BRB No. 00-1148

FREDERICK TAMM	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: Aug. 21, 2001
	)	
v.	)	
	)	
OLE HANSEN & SONS	)	
	)	
and	)	
	)	
ARGONAUT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Adopting Stipulation and Modification of Award of Benefits and the Decision and Order Modifying in Part Previous Decision and Order Upon Reconsideration Requested by the Director and Denying Motion for Reconsideration by the Claimant of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Frederick Tamm, *pro se*, Woodston, New Jersey.

John E. Kawczynski (Weber Goldstein Greenberg & Gallagher LLP), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself,[1] appeals the Decision and Order Adopting Stipulation and Modification of Award of Benefits and Decision and Order Modifying in Part Previous Decision and Order Upon Reconsideration Requested by the Director and Denying Motion for Reconsideration by the Claimant (99-LHC-1282) of Administrative Law Judge Ainsworth H. Brown 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 by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant fell while carrying an acetylene bottle during the course of his employment on December 28, 1983, injuring his low back; he has not returned to work with this employer and alleges that he remains permanently totally disabled following three surgeries with chronic lumbar radiculopathy.[2] On January 20, 1984, Administrative Law Judge Freeman C. Murray awarded claimant compensation for a permanent total disability and medical benefits. Employer now seeks modification of that award, arguing claimant's disability is now partial as it has established the availability of suitable alternate employment and that it is not responsible for unrelated and/or unnecessary medical treatment procured by claimant.

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[1]Claimant was represented by counsel before the administrative law judge; claimant's counsel filed his Petition for Review but subsequently withdrew from this case. *See* Order dated September 15, 2000.

[2]Employer has paid temporary total disability benefits to claimant from the date of injury until February 13, 1985, based on an average weekly wage of $789.60. 33 U.S.C. §908(b). Following 104 weeks of payment, liability for further compensation was assumed by the Special Fund pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer filed for modification on March 9, 1999.

In his decision on modification, Administrative Law Judge Ainsworth Brown (the administrative law judge) accepted the stipulations of the parties regarding claimant's average weekly wage at the time of his injury, his entitlement to compensation and medical benefits as previously awarded and the Special Fund's entitlement to a credit for the amount of claimant's earnings received post-injury while he was receiving permanent total disability payments from the Special Fund.[3] *See* Stips. 3, 4, 5. Further, the administrative law judge found that the issue of claimant's entitlement to reimbursement of various medical bills, including those for three surgeries,[4] by employer was premature as there was nothing in the record to show that the bills had been submitted to employer or that employer had refused to pay them. Finally, the administrative law judge found that employer had established the availability of suitable alternate employment and that claimant retains a residual wage earning capacity of $6.00 per hour. In order to compensate for the effects of inflation, the administrative law judge used the National Average Weekly Wage[5] (NAWW) currently in effect to determine that claimant's compensation should be reduced by $145.92.

Following the issuance of his decision, both claimant and the Director, Office of Workers' Compensation Programs (the Director), sought reconsideration of the administrative law judge's

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[3]Claimant agreed that he worked for American Micro Products, LLC, between July 15 to December 31, 1997, and from January 1 through September 30, 1998, earning a total of $9,342. Stip. 3.

[4]Dr. Neff performed back surgery on claimant on June 17, 1998, CX 21, September 3, 1998, CX 26, and in September 1999. HT at 22.

[5]The NAWW is based on the national average earnings of production or nonsupervisory workers on private nonagricultural payrolls and represents the average of these earnings during the three consecutive calendar quarters ending on June 30 of each particular year as obtained from the Bureau of Labor Statistics. LHCA Bulletin No. 90-1 (Oct. 1, 1989); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

decision. On reconsideration, the administrative law judge granted the Director's request to modify the amount claimant would receive in compensation but denied claimant's requests to reconsider his finding that employer had established the availability of suitable alternate employment and that he need not address the issue of medical benefits as claimant must first submit the subject medical bills to employer for a determination of their compliance with Section 7, 33 U.S.C.§907, of the Act.

Claimant now appeals without legal representation, contending that the administrative law judge erred in denying him continuing total disability compensation and in not ordering employer to reimburse him for all submitted medical bills. Employer responds, urging affirmance. The Director has not participated in this appeal.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 30 BRBS 1 (CRT) (1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). When considering a motion for modification, the administrative law judge is permitted to have before him the record from the prior hearing. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). 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,* 521 U.S. 121, 31 BRBS 54(CRT) (1997)(*Rambo II); Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Once this initial burden is met, the standards for determining disability are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *Id.*

Where, as in the instant case, claimant establishes that he is unable to perform his usual employment duties to a work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the geographic area in which claimant resides which, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 6878, 18 BRBS 79(CRT)(5th Cir. 1986). In his decision, the administrative law judge found that two of the three jobs proffered by employer's vocational consultant, Susan Galyo, specifically positions with COPS Monitoring and Flower World, were approved by claimant's treating physician, Dr. Neff, and constituted suitable alternate employment.[6] In addressing this issue, the

[6]The position at COPS Monitoring was that of a security alarm dispatcher, paying

administrative law judge considered claimant's argument that the identified positions were located too far from his home, but found this contention to be without merit as claimant drove this distance to his former employer, and presently drives similar a distance to visit his neurosurgeon.[7] On reconsideration, the administrative law judge expanded upon his decision to credit the opinion of Dr. Neff that the two positions were within claimant's physical capacities, finding that even though Dr. Neff had not completed a physical capacities form, it is evident that a long-term treating physician's approval encompasses his understanding of his patient's physical capabilities. *See* Decision on Recon. at 2. Moreover, the administrative law judge found that Dr. Maslow had deferred to Dr. Neff's opinion in this matter. *Id.* Finally, the administrative law judge noted ongoing physical therapy does not preclude employment, and that claimant could lie down when he is not at work.

Although it is well-established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and is not bound to accept the opinion or theory of any particular witness, *see Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962), in the instant case the administrative law judge erroneously interpreted the opinion of Dr. Maslow as supporting that of Dr. Neff. In his letter of February 29, 2000, Dr. Maslow reviewed the two employment positions identified by the vocational counselor and found them unsuitable as presented.[8] *See* EX 20. Contrary to the administrative law judge's statement that Dr. Maslow deferred to Dr. Neff's opinion on this issue, Dr. Maslow concluded his evaluation by stating only that the vocational counselor may also want to contact Dr. Neff for his opinion regarding claimant's capabilities.[9] In so doing. Dr. Maslow neither weakened his position

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$5.50 per hour, and the job at Flower World was for an order taker, paying $6 per hour. EX 19; HT at 88-110.

[7]Claimant's home in Woodston, New Jersey is approximately 22 miles from the job at COPS Monitoring located in Williamstown, New Jersey; 31.6 miles from Flower World located in Pennsauken, New Jersey; 33.6 miles from Micro Processing in Cherry Hill, New Jersey, and 26.7 miles from Dr. Neff's office in Haddon Heights.

[8]Dr. Maslow opined that claimant would be unable to sit for the six or seven hours per day required by the job at Flower World and that the position at U.S. Vision would have to be modified before it could be considered suitable. EX 20.

[9]Specifically, Dr. Maslow stated:

> If you feel that Dr. Neff could shed some light on this matter, and might be able to give a better feel for his capabilities having operated on this nan and taken care of him, then I would urge

that the proffered jobs as presented were not suitable for claimant nor did he defer to Dr. Neff's opinion or judgement. Thus, as the administrative law judge's decision to credit Dr. Neff was therefore based in part upon an erroneous evaluation of Dr. Maslow's report letter, that determination cannot stand. Accordingly, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment and we remand the case to the administrative law judge for reconsideration of the evidence regarding this issue. *See generally Martiniano v, Golten Marine Co.*, 23 BRBS 363 (1990).

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you to contact Dr. Neff.

EX 20.

If, on remand, the administrative law judge again determines that the identified positions constitute suitable alternate employment, claimant will be considered only partially disabled. An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). Sections 8(c)(21) and 8(h) require that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury.[10] *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C.Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In awarding claimant permanent partial disability compensation, the administrative law judge determined that claimant's post-injury wage-earning capacity was $145.92, adjusted for inflation.[11] The administrative law judge then ordered that amount subtracted from claimant's weekly compensation of $526.40. The Director requested reconsideration determination, noting that claimant's average weekly wage should be reduced by the amount

[10]This insures that a claimant's wage-earning capacity is considered on an equal footing with the determination under Section 10 of the average weekly wage at the time of injury. 33 U.S.C. §910.

[11]In reaching this determination, it appears the administrative law judge found the proffered jobs paid $240 per week based on $6 per hour offered by Flower World and using the change in the NAWW from 1983, the date of injury (*i.e.*, $274.14) to 2000 (*i.e.*, $450.64) adjusted that amount to $145.92, reflecting a 60.8% change for inflation.

of his adjusted post-injury wage earning capacity.[12] The administrative law judge agreed with the Director and modified his decision on reconsideration as requested. As the administrative law judge's use of the percentage change in the NAWW is in accordance with law, we affirm the administrative law judge's calculation of the wages employer's identified position would have paid in 1983.

Finally, claimant contends that the administrative law judge erred in failing to determine whether he is entitled to continuing medical benefits, including reimbursement for the three surgeries performed on his back. Claimant is entitled to medical benefits for a work injury if the treatment is necessary and related to that injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). The administrative law judge stated both in his initial decision on modification and on reconsideration that inasmuch as claimant had presented no evidence that medical bills had been submitted to the employer and that employer had refused to pay them, the issue was premature and claimant should submit the appropriate medical bills for a determination as to the necessity and appropriateness of the treatments rendered. *See* Decision at 3. However, in his opening statement before the administrative law judge, claimant's counsel asserted that employer is responsible for medical benefits due to claimant's back injury, HT at 6-7; moreover, such bills had been submitted into the record prior to the hearing. *See, e.g.,* CXS 11, 18. The administrative law judge therefore should have addressed this issue. 20 C.F.R. §702.226(a). Consequently, on remand, the administrative law judge must also consider whether claimant is entitled to reimbursement of past medical bills and future treatments since there is evidence that may be sufficient to establish that he was and is undergoing treatment necessary for his work-related injury. *See Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997).

Accordingly, the administrative law judge's determinations regarding suitable alternate employment and reimbursement of medical expenses are vacated, and the case is

[12]As the Director correctly set forth on reconsideration, Section 8(c)(21), 33 U.S.C. §908(c)(21), requires that a claimant's average weekly wage be reduced by the amount of his post-injury wage earning capacity, which results in a compensation rate of $429.12 [$789.60 - $145.92 = $643.68 x 2/3 = $429.12]. Under the administrative law judge's original computations claimant's compensation rate would have been reduced to $380.48 [$789.60 x 2/3 = $526.40 - $145.92 = $380.48].

remanded to the administrative law judge for consideration consistent with this opinion. In all other respects, the decisions below are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge