BRB No. 90-1604

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| RAYMOND MILLER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SUNDIAL MARINE TUG & BARGE | ) | DATE ISSUED: |
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| and | ) | |
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| SAIF CORPORATION | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order-Granting Petition For Modification of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Dolores Empy (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland Oregon, for claimant.

Randolph P. Harris (SAIF Corporation), Portland, Oregon, for employer/ carrier.

BEFORE: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Granting Petition For Modification (89-LHC-475) of Administrative Law Judge Alfred Lindeman 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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On July 27, 1989, claimant sustained a left shoulder and cervical spine injury while working as a shipfitter for employer. Claimant was diagnosed as having an acute herniation at C5-6. After undergoing an anterior discectomy and inner fusion on December 13, 1979, claimant returned to work on April 7, 1980, but ultimately terminated his employment with employer on the advice of his physician on April 29, 1981. Although extensive rehabilitation efforts were made, they proved unsuccessful. Claimant sought disability compensation under the Act. Claimant and employer ultimately stipulated that in light of claimant's physical restrictions, his illiteracy, and the general

economic conditions in the Portland area at that time, claimant was permanently totally disabled. Accordingly, on September 7, 1984, Administrative Law Judge Vivian Schreter Murray entered a Decision and Order which awarded claimant permanent total disability compensation consistent with the parties' stipulations. In addition, the administrative law judge granted employer Section 8(f), 33 U.S.C. §908(f), relief.

Thereafter, on April 27, 1987, claimant was re-evaluated at employer's request by doctors at the Northwest Pain Center. Although they found claimant's physical condition was essentially unchanged, these doctors opined that claimant was capable of performing light to medium work, avoiding overhead work and excessive or repetitive use of his arms at or above shoulder level, particularly with his left arm. EX 56. A vocational assessment was also performed at the Northwest Vocational Evaluation Center, a division of the Northwest Pain Center. This evaluation recommended vocational testing, as well as a transferable skills analysis and labor market survey. Accordingly, in December 1987, claimant was evaluated by Nancy Powell, a vocational specialist, who performed a labor market survey and identified several plastics industry and security jobs which she believed were suitable for claimant. EX 57 at 132-143. Repeat vocational surveys conducted in May 1988 and in May 1989 yielded similar results.

Based on the Northwest Pain Center's medical evaluation and vocational assessment, Ms. Powell's vocational surveys, and the improved economic conditions in the Portland area, employer sought to modify claimant's award pursuant to Section 22 of the Act, 33 U.S.C. §922.[1] In a Decision and Order dated April 26, 1990, Administrative Law Judge Alfred Lindeman granted modification, finding that while claimant's physical condition remained essentially unchanged, employer established a change in claimant's economic condition. The administrative law judge credited Ms. Powell's testimony and the Northwest Center's assessment of claimant's ability to work over Dr. Rollins' opinion that claimant was not employable, finding it compatible with claimant's testimony regarding his weekly golfing and other recreational activities. He thus found that employer had met its suitable alternate employment burden by identifying available openings for both plastics and security jobs which claimant could obtain if he diligently tried. Inasmuch as the alternate jobs identified paid between $2.13 to $2.55 per hour at the time of claimant's injury, and the average of these two figures, $2.34, was less than the minimum wage in 1979 of $2.90, the administrative law judge employed the minimum wage and determined that claimant had a post-injury wage-earning capacity of $116 (40 hours x $2.90 per hour). Accordingly, he modified the award to reflect that claimant was entitled to permanent partial disability under Section 8(c)(21) as of May 24, 1989, the date of the last vocational survey. Claimant appeals the modification of the initial award. Employer responds, urging affirmance.

Claimant's initially argues that the administrative law judge erred in granting modification absent evidence of a change in claimant's underlying physical condition. The United States Supreme

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[1]Under Section 22 of the Act, 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 because of a mistake in fact or change in condition. 33 U.S.C. §922. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

Court's decision in *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144 (1995), is dispositive of this issue. In *Rambo*, the Court held that a disability award may be modified under Section 22 where there is a change in an employee's wage-earning capacity, even in the absence of any change in the employee's physical condition. In so concluding, the Court characterized language in *Pillsbury v. Alaska Packers Assoc.*, 85 F.2d 758 (9th Cir. 1936), and *McCormick S.S. Co. v. United States Employees' Compensation Commission*, 64 F.2d 84 (9th Cir. 1933), relied upon by claimant in the present case, as dicta which is clearly inconsistent with the statute. Claimant's argument is, therefore, rejected.

Moreover, after review of the evidence of record, we affirm the administrative law judge's determination that modification was warranted based on a change in claimant's economic condition as supported by substantial evidence. Claimant initially asserts that the testimony of Jeff Hannum, a state labor economist, and Frank Ryall, an occupational market analysis, is insufficient to establish that there had been a significant improvement in job opportunities available in the rubber and plastics industry since 1984. We note, however, that the administrative law judge did not base his finding of a change in claimant's economic condition on the generally improved employment opportunities in the plastics injury in the Portland area. Rather, he found that employer established a change in claimant's economic condition because it established the availability of specific available job opportunities in both the plastic and security areas which were suitable for claimant and which he could obtain if he diligently tried, consistent with the relevant case law of the United States Court of Appeals for the Ninth Circuit, in which circuit the present case arises. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329, 12 BRBS 660, 662 (9th Cir. 1980).

Claimant also argues, however, that Ms. Powell's labor market reports should be disregarded for various reasons. Claimant maintains that Ms. Powell's surveys are flawed because she included jobs within the medium strength category in her labor market surveys, in disregard of Dr. Loomis's recommendation that claimant be limited to part-time light duty employment. In determining claimant's physical capabilities, however, the administrative law judge credited the Northwest Pain Center's assessment of claimant's capabilities as light to medium, as was within his discretion. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Moreover, Ms. Powell testified that while the injection molding machine tender and extruder operator jobs in the plastics industry are classified as requiring moderate strength in Dictionary of Occupational Titles (DOT) labor codes, when she was exploring specific job opportunities she looked at the actual job duties and identified jobs within claimant's lifting limitation of less than 30 pounds. Tr. at 64-66, 74-75. Claimant's arguments that the surveys should be disregarded because Ms. Powell did not account for claimant's various complaints and for Dr. Fleming's dexterity assessment are also rejected. Since the administrative law judge credited Northwest's assessment of claimant's physical capacity and its doctors did not impose any limitations based on claimant's complaints or his

dexterity, the fact that Ms. Powell failed to consider these factors cannot alter the result.[2] Finally, we reject claimant's argument that Ms. Powell's vocational surveys should be disregarded because she did not conduct an on-site work place evaluation. An on-site evaluation is not required under the Act for employer to meet its suitable alternate employment burden; the expert need only be aware of the requirements of the jobs identified as suitable.

Claimant also avers that the plastics jobs identified are not suitable because Ms. Powell failed to account for his restriction regarding repetitive use of the upper extremity. Even if claimant is correct, it does not affect the result. As claimant does not dispute that he is capable of light duty work or contest the suitability of the security jobs identified,[3] suitable alternate employment was established in any event. Accordingly, because the vocational testimony of Ms. Powell in conjunction with the Northwest Center records provide substantial evidence to support the administrative law judge's finding that claimant is no longer permanently totally disabled, and claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, the administrative law judge's decision to grant modification based on a change in claimant's economic condition is affirmed.

[2]We note that when Ms. Powell was confronted with Dr. Fleming's testimony on cross-examination, she indicated that it did not change her opinion. Tr. at 60-62. Moreover, although claimant characterizes Dr. Fleming's report as stating that claimant's psychomotor speed was below average and that he had poor fine and gross motor dexterity, he actually found that, overall, claimant's dexterity was fair to above average, that he scored better than fifty percent of the norm group, and that this was encouraging for a job or training program requiring some speed or fine dexterity. EX 41.

[3]Contrary to claimant's assertion, the fact that neither Mr. Ryalls nor Mr. Hannum addressed the security jobs in their analysis of the availability of work in the greater Portland area is not determinative since specific available security jobs were identified by Ms. Powell.

Accordingly, the administrative law judge's Decision and Order-Granting Petition For Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge