

BRB No. 13-0102

WILLIAM F. CORBETT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: 09/20/2013
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (2009-LHC-01244) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his neck at work in 1988. As continued work aggravated his condition, claimant ceased working in August 1990 and he filed a claim for benefits. On remand following the Board's decision vacating the denial of benefits, *Corbett v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 95-1168, 96-0293 (Oct. 17, 1996), the administrative law judge found that claimant's decision to stop working was due, at least in part, to his work-related neck condition. The administrative law judge

awarded claimant permanent partial disability benefits for his work-related neck injury and medical benefits for his neck condition and his work-related carpal tunnel syndrome.¹ 33 U.S.C. §§907, 908(c)(21); Decision and Order on Remand at 8-10 (1997).

In April 2008, when he was 82 years old, claimant's neck condition had deteriorated to the point where he had to have major neck fusion surgery. *See* CX 2k-o. He spent two weeks in the hospital and another 25 days in a rehabilitation facility. Employer did not dispute that claimant's neck surgery was related to the 1988 work injury; employer paid for the surgery. 33 U.S.C. §907. In March 2009, claimant's examination revealed he has no cervical rotation due to the fusion, as well as weakness in various other body parts. Dr. Gharbo stated on March 24, 2009, that claimant is not capable of sedentary, full-time work, regardless of his age.² CX 2s.

Claimant filed a motion for modification of his 1997 permanent partial disability award, seeking permanent total disability benefits from the date of the surgery, April 22, 2008. 33 U.S.C. §922. The administrative law judge denied claimant's motion, stating that "[a]lthough Claimant has clearly proven that his neck condition has deteriorated, he has failed to demonstrate that this deterioration is the cause of his current total disability." Decision and Order at 7. Specifically, the administrative law judge found that claimant had other serious medical conditions that pre-existed the 2008 surgery and that claimant conceded he did not feel he could work as of 2000. Decision and Order at 7. The administrative law judge found that claimant failed to establish he could work before the surgery, and thus that claimant failed to "establish a change in condition such that the claim may be reopened for modification." *Id.* Claimant appeals, and employer responds, urging affirmance.

Under Section 22 of the Act, 33 U.S.C. §922, the party seeking modification has the burden of establishing a change in condition or a mistake in fact in order to re-open a final decision. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31

¹The administrative law judge found that claimant was unable to return to his usual work and that employer's offer of alternate work at its facility was not suitable. However, because claimant conceded he could work a minimum wage position, the administrative law judge calculated claimant's residual wage-earning capacity based on the minimum wage as of May 23, 1988. Decision and Order on Remand at 8. No party appealed this decision, and the parties stipulated in 2012 that they did not dispute the 1997 decision.

²According to Dr. Gharbo, claimant is not capable of sedentary work due to his lack of cervical rotation, his left shoulder and left foot weakness, left hand atrophy, his flexed gait pattern, and his high risk of falling. CX 2s. Dr. Gharbo stated these conditions are related to the neck condition and surgery.

BRBS 54(CRT) (1997); *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003). A “change in condition” may be a change in a claimant’s physical or economic condition. *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *see also Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Claimant contends he established a change in his physical condition, as he produced evidence that his work-related neck condition deteriorated to the point that major surgery became necessary and rendered him unable to work. The administrative law judge agreed that claimant had established a change in his physical condition due to the work injury and that he is unable to work. However, he denied modification on the ground that claimant did not also establish that his work injury caused his total disability. Decision and Order at 7. For the reasons set forth herein, we conclude the administrative law judge erred in denying claimant’s motion for modification and we reverse the denial of benefits.

Initially, we hold that the administrative law judge placed an improper burden on claimant. Once the proponent, here claimant, has established a change in condition or mistake in fact, the normal legal standards apply to the adjudication of the claim. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez*, 23 BRBS at 431. In this case, the administrative law judge found that claimant established a change in his condition – the deterioration of his work-related neck condition. Thus, it is claimant’s burden to establish that he is unable to perform his usual work due to his work injury. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). It is not claimant’s burden to establish that he was not already disabled by a non-work-related condition prior to the deterioration of his work injury. Because claimant produced evidence that the deterioration of the work injury has caused additional disability, *i.e.*, made him unable to work, it is employer’s burden to produce evidence that claimant’s disability is due to something other than this condition. *See generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). This it has failed to do.

Claimant produced evidence that, physically, his work-related neck condition deteriorated and required fusion surgery. CX 1. Drs. Gharbo and Amadeo stated claimant was incapable of working after the 2008 surgery due to the residuals of his neck condition and the surgery. CX 2s; *see n. 2, supra*. This evidence is medically uncontradicted. Therefore, claimant has established a prima face case of total disability. *News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). Moreover, where claimant is found incapable of any work due to the work injury, employer cannot mitigate claimant’s disability status by showing the availability of suitable alternate employment. *See J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42

BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010); *see generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999). Therefore, unless employer can establish by substantial evidence that claimant's total disability is the result of a supervening cause, claimant's total disability is compensable. *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012).

Employer asserts the administrative law judge properly found that claimant's total disability pre-existed the work-related neck surgery in 2008 and was due to claimant's other, non-work-related medical conditions and his age. We disagree, as there is not substantial evidence of record to support the administrative law judge's finding in this regard. Employer's vocational expert, Ms. Byers, stated that claimant was 82 years old at the time of his neck surgery, he had had multiple hip and knee replacement surgeries, and he also had hearing loss, sleep apnea, cataracts, shoulder problems, facial numbness, dizziness, and chronic wasting and weakness in his hands. Thus, she concluded that "based on the review of the records, it is clear to me that Mr. Corbett was not capable of gainful employment . . . long before his surgery of April 2008."³ CX 7c. As Ms. Byers opined that claimant had no wage-earning capacity prior to the 2008 neck surgery and none thereafter, she opined that the surgery did not affect claimant's ability to work. *Id.*

The administrative law judge gave corroborative weight to Ms. Byers's opinion, finding it supportive of claimant's own testimony that he was unable to work as early as 2000. Decision and Order at 6-7; Tr. at 15. Specifically, the administrative law judge found that claimant's own testimony refuted his claim because: 1) he did not address whether the disabling conditions identified by his physicians were present before or after he became totally disabled;⁴ and 2) he presented no evidence that he was capable of working prior to the surgery, as he testified he could not drive after his first knee surgery and he felt incapable of working as of 2000. Decision and Order at 7.

³In the preceding paragraph, Ms. Byers surmised that claimant's multiple medical conditions made him "unable to work since at least 1997. . . ." CX 7c. Ms. Byers stated she reviewed records from six medical sources, naming the doctors. Some of these physicians evaluated and/or treated claimant in conjunction with the neck surgery. CX 7a. There is no medical evidence in the record pre-dating the treatment for claimant's neck in April 2008.

⁴Claimant asserts the ailments identified in his 2009 post-surgical examination, *see* n.2, *supra*, were the ones which caused his doctor to declare that he could not perform even sedentary work and were related solely to his neck surgery, as the doctor did not address his knee, hip, hearing loss, and carpal tunnel conditions. CX 2s.

Claimant was adjudicated to be permanently partially disabled as of September 1, 1990. The record contains no medical evidence contemporaneous with claimant's surgeries to his knees and hips and, although the dates of these surgeries are referenced generally in the medical reports generated by the neck surgery, there is no evidence concerning claimant's ability to work after the procedures. Dr. Gharbo did not mention these conditions as the basis for claimant's inability to work. *See* n. 2, 4, *supra*. Moreover, there is no evidence in the record of disability due to claimant's hearing loss, sleep apnea, and cataracts. Thus, there is no evidentiary foundation for Ms. Byers's conclusion that claimant was totally disabled before his 2008 surgery, and likely as early as 1997. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140, 32 BRBS 48, 52(CRT) (4th Cir. 1998) ("The ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based.").

Moreover, it was not rational for the administrative law judge to find claimant's own testimony fatal to his claim. Although claimant stated that he stopped driving after his first knee surgery, such an admission does not equate to his being totally disabled from working due to a knee condition, as public or other private transportation could have been available. Further, the administrative law judge's reliance on claimant's statement that he felt unable to work in 2000 is not well-founded. A review of the transcript reveals that employer's attorney randomly picked the year 2000 in asking claimant when he felt he could not work, and claimant merely agreed with it. Tr. at 14-15. There is no basis in the record for placing significance on the year 2000 as it pertains to claimant's disability status. Contrary to the administrative law judge's conclusion, the record lacks *any* evidence, must less substantial evidence, supporting his inference, or establishing, that claimant's total disability was caused by something other than his work-related neck condition and the surgery therefor and its residuals. *Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 894 (5th Cir. 1982); *Director, OWCP v. Bethlehem Steel Corp. [Roberson]*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980); *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965) (the Board need not accept findings that were made in an invalid manner or that are not supported by substantial evidence). Accordingly, as claimant has established that his work-related neck condition deteriorated, necessitating surgery and resulting in total disability, and as this evidence is uncontradicted by any creditable evidence, we reverse the administrative law judge's denial of claimant's motion for modification. We modify the decision to reflect an award to claimant of permanent total disability benefits from April 22, 2008, and continuing, based on claimant's average weekly wage at the time of injury.

Accordingly, the administrative law judge's Decision and Order Denying Modification is reversed. Claimant is entitled to permanent total disability benefits commencing April 22, 2008.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge