BRB No. 13-0411

ALBERT R. LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED: Apr. 15, 2014
	)	
and	)	
	)	
CONTRACT CLAIM SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

John Noble (Noble and Crow, P.A.), Rockville, Maryland, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-LHC-01673) of Administrative Law Judge Linda S. Chapman 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

This case is before the Board for the third time. Claimant, a long-time warehouse worker, sustained a back injury in 2001 and reinjured his back in 2005 during the course of his employment with employer. After the 2005 injury, claimant underwent surgery. In a decision dated July 28, 2008, Administrative Law Judge Bullard awarded claimant

permanent partial disability benefits, as she found that employer had established the availability of suitable alternate employment and claimant did not conduct a diligent job search. Claimant appealed, and the Board vacated the award and remanded the case for the administrative law judge to address the effects of claimant's medications on the suitability of the identified jobs. *A.L. v. Army & Air Force Exchange Service*, BRB No. 08-0841 (July 23, 2009). On remand, in a decision dated February 12, 2010, Judge Bullard found that all of the jobs identified by employer were suitable because they were office-based, would not require claimant to operate a car or machinery, and did not conflict with claimant's use of pain medication. Judge Bullard reinstated her award of permanent partial disability benefits. Claimant again appealed, and the Board affirmed Judge Bullard's award. *Lewis v. Army & Air Force Exchange Service*, BRB No. 10-0394 (Jan. 26, 2011).

Claimant subsequently filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, contending there had been a worsening of his physical condition since the last award, such that he could no longer perform any job, including the jobs previously identified as suitable. Claimant testified at the modification hearing and submitted additional medical reports. Employer offered no new evidence. Administrative Law Judge Chapman (the administrative law judge) found that claimant failed to establish a change in his condition and, accordingly, is not entitled to have his permanent partial disability benefits award modified. Claimant appeals the decision denying his motion for modification. Employer has not responded to the appeal.

Claimant contends the administrative law judge erred in finding that he did not establish a change in his physical condition. Specifically, claimant asserts that his pain has increased, he must now use a cane, he uses stronger medication, and he has developed a herniated disk, all making the previously suitable jobs unsuitable. We reject claimant's contentions of error and affirm 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 of a prior decision is permitted if the proponent of the motion establishes a mistake in the determination of a 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). The moving party, claimant in this case, bears the burden of showing that Section 22 is applicable. *Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997). The standard for determining disability is the same for a Section 22 modification proceeding as it is in the original claim under the Act. *See, e.g., Del Monte Fresh Produce v. Director, OWCP*, 563 F.2d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Evidence that alternate employment is not suitable or available may provide grounds for modifying prior awards. *See Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d

Cir. 2003); *R.V.* [*Vina*] *v. Friede Goldman Halter*, 43 BRBS 22 (2009); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir.1997); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988).

In the award dated February 12, 2010, Judge Bullard found that claimant could not return to his usual work operating machinery, that he was restricted from repetitive bending, stooping, lifting or carrying over 10 pounds, that he must be able to sit, stand, and change positions at will, and that he cannot sit on a bench or stool. As the jobs identified by employer were within these restrictions, Judge Bullard found they were suitable and available, and she awarded claimant permanent partial disability benefits. Decision and Order on Remand at 2. Subsequent to this award, claimant returned to Dr. Ammerman for follow-up evaluations and a lumbar MRI. In December 2010, Dr. Ammerman reiterated his restrictions, specifically stating that claimant must be allowed to change positions at will and use his cane and pillow, and, if the previously identified jobs do not meet such restrictions, then claimant cannot work. CX 3. In December 2011, Dr. Ammerman found that, although claimant moved slowly and had tenderness over the sacrococcygeal region and right leg, his work restrictions were unchanged, and he is not impaired by his use of Tylenol with Codeine. In May 2012, an MRI showed a mild degree of discogenic disease and a small L5-S1 herniation. CX 1. Based on this MRI, Dr. Ammerman concluded that surgical intervention is not necessary and that claimant should continue taking Tylenol with Codeine. In November 2012, Dr. Ammerman stated that claimant's work restrictions are as follows: avoid repetitive lifting over 10 pounds; no repetitive bending at the waist; no crawling or stooping; no walking for more than 30 continuous minutes; and the ability to change from a seated position to standing approximately every hour. *Id.* Additionally, Dr. Umosella, addressing claimant's depression due to chronic pain on January 27, 2011, recommended that claimant undergo cognitive therapy and counseling. In July and September 2011, he concluded that claimant's pain and depression were stable. CX 2.

The administrative law judge found that claimant's doctors have consistently reported that claimant's conditions are stable and they have not indicated there has been any change in his restrictions. She observed, therefore, that the only basis for finding a change in claimant's condition was his subjective complaints of pain. While subjective complaints may establish a change in condition, the administrative law judge found that here they do not, as claimant's complaints are not credible. The administrative law judge specifically discredited claimant's assertions that he was in agonizing pain while at the hearing, because she learned that he had not taken his medication beforehand, and she observed that he did not shift positions or appear to be in excruciating pain. Decision and Order at 10. Moreover, the administrative law judge found claimant's testimony was inconsistent, as he claimed to have been at the maximum level of pain in 2007, and he testified that this had not changed. *Id.* at 11. The administrative law judge also found that employer's previously identified alternate jobs remain suitable for claimant. Based

on the inconsistencies in claimant's testimony and the lack of medical reports establishing debilitating pain from his injuries, and drowsiness from his medications, and as she found that claimant has not established an inability to perform the previously identified suitable alternate employment, the administrative law judge found that claimant did not establish a change in his condition warranting modification of the award of permanent partial disability benefits. *Id.*

Contrary to claimant's general assertions of error, the administrative law judge specifically evaluated and discussed the relevant evidence of record. She rationally found that no doctor stated claimant's physical condition had deteriorated and that a comparison of claimant's 2012 work restrictions with those on which the 2010 award was based shows they are essentially the same. Moreover, the administrative law judge rationally rejected claimant's testimony concerning his pain. Questions of witness credibility are for the administrative law judge as the trier-of-fact. *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). The administrative law judge is entitled to weigh the evidence and to draw her own inferences therefrom. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). That other inferences could have been drawn does not establish error in the administrative law judge's conclusion. *Id.* In this case, the administrative law judge addressed and, as is within her discretion, discredited claimant's subjective complaints of pain for rational reasons. As the administrative law judge's findings and inferences are rational, supported by substantial evidence, in accordance with law, and contain no reversible error, they are affirmed. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a change in his condition, and we affirm the denial of permanent total disability benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge