BRB No. 93-1386

YVONNE OVERBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BANGOR NCO CLUB	)	DATE ISSUED:
	)	
and	)	
	)	
AIR FORCE CENTRAL WELFARE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Modification of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Paul A. Gargano (Law Offices of Paul A. Gargano), Cambridge, Massachusetts, for claimant.

Roy H. Leonard (Office of Legal Counsel, Air Force MWR and Services Agency), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order of Modification (92-LHC-1114) of Administrative Law Judge Vivian Schreter-Murray 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

While employed as a bartender, claimant sustained an injury to her back when she slipped and fell while walking out of a walk-in cooler on January 23, 1987. Administrative Law Judge Martin J. Dolan, Jr. initially awarded claimant benefits for temporary total disability from May 1, 1987, but denied benefits for five days on which claimant worked at the club. On May 24, 1989, claimant started working for another employer, G & M.[1] Emp. Ex. 20. Employer subsequently filed a motion for modification on June 1, 1990, pursuant to Section 22 of the Act, 33 U.S.C. §922. Ruling on employer's motion for modification, Administrative Law Judge Vivian Schreter-Murray found that claimant was no longer temporarily totally disabled as of May 24, 1989, when claimant began working for G & M. The administrative law judge awarded claimant temporary partial disability benefits from May 24, 1989 until May 24, 1992, and permanent partial disability benefits from May 24, 1992, when claimant reached maximum medical improvement. On appeal, claimant challenges the administrative law judge's determination that modification of her award was appropriate and that employer established suitable alternate employment. Employer responds in support of the administrative law judge's findings.

Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification based on a mistake of fact or change in conditions. Modification based on a change in conditions may be granted where the claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144 (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Employer may attempt to modify a total disability award pursuant to Section 22 by establishing the availability of suitable alternate employment. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989). Where it is shown that claimant is unable to perform her usual job, as here, the burden shifts to employer to demonstrate the availability of suitable alternate employment opportunities that are available to claimant in the local community which considering her age, education, work experience and physical restrictions, she is capable of performing and which she could realistically secure if she diligently tried. Claimant is at most partially disabled if employer establishes suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Blake v. Ceres Inc.*, 19 BRBS 219 (1987).

Claimant initially argues that the administrative law judge erred in granting employer's motion for modification as there has been no change in claimant's physical condition or wage-earning capacity. Employer responds that modification was properly granted by the administrative law judge as the evidence reflects a change in claimant's condition both physically and economically as claimant reached maximum medical improvement and returned to work for another employer after the initial Decision and Order was issued and after the initial hearing in this case, respectively.

[1]We refer to this employer as G & M but note that Administrative Law Judge Schreter-Murray uses the name G & M Market(s) while claimant refers to it by the name of G & M Variety. Decision and Order of Modification at 3, 5, 7, 9; Tr. of July 28, 1992 at 16.

We agree with employer. Although Administrative Law Judge Dolan found that claimant could work only four hours a day, Administrative Law Judge Schreter-Murray subsequently found that claimant could work eight hours a day based on newly submitted evidence.[2] Decision and Order of Modification at 3-4; Decision and Order at 6; Cl. Ex. 1 at 15, 31; Emp. Ex. 4. Administrative Law Judge Schreter-Murray permissibly determined that claimant's testimony that she cannot work eight hours a day was inconsistent with and not supported by the medical evidence. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969); Decision and Order of Modification at 4-5; Cl. Ex. 1; Emp. Ex. 4; Tr. of July 28, 1992 at 35-37. Thus, employer established that there was a change in claimant's physical condition permitting her to work more hours.

Furthermore, after the initial hearing was held, but before Administrative Law Judge Dolan's Decision and Order was issued, claimant returned to work for another employer on May 24, 1989. Decision and Order of Modification at 3; Emp. Ex. 20. Claimant argues that the administrative law judge erred by finding that this job constitutes suitable alternate employment and that she erred in failing to impose the burden on employer to establish suitable alternate employment. Claimant asserts that the testimony of Mr. Ellingwood, employer's vocational counselor, is insufficient to establish suitable alternate employment. Contrary to claimant's contention, a job which claimant secures on her own initiative may constitute suitable alternate employment, as it satisfies employer's burden of showing the availability of a realistic job opening. *See generally Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990); *Shiver v. United States Marine Corps, Marine Base Exchange*, 23 BRBS 246 (1990). Moreover, the administrative law judge rationally found that claimant's current employment at G & M constitutes suitable alternate employment. The administrative law judge found that claimant's position is not sheltered because the position offers full-time work and claimant is one of nine employees who has worked regularly over the past years. *See generally Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986); *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981); Decision and Order of Modification at 5; Tr. of July 28, 1992 at 16-17, 24. Claimant works 30-35 hours per week at G & M, the same number of hours she worked at employer's club, and she testified full-time work is available at G & M. Tr. of July 28, 1992 at 21-22, 24, 44-45, 47. The administrative law judge found that the position is within claimant's physical restrictions, and she noted that claimant worked regularly at G & M during the last year with the exception of three or four days when she called in sick.[3] Tr. of July 28, 1992 at 18. We affirm the administrative law judge's finding that claimant's

[2]Dr. Wickenden testified that claimant has the ability to perform a light duty job with intermittent standing for eight hours. Cl. Ex. 1 at 15, 31. Dr. Wickenden also completed a work restriction evaluation which indicated that claimant could return to light work eight hours a day and that she reached maximum medical improvement on February 20, 1992. Emp. Ex. 4.

[3]Claimant's description of her job in a deli where she makes pizza, sandwiches, hot dogs, and hamburgers for four or five hours a day, and Dr. Wickenden's statement that claimant would be able to work behind a counter at a cash register for eight hours a day support the administrative law judge's finding that claimant's work at G & M is within her restrictions. Tr. of July 28, 1992 at 16; Cl. Ex. 1 at 31.

employment with G & M constitutes suitable alternate employment as it is rational and supported by substantial evidence.[4] Consequently, we affirm the administrative law judge's finding that employer established a change in claimant's physical and economic condition sufficient to warrant modification of the prior award, as claimant now has a higher post-injury wage-earning capacity. *See Rambo*, 115 S.Ct. at 2144; *Fleetwood*, 776 F.2d at 1225, 18 BRBS at 12 (CRT); *Wynn*, 21 BRBS at 290.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]We need not address claimant's contentions concerning Mr. Ellingwood's testimony as the administrative law judge did not rely on it in finding suitable alternate employment established.