

BRB No. 99-0704

TERRY W. CAMPBELL )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 NORFOLK SHIPBUILDING AND ) DATE ISSUED: April 7, 2000  
 DRYDOCK CORPORATION )  
 )  
 and )  
 )  
 RICHARD FLAGSHIP SERVICES )  
 INCORPORATED )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT )  
 OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order on Remand and Decision and Order on Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gerard E.W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and Decision and Order on Motion for Reconsideration (94-LHC-822) 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 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).

This case is on appeal to the Board for the second time. Claimant, a rigger, injured his head, neck, and back at work on May 2, 1987. Employer voluntarily paid claimant temporary total and temporary partial disability benefits for various periods between May 1987 and January 7, 1993. Claimant returned to light duty work for employer in October 1992 but was fired from this job on January 9, 1993, for violating the five day call-in rule. Claimant worked for a different employer from September 1993 through December 1993. In his initial Decision and Order, the administrative law judge denied claimant's claim for temporary total disability benefits commencing January 9, 1993. Claimant subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking permanent total disability benefits commencing August 5, 1994. The administrative law judge denied benefits, and claimant appealed.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 97-1371 (June 17, 1998)(unpublished), the Board affirmed the administrative law judge's finding that there had been no change in claimant's condition since the initial decision. The Board, however, vacated the denial of benefits on modification and remanded the case to the administrative law judge to reconsider whether a mistake in fact had occurred regarding claimant's entitlement to total or partial disability benefits. The Board held that the administrative law judge erred in characterizing the change in Dr. Suter's testimony regarding the extent of claimant's disability from 1994 to 1996 as inconsistent, when in fact it took into consideration the physician's ongoing treatment of claimant and reflected the progression of the diagnosis of claimant's condition subsequent to his work injury. The Board also remanded the case for the administrative law judge to discuss and weigh Dr. Dvorak's May 6, 1994, opinion which had not been considered in the administrative law judge's decision on modification.

On remand, the administrative law judge awarded claimant permanent total disability benefits commencing January 4, 1993, following claimant's discharge, finding that employer did not establish suitable alternate employment as claimant's light duty job in employer's facility was outside of claimant's restrictions and too physically demanding. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Upon the motion for reconsideration of the Director, Office of Workers' Compensation Programs, the

administrative law judge awarded claimant permanent total disability benefits as of October 19, 1992, the date he found claimant reached maximum medical improvement.

On appeal, employer challenges the administrative law judge's award of benefits, contending that the administrative law judge erred in awarding total disability benefits as of October 19, 1992, as claimant's light duty job in employer's facility constituted suitable alternate employment, and since claimant did not request compensation on modification until August 5, 1994. Employer also raises contentions concerning the Board's first decision in this case in order to preserve these issues for appeal.<sup>1</sup> Claimant did not file a response brief.

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<sup>1</sup>Contrary to employer's argument, the Board acted within its discretion in denying its motion to dismiss claimant's appeal, and in addressing claimant's appeal of the administrative law judge's Decision and Order Denying Section 22 Modification in BRB No. 97-1371 even though claimant's counsel did not timely file his Petition for Review and brief, as the Board has the discretion to extend the time for filing a Petition for Review and brief. See 20 C.F.R. §802.211(d).

Employer initially argues that the administrative law judge erred in finding that claimant's light duty job in employer's facility was not suitable, as employer asserts it was within Dr. Suter's restrictions. Where, as in the instant case, it is undisputed that claimant is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). One way that employer can meet this burden is by providing claimant with a suitable light duty job within its facility. See *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). A job which is outside of claimant's restrictions or is too physically demanding for claimant is not suitable alternate employment. See *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). Claimant may be found to be totally disabled while he is working in post-injury employment if he works through extraordinary effort and in spite of excruciating pain, or is provided a position only through an employer's beneficence, *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Lewis v. Haughton Elevator Co.*, 5 BRBS 62 (1976), *aff'd*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), though such an award is to be the exception, rather than the rule. See, e.g., *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). These standards for establishing entitlement to disability compensation are equally as applicable in modification proceedings as they are in initial adjudications. See *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997). Contrary to employer's contentions, the issue of whether a light duty job constitutes suitable alternate employment is question of fact, subject to Section 22 modification,<sup>2</sup> see generally *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1993); *Finch v. Newport New Shipbuilding & Dry Dock Co.*, 21 BRBS 196 (1989), and the doctrine of *res judicata* does not preclude the re-litigation of claimant's entitlement to total disability compensation, as Section 22 displaces traditional concepts of finality in decision making by allowing the fact-finder 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 (1971); see also *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459 (1968); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

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<sup>2</sup>Employer's reliance on the holding in *Smith v. The American University*, 14 BRBS 875 (1982)(that the issue of suitable alternate employment is a question of law and thus not a proper basis for a motion for modification), is misplaced as in that case partial disability, instead of total disability, was erroneously awarded despite the fact that employer admitted no evidence of suitable alternate employment once claimant established his *prima facie* case of total disability. *Smith*, 14 BRBS at 878-879.

In the instant case, the administrative law judge found that the job at employer's facility was not suitable for claimant, as it was too physically demanding and was outside of his medical restrictions.<sup>3</sup> Decision and Order on Remand at 4-6. The administrative law judge acted within his discretion in crediting claimant's testimony that the light duty job in employer's facility caused him pain through the neck, across the shoulders, and in his hip area, and inflamed his headaches. See generally *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); 1994 Tr. at 25, 28-30 (Emp. Ex. 1 at 25, 28-30); Cl. Exs. 1 at 9, 9 at 26, 27, 35. By 1992, Dr. Suter stated claimant could perform light duty work three to four hours per day, three days a week. Cl. Exs. 1 at 9, 9 at 26, 27, 35; Emp. Ex. 2 at 35. He also stated claimant could not use hand-held equipment, or drive or operate vehicles while taking pain medication. *Id.* After that time, Dr. Suter stated that although claimant's condition did not deteriorate, claimant was too sedated to work if he took sufficient medication to control his work-related headaches and cervical spine pain. Cl. Exs. 1, 1A at 14, 2A, 9; Emp. Ex. 6 at 22-24. In view of claimant's need for pain medication, the administrative law judge reasonably interpreted Dr. Suter's restriction from working with hand-held equipment while taking medication as precluding claimant from performing the job provided by employer.<sup>4</sup> See *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Campbell*, slip op. at 4; Decision and Order on Remand at 6. Moreover, the administrative law judge acted within his discretion in relying upon Dr. Dvorak's May 6, 1994, opinion that claimant is completely disabled from working as a laborer as it is supportive of Dr. Suter's opinion regarding the extent of claimant's disability.

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<sup>3</sup>Claimant's light duty job involved testing lights using hand-held equipment which hung from heavy 50 foot electrical cords. 1994 Tr. at 161-164 (Emp. Ex. 1 at 161-164). Although another worker would place the electrical cords on a counter for claimant, claimant still would have to bend down to tape the cords and carry them to the appropriate stack. 1994 Tr. at 29 (Emp. Ex. 1 at 29). Claimant testified that he felt pain while using hand-held equipment, stooping and bending, and sitting on hard chairs. 1994 Tr. at 30 (Emp. Ex. 1 at 30).

<sup>4</sup>Dr. Neal's opinion that claimant should have been able to return to his usual work without restrictions on August 2, 1987, was not credited by the administrative law judge since that physician's opinion was premised on his conclusion that the headaches which disable claimant are not work-related. The administrative law judge previously found that the headaches are in fact work-related, crediting the opinion of Dr. Suter in this regard. See 1995 Decision and Order at 16; Emp. Exs. G, 7 at 14, 18, 22. Thus, Dr. Neal's opinion is insufficient to establish that claimant is not now totally disabled.

*Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.3d 403 (2d Cir. 1961); Decision and Order on Remand at 3-4. The evidence credited by the administrative law judge thus leads to the conclusion that a mistake of fact occurred in the determination that employer established the availability of suitable alternate employment. As the administrative law judge's findings are rational and supported by substantial evidence, we affirm his determination that employer did not establish suitable alternate employment by virtue of the light duty job at its facility. Inasmuch as the job was not suitable for claimant, he is not precluded from obtaining total disability benefits despite his discharge from the job for excessive absenteeism. *Cf. Brooks v. Newport New Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993) (claimant is not entitled to total disability benefits when he is discharged from a *suitable* job at employer's facility which he was successfully performing due to a violation of a company rule). Thus, we affirm the award of total disability benefits for the periods when claimant was not working.

However, despite our affirmance of the administrative law judge's finding that claimant's job at employer's facility was not suitable alternate employment, we cannot affirm the administrative law judge's award of total disability benefits during the period that claimant was actually working. The administrative law judge did not find that claimant was working only through extraordinary effort and in spite of excruciating pain, or for a beneficent employer,<sup>5</sup> and such findings are necessary in order for total disability to exist concurrently with claimant's working. *See Ezell*, 33 BRBS at 26-27. Thus, we remand this case for further consideration of the extent of claimant's disability for the periods of time he was working part-time in the light duty job for employer from October 19, 1992, through January 9, 1993, and for a different employer from September through December 1993.<sup>6</sup> If the administrative law judge

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<sup>5</sup>The administrative law judge stated correctly in his initial Decision and Order that total disability concurrent with continued employment will usually be granted only in circumstances where post-injury employment is due solely to the beneficence of the employer or where claimant's continued employment is due to extraordinary effort and in spite of claimant's excruciating pain and diminished strength, and he found that claimant was not working through extraordinary effort. 1995 Decision and Order at 18-19.

<sup>6</sup>Claimant worked part-time for a different employer, Savage Builders, for three months earning minimum wage and a total of \$1,156. Emp. Ex. C-15. Claimant testified that he quit his job supervising the loading of trucks at Savage Builders because he could not handle it and because work got slack due to the wintertime. 1996 Tr. at 25; 1994 Tr. at 36-38, 74 (Emp. Ex. 1 at 36-38, 74). This short-term job therefore is also insufficient to establish ongoing suitable alternate employment.

does not find that claimant was working under the above circumstances, he should consider claimant's entitlement to partial disability benefits for these periods. In awarding partial disability benefits, the administrative law judge must determine claimant's loss in wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), taking into account that claimant's light duty job at employer's facility was too physically demanding for him and outside his work restrictions, as we have affirmed these findings, and that claimant may have worked in pain at Savage Builders.<sup>7</sup> See *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n.5; *Ezell*, 33 BRBS at 26-27.

With respect to the date from which the administrative law judge awarded claimant benefits on modification, employer argues that the administrative law judge erred in awarding benefits beginning on October 19, 1992, since claimant claimed benefits only from August 5, 1994. In a motion for reconsideration to the administrative law judge, the Director contended that the award of benefits commencing January 4, 1993, was inconsistent with the administrative law judge's finding that claimant's light duty job was not suitable. The administrative law judge noted that neither claimant nor employer objected to the Director's motion, and thus he granted reconsideration and found claimant entitled to permanent disability compensation commencing from the date of maximum medical improvement,

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<sup>7</sup>The parties initially stipulated that if claimant was able to perform 20 hours of light work per week, then claimant would have a loss of \$423.11 in weekly income, yielding a temporary partial compensation rate of \$282.07. 1995 Decision and Order at 2 n. 7. This stipulation was not made before the administrative law judge on modification and thus is no longer binding upon the parties. Decision and Order Denying Section 22 Modification at 3; 29 C.F.R. §18.51.

October 19, 1992.<sup>8</sup>

We affirm this determination. Under Section 22 of the Act, an administrative law judge is afforded broad discretion in correcting mistakes in fact and may correct such mistakes on his own motion or on any party's motion. See generally *Aerojet-General*, 404 U.S. at 256. Thus, the administrative law judge has the authority under Section 22 to determine that claimant is entitled to permanent disability benefits for a period not claimed, based on his finding that a job was mistakenly found to be suitable. See generally *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). Moreover, the administrative law judge did not abuse his discretion in granting the Director's motion for reconsideration to account for claimant's entitlement to permanent, rather than temporary disability benefits prior to his discharge from the unsuitable job. See generally *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). In this regard, we note that employer had voluntarily paid claimant temporary partial disability benefits from October 2, 1992-December 13, 1992, and from December 31, 1992-January 3, 1993, and temporary total disability benefits from December 14, 1992-December 30, 1992. See Emp. Ex. A-2; see also Emp. Ex. 3A-2. The administrative law judge thus properly awarded permanent disability benefits commencing October 19, 1992, based upon his uncontested finding that claimant's condition reached maximum medical improvement on that date. Decision and Order on Remand at 7. As discussed above, however, the administrative law judge is to reconsider the extent of claimant's disability during the periods he was working.

Accordingly, the administrative law judge's Decision and Order on Remand and Decision and Order on Motion for Reconsideration are vacated insofar as they award total disability benefits to claimant while he was working from October 19, 1992, through January 9, 1993, and from September 1993 through December 1993.

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<sup>8</sup>Claimant did not object to any of the grounds listed in the Director's motion for reconsideration by letter dated March 2, 1999. Employer responded on March 1, 1999, to Director's motion for reconsideration. Employer disagreed with the Director that the light duty position it provided was not suitable alternate employment, but without waiving its objection or appeal rights concerning that issue, agreed with the Director that the administrative law judge's permanent disability award should be dated back to October 19, 1992.

The case is remanded to the

administrative law judge for consideration of claimant's entitlement to disability compensation during these periods consistent with this opinion. In all other respects, the decisions are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge