BRB No. 97-0611

KELLY W. PARDEN	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
HALTER MARINE, INCORPORATED	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Section 22 Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Section 22 Modification (92-LHC-845) of Administrative Law Judge Lee J. Romero, 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). 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sought permanent total disability benefits under the Act in connection with a back injury he sustained while working for employer on August 31, 1982. At the initial hearing before the administrative law judge, employer and claimant stipulated that claimant was entitled to permanent total disability benefits based on an average weekly wage of $415.49. Accordingly, the only issue pending before the administrative law judge was employer's entitlement to relief under Section 8(f), 33 U.S.C. § 908(f), and the

administrative law judge found employer was not entitled to Section 8(f) relief. *Parden v. Halter Marine, Inc.*, 92-LHC-845 (April 22, 1993).

Subsequently, employer requested modification of the administrative law judge's decision, alleging that claimant was only permanently partially disabled. The administrative law judge determined that although employer was not bound by its prior stipulation, as a compensation order based on the stipulations of the parties is properly subject to modification, modification was not warranted on the facts presented because employer had not successfully established the availability of suitable alternate employment. Employer appeals, contending that the administrative law judge erred as a matter of law in finding that suitable alternate employment had not been shown. Claimant has not responded to employer's appeal.

Under Section 22 of the Act, 33 U.S.C. §922, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification based on a mistake of fact or change in condition. Modification based on a change in condition may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Furthermore, Section 22 allows for modification of an award where there is a change in claimant's wage-earning capacity, even in the absence of a change in physical condition. *Rambo*, 115 S.Ct. at 2144, 30 BRBS at 1 (CRT); *see also Price v. Brady Hamilton Stevedore Co.*, 31 BRBS 81 (1996); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd,* 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Where, as in the instant case, a claimant is unable to return to her usual employment duties, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where the claimant resides which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the case at hand, the administrative law judge accepted the physical restrictions set forth by Dr. Rutledge that claimant should lift no more than ten pounds, that claimant is limited to standing no longer than fifteen minutes at a time, that claimant can sit no longer than thirty consecutive minutes, and that claimant cannot climb, stoop, or bend to any significant degree. Decision and Order at 3, 13 n.16.

Employer attempted to meet its burden of establishing the availability of suitable alternate employment through the testimony of its vocational expert, Nancy Favaloro. In her report dated October 10, 1993, Ms. Favaloro considered claimant's educational background, work history, and medical restrictions, and determined that claimant was

capable of performing the following jobs: cashier for Springdale 6 Theaters, security guard for NYCO and Vinson Guard Service, service advisor for V-J Chevrolet, courier for Alabama Reference Lab, delivery driver for Godfather's Pizza, and photo lab worker for Van's Photo. She concluded that claimant could earn from $4.25 an hour to $6.92 per hour ($1200 per month). Employer's Exhibit 2. Ms. Favaloro also testified at the hearing on October 31, 1995, and indicated that she updated her 1993 survey in May 1995, and determined that all of the jobs identified in her 1993 survey still had positions available. Tr. at 21. In addition, she identified several other positions not identified previously including a position at NYCO-FLEX for a sewing machine operator, a cashier position at Mobile Greyhound Park, a dispatcher at BFI Waste Management Company, a pizza delivery position at Domino's, and an assembler of automotive parts at Production Workers Manufacturing Company. Tr. at 21-22. Finally, Ms. Favaloro updated her survey again in October 1995, finding that several previously identified employers were still looking, including Alabama Reference, NYCO, Vinson Guard, Mobile Greyhound Park, Treadwell Ford, BFI, both pizza companies, and NYCO-FLEX. She also found a new position available with QMS as a dispatcher.

After considering employer's vocational evidence, the administrative law judge found that Ms. Favaloro's October 13, 1993, report did not establish suitable alternate employment because it is outdated and does not establish the current availability of suitable alternate employment. He then found that "every job position identified by Ms. Favaloro in May and October 1995 was insufficiently detailed in the description of the terms and precise nature of duties and physical demands to constitute suitable alternate employment." In making this determination, he noted that Ms. Favaloro had provided broad job descriptions and vague assurances that the jobs for a cashier, security and gate guard, service advisor, sewing machine operator, teller position, ticket sales, assembly worker, and dispatcher positions allowed for alternating sitting, standing and walking, but did not identify work time specifics regarding postural demands or permissible standing or walking periods for comparative purposes with claimant's limitations. Moreover, he noted that Ms. Favaloro did not indicate whether the potential employers permitted the use of medication while performing such a job. In addition, he noted that certain jobs Ms. Favaloro, identified, *i.e.,* the Domino's pizza driver, courier, and assembly positions, required lifting in excess of claimant's lift restrictions, while others, *i.e,* the service advisor, Godfather's delivery driver, ticket sales, and teller position, were merely described as requiring no "real" lifting or no "heavy" lifting. Based on the lack of detail regarding the physical requirements of the jobs and the uncertainty as to whether such jobs conformed to claimant's restrictions, the administrative law judge determined that suitable alternate employment was not established, and denied employer's motion for modification of the prior award of permanent total disability to permanent partial disability accordingly.

We agree with employer that the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment on modification cannot be affirmed. Initially, the administrative law judge erred in finding that Ms. Favaloro's

October 13, 1993, report was outdated, and therefore insufficient to establish the availability of suitable alternate employment. In order for employer to meet its burden of establishing suitable alternate employment, employer must establish that the alternate work identified was available during "critical periods," when claimant was capable of performing it, *i.e.*, once claimant reached maximum medical improvement. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1045 n.11, 26 BRBS 30, 35 n.11 (CRT) (5th Cir. 1992); *Bryant v. Carolina Shipping Co*., 25 BRBS 294, 296 (1992). As claimant reached maximum medical improvement on January 15, 1985, Decision and Order at 1, the positions Ms. Favaloro identified in the 1993 survey were available during the "critical period," and therefore should have been considered by the administrative law judge in assessing the extent of claimant's disability.[1] Furthermore, contrary to the administrative law judge's decision, any error that Ms. Favaloro may have made in failing to consider whether the potential employers permitted the use of medication in exploring alternate job opportunities is harmless; there is no indication in the record that claimant's medication had any limiting affect on his work capabilities. Finally, although the administrative law judge correctly noted that the pizza delivery driver, courier, and assembly positions required lifting in excess of claimant's 10 pound restrictions, he erred in rejecting the remaining positions identified by Ms. Favaloro as inadequately detailed because of her failure to describe the work time specifics. At the hearing, Ms. Favaloro testified that she had specifically considered Dr. Rutledge's opinion that claimant was limited to standing for no longer than fifteen minutes at a time and sitting for no longer than thirty minutes in identifying suitable alternate job opportunities. Tr. at 17. In addition, she testified that she had contacted the prospective employers directly, and with the exception of the service advisor job, had been told by each of them that the available jobs identified were within the aforementioned parameters. Tr. at 20, 33-34. Ms. Favaloro also specifically responded to the administrative law judge's questions regarding the position of sewing machine operator, and stated that that particular employer did not think that claimant's restrictions would present a problem. Tr. at 34. In light of these errors in evaluating employer's vocational evidence, we vacate the administrative law judge's finding that claimant is permanently totally disabled and remand for him to reconsider the extent of claimant's disability in light of Ms. Favaloro's vocational testimony.

[1]We further note that Ms. Favaloro testified that all of the jobs identified in the 1993 survey were still available in May 1995. *See* Tr. at 21.

Accordingly, we vacate the administrative law judge's award of permanent total disability compensation contained in his Decision and Order on Section 22 Modification and remand for him to reconsider the extent of claimant's disability consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge