BRB No. 00-763

GERALD W. ELLISON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARDS, INCORPORATED	)	DATE ISSUED: April 24, 2001
	)	
and	)	
	)	
ARM INSURANCE SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Request for Modification of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Florida, for claimant.

Mary Nelson Morgan (Cole, Stone, Stoudemire, Morgan & Dore, P.A.), Jacksonville, Florida, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Request for Modification (1999-LHC-1569) 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 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In 1996, Administrative Law Judge Neusner awarded claimant permanent total

disability benefits, finding that work at employer's facility did not constitute suitable alternate employment as it was sheltered employment.[1] Decision and Order at 12-13. In 1999, employer moved for modification of the 1996 award pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting that it established a change in claimant's economic condition by its submission of a labor market survey showing the availability of alternate work for claimant. The motion came before Administrative Law Judge Malamphy, who determined that employer established the availability of suitable alternate employment, thereby changing claimant's disability from total to partial. Decision and Order (Modif.) at 7-8. Claimant appeals the modified award, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that employer established a change in conditions warranting a modification of his award from permanent total to permanent partial disability benefits. He argues that employer's evidence

[1]Claimant was injured in 1986. In 1993, Administrative Law Judge Chao awarded benefits. The appeal of that decision was dismissed by the Board as being premature due to motions for modification and reconsideration before the administrative law judge. *Ellison v. North Florida Shipyards, Inc.*, BRB No. 93-1273 (May 26, 1993). On reconsideration, Judge Chao vacated the award, and on September 23, 1993, the claim was set for retrial. Thereafter, Administrative Law Judge Neusner awarded permanent total disability benefits. Decision and Order (Feb. 23, 1996). Those benefits were affirmed on appeal in 1997; however, the average weekly wage was vacated, and the case was remanded for recalculation of claimant's benefits. *Ellison v. North Florida Shipyards, Inc.*, BRB No. 96-852 (March 26, 1997). The Board denied claimant's motion for reconsideration. On remand, Judge Neusner recalculated claimant's average weekly wage and denied claimant's motion for reconsideration. Decision and Order on Remand (Oct. 29, 1997); Order as to Claimant's Motion for Reconsideration (Dec. 4, 1997).

demonstrates only an improved economy and that this evidence is insufficient to show that claimant is able to perform the identified jobs. Employer asserts that its evidence sufficiently establishes that claimant has a wage-earning capacity and that he is no longer entitled to total disability benefits.

Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The Supreme Court has held that a disability award may be modified under Section 22 where there is a change in an employee's wage-earning capacity, even without a change in his physical condition. *Id.* However, modification is not permitted with every change in actual wages or with every transient change in the economy. *Id.*; *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). If a change in condition is asserted as the reason for the modification, the party making such assertion has the burden of establishing the change. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Once this burden is met, the standard for determining disability is the same in a modification proceeding as it is in an initial hearing. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

The record before us establishes that claimant injured his back in 1986, underwent three surgeries and is now limited to sedentary work. Emp. Ex. 3; Tr. at 8. Claimant was 47 years old at the time of the hearing in 2000, with a seventh grade education and a background in heavy employment. Tr. at 8-9, 15-17, 32, 43, 49. He has been diagnosed with failed back syndrome, and he is currently being treated with medication alone. Emp. Exs. 1, 4. Employer hired Mr. Albert to conduct a labor market survey, and he identified a number of possible sedentary jobs for claimant.[2] Mr. Albert testified that his survey was based on the state of the economy, as well as claimant's age, experience, transferrable skills, test scores, restrictions and abilities. Tr. at 13, 27. Dr. Scharf, who performed claimant's surgeries and re-evaluated him in 1998, approved ten of the identified jobs. Dr. Hofmann, who evaluated claimant in 1999 and is currently supplying him with pain medication, approved five of the ten jobs. Emp. Exs. 2, 5; Tr. at 16-23. The doctor-approved positions include work as an appointment setter, an electronic technician, a tugboat dispatcher, a weight inspector and a caller. Emp. Exs. 2, 5; Tr. at 16-23. Mr. Albert concluded, therefore, that claimant is employable in the current labor market. Tr. at 23.

[2]Employer originally attempted to show that claimant had a residual wage-earning capacity by establishing available work at its facility.

Claimant, his wife, and Mr. Spruance, claimant's vocational expert, testified that claimant is not capable of regular, sustained employment. Tr. at 37-38, 41, 43-44, 54, 57, 60, 62-63. Claimant and his wife testified as to claimant's daily bouts of pain, which they both felt would prevent him from performing the identified work. Tr. at 36-38, 44-46. Claimant further stated that, although he has not sought employment on his own, he applied for most of the jobs on employer's list but was not hired. Tr. at 52. Mr. Spruance believed that claimant's physical condition would prevent him from working. He also testified that claimant has no transferrable skills, has only an average ability to learn new skills, and that nothing in claimant's past would lead Mr. Spruance to believe claimant could perform the jobs identified by employer. Tr. at 54-56, 59, 62. Moreover, Mr. Spruance stated that the opportunities in the unskilled sedentary market have not increased, and he does not believe he could locate a job for claimant were he asked to do so. Tr. at 58, 60.

The administrative law judge credited the opinions of Mr. Albert and Drs. Scharf and Hofmann. He found that employer established suitable alternate employment for claimant, thereby demonstrating that claimant has a residual wage-earning capacity warranting modification of the previous award of benefits. Although the administrative law judge gave credence to claimant's complaints of pain, he gave greater weight to the doctors' approvals of full-time sedentary work. Additionally, the administrative law judge noted that claimant did not seek employment on his own and that he could not prove that he attempted to secure work from the list provided by employer. Decision and Order (Modif.) at 7-8.

We reject claimant's contention that the evidence establishes only a change in the general economy and hold that there has been no error in evaluating the evidence. While Mr. Albert did testify as to the growth in the economy in 1999-2000, his opinion regarding the availability of jobs for claimant was not based on state of the economy alone. Rather, he identified specific jobs and had a number of those jobs approved by the doctors who treated claimant. With regard to the vocational evidence, an administrative law judge may credit a vocational expert's opinion even if the expert did not examine the employee, as long as he was aware of the employee's age, education, work history, restrictions, *etc.*, when exploring job opportunities. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). The record reveals that Mr. Albert was aware of these details of claimant's background and condition; therefore, it was not unreasonable for the administrative law judge to credit Mr. Albert's opinion, in light of the doctors' approvals, over that of claimant, his wife and his expert, as it is within the administrative law judge's discretionary powers to determine how to credit and weigh the evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *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.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As the administrative law judge's

determinations are rational, we hold that employer met its burden of showing the availability of suitable alternate employment, and we affirm the administrative law judge's decision to modify claimant's award from permanent total disability benefits to permanent partial disability benefits based on a change in his wage-earning capacity. *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

_____
MALCOLM D. NELSON, Acting
Administrative Appeals Judge