

DON K. WILSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HUNTINGTON INGALLS,)	DATE ISSUED: <u>Aug. 19, 2014</u>
INCORPORATED-PASCAGOULA)	
OPERATIONS)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification and the Order Denying Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Ross Diamond III (Diamond Fuquay, LLC), Mobile, Alabama, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification and the Order Denying Reconsideration (2012-LHC-01117) of Administrative Law Judge Larry W. Price 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 or about July 29, 1992, claimant sustained injuries to his shoulders, back and neck while working for employer as a rigger. After claimant filed a claim for benefits under the Act, the parties stipulated to all issues regarding the disability and medical benefits due claimant as a result of the work incident; therefore, the sole issue presented for adjudication was employer's entitlement to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Specifically, the parties stipulated that while claimant had initially returned to work in a light-duty capacity following his work injuries, he was no longer capable of performing modified work, and that employer established the availability of suitable alternate employment that claimant was capable of performing as of February 9, 1995. Consequently, in a Decision and Order issued on July 31, 1996, Administrative Law Judge McColgin awarded claimant permanent partial disability benefits, payable by employer, from May 31, 1993 to July 28, 1994, permanent total disability benefits from July 29, 1994 to February 8, 1995, and permanent partial disability benefits from February 9 to May 30, 1995, after which time the Special Fund would commence the payment of claimant's permanent partial disability benefits. 33 U.S.C. §§908(a), (c)(21), (h); 908(f).

On July 30, 1996, the day before the issuance of Judge McColgin's Decision and Order, claimant underwent surgery on his right shoulder for a torn rotator cuff. Following this surgery, employer voluntarily paid claimant temporary total disability benefits from July 30, 1996 through February 28, 1997, at which time the Special Fund reinstated its payments of permanent partial disability benefits. *See* EXS 11, 14. In the interim, on January 27, 1997, claimant, citing his shoulder surgery and a worsening of his physical condition, filed a motion for modification, alleging a change in his physical and economic conditions and seeking permanent total disability compensation commencing as early as August 18, 1995. EX 15.

In his Decision and Order Denying Modification dated August 13, 2013, Judge Price (the administrative law judge) accepted, *inter alia*, the parties' stipulation that following his July 30, 1996 right shoulder surgery, claimant reached maximum medical improvement on February 23, 1997. The administrative law judge found that claimant did not establish a change in his physical or economic condition subsequent to that date. Accordingly, the administrative law judge denied claimant's petition for modification and thereafter, claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's denial of his motion for modification. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not responded on behalf of the Special Fund.

In seeking modification of the administrative law judge's July 31, 1996, decision, claimant testified regarding his medical condition following his July 1996 right shoulder surgery and the prescription medication he takes to alleviate his pain. Tr. at 41, 45-48. Claimant also submitted into evidence the deposition of Dr. Daugherty, the Board-certified orthopedic surgeon who performed claimant's right shoulder surgery, and of Dr. Ruan, his treating pain specialist. CXS 6, 10. In his decision addressing claimant's motion for modification, the administrative law judge accepted the parties' stipulation that following his July 30, 1996, shoulder surgery, claimant reached maximum medical improvement on February 23, 1997. Decision and Order Denying Modification at 2, 13. The administrative law judge found that Dr. Daugherty assigned claimant physical restrictions at that time, and that "no evidence in the record suggests that Claimant's limitations are any more restrictive than they were when they were set by Dr. Daugherty in February 1997." *Id.* at 13. The administrative law judge also found that the evidence with regard to claimant's psychological state and prescribed medications does not support a change in condition. Thus, the administrative law judge found the evidence insufficient to establish that claimant cannot perform the light-duty employment positions previously stipulated to, and he consequently denied claimant's claim for modification. *Id.* at 14-15.

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 due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). The standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo I*, 515 U.S. at 296, 30 BRBS at 3(CRT); *Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990).

We agree with claimant that the administrative law judge's denial of claimant's motion for modification cannot be affirmed. The administrative law judge based his decision upon a finding that claimant's physical restrictions have remained the same since February 23, 1997, the date Dr. Daugherty opined and the parties stipulated that claimant reached maximum medical improvement following his July 30, 1996 right shoulder surgery. *See* Decision and Order Denying Modification at 13-14. In seeking modification in January 1997, however, claimant alleged that his physical and economic conditions changed as a consequence of the right shoulder surgery he underwent on July 30, 1996, such that he is totally disabled. Thus, the issue presented for adjudication before the administrative law judge was whether claimant demonstrated a change in his physical or economic condition after the time of the initial award, July 31, 1996, which was based on the parties' stipulation that claimant was permanently partially disabled.

As the parties stipulated that claimant was permanently partially disabled at the time of Judge McColgin's compensation order, this stipulation establishes claimant's condition as of July 31, 1996.¹

The evidence presented by claimant in support of his motion for modification purports to establish greater physical restrictions following his July 30, 1996, surgery than those in place at the time of Judge McColgin's decision. *Compare* CX 1 at 70 (no use of arms for overhead work, sustained work at shoulder level, and no lifting more than 25-30 from floor to waist) *with* CX 1 at 87; EX 2 at 91-96, 100 (claimant capable of physically performing sedentary to light duty work). Consequently, as the administrative law judge addressed only whether claimant established a change in his condition since February 23, 1997, rather than since July 31, 1996, when his surgery was performed, we vacate the denial of claimant's motion for modification and remand this case for the administrative law judge to address whether claimant established a change in his physical condition at any time after the entry of the prior award.

The administrative law judge also found there is no evidence to suggest that claimant cannot perform the light-duty employment opportunities he previously stipulated he could perform. *See* Decision and Order Denying Modification at 14. We agree with claimant that the administrative law judge did not fully address the suitability of these employment positions in light of the pain medications claimant has been prescribed since his July 30, 1996 shoulder surgery.² While the administrative law judge found that Dr. Ruan prescribed claimant "various medications" to deal with his pain without restricting claimant from working, *id*; *see* CX 6, the administrative law judge did not address Dr. Daugherty's testimony regarding the effect of claimant's pain medications on his ability to work. *See* CX 10 at 15, 43; CX 3; *see generally* *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Moreover, once the administrative law judge makes findings of fact concerning any change in claimant's physical condition since the July 1996 surgery, he should address claimant's contention that employer's labor market surveys fail to establish the availability of suitable alternate employment in

¹ As a general rule, stipulations made by parties are binding upon those who made them. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). Stipulations are offered in lieu of evidence and thus may be relied upon to establish an element of the claim. *See Mitri v. Global Linguist Solutions*, __ BRBS __, BRB No. 13-0497 (Jun. 13, 2014). Where, as in this case, the extent of a claimant's disability has been previously stipulated to, either party may subsequently request modification alleging that claimant's condition has changed. *See Ramos*, 34 BRBS at 84.

² Claimant has been prescribed, inter alia, Exalgo, Oxycotin, Hydrocone, Valium and Soma. *See* Tr. at 45; CX 6.

view of the restrictions to claimant's shoulder, his medications, and his educational and vocational history, such that he is entitled to total disability benefits. *See generally Del Monte Fresh Produce*, 563 F.3d 1216, 43 BRBS 21(CRT); *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

Accordingly, the administrative law judge's Decision and Order Denying Modification is vacated, and the case remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge