BRB No. 01-0401

NORMAN R. DOVE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Jan. 4, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Denying Section 8(f) Relief and Order Granting Cross-Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Norman R. Dove, Newport News, Virginia, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Modification and Denying Section 8(f) Relief and Order Granting Cross-Motion for Reconsideration (92-LHC-2385; 94-LHC-0817) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on claims 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 counsel, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). If they are, they must be affirmed. 20 C.F.R. §§802.211(e), 802.220.

Claimant pursued claims for various injuries to his back, neck, left shoulder and arm which occurred during the course of his employment for employer in 1990 and 1991. Claimant returned to work for employer on June 23, 1993. Claimant stopped working three days later. He sought treatment for stomach pain he alleged was related to anti-inflammatory

medication prescribed for his work-related back injury. Employer terminated claimant's employment effective June 25, 1993. The parties stipulated at the initial hearing on November 1, 1994, that employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from April 20,1994, when claimant underwent surgery for his work-related left shoulder injury. Claimant sought compensation for various periods of temporary total disability from September 22, 1992, and continuing compensation for temporary total disability from June 28, 1993. In his initial decision, the administrative law judge found claimant entitled to temporary total disability compensation for the periods sought and continuing. The administrative law judge rejected employer's contention that claimant was terminated for cause, finding that claimant was unable to work due to stomach pain related to his back injury, and that claimant complied with employer's excused absentee policy when he stopped working on June 25, 1993. The administrative law judge found that employer's offer of light-duty employment on June 23, 1993, did not establish the availability of suitable alternate employment, and that, in the absence of any other evidence, employer failed to establish the availability of suitable alternate employment.

In May 1998, employer sought modification of the administrative law judge's decision under Section 22 of the Act, 33 U.S.C. §922, alleging a change in condition. Specifically, employer argued that claimant is physically capable of full-time light-duty work and that it established the existence of suitable alternate employment. Moreover, employer contended that claimant is permanently partially disabled based upon a wage-earning capacity of $191.27 per week. Employer also requested relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f).

In his decision on modification, the administrative law judge credited evidence that suitable alternate employment was available on March 8, 1995; however, the administrative law judge found that he could not grant modification as of that date because his initial decision was filed with the district director on March 27, 1995, and employer had requested modification only from the date of its November 8, 1999, labor market survey. The administrative law judge found that claimant never diligently sought work after suitable jobs were identified in March 1995. The administrative law judge also found that claimant was excused from seeking suitable work while undergoing DOL-approved computer training from September 4 to October 2, 1995, and during the course of his recovery from surgery for his work-related left arm injury from November 2, 1995, to February 12, 1996. The administrative law judge credited employer's November 8, 1999, labor market survey to find that employer established the availability of suitable alternate employment as of that date. He also credited medical evidence that claimant's left arm, shoulder, and back injuries reached maximum medical improvement. Based on this evidence, the administrative law judge calculated claimant's residual wage-earning capacity as $170 per week, and concluded that claimant is entitled to weekly compensation of $187.43 for permanent partial disability commencing on November 8, 1999. 33 U.S.C. §908(c)(21). Employer's request for Section

8(f) relief was denied.

Employer moved for reconsideration, stating that at the hearing on modification it requested modification from the date the initial decision of the administrative law judge was issued by the district director on April 1, 1995, and arguing that, based on the administrative law judge's finding that suitable alternate employment was established in March 1995, the administrative law judge should modify claimant's compensation award from temporary total disability to permanent partial disability commencing April 1, 1995. In his order on reconsideration, the administrative law judge agreed with employer's contention and modified the commencement date of claimant's compensation for permanent partial disability to April 1, 1995.[1] The administrative law judge also modified his decision to find that claimant is not entitled to compensation for temporary total disability while undergoing DOL-approved computer training from September 4 to October 2, 1995.

Section 22 provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. *See 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); *Vasquez v. Continental Maritime of San*

[1]Claimant appealed to the Board the administrative law judge's Order of Clarification denying claimant's contention that his attorney is entitled to a fee on the basis that the administrative law judge found a lesser post-injury wage-earning capacity than the wage-earning capacity alleged by employer on modification. BRB No. 00-0993. By Order issued November 21, 2000, the Board dismissed claimant's appeal without prejudice and remanded the case for the administrative law judge to address employer's motion for reconsideration of his initial decision. After issuance of the administrative law judge's order on reconsideration, claimant did not request reinstatement of his appeal of the administrative law judge's denial of an attorney's fee.

Francisco, Inc., 23 BRBS 428 (1990). An employer may seek modification of a total disability award based on a change in condition by offering evidence of the availability of suitable alternate employment. *See, e.g., Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1, 8 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52 (1989). In order to obtain modification on this basis, employer must offer evidence that demonstrates that there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. *Jensen v. Weeks Marine, Inc. [Jensen II]*, 34 BRBS 147 (2000).

In reviewing this appeal by a claimant without counsel, where employer sought modification based on a change in condition, we must initially determine whether the employer has met the threshold requirement by offering evidence demonstrating that there has been a change in claimant's condition.[2] *See Jensen II*, 34 BRBS at 149-151; *Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 14-15 (1993). The record indicates that, at the date of the initial, formal hearing on November 1, 1994, claimant was unable to work as he was recuperating from left shoulder surgery performed by Dr. Stiles in April 1994. EX 19, 28. On modification, employer submitted evidence that on January 5, 1995, claimant began working with vocational counselor George Davis through the Department of Labor's Office of Workers' Compensation Programs (OWCP). These services included an interview, testing, and identification of appropriate job categories. EX 2. Mr. Davis conducted a labor market survey in February 1995, and specific positions identified in the survey were approved by Dr. Stiles in March 1995. EX 2 at 9, 14, 16, 17. Employer also submitted, *inter alia*, the medical records of Dr. Stiles covering the period from March 8, 1995, through January 29, 1998, which contain specific work restrictions, EX 18, and a form signed by Dr. Stiles stating that claimant reached maximum medical improvement on October 3, 1996, EX 15. In addition to Mr. Davis's February 1995 labor market survey, employer submitted labor market surveys conducted on May 5, 1996, February 12, 1999, and November 8, 1999. EX 4, 9, 11. Accordingly, we hold that employer submitted sufficient evidence of a change in claimant's economic condition to support modification of the administrative law judge's initial decision. *See Delay*, 31 BRBS at 204-205; *Lucas*, 28 BRBS at 6-8. Moreover, employer's evidence of suitable alternate employment could not have been developed earlier, since the medical evidence on which it was based was not available at the time of the 1994 hearing; claimant was unable to work at the date of the formal hearing because he was

[2]We note that claimant was represented by counsel at the hearing on modification where claimant presented his testimony and documentary evidence. Accordingly, we find no merit in claimant's assertion in his notice of appeal that he was unable to submit evidence on modification.

recuperating from surgery for his work-related shoulder injury. *See Jensen v. Weeks Marine, Inc. [Jensen III]*, ___ BRBS ____, BRB No. 01-0532, slip op. at 7-8 (November 30, 2001); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). We therefore hold that employer produced sufficient, timely evidence of suitable alternate employment to bring the claim for modification within the scope of Section 22.

Once employer met its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez*, 23 BRBS at 431. Accordingly, where as here, it is uncontested that claimant is unable to return to his usual employment as a rigger, the burden shifts to employer to establish the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). Employer can meet its burden by demonstrating the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In his decision on modification, the administrative law judge credited as evidence of suitable alternate employment positions identified by Mr. Davis in February 1995 and approved by Dr. Stiles in March 1995 as within claimant's physical limitations: a customer service representative at Sears, photofinishing laboratory worker, and film rental clerk. EX 2 at 14-17. The administrative law judge found the Sears job is also within claimant's skills and intellectual abilities, as Mr. Davis tested claimant and found that claimant performed at the junior high school level in academic subjects, although claimant had graduated from high school, and he had been a supply clerk in the Marines. EX 2 at 1, 5; 9 at 3; Tr. at 113. The administrative law judge found that the photofinishing and Blockbuster positions similarly do not require any demanding physical or intellectual abilities. EX 2 at 16-17. The administrative law judge also credited employer's November 8, 1999, survey to find claimant has a residual wage-earning capacity of $170 per week, based on the minimum wage of $4.25 per hour in 1991. The administrative law judge initially commenced claimant's compensation for permanent partial disability on November 8, 1999, based on his belief that this date was the one requested in employer's motion, but on reconsideration, based on the credited evidence, he modified the date to find that permanent partial disability benefits commenced on April 1, 1995.

The administrative law judge further found that claimant did not diligently seek work, as the evidence showed he received aggressive job placement efforts from Goodwill and from Mr. Davis but failed to follow-up on job leads. Moreover, claimant instructed Dr. Stiles's office not to release his medical records to Mr. Davis in November 1995 when he was recuperating from left arm surgery. EX 2 at 27, 28, 31. The administrative law judge also credited evidence that claimant refused to provide permission for Mr. Davis to request additional funds from OWCP to continue with vocational rehabilitation in January 1996, despite claimant's receiving advice from his attorney that he cooperate. EX 2 at 29. The administrative law judge found that claimant's subsequently obtaining part-time employment as a janitor and with Circuit City does not establish diligence, based on claimant's quitting each job and his lack of credibility in stating that the jobs were not physically suitable. Tr. at 109-110. The administrative law judge found that claimant was not credible based on his failure to follow-up on job applications and his refusal to authorize the release of his medical records from Dr. Stiles to Mr. Davis. Moreover, the administrative law judge noted that claimant's testimony that Dr. Stiles told claimant to stop his computer training class in 1995 was not corroborated by Dr. Stiles's records. EX 19, 20. In addition, while claimant testified he is without typing skills or the ability to drive a forklift, and he told employer's vocational consultant, Ms. Swartzbaugh, that he had not undergone computer training, the administrative law judge found that claimant stated on his shipyard employment application that he could type and operate a forklift and that he received computer training from Goodwill. *Compare* EX 2 at 25-26 and 29 *with* Tr. at 117-118; EX 11 at 5, 7. The administrative law judge next addressed claimant's diligence after February 12, 1996, when Dr. Stiles gave claimant specific work restrictions following his November 2, 1995, left arm surgery. The administrative law judge found that Dr. Stiles's February 1996 restrictions were no more limiting than the restrictions he noted on March 8, 1995. EX 18. The administrative law judge found no evidence that claimant sought work in 1996 or thereafter and that claimant's work restrictions have not changed since October 3, 1996, when Dr. Stiles opined that they were permanent. *Id*.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In the instant case, the administrative law judge's decision to credit positions as a customer service representative, photofinishing laboratory worker, and film rental clerk, identified in the labor market survey of Mr. Davis, and approved by claimant's treating physician, Dr. Stiles, is rational. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge credited substantial evidence to rationally find that claimant did not diligently seek suitable employment. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Berezin v. Cascade General, Inc.*, 34

BRBS 173 (2000). Accordingly, we affirm the administrative law judge's findings that employer established the availability of suitable alternate employment, and that claimant failed to rebut employer's evidence by diligently seeking work.[3]

Finally, we address the administrative law judge's finding on reconsideration that claimant is not entitled to compensation for temporary total disability while he was engaged in an OWCP-approved vocational rehabilitation from September 4 to October 2, 1995. The administrative law judge reasoned that there is no evidence that claimant's computer training precluded his working during this period, and there was evidence claimant was encouraged to apply for jobs while undergoing training.[4] Claimant can establish total disability if suitable

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[3]Moreover, we affirm the administrative law judge's finding, based on jobs identified in employer's November 8, 1999, labor market survey, that claimant has a residual wage-earning capacity of $170. The administrative law judge credited full-time jobs in Mr. Davis's February 1995 labor market survey to find that employer established the availability of suitable alternate employment. The administrative law judge's finding that claimant has post-injury wage-earning capacity of $170 was derived by multiplying a full-time 40 hour week by the minimum wage of $4.25 in effect when claimant was last injured at work in 1991. This finding is in accordance with law, and as the rate is based on the minimum wage for a full-time employee, it applies regardless of which survey the administrative law judge ultimately credited to determine claimant's wage-earning capacity. *See generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

[4]The administrative law judge noted employer's concession in its motion for

alternate employment is not reasonably available due to his participation in a DOL-sponsored rehabilitation program. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). Claimant bears the burden of proving that he is unable to perform suitable alternate employment due to his participation in a vocational training program. *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *see also Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998).

In the instant case, contrary to the administrative law judge's finding, the only evidence establishes that claimant was unable to work while engaged in computer training. The July 25, 1995, entry in Mr. Davis's August 21, 1995, vocational report described claimant's computer training at Goodwill as entailing daily classes from 9 to 3:30. EX 2 at 18-19. The OWCP report approving the proposed training stated that claimant would be a full-time student, and that he would be paid a maintenance allowance, EX 2 at 20. *See* 33 U.S.C. §908(g). Claimant testified that he was in training five days per week for eight to nine hours per day. Tr. at 113. The administrative law judge's rationale that claimant was encouraged to apply for jobs while in training is not relevant to claimant's ability to perform suitable alternate employment while undergoing computer training at Goodwill, as the evidence shows that claimant was directed to job openings that would be available only after he completed training on October 2, 1996. Specifically, in his report dated September 22, 1995, Mr. Davis wrote under his August 30, 1995, entry, "[C]ounselor encouraged claimant to try to begin to seek employment now for positions that might be available in the beginning of October." EX 2 at 21; *see also* EX 2 at 22, 24. Accordingly, as the evidence supports the conclusion that claimant was unable to perform suitable alternate employment while undergoing computer training at Goodwill from September 4 to October 2, 1995, and there is no contrary evidence in the record, we reverse the administrative law judge's denial of compensation for temporary total disability for the period of time claimant was engaged in an OWCP-approved vocational rehabilitation. *See generally Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Kee*, 33 BRBS at 223.

Accordingly, the administrative law judge's Decision and Order Granting Modification and Denying Section 8(f) Relief and Order Granting Cross-Motion for Reconsideration are reversed insofar as the administrative law judge denied compensation for temporary total disability while claimant was engaged in OWCP-approved vocational rehabilitation, and modified to award claimant compensation for temporary total disability from September 4 to October 2, 1995. In all other respects, the administrative law judge's

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reconsideration that claimant is entitled to compensation for temporary total disability while recovering from his left arm surgery between November 2, 1995, and February 12, 1996.

decisions are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge