

LINA THOMPSON)	
)	
Claimant-Respondent)	
)	
v.)	
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DEPARTMENT OF THE NAVY/MWR)	DATE ISSUED: <u>Dec. 10, 2003</u>
)	
and)	
)	
CONTRACT CLAIMS SERVICES)	
INCORPORATED)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Thomas M. DeBenedetto (Law Offices of Thomas DeBenedetto), San Diego, California, for claimant.

William N. Brooks II (Law Offices of William N. Brooks II), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-2023) of Administrative Law Judge Thomas M. Burke 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

Claimant, while working for employer as a bartender, sustained injuries to her right elbow, right wrist, and lumbar spine, and alleged injuries to her neck and right shoulder as a result of three work incidents; a slip-and-fall accident on March 5, 1994, a slip accident on or around March 17, 1994, and increased back pain following the lifting of a five-gallon container of syrup on or about March 24, 1994. Claimant stated that following the third incident she has not been able to hold any employment on a regular, consistent basis. She thus filed a claim for benefits under the Act.

In a Decision and Order dated August 11, 2000, Administrative Law Judge Ellin M. O'Shea determined that claimant sustained work-related injuries to her right elbow, wrist, and shoulder, her lumbar spine and her neck. Judge O'Shea next determined that claimant was not able to perform her usual employment as a bartender, and that the jobs identified in employer's labor market surveys were insufficient to establish the availability of suitable alternate employment. Accordingly, she found claimant entitled to an award of permanent total disability benefits from October 25, 1994, through September 30, 1997, and from April 1, 1998, and continuing, based on an average weekly wage of \$310.80.¹

On February 7, 2001, employer sought modification of Judge O'Shea's award of permanent total disability benefits, asserting a change in economic conditions based on its most recent labor market survey as well as evidence that claimant has worked post-injury. In addition, employer argued it is entitled to a Section 14(j) credit, 33 U.S.C. §914(j), for the two time periods following the original hearing when claimant was working and also receiving permanent total disability benefits. In response, claimant asserted that employer's petition for modification was premature. In addition, claimant argued that her treating physician, Dr. Rawlings, found a very serious worsening of her physical condition.

In his decision on modification, Administrative Law Judge Thomas M. Burke (the administrative law judge), found that modification of Judge O'Shea's decision is not warranted. Specifically, he concluded that claimant established an additional physical restriction with regard to her right upper extremity, that employer did not establish the availability of suitable alternate employment, that employer did not demonstrate that claimant has any post-injury wage-earning capacity, and that employer is not entitled to a Section 14(j) credit. Accordingly, the administrative law judge denied employer's petition for modification. Employer appeals this decision, and claimant responds, urging affirmance.

Employer asserts that the administrative law judge erred in relying upon the opinion of Dr. Rawlings to determine that claimant has established an additional physical limitation with regard to her right upper extremity which precludes her from positions as a parking lot cashier. Employer alternatively contends that, assuming claimant has a restriction against

¹Judge O'Shea determined that claimant worked, and thus was not entitled to total disability benefits, for the period between October 1, 1997, and March 31, 1998.

frequent and intermittent use of her right upper extremity, this restriction is insufficient to preclude claimant from working as a parking lot cashier. Employer also argues that the administrative law judge erred in finding that claimant's post-injury part-time employment as a film processor is not suitable alternate employment and therefore that it cannot establish her post-injury wage-earning capacity. Employer's contentions are without merit.

Section 22 provides that upon his own initiative or at the request of any party, on the grounds of a change in condition or mistake in a determination of fact, the fact-finder may, at any time prior to one year after the denial of a claim or the last payment of benefits, review the terms of an award or denial of benefits. 33 U.S.C. §922. Section 22 allows for modification of an award where there is a change in claimant's wage-earning capacity, even in the absence of a change in her physical condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). The standards for determining the extent of disability are the same in modification proceedings as they are in the initial proceeding. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Once, as here, claimant succeeds in establishing that she is unable to perform her usual work, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant can perform considering her age, education, background, work experience, and physical restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 94 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). The Ninth Circuit has explicitly held that short-lived employment is insufficient to meet employer's burden, as it does not establish that alternate work is realistically and regularly available to claimant on the open market. *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT).

In the instant case, the administrative law judge acted within his discretion in crediting the opinions of Drs. Rawlings and Bernicker over the contrary opinion of Dr. Dodge regarding claimant's present physical condition, and in finding that employer's surveillance tapes are insufficient to demonstrate that claimant could work in a higher paced environment or beyond her existing restrictions as previously determined by Judge O'Shea. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). We therefore affirm his

determination that claimant's condition has worsened by virtue of her carpal tunnel syndrome such that, on modification, she now has additional physical limitations of her right upper extremity. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Additionally, we affirm the administrative law judge's finding that the availability of suitable alternate employment was not established, as he rationally determined, based upon consideration of the credited testimony provided by claimant and the physical restrictions imposed by Drs. Dodge and Rawlings, that claimant cannot perform the parking lot attendant job. *Stevens*, 909 F.2d at 1260, 23 BRBS at 94(CRT); *Mangaliman*, 30 BRBS 39. Moreover, we affirm the administrative law judge's finding that claimant's post-injury employment as a film processor at Smith's Food and Drug Centers for three and one-half months is insufficient to establish her post-injury wage-earning capacity, as this job ended after a short period and thus the finding is consistent with the holding in *Edwards*, 999 F.2d at 1374, 27 BRBS at 81(CRT).² Consequently, we affirm the administrative law judge's finding that employer has not established a change in claimant's economic condition from the time of Judge O'Shea's decision, and thus hold that employer is not entitled to modification of Judge O'Shea's continuing award of permanent total disability benefits.

Employer lastly asserts, that in contrast to the administrative law judge's decision, it is entitled to a Section 14(j) credit by virtue of the fact that claimant was paid permanent total disability benefits during the periods of March 14, 1999, through July 10, 1999, and from June 16, 2000, through November 30, 2000, when she held gainful employment and received wages. Employer maintains that for those specific time periods the administrative law judge should have calculated claimant's earning capacity based on those wages, modified Judge O'Shea's award of permanent total disability to one of permanent partial disability, and then awarded employer a Section 14(j) credit for the resulting overpayment of benefits.

In his decision, the administrative law judge rejected employer's request for a Section 14(j) credit, since he found that employer did not make advance payments of compensation. Specifically, the administrative law judge found that the language of Section 14(j) does not support employer's request for a credit for wages earned by claimant in the two post-injury jobs. Section 14(j) provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). An employer may not receive credit under Section 14(j) of the Act, 33 U.S.C. §914(j), for wages received by claimant from another employer as those wages were not paid "in lieu of compensation." *Carter v. General Elevator Co.*, 14 BRBS 90, 98 n. 1 (1981).

² Employer concedes that this case is factually indistinguishable from *Edwards*, but it relies on the Board's decision wherein it held that a similar job was sufficient to establish suitable alternate employment. This decision, however, was reversed by the Ninth Circuit on this precise point. *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

However, in the instant case, the administrative law judge determined that claimant's part-time position as a film processor appeared to be within her physical restrictions. Moreover, in contrast to claimant's post-injury position with Maloso Enterprises from June 16 through November 30, 2000, the administrative law judge did not conclude that claimant performed the work as a film processor only through extraordinary effort and in spite of marked pain.³ Thus, as employer suggests, it may be entitled to modification of the award of permanent total disability benefits for the period during which claimant worked in this position, March 14, 1999, through July 10, 1999. *See Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003).

We therefore vacate the administrative law judge's finding that employer has not established modification as to Judge O'Shea's award of permanent total disability benefits for the period between March 14, 1999, and July 10, 1999, and remand for the administrative law judge to reconsider claimant's entitlement to benefits during this specific period of time. *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). If, on remand, the administrative law judge determines that the film processor position provided suitable work for claimant for the limited period before the job ended, he must then determine claimant's entitlement to an award of permanent partial disability benefits rather than permanent total disability benefits for this specific time frame, and modify Judge O'Shea's decision accordingly. 33 U.S.C. §§922, 908(c), (h); *see generally I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). If the administrative law judge modifies Judge O'Shea's award of permanent total disability benefits for the period encompassing March 14, 1999, through July 10, 1999, he must then consider employer's entitlement to a credit for any overpayment in permanent total disability benefits made during that time, pursuant to Section 22 of the Act. *See* 33 U.S.C. §922;⁴ *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2^d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (under Section 22, employer entitled to credit its excess temporary total disability payments for one injury against its liability for permanent partial disability for another injury); *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992) (Section 22 provides the employer with a credit for overpayments against prospective disability compensation payments); *Ravalli v. Pasha Maritime Services*, 36 BRBS 47 (2002), *recon. denied*, 36 BRBS 91 (2002) (under Section 22, a credit is available for a decrease in an award where

³ As the administrative law judge found based on the medical evidence that claimant worked in the hostess position at Maloso Enterprises only through extraordinary effort and in spite of marked pain, he properly found her entitled to permanent total disability benefits during this period. *See* Decision and Order at 19.

⁴Section 22 states that "an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, . . ." 33 U.S.C. §922.

benefits are still owing). The administrative law judge's denial of benefits for the period from June to November 2000 is affirmed.

Accordingly, the administrative law judge's finding that employer has not established modification with regard to the award of permanent total disability benefits for the period between March 14, 1999, and July 10, 1999, is vacated and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge