BRB No. 06-0350

DIANA G. ELEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 12/15/2006
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Diana G. Eley, Hampton, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification (2005-LHC-00208) of Administrative Law Judge Daniel A. Sarno, Jr., 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). In an appeal by claimant without legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v.*

Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965). If they are, they must be affirmed. *Id.*

Claimant began working for employer in 1979 in the clean-up department. On April 15, 1993 claimant sustained a work-related injury to her right shoulder, which required arthroscopic surgery on May 26, 1994. Following her recovery, claimant returned to light-duty work for employer, but was subsequently laid off. Claimant worked in various non-maritime jobs between 1994 and 2002, and employer voluntarily paid claimant temporary total and partial disability compensation for various periods. After employer terminated her disability benefits, claimant filed a claim seeking permanent total disability benefits beginning March 22, 2000.

In the initial Decision and Order issued on April 20, 2004, Administrative Law Judge Fletcher E. Campbell, Jr., found that claimant established that she was unable to perform her usual pre-injury duties with employer, and that that employer failed to establish the availability of suitable alternate employment. The administrative law judge found that claimant had reached maximum medical improvement based on Dr. Stiles's March 1998 opinion. Accordingly, the administrative law judge found claimant entitled to permanent total disability compensation. The administrative law judge denied employer's claim for relief pursuant to Section 8(f), 33 U.S.C.§908(f).

Employer appealed this decision to the Board, challenging the administrative law judge's finding that it failed to establish the availability of suitable alternate employment and its entitlement to Section 8(f) relief. BRB No. 04-0635. Employer subsequently filed a motion for modification, and, consequently, the Board dismissed employer's appeal and remanded the case for modification proceedings. 33 U.S.C. §922. Administrative Law Judge Sarno (the administrative law judge) granted employer's motion for modification, finding that employer established the availability of suitable alternate employment, beginning on June 10, 2003. Accordingly, the administrative law judge modified claimant's award of permanent total disability benefits to an award of permanent partial disability benefits. The administrative law judge also found employer entitled to Section 8(f) relief. Claimant, without legal representation, appeals the administrative law judge's modification of her disability award, and employer responds, urging affirmance.[1]

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing an otherwise final decision; 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

[1] In an Order dated March 10, 2006, the Board granted employer's request to dismiss its appeal, BRB No. 06-0350A.

condition. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Under Section 22, the administrative law judge has 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); *see Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993).

In this case, Judge Sarno found merit in employer's specific arguments in support of its Section 22 modification request including: Judge Campbell's error in characterizing Dr. Hansen as a board-certified psychiatrist and neurologist, when, in fact, Dr. Hansen is not board-certified in psychiatry; and Judge Campbell's incorrect assumption that Dr. Reid had not examined claimant. Additionally, the administrative law judge found that employer obtained the opinion of Dr. Hansen, claimant's treating physician, approving some of the positions described by Mr. Kay in employer's labor market survey. The administrative law judge found that employer's evidence on modification established the availability of suitable alternate employment, and that claimant, therefore, is only partially disabled.

In order to meet its burden of establishing suitable alternate employment, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides which claimant, by virtue of her age, education, work experience, and physical restrictions is capable of performing if she diligently tried. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1999); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). Employer may meet its burden by presenting evidence of jobs which were available during the time claimant was able to work. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir.1988).

The administrative law judge found that the labor market survey conducted in 2003 and updated in 2005 shows that claimant is able to perform a variety of jobs, given her physical restrictions, experience and abilities. The administrative law judge found that some of the positions identified were approved by Drs. Ross and Hansen.[2] The administrative law judge found that Dr. Hansen's approval is especially persuasive given that he had treated claimant for her pain for an extended period of time and had

[2] Dr. Hansen approved jobs as a donation center attendant, greeter, customer service surveyor, dispatcher, unarmed security guard, cashier, toll collector, and cafeteria monitor. EXs 39, 48, 52.

previously expressed reservations about claimant's ability to work. In this regard, the administrative law judge discussed Dr. Hansen's concerns that claimant's depression could be vocationally limiting and the doctor's suggestion that claimant undergo a psychiatric functional capacity evaluation. The administrative law judge stated that Dr. Hansen is not a psychiatrist, as the prior administrative law judge incorrectly found, but rather is a neurologist. The administrative law judge found that the record does not contain any evidence that claimant participated in the suggested evaluation, and, that, moreover, claimant was evaluated in June 2005 by Dr. Mansheim, an employer-chosen psychiatrist, who concluded that claimant did not suffer from any psychiatric disability which would prevent her from working in a sedentary position. Therefore, the administrative law judge found that Dr. Hansen's concern about claimant's depression does not undermine the evidence of claimant's ability to work in a sedentary position. The administrative law judge further found that claimant's ability to work is supported by her testimony regarding her volunteer duties at the YMCA and the surveillance videotapes of claimant employer submitted.

We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. Dr. Hansen's approval, from a physical perspective, of the positions identified by employer and Dr. Mansheim's opinion that claimant is not psychologically disabled from performing sedentary work constitute substantial evidence that employer met its burden in this regard. *Tann,* 841 F.2d 540, 21 BRBS 10(CRT); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Moreover, the parties stipulated that claimant has not looked for work since 2002, and therefore we affirm the finding that claimant did not show she diligently, yet unsuccessfully, sought suitable employment. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Therefore, we affirm the administrative law judge's finding that claimant is partially disabled and his modification of the prior award of total disability benefits. *Wheeler*, 37 BRBS 107.

We next address the administrative law judge's finding regarding claimant's post-injury wage-earning capacity. An award for permanent partial disability in a case not covered by the schedule is based on two-thirds of the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). This calculation requires that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury so that the wages are compared on an equal footing. *See generally Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995) (the Supreme Court noted the administrative law judge's wage-earning capacity analysis in which he properly accounted for inflation); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986).

The administrative law judge found that claimant's post-injury wage-earning capacity is $258.40 per week, based on employer's calculation of the average hourly wages of the jobs it identified as suitable, times 40 hours per week. The administrative law judge adjusted this figure to 1993 wage levels by using the percentage change in the national average weekly wage between 1993 and 2005. He found that claimant's adjusted wage-earning capacity is $177.95 in 1993 dollars, resulting in an award of $180.60 per week.[3]

We cannot affirm the administrative law judge's finding that claimant's post-injury wage-earning capacity is $258.40 per week, as further findings of fact are necessary. The administrative law judge summarily relied on employer's figures to find that claimant had a residual weekly earning capacity of $258.40. Decision and Order at 12. While it is acceptable to rely on an average of the range of salaries from the jobs identified as suitable alternate employment, *see, e.g., Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998), we cannot determine from employer's calculation whether any of the jobs which were not approved by the administrative law judge were included in the wage calculation.[4] In addition the administrative law judge's calculation is based on the assumption that claimant could obtain work for 40 hours each week. However, some of the jobs identified in the labor

[3] Average weekly wage of $451.60 - $177.95 = $273.65. $273.65 x 2/3 = $180.60. 33 U.S.C. §908(c)(21), (h).

[4] The administrative law judge specifically noted that Dr. Hansen did not approve the position at a dry cleaner. Decision and Order at 7.

market survey and approved by Dr. Hansen are not full-time positions.[5] Consequently, we vacate the administrative law judge's finding that claimant's post-injury wage-earning capacity prior to an inflation adjustment is $258.40 per week. On remand, the administrative law judge must make a finding regarding claimant's residual wage-earning capacity, with these considerations in mind, as well accounting for any other relevant factors within the scope of Section 8(h). *See Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

Accordingly, we affirm the administrative law judge's Decision and Order modifying claimant's award from one for permanent total disability benefits to one for permanent partial disability benefits as of June 10, 2003. The administrative law judge's finding of claimant's post-injury wage-earning capacity is vacated, and the case is remanded for further findings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[5] For example, the donation center attendant at Goodwill listed part-time hours between 16 and 24 and full-time as 32 to 40. EX 39. The greeter position at Wal-Mart listed hours per week as between 25 and 35. *Id.* The dispatcher job listed hours per week between "16-40." *Id* .