BRBS 219 (1987). A change in a claimant's earning capacity qualifies as a change in conditions under the Act. Rambo I, supra at 296. Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. Id.; See also Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998); Vasquez, supra at 431.

However, Section 22 is not intended as a basis for re-trying or litigating issues that could have been raised in the initial proceeding or for correcting litigation strategy, tactics, errors, or misjudgments of counsel. General Dynamics Corp. v. Director, OWCP [Woodberry], supra; McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); Delay v. Jones Washington Stevedoring Company, supra, at 204.

The U.S. Department of Labor (DOL) has consistently advanced a view that Section 22 articulates a preference for accuracy over finality in judicial decision making. See Kinlaw, supra at 71; Old Ben Coal Company v. Director, OWCP [Hilliard], 292 F.3d 533, 36 BRBS 35, 40-41 (CRT) (7th Cir. 2001); R.V. v. Friede Goldman Halter, supra. DOL has maintained in other modification proceedings that as Section 22 was intended to broadly vitiate ordinary **res judicata** principles, the interest in "getting it right," even belatedly, will almost invariably outweigh the interest in finality. Kinlaw, supra at 71.

B. The Threshold Requirement under Section 22 of the Act

I find that Employer/Carrier have met the threshold requirement for modification under Section 22 of the Act by presenting a change in Claimant's physical and economic condition. Subsequent to the issuance of the original Decision and Order in this matter, Employer/Carrier obtained medical evidence, which concluded Claimant had reached MMI and could return to work, and vocational evidence, which identified positions in the Houston job market. Consequently, I find and conclude that Employer/Carrier have presented information to warrant consideration of modification under Section 22.

Therefore, balancing the need to render justice under the Act against the need for finality in decision making, I hereby grant Employer/Carrier's request and reopen the record to consider modification of the prior Decision and Order.

C. Nature and Extent of Disability

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time 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, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic and a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Ins. Guaranty Assn. v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The parties stipulated that Claimant reached maximum medical improvement on December 9, 2011, when Dr. Barrash completed the Form OWCP-5. (Tr. 14-15; EX-16). Claimant agrees that his condition became permanent on December 9, 2011. See Claimant's Brief, p. 13.

Claimant's treating physician stated that Claimant could not return to work in a war zone. Aside from the COPD, Claimant continues to suffer from muscle pain. He is unable to walk for more than 200 yards at a time, has no pulse in his right foot, and has weak pulses in the left foot. Shrapnel continues to emerge from his hands and legs. (CX-7). This opinion is in line with the pre-modification medical evidence that led the undersigned to find Claimant totally disabled. See Decision and Order dated July 31, 2006. Further, while Dr. Barrash opined Claimant could return to his usual job, he could not say that Claimant's condition "improved," only that Claimant was "certainly able to do more than that which he tried to demonstrate" in the FCE in November 2005, which placed Claimant at a light-medium physical demand level. (EX-16; EX-20, p. 10:12 - p. 11:17). However, the FCE estimated that a consistent effort by Claimant could have placed him, at best, at a medium level, not at the heavy duty level required by his employment. Claimant's job required working 84 hours per week, moving containers, lifting lids, and dragging dumpsters 25-30 feet. (EX-20, p. 8:1 - p. 9:3). Additionally, in Employer/Carrier's Post Hearing Brief, Employer/Carrier essentially agree that Claimant cannot return to work overseas. See Employer/Carrier's Brief, p. 15.

Accordingly, I find and conclude that Claimant is permanently disabled as of December 9, 2011, and has established a **prima facie** case of total disability since he cannot return to his former job with Employer. The remaining issue, then, is whether Employer/Carrier have established suitable alternative employment.

E. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, as here, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified

jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978). The claimant's obligation to seek work does not displace the employer's **initial** burden of demonstrating job availability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

On November 15, 2005, Claimant underwent a second FCE with MES Solutions. Although the raw data placed Claimant at the light-medium physical demand level of work, it was concluded that a more consistent effort may have placed him at the medium level. More recently, Dr. Evans's evaluation revealed Claimant is unable to walk for more than 200 yards at a time, has no pulse in his right foot and weak pulses in the left foot, has shrapnel that continues to come out of his hands and legs, and has intermittent claudication (muscle pain). (CX-7).

Claimant turned 70 years old on January 19, 2014. He testified he has trouble walking and at times needs an oxygen tank for respiration. He gets fatigued easily. He cannot stand or walk for too long. Claimant testified he thought he would be unable to obtain or keep a job. (Tr. 17-19).

Mr. Quintanilla submitted a labor market survey and vocational evaluation on October 22, 2013. (EX-18). He reviewed medical records from Drs. Fulford, Evans, Whitsell, and Barrash and the FCEs. He used the work restrictions provided in the last FCE. He conducted his labor market survey in Houston of positions using sedentary to light physical demand level classifications with an upper lifting limit of 20 pounds. (EX-18, pp. 1-2, 6; EX-22, p. 9:4 - p. 11:24).

The four jobs are arguably all within Claimant's physical limitations generally, but do not identify the physical duties or demands of the jobs. (EX-18, p. 6; EX-22, p. 11:25 - p. 16:15). Even finding Claimant physically able to perform the identified positions, I am not convinced that Employer/Carrier have met their burden of proof. They have only shown four job opportunities, which may or may not be open to employees who are 70 years of age and who have been out of the workforce for ten years. Employer/Carrier's vocational expert admitted employers tend to judge an applicant on his appearance and Claimant appeared older than his age. Quintanilla testified Claimant "probably would not be hired" if he had to compete against a lot of younger workers. The Advanced Age Workers program identifies employers strictly looking for older individuals like Claimant. However, the jobs identified in the labor market survey were not labeled as jobs under the Advanced Age Workers program. (EX-22, p. 18:17 - p. 19:24). Quintanilla acknowledged that Claimant would be better suited for a stationary position such as gate guard; nonetheless, Quintanilla identified the more demanding patrol position in his labor market survey. (EX-22, p. 20:14 - p. 22:10).

Assuming, **arguendo**, that Employer/Carrier have established suitable alternative employment, I find Claimant has made a diligent effort to obtain employment. While he expressed doubt as to his employability, Claimant nonetheless applied for the four positions listed in the labor market survey. He was not successful in his search. (CX-8; see also, Claimant's Brief, p. 18).

In view of the foregoing, I find that Employer/Carrier have not established suitable alternative employment and have not established that Claimant could compete for the identified positions or is reasonably likely to secure them or similar positions. As such, Claimant remains totally disabled.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.⁷ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier's request for modification is **GRANTED**.
2. Employer/Carrier shall pay Claimant compensation for temporary total disability from October 4, 2004 through December 8, 2011, based on Claimant's average weekly wage of \$1,579.60.
3. Employer/Carrier shall pay Claimant compensation for permanent total disability from December 9, 2011 to the present and continuing thereafter based on Claimant's average weekly wage of \$1,579.60.

⁷ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **April 5, 2013**, the date this matter was referred from the District Director.

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f), for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's work injury.

6. Employer/Carrier shall receive credit for all compensation heretofore paid, if any, as and when paid.

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

8. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

ORDERED this 15th day of July, 2014, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge