BRB No. 01-0564

RUDY RODRIGUEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	DATE ISSUED: April 3, 2002
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Rudy Rodriguez, Newark, California, *pro se.*

Laura G. Bruyneel (Bruyneel & Leichtnam), San Francisco, California, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Modification (99-LHC-2076) of Administrative Law Judge Anne Beytin Torkington 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). In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §802.211(e). If they are, they must be affirmed.

Claimant, a tractor driver, sustained injuries to his lower back, neck, left shoulder, left hand, and left knee on February 20, 1991, when the tractor he was driving stopped suddenly and he was thrown forward in the cab. Claimant has not worked since his injury. After entering into stipulations, the parties agreed to a compensation order issued by the district director on October 19, 1994, awarding claimant permanent partial disability benefits, and granting employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). *See* 20 C.F.R. §702.315.

On January 27, 1999, employer filed a petition for modification of the compensation order. At a formal hearing before the administrative law judge, employer submitted evidence in support of its position that, as a result of claimant's improved physical condition as well as improved working conditions, claimant is presently capable of returning to his former employment duties as a tractor driver. Claimant, in response, offered testimony and evidence in support of his argument that employer failed to meet its burden of proof that improvements in claimant's physical condition and in the working conditions in claimant's previous job enable claimant to return to his previous employment duties as a tractor driver with employer.

In her Decision and Order Granting Modification, the administrative law judge found that employer established that both claimant's physical condition and the working conditions of claimant's former employment have changed, pursuant to Section 22 of the Act, 33 U.S.C. §922. Next, the administrative law judge determined that, as a result of these changes, claimant is physically capable of performing his former employment duties as a tractor driver. Thus, the administrative law judge found that claimant's entitlement to permanent partial disability benefits is terminated as of the date of the Decision and Order.

On appeal, claimant, representing himself, challenges the administrative law judge's decision granting modification and terminating claimant's permanent partial disability benefits. Employer responds, urging affirmance of the administrative law judge's decision.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section of the Act is permitted based on a mistake of fact in the initial decision or on 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); *Jensen v. Weeks Marine, Inc. [Jensen II]*, 34 BRBS 147 (2000). An award of benefits based upon the agreements and stipulations of the parties pursuant to 20 C.F.R. §702.315 is subject to Section 22 modification. *See Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). In the instant case, the October 19, 1994 compensation order represents an award based on the agreement and stipulations of the parties; thus, it may be modified if the requirements of Section 22 are met. *Id.*

A party requesting modification due to a change in condition has the burden of showing the change in condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Jensen II*, 34 BRBS 149; *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Where modification is sought based on a change in condition, an initial determination must be made as to whether the petitioning party has offered evidence demonstrating that there has been a change in claimant's physical or economic condition. *Jensen II,* 34 BRBS 147 (2000); *Duran v. Interport Maintenance Corp.,* 27 BRBS 8 (1993). If the moving party has submitted evidence which is sufficient to bring the claim within the scope of Section 22, then the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in claimant's physical or economic condition from the time of the initial award to the time modification is sought. Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo II,* 521 U.S. 121, 31 BRBS 54(CRT); *Jensen II,* 34 BRBS at 149; *Ramos,* 34 BRBS at 84.

In the instant case, the administrative law judge found that employer satisfied its burden to show that there has been a change in claimant's physical condition since the issuance of the compensation order which was based on the parties' stipulation that claimant is disabled from performing his previous employment duties as a tractor driver. *See* Decision and Order at 14-15. In support of its petition for modification, employer submitted into evidence the medical report and hearing testimony of Dr. Bernstein, a Board-certified orthopedic surgeon. Dr. Bernstein conducted a physical examination of claimant on June 7, 1999, and reviewed claimant's medical records, surveillance videotapes, and the tractor driver job analysis prepared by employer's vocational expert, Howard Stauber. In addition, Dr.

Bernstein visited the waterfront in order to personally observe the performance of the tractor driver job. *See* EX-4; EX-6; Tr. at 94-95, 118-122, 138-139. Thereafter, Dr. Bernstein compared his own assessment of claimant's current physical capabilities with the physical restrictions which had been imposed on claimant by Dr. Stark in a medical report dated December 8, 1992, *see* CX-6, and concluded that claimant is presently able to perform certain activities, including repetitive bending, light lifting and light carrying, which had been previously precluded by Dr. Stark. *See* CX-6; Tr. at 146-150. As the administrative law judge rationally found that Dr. Bernstein's opinion provides evidence of a change in claimant's physical condition since the issuance of the compensation order in this case, we affirm the administrative law judge's consideration of the claim pursuant to Section 22. *Ramos*, 34 BRBS at 84; *Jensen v. Weeks Marine, Inc. [Jensen I]*, 33 BRBS 97, 100 (1999).

Accordingly, we now consider, in accordance with the same standards for determining disability that are used in an initial proceeding under the Act, whether the administrative law judge's determination that claimant is now able to return to his usual employment as a tractor driver is supported by substantial evidence. *See Rambo II,* 521 U.S. 121, 31 BRBS 54(CRT); *Jensen II,* 34 BRBS at 149; *Ramos,* 34 BRBS at 84. Under the Act, a claimant has the burden of establishing the nature and extent of his disability. In this regard, in order to establish a *prima facie* case of total disability, claimant must show that he cannot return to his usual employment due to his work-related injury. *See, e.g., Ramos,* 34 BRBS at 84; *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127, 128 (1998); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242, 245 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP,* 909 F.2d 1488 (9th Cir. 1990).

In the instant case, the administrative law judge considered the opinions of Drs. Bernstein and Zacharia, as well as the opinion of vocational expert Mr. Stauber, in assessing whether claimant remained disabled from his regular employment. Dr. Bernstein stated that, assuming that claimant had opportunities to stretch, an hour lunch, and two 15-minute breaks during the day, claimant is able to work a full eight-hour day as a tractor driver. *See* Tr. at 123; EX-6. Dr. Zacharia, claimant's treating orthopedist, testified that claimant could physically perform the tractor-driver job, as described in Mr. Stauber's job analysis, on a full-time basis, but not without discomfort. Specifically, Dr. Zacharia opined that it would be imprudent for claimant to return to the work described in the job analysis, explaining that the problematic job requirements included sitting for two-hour periods, climbing and twisting to enter and exit the tractor cab, twisting to see behind the tractor, and working in inclement weather. *See* Tr. at 172-174, 179-182. Mr. Stauber presented testimony regarding his written job analysis, as well as his extensive first-hand observations of the tractor driver position. Mr. Stauber identified various aspects of the tractor driver position

that have significantly improved since the mid-1990's, including improved tractors and terminal surfaces which have reduced jarring and bouncing, the use of mirrors to minimize twisting, and improved training for drivers to facilitate a safe and smooth operation. *See* Tr. at 188-191, 194-198.[1] Mr. Stauber also stated that tractor drivers work for periods of 1½-2 hours followed by 15-minute breaks and a lunch break. He explained, however, that drivers do not actually have to remain seated in their cabs for the entire two-hour period, as they have opportunities to get out of the cab to adjust equipment or as they wait in line for a container. *See* Tr. at 191-194.

After considering the medical and vocational evidence, the administrative law judge credited the testimony of Dr. Bernstein and Mr. Stauber to conclude that, as a result of improvements in claimant's physical condition and the conditions of the tractor driver position, claimant is now capable of returning to his usual work.[2] In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge fully weighed the evidence and the credited opinions of Dr. Bernstein and Mr. Stauber provide substantial evidence to support his findings, we affirm the administrative law judge's conclusion that claimant is able to return to his usual work, and, thus, is no longer

[1]With respect to recent improvements in tractor design, employer provided testimony of improved shock adsorbers, power steering, and heaters. *See* Tr. at 188-190. Improved terminal surfaces are due to repaving and filling in of ruts and potholes. *See* Tr. at 194-195.

[2]Specifically, in this regard, the administrative law judge credited the opinion of Dr. Bernstein over that of Dr. Zacharia. The administrative law judge found Dr. Bernstein's opinion to be better-reasoned and persuasive, observing that his opinion is supported by objective findings, his review of the surveillance videotape evidence of claimant's physical activities, and his own observation of the tractor trailer position. *See* Decision and Order at 17-18. In identifying deficiencies in Dr. Zacharia's opinion, the administrative law judge observed, first, that the doctor's opinion is unsupported by objective findings and is based, rather, on claimant's reported symptoms which are inconsistent with the surveillance videotape evidence of claimant's physical activities, and, second, that the doctor's understanding of the tractor driver job is inadequate. As the inferences drawn from the evidence by the administrative law judge are reasonable and as he acted within his discretion as trier-of-fact, we affirm the administrative law judge's crediting of Dr. Bernstein's opinion over that of Dr. Zacharia. *See Wheeler, infra,* 21 BRBS 33.

disabled. *See Ramos,* 34 BRBS at 84; *Chong,* 22 BRBS at 245; *Wheeler,* 21 BRBS 33. We therefore affirm the administrative law judge's grant of modification and denial of continuing permanent partial disability benefits. *See Ramos,* 34 BRBS at 84-85.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge