BRB No. 90-2248

JORGE VARGAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order - Granting Modification of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Watson A. Garoni, San Francisco, California, for claimant.

Bill Parrish, San Francisco, California, for self-insured employer.

BEFORE: DOLDER and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order -- Granting Modification (90-LHC-843) of Administrative Law Judge Alfred Lindeman 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 if they are rational, supported by substantial evidence, and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his back on March 6, 1975, while working for employer as a shipyard painter. Thereafter, he worked intermittently until December 29, 1976, when he stopped working due to back pain. In a Decision and Order dated October 9, 1980, Administrative Law Judge Joseph A. Matera awarded claimant permanent total disability benefits commencing May 9, 1976, based on two-thirds of the stipulated average weekly wage of $278.76, and attorneys' fees. In addition, he awarded employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Thereafter, on February 22, 1989, employer sought

modification pursuant to Section 22 of the Act, 33 U.S.C. §922, arguing that claimant's economic condition had changed and that claimant was no longer permanently totally disabled. In a Decision and Order dated August 17, 1990, Administrative Law Judge Alfred Lindeman granted employer's modification request, finding that employer established that claimant's physical condition had improved and that suitable alternate employment existed which claimant could perform. Accordingly, the administrative law judge modified the prior award to reflect that claimant was entitled to permanent partial disability benefits, commencing on the effective date of his Decision and Order, based on two-thirds of the difference between claimant's average weekly wage at the time of injury of $278.76 and his post-injury wage-earning capacity of $110. Claimant appeals, arguing that the administrative law judge's determination on modification that he is no longer permanently totally disabled is not supported by substantial evidence and that his unwillingness to cooperate with employer's vocational rehabilitation efforts is of no legal consequence. In addition, claimant contends that the administrative law judge erred in failing to grant his motion to reopen the record for the submission of the report of employer's vocational expert, Ann Wilson, upon which she relied in testifying at the modification proceeding. Employer responds, urging affirmance.

Under Section 22 of the Act, any party may seek modification of a compensation award within one year of the date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. Modification based on a change in condition may be due to a change in either claimant's physical or economic condition. See Fleetwood v. Newport News Shipbuilding and Dry Dock Co., 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); Ramirez v. Southern Stevedores, 25 BRBS 261 (1992). The standards for determining the nature and extent of disability are the same during modification proceedings as during the initial adjudicatory proceedings under the Act. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428, 431 (1990). Once claimant establishes that he is unable to perform his usual work, he has established a prima facie case of total disability. The burden then shifts to employer to establish the availability of specific job opportunities within the geographic area where claimant resides, which he is capable of performing considering his age, education, work experience, and physical restrictions and which he could secure if he diligently tried. See Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 145 (1991).

Initially, we reject claimant's assertion that the administrative law judge's finding of a change in claimant's

condition under Section 22 is not supported by substantial evidence. In finding a change in claimant's condition, the administrative law judge relied primarily on the testimony of Dr. Bernstein, a board-certified orthopedic surgeon, and Ann Wilson, employer's vocational consultant. Claimant argues that Dr. Bernstein's opinion that claimant's pain level had decreased cannot properly support the administrative law judge's determination, because pain is subjective and cannot be measured by a physician and the physical restrictions he imposed were essentially the same as those imposed by Dr. Cowan at the initial hearing. We reject this contention. In his February 1989 report, Dr. Bernstein opined that claimant was capable of performing light work, which encompassed lifting, carrying, moving, pushing and pulling items within a 20 pound range, and partial bending and stooping. At the modification hearing, Dr. Bernstein testified that while claimant's degenerative condition had worsened from a pathological standpoint, his physical capabilities had increased because he was no longer in constant pain. Dr. Bernstein further stated that his opinion was corroborated by employer's May 1990 surveillance tape[1] and that he believed that claimant was physically capable of performing the alternate work which Ms. Wilson identified as suitable on a full-time basis. Because Dr. Bernstein's opinion provides substantial evidence from which the administrative law judge could rationally conclude that there had been a change in claimant's ability to work, we affirm the finding of a change in condition. See O'Keeffe, supra.

The testimony of employer's vocational expert, Anne Wilson also supports the administrative law judge's grant of modification. After reviewing Dr. Bernstein's February 1989 report, other medical reports dating back to 1975, the prior April 1980 vocational report, claimant's May 1990 deposition, and the aforementioned surveillance tape, as well as discussing claimant's case with Dr. Bernstein, Ms. Wilson opined that claimant was capable of performing work as a passive security guard or commercial building maintenance worker. Within these categories, Ms. Wilson identified 14 specific positions which paid between $2.50 to $3.00 per hour at the time of claimant's injury which she considered realistically available to claimant given his age (57), physical restrictions, second grade education, and limited proficiency in English. Although claimant argues that Ms. Wilson's testimony cannot properly support a finding of a change in claimant's condition because the type of jobs she identified as suitable were essentially the same type of jobs identified by the

[1] This tape depicted claimant walking without a limp, climbing steps normally, bending from the waist, getting out of a car shooting and dribbling a basketball, watering and mowing a lawn, pulling a power mower rope, carrying lawn cuttings, and performing weeding in a kneeling position.

vocational expert at the initial August 14, 1980 hearing[2], we reject this assertion. As Dr. Bernstein opined that claimant's condition had improved and that he was now capable of performing the work Ms. Wilson identified, the fact that the jobs were similar to those identified by the vocational expert at the initial hearing is not determinative.

Claimant's assertion that Ms. Wilson's testimony cannot provide substantial evidence to support a finding of modification in light of its hearsay nature must also fail. The formal rules of evidence are not applicable to administrative hearings before an administrative law judge, and hearsay evidence is generally admissible, if considered reliable. See Richardson v. Perales, 402 U.S. 389 (1971); Vonthronsohnhaus v. Ingalls Shipbuilding, Inc., 24 BRBS 154, 157 (1990); 33 U.S.C. §923(a); 20 C.F.R. §702.339. Claimant's argument that Ms. Wilson's testimony does not provide substantial evidence to support the administrative law judge's modification determination is accordingly rejected.[3]

Claimant's contention that the administrative law judge abused his discretion in denying his post-hearing motion to reopen the record for the receipt of Ms. Wilson's vocational report is also rejected. In his October 2, 1990, Order denying claimant's motion, the administrative law judge, noting that claimant did not seek to have this evidence admitted until after an adverse decision had been rendered, essentially concluded that claimant had not been diligent in developing and submitting this evidence.[4] The administrative law judge has broad discretion in determining whether to reopen the record after the hearing for the submission of additional evidence and his rulings on evidentiary matters are reversible only it they are arbitrary, capricious, or an abuse of

[2]At the initial hearing employer's vocational expert, Mr. Bouchard, testified that claimant could perform security guard or custodial work. August 14, 1980 Tr. at 97.

[3]Contrary to claimant's assertions on appeal, claimant's failure to cooperate with employer's vocational efforts is a proper factor to be considered in determining the extent of claimant's disability. See Dangerfield v. Todd Pacific Shipyards Corp., 22 BRBS 104, 109-110 (1989); Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 126, decision on reconsideration, 17 BRBS 160 (1985). The administrative law judge, however, does not appear to have placed any significant reliance on this factor in determining that claimant was only partially disabled in this case.

[4]The administrative law judge also determined that claimant's motion evinces an attempt to delay the proceedings without good cause.

discretion. See Ramirez, 25 BRBS at 264. Given claimant's counsel's lack of diligence in not submitting this evidence in a timely manner, we conclude that the administrative law judge did not abuse his discretion in refusing to reopen the record in this case. See Sam v. Loffland Brothers, Co., 19 BRBS 228, 230 (1987).[5] Moreover, as claimant's counsel was present at the pre-trial deposition of Ms. Wilson, and claimant was afforded the opportunity to cross-examine Ms. Wilson at the modification hearing, the administrative law judge's decision not to admit this report into evidence was not prejudicial and did not violate claimant's due process rights. See Cornell v. Lockheed Aircraft International, 23 BRBS 253, 258-259 (1990); Carter v. General Elevator Co., 14 BRBS 90 (1981).[6]

[5]Citing the transcript of the modification proceedings at 84-87, claimant maintains that at the hearing it objected to employer's failure to comply with his pre-trial request for production of this document. The objection referred to in the transcript, however, involved employer's failure to produce the report of Mr. Blanchard, the vocational expert who testified at the initial hearing, which Ms. Wilson relied upon in forming her opinion.

[6] Claimant also argues on appeal that subsequent to the administrative law judge's decision on modification, he applied for, but was unable to obtain any of the alternate jobs identified by Ms. Wilson and that he would have also presented this evidence if his motion to reopen the record had been granted. As this argument was not raised before the administrative law judge, we decline to address it on appeal. See Maples v. Texports Stevedores Co., 23 BRBS 302 (1990), aff'd sub. nom. Texports Stevedores Co. v. Director, OWCP, 931 F.2d 331 (5th Cir. 1991). Any evidence claimant possesses on this issue may be presented by filing for modification with the administrative law judge.

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge