

BRB No. 05-0776

JOHN W. KNEBEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED: 06/12/2006
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Motion for Section 22 Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

William C. Cruse and Jennifer Cortes (Blue Williams, L.L.P.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Claimant's Motion for Section 22 Modification (2004-LHC-1039) of Administrative Law Judge Clement J. Kennington 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was exposed to toxic substances while in the course of his employment with employer as a civilian mechanic on a chemical detection vehicle in the Persian Gulf from October 4, 1990 to April 30, 1991. Claimant subsequently developed symptoms which were diagnosed as Gulf War Syndrome (GWS). Claimant, who was last employed in August 1996, filed a claim for benefits under the Act, and a formal hearing was held on October 23, 2000. In a Decision and Order issued on March 22, 2001, Administrative Law Judge C. Richard Avery found, *inter alia*, that claimant suffers from GWS, an occupational disease which was causally related to his employment with employer. Judge Avery next determined that claimant had not yet reached maximum medical improvement. After finding that claimant was incapable of performing his previous employment duties and that employer failed to establish the availability of suitable alternate employment, Judge Avery awarded claimant temporary total disability compensation from August 20, 1996, and continuing. 33 U.S.C. §908(b).

Claimant subsequently sought modification of Judge Avery's Decision and Order pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting that he reached maximum medical improvement on June 16, 2001, and thus is entitled to an ongoing award of permanent total disability compensation. 33 U.S.C. §908(a). Employer also requested Section 22 modification on the basis that claimant has a residual wage-earning capacity and thus should be awarded only permanent partial disability benefits. 33 U.S.C. §908(c)(21). The case was assigned to Administrative Law Judge Clement J. Kennington (the administrative law judge), and a formal hearing was held on March 7, 2005, at which time new evidence was admitted into the record. In a Decision and Order Granting Claimant's Motion for Section 22 Modification issued on May 19, 2005, the administrative law judge first found that claimant reached maximum medical improvement on June 16, 2001. After observing that the parties were in agreement that claimant is unable to resume his former employment, the administrative law judge next considered whether employer established the availability of suitable alternate employment. Concluding that employer did not make such a showing, the administrative law judge awarded claimant permanent total disability compensation from June 16, 2001, and continuing. 33 U.S.C. §908(a).

On appeal, employer assigns error to the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; 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, 30 BRBS 1(CRT) (1995). Employer does not contest the administrative law judge's finding that claimant's disability became permanent on June 16, 2001; we therefore affirm the administrative law judge's determination to grant claimant's request for modification on

this basis. With respect to employer's request for modification on the basis that claimant has a residual wage-earning capacity, employer may meet its burden of showing a change in condition with evidence demonstrating the availability of suitable alternate employment. See, e.g., *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989); *Blake v. Ceres Inc.*, 19 BRBS 219 (1987). The standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Where, as in this case, a claimant is incapable of resuming his former employment duties, claimant has established a *prima facie* case of total disability. The burden then shifts to employer to establish the availability of suitable alternate employment. See *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001). In order to meet this burden, employer must show the availability of realistic job opportunities in the relevant community, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Id.* In addressing this issue, the administrative law judge must compare claimant's physical restrictions and vocational factors with the requirements of the position identified by employer. See *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

In this case, employer argues that it established the availability of suitable alternate employment by means of the labor market surveys conducted by rehabilitation counselor Nancy Favaloro. Employer contends that five of the positions identified in the labor market surveys were specifically approved by examining physicians Drs. Griffiss and Davis as well as by examining psychologist Dr. Heilbronner. Employer avers that the administrative law judge erred in discrediting the opinions of employer's doctors and vocational expert that claimant could perform these five positions.

Claimant's treating physician, Dr. Rea, concluded that claimant is totally disabled for any work due to his work-related injury. CX 2 at 6-10. Dr. Didriksen, Ph.D., claimant's neuropsychologist, stated that claimant would have significant difficulty performing reliably and consistently in any workplace setting. CX 3 at 6. Employer had claimant examined by two physicians and a neuropsychologist. In his initial report dated October 8, 2004, Dr. Griffiss diagnosed claimant with GWS as well as mild post-traumatic stress disorder (PTSD), and indicated that the most disabling of claimant's GWS symptoms are his apraxia, vertigo, and cognitive lapses. Dr. Griffiss stated that physical therapy and cognitive behavioral therapy would improve claimant's functioning and might enable him to perform sedentary jobs. Dr. Griffiss concluded that without such treatment, claimant "currently is totally disabled for any reasonable occupation."

EX 3 at 3-6. In a supplemental report dated January 7, 2005, Dr. Griffiss reported that claimant is unable to drive, to stand for prolonged periods, to perform new tasks that require memory of the sequence as opposed to following a written protocol, or to use tools where distraction is likely. He further indicated that claimant needs 20-30 minute breaks every 3-4 hours. Lastly, Dr. Griffiss stated that jobs involving primarily sitting, repetitive tasks that can be written down, limited public interaction, modest levels of typing or computer use, and modest physical exertion would be appropriate for claimant. *Id.* at 7-8.

In a report dated September 9, 2004, Dr. Davis diagnosed claimant with GWS, including polyneuropathy, chemical sensitivity syndrome, fibromyalgia, and chronic fatigue syndrome. He concluded that claimant is totally disabled for any significant work activities, explaining that claimant would have difficulties with tasks requiring significant memory, concentration and sequential steps; with use of his hands and operation of a motor vehicle; and with his chronic fatigue and multiple chemical sensitivities. EX 4 at 7-8.

In a neuropsychological re-evaluation report dated September 30, 2004,¹ Dr. Heilbronner stated that claimant's current test results reveal mild to moderate difficulties related to attention, memory, psychomotor speed, and executive functioning. Dr. Heilbronner additionally reported that claimant has severe depression and a high level of psychological distress. He concluded that it is unlikely that claimant could remain gainfully employed in light of his focus on his physical symptoms and his current level of psychological distress. Noting that claimant may possess residual skills for employment, Dr. Heilbronner added that vocational training or a work hardening program would be necessary. EX 5 at 37-38. In a supplemental report dated February 8, 2005, Dr. Heilbronner indicated that due to claimant's fatigue, jobs requiring sustained attention, concentration and vigilance would be difficult for claimant. He further stated that claimant would need sedentary to light work with breaks every 3-4 hours and a supportive work environment. He added that claimant's psychological condition presents problems related to public service and taking orders from supervisors. *Id.* at 39-40.

Based on the specific restrictions related by these doctors, employer obtained two labor market surveys from Nancy Favaloro. EX 9 at 7-14; Hearing Tr. at 70-95. Nine positions were identified as appropriate by Ms. Favaloro and were submitted to Drs. Griffiss, Davis and Heilbronner for their approval. Employer also submitted the depositions of Drs. Griffiss, Davis and Heilbronner, in which they testified regarding their examinations of claimant, claimant's symptoms and functional limitations, and claimant's ability to perform the jobs identified in the labor market surveys. EXs 11, 12, 13. Five jobs were approved by all of the three doctors: call center customer service

¹ Dr. Heilbronner had previously evaluated claimant in September 2000.

representative,² unarmed lobby security officer, blood bank telerecruiter, photo lab worker, and unarmed security guard.³ Both Drs. Griffiss and Heilbronner endorsed the unarmed lobby security officer and unarmed security guard positions as being especially suitable for claimant. EXs 12 at 70; 13 at 17, 19-20.

In his decision, the administrative law judge found that employer failed to establish the availability of suitable alternate employment or that claimant is capable of performing any employment at this time. Decision and Order at 23. In reaching this conclusion, the administrative law judge first observed that at the time of their evaluations of claimant in September 2004, Drs. Griffiss, Davis and Heilbronner stated that claimant was totally disabled, but that five months later, they stated that claimant was capable of performing work within certain restrictions. Decision and Order at 22. The administrative law judge declined to rely on these subsequent opinions, finding them to be unsupported by the doctors' previous findings or a re-examination of claimant; the administrative law judge additionally found that the contradiction between the doctors' original evaluations and their subsequent opinions is not explained. Decision and Order at 22-23. Having rejected the deposition testimony of these three doctors that claimant is capable of performing restricted work, the administrative law judge likewise rejected their approval of the five specific jobs identified in the labor market surveys.⁴ Decision and Order at 23.

We are unable to affirm the administrative law judge's conclusion that employer failed to establish the availability of suitable alternate employment. The Board generally will not interfere with the administrative law judge's weighing of the evidence or credibility determinations. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109, 113 (1998). The Board, however, is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner. *Howell v.*

² With respect to the customer service representative position, Dr. Davis testified that claimant could do the job if there was nobody standing over him "hassling him," EX 11 at 51-53, and Dr. Griffiss testified that he could do the job if he had a cue card in front of him, EX 12 at 68.

³ Positions as manager trainee, travel reservationist, dental lab technician trainee, and electronics assembler were disapproved by Drs. Davis and Griffiss. EXs 11, 12.

⁴ The administrative law judge additionally rejected the testimony of Ms. Favaloro regarding claimant's ability to perform the jobs identified in her labor market surveys. In this regard, the administrative law judge observed that Ms. Favaloro did not meet with claimant, that she relied on the reports of Drs. Griffiss, Davis and Heilbronner releasing claimant to restricted employment which were discredited by the administrative law judge, and that she did not specify how the identified jobs were within the restrictions imposed by employer's physicians. Decision and Order at 23.

Einbinder, 350 F.2d 442 (D.C. Cir. 1965); *Hernanadez*, 32 BRBS at 113; *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *see also Patterson*, 36 BRBS at 154.

In this case, the administrative law judge rejected, as unsupported, the revised opinions of Drs. Griffiss, Davis and Heilbronner that claimant can perform some of the positions identified in the labor market surveys. Contrary to the administrative law judge's characterization of these later opinions as unsupported and in direct contradiction to the doctors' original opinions, however, the record supplies a basis for the changes in their opinions. Although the doctors initially stated that claimant was totally disabled or unlikely to remain employed if hired, the doctors provided supplemental reports detailing claimant's specific restrictions. *See* EXs 3 at 7-8; 5 at 39-40; 11 at 47-48; *see also* n. 5, *infra*. Purporting to utilize these specific restrictions, Ms. Favaloro attempted to identify job openings claimant could perform given his restricted abilities. EX 9 at 7-14. The doctors were then provided with Ms. Favaloro's vocational reports and their depositions were taken. In their deposition testimony, Drs. Griffiss, Davis and Heilbronner addressed the specific positions identified in the labor market surveys, compared the job requirements of the positions with their medical assessments of claimant's physical and neuropsychological conditions, and stated that five of the jobs are suitable for claimant. *See* EXs 11 at 49-57; 12 at 66-71; 13 at 15-29. Notwithstanding that detailed testimony explaining the evolution of the doctors' views regarding claimant's employability was not elicited during their depositions, the depositions, which were taken after additional information was supplied to the doctors, reflect the doctors' current opinions regarding claimant's ability to work.⁵

⁵ In this regard, Dr. Davis testified that his supplemental opinion setting forth claimant's functional restrictions was rendered after his review of a neuropsychologist's report that was not previously available to him. *See* EX 11 at 47-48. Dr. Davis opined that claimant is presently capable of performing five of the jobs. EX 11 at 51-57. Dr. Griffiss, after approving some of the jobs enumerated in the labor market surveys, testified that it would be good for claimant to seek employment. EX 12 at 70. In reference to his original opinion that claimant would require physical and cognitive behavioral therapy in order to be employable, *see* EX 3 at 5-6, Dr. Griffiss testified that the jobs he approved are not significantly more strenuous than claimant's current activities of daily living and, thus, claimant would not need to build up his physical ability in order to work. EX 12 at 71. Dr. Heilbronner stated that his February 8, 2005 supplement to his September 2004 report was generated in response to a request from employer's counsel for comments in greater detail regarding claimant's restrictions from a neuropsychological perspective. EXs 5 at 39; 13 at 12-15. Dr. Heilbronner further testified that after writing his February 8, 2005 supplemental report, he was provided with the vocational reports. EX 13 at 15. He stated that claimant presently has the ability to perform the approved jobs without having undergone cognitive training or work hardening although those supports could improve his level of functioning. *Id.* at 21-29.

Because the record contains an adequate basis for the doctors' opinions regarding claimant's employability, we hold that the administrative law judge's reason for discrediting the most recent opinions expressed by Drs. Griffiss, Davis and Heilbronner is not rational or supported by substantial evidence. See *Patterson*, 36 BRBS at 154; *Hernandez*, 32 BRBS at 113. Therefore, we must vacate the administrative law judge's finding that employer did not establish the availability of suitable alternate employment.⁶ *Id.* We therefore remand the case for the administrative law judge to weigh the evidence regarding claimant's ability to perform any work and to reconsider whether the medical and vocational evidence submitted by employer is sufficient to meet its burden of establishing the suitability of the positions identified in the labor market surveys.⁷ See *Pietrunti*, 119 F.3d at 1042, 31 BRBS at 89(CRT). The fact that employer did not elicit specific testimony from Ms. Favaloro as to how she believed the identified positions are consistent with the restrictions imposed by the doctors does not necessarily establish that the jobs are not suitable. In addition to addressing the medical opinions concerning the suitability of the jobs, the administrative law judge, as the fact-finder, may independently compare the job requirements to claimant's physical restrictions and other vocational factors. See *Patterson*, 36 BRBS at 154; *Hernandez*, 32 BRBS at 113.

Accordingly, the administrative law judge's determination that claimant's disability became permanent on June 16, 2001 is affirmed. The administrative law judge's finding that employer did not establish the availability of suitable alternate

⁶ Because the administrative law judge's rejection of Ms. Favaloro's opinion was based in significant part on his rejection of the revised opinions of Drs. Griffis, Davis and Heilbronner, we also vacate his rejection of her opinion. Moreover, although an administrative law judge may properly consider whether a vocational expert met with the employee, the absence of such a meeting does not require the rejection of the expert's opinion, as long as the vocational expert was aware of the employee's age, education, work history, and restrictions, when exploring job opportunities. See, e.g., *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

⁷ We need not address at this time employer's argument that claimant did not demonstrate a diligent, yet unsuccessful post-injury job search. See Emp. P/R at 15, 18-20. This issue does not arise until employer has established the availability of suitable alternate employment. See *Pietrunti*, 119 F.3d at 1041, 31 BRBS at 88(CRT); *Palombo*, 937 F.2d at 73, 25 BRBS at 5-6(CRT); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 24 (1988). If, on remand, the administrative law judge finds that employer has met its burden of establishing the availability of suitable alternate employment, he then must consider whether claimant rebutted employer's showing by demonstrating that he diligently tried but was unable to secure such employment. *Id.*

employment is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge