BRB No. 14-0122

JORGE RODRIGUEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BOLLINGER SHIPYARDS, INCORPORATED	)	DATE ISSUED: Oct. 16, 2014
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Pedro F. Galeas (The Galeas Law Corporation APLC), New Orleans, Louisiana, for claimant.

Kevin A. Marks and Jennifer L. Sinder (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2013-LHC-00660) 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.* (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).

On October 22, 2003, claimant sustained injuries to his back and ribs while working for employer. Employer voluntarily paid claimant temporary total disability benefits from November 19, 2003, through November 1, 2005. Claimant thereafter filed a claim seeking additional benefits under the Act. In a Decision and Order issued on March 24, 2008, the administrative law judge awarded claimant ongoing temporary total disability benefits. 33 U.S.C. §908(b). On employer's appeal, the Board affirmed the administrative law judge's decision in its entirety. *J.R.* [*Rodriguez*] *v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008). This decision was subsequently affirmed by the United States Court of Appeals for the Fifth Circuit. *Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

In October 2012, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting that there was a change in claimant's physical and economic conditions. In his Decision and Order, the administrative law judge found that claimant's condition reached maximum medical improvement on September 23, 2010, and that employer established the availability of suitable alternate employment as of May 14, 2012. The administrative law judge therefore modified the prior ongoing award of temporary total disability, and awarded claimant temporary total disability benefits from October 22, 2003 to September 23, 2010, permanent total disability benefits from September 24, 2010 to May 14, 2012, and ongoing permanent partial disability benefits from May 15, 2012. 33 U.S.C. §908(a), (b), (c)(21).

On appeal, claimant challenges the administrative law judge's granting employer's motion for modification. Employer responds, urging affirmance.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to this section is permitted based upon a mistake in a determination of fact in the initial decision or a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g.*, *Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997). The standards for determining the extent of disability are the same as it is in the initial proceeding. *See Rambo I*, 515 U.S. at 296, 30 BRBS at 3(CRT); *Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Claimant contends the administrative law judge erred in modifying the prior award of total disability benefits. Specifically, claimant contends that, contrary to the administrative law judge's conclusion, his condition has deteriorated and that he remains incapable of working. We reject claimant's contentions of error.

Where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to perform his usual employment duties because of his injury, the burden shifts to employer to establish the availability of suitable alternate employment.[1] In order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). In view of the fact that the prior decision had determined that claimant was incapable of any work, the administrative law judge in this case appropriately reviewed the relevant evidence in order to assess whether there has been a change in claimant's physical capabilities.

The administrative law judge stated that, in light of the opinions of Drs. Bartholomew and Hamsa, he was not impressed with claimant's testimony that he is unable to resume any employment. The administrative law judge found, based on the opinions of Drs. Bartholomew and Hamsa, that claimant can return to sedentary and light-duty work. Decision and Order at 7-8. Dr. Bartholomew, a Board-certified neurosurgeon, opined that, in view of claimant's refusal to undergo surgery, claimant is capable of performing sedentary to light-duty work with no repetitive bending, stooping, crawling, twisting, turning, or lifting greater than twenty-five pounds. *See* Decision and Order at 6; EXs 5 at 4; 10 at 14. Dr. Hamsa, claimant's long-standing treating physician, agreed with the restrictions placed on claimant by Dr. Bartholomew and that claimant is capable of light-duty employment. CX 3.

The administrative law judge then found that employer met its burden of establishing the availability of suitable alternate employment based on the report of its vocational expert, Mr. Stokes, which identified five employment positions suitable for and available to claimant.[2] Decision and Order at 11. These five positions were approved by Dr. Bartholomew as being within claimant's physical capabilities. *See* EXs 8; 10 at 14-17. Therefore, the administrative law judge found that employer established a

[1] Employer does not contest the administrative law judge's finding that claimant is incapable of resuming his usual employment duties as a pipefitter. *See* Decision and Order at 8.

[2] Those positions identified by Mr. Stokes were inventory auditor, security guard, cashier, pizza courier and cafeteria line server. *See* EX 7.

change in claimant's physical and economic conditions, and that claimant is only partially disabled as of May 15, 2012.[3]

It is well-established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw his own inferences therefrom. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). On appeal, claimant merely recites medical evidence favorable to his position that he remains totally disabled. However, the Board may not reweigh the evidence, and the administrative law judge's decision is supported by substantial evidence of record in the form of the opinions of Drs. Bartholomew and Hamsa, both of whom opined that claimant is capable of sedentary to light-duty employment. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijanjos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Claimant does not otherwise challenge the suitability of the jobs identified in employer's labor market survey. Therefore, as the administrative law judge's finding that claimant is capable of performing the five identified positions is rational, supported by substantial evidence and consistent with law, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment and his consequent award of ongoing permanent partial disability benefits commencing May 15, 2012.[4] *Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT).

[3] The administrative law judge found that the average weekly wage in 2003 of the five positions is $249.04, and that claimant has a weekly loss of wage-earning capacity of $212.64. 33 U.S.C. §908(c)(21), (h).

[4] In both the administrative law judge's March 2008 and December 2013 decisions, the administrative law judge awarded claimant medical benefits. In two supplemental filings with the Board, claimant, without elaboration, states that employer has declined to pay for his medical care. Disputes of this nature should initially be brought to the attention of the district director. *See generally Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992); 20 C.F.R. §702.372. The record reflects that the administrative law judge informed claimant that he was referring a medical benefits issue to the district director. Decision and Order at 1 n.1.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge