

WILLIE E. BOND)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTHROP GRUMMAN)	DATE ISSUED: 08/15/2013
SHIPBUILDING, INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Matthew H. Kraft, P.L.C.), Virginia Beach, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (2011-LHC-00986) of Administrative Law Judge Kenneth A. Krantz 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 law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 22, 1998, claimant sustained an injury to his back while working for employer as a painter; in 1999, claimant sustained bilateral wrist injuries which he attributed to his work for employer. In a Decision and Order dated May 8, 2003, Administrative Law Judge Campbell found that claimant failed to establish that his wrist conditions were work-related. Having accepted the parties' stipulations that claimant

sustained a work-related back injury in 1998 and that, as a result of this injury, claimant could not return to his usual employment duties with employer, Judge Campbell found that employer established the availability of suitable alternate employment paying \$222.40 per week. Consequently, Judge Campbell awarded claimant permanent partial disability benefits for a weekly loss in wage-earning capacity of \$411.33, commencing January 22, 1998.¹ 33 U.S.C. §908(c)(21), (h).

In 2007, claimant filed a motion for modification alleging a change in his physical and economic conditions and seeking permanent total disability compensation commencing January 29, 2007. In his Decision and Order Denying Modification, Judge Krantz (the administrative law judge) addressed at length claimant's new evidence as well as the prior medical evidence and determined that claimant did not establish a change in his physical or economic condition. Accordingly, the administrative law judge denied claimant's petition for modification.

On appeal, claimant challenges the administrative law judge's denial of his motion for modification. Employer responds, urging affirmance.

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. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). It is well established that the party requesting modification bears the burden of proof in demonstrating that the claim comes within the scope of Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990).

Claimant challenges the administrative law judge's finding that he did not establish a change in his physical and economic condition. Specifically, claimant asserts entitlement to permanent total disability benefits commencing January 29, 2007, based, inter alia, upon the January 29, 2007, report of Dr. Byrd that claimant is not capable of gainful employment, *see* CX 23L, and claimant's testimony regarding his ongoing symptoms of back pain. In his decision, the administrative law judge found the opinion

¹On claimant's appeal, the Board affirmed Judge Campbell's finding that employer had established the availability of suitable alternate employment and his award of permanent partial disability benefits to claimant. The Board remanded the case, however, for reconsideration of the issue of whether claimant's carpal tunnel syndrome is work-related. *Bond v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0666 (June 22, 2004). On remand, the case was reassigned to Administrative Law Judge Huddleston who, in a Decision and Order dated March 9, 2005, found that claimant did not establish that his wrist conditions are related to his employment. This decision was not appealed.

of Dr. Ross, that claimant's condition had not changed since 2002, to be well-reasoned and well-documented. The administrative law judge found that Dr. Ross examined claimant, performed multiple tests, and reviewed claimant's medical and social histories, symptoms and pain inventories in arriving at an opinion that was both thorough and supported by his findings. In contrast, the administrative law judge found that the opinion of Dr. Byrd, that claimant's condition had worsened since 2001, was less reasoned and documented, noting that Dr. Byrd relied only upon a physical examination of claimant and one MRI. Moreover, the administrative law judge found that while Dr. Byrd, in his January 29, 2007, report, stated that claimant was "not capable of gainful employment at this time," *see* CX 23L, he subsequently changed his opinion on August 8, 2007, after reviewing additional documentation, to reflect his belief that claimant "is able to perform sedentary to light duty work."² *See* EX 15. The administrative law judge also discounted claimant's subjective complaints of increased pain, finding that claimant is not presently taking prescription pain medication, he had not sought additional medical treatment for his back pain since 2007, and deposed that there are no activities that he could perform in 2002 that he could not perform in 2011. The administrative law judge thus concluded that claimant did not meet his burden of demonstrating a change in his physical condition. *See* Decision and Order at 20-23.

The administrative law judge similarly concluded that claimant did not demonstrate a change in his economic condition such that he could not perform the alternate employment positions previously found to have been suitable and available by Judge Campbell.³ Specifically, the administrative law judge found that Dr. Ross and Dr. Byrd each opined that claimant was capable of performing sedentary to light duty work. The administrative law judge also rejected claimant's assertion that his math skills and advancing age provide a basis for modification. The administrative law judge acknowledged that claimant's math skills are between the fourth and fifth grade levels, but he found that this is not significantly different from the finding by Judge Campbell that claimant has fifth grade math skills. *See* Decision and Order at 24. The administrative law judge also credited the testimony of Ms. Harvey that claimant's age has not rendered him incapable of performing the types of jobs previously found suitable. Thus, the administrative law judge concluded that claimant did not provide persuasive evidence that he was no longer able to perform the identified suitable alternate

²Dr. Byrd stated that, initially, he did not have the benefit of: 1) a physical capacity evaluation of claimant dated August 21, 1998; 2) Dr. Ross's medical evaluation dated January 22, 2007; and 3) a functional capacity evaluation of claimant dated May 1, 2007. Dr. Byrd's review of these records provided the basis for his change in opinion regarding claimant's ability to work. EX 15 at 1.

³Judge Campbell approved five specific employment positions as being vocationally and medically appropriate for claimant. *See* EX 1 at 13-14.

employment.⁴ *Id.* at 23-24.

We affirm the administrative law judge's finding that claimant did not establish a change in either his physical or economic condition. In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence and may draw his own inferences therefrom. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). It is impermissible for the Board to substitute its own views for those of the administrative law judge. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). In this case, the administrative law judge rationally rejected claimant's subjective complaints of pain, *Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982), and found that the opinions of Dr. Ross, Dr. Byrd and Ms. Harvey support the conclusion that claimant's physical condition has not worsened and that claimant remains capable of performing the suitable alternate employment previously identified. As these findings are supported by substantial evidence, they are affirmed. *See generally 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 did not establish a basis for modification of Judge Campbell's award of ongoing permanent partial disability benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴Given the administrative law judge's rational reliance on Ms. Harvey's opinion that claimant's age has not disqualified him from suitable alternate employment, we express no opinion on whether a claimant's advancing age, alone, would be grounds for modification.