BRB Nos. 03-0718
and 03-0718A

JOSEPH N. DANIELS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 21, 2004
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (2000-LHC-2459, 2460, 2461, and 2002-LHC-1918) of Administrative Law Judge Richard E. Huddleston 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a shipwright, injured his knees at work in 1993. Initially, the administrative law judge found that claimant cannot return to his usual work as stipulated by the parties, and that employer did not establish the availability of suitable alternate employment. Thus, the

administrative law judge awarded claimant ongoing permanent total disability benefits from October 5, 1999, for his work-related knee injuries. Claimant and employer appealed the administrative law judge's decision. BRB Nos. 02-494/A. Before the Board decided the appeals, both parties moved for modification; the Board dismissed the appeals in Orders dated May 9, 2002, and September 26, 2002. In his decision on modification, the administrative law judge modified the award of benefits to acknowledge claimant's entitlement to the temporary and permanent disability benefits which employer voluntarily had paid. The administrative law judge denied employer's modification request, finding that employer did not establish a mistake in fact in the prior finding that employer did not establish the availability of suitable alternate employment.

Both parties filed timely appeals of the administrative law judge's Decision and Order on modification. BRB Nos. 03-0718/A. By motion dated September 9, 2003, employer sought to reinstate its appeal of the administrative law judge's original award of benefits. By Order dated October 17, 2003, the Board denied this motion as employer's request to reinstate its original appeal was not made within 30 days of the date the administrative law judge's decision on modification was filed. Hence, we now consider only those portions of the parties' briefs that address the administrative law judge's Decision and Order on modification. Employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment. In his appeal, claimant challenges the propriety of the administrative law judge's consideration of employer's modification request. Both parties have filed response briefs.

We first address claimant's appeal. Claimant contends that the administrative law judge erred in considering employer's request for modification because it was not based on new evidence or evidence that was unavailable at the first hearing. 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. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT)(1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256, *reh'g denied*, 404 U.S. 1053 (1971); *see Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT)(2d Cir. 2003); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT)(7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The decision to reopen a case due to a mistake in fact must render justice under the Act. *See O'Keeffe*, 404 U.S. at 256; *Banks*, 390 U.S. at 464; *Old Ben Coal Co.*, 292 F.3d at 546-547, 36 BRBS at 44-45(CRT).

In the instant case, employer sought modification of the administrative law judge's finding that it did not establish the availability of suitable alternate employment, alleging a mistake in fact. Employer asserted that the administrative law judge erred in finding that claimant could not perform the jobs it identified as suitable because of his intellectual limitations. Employer also asserted that the administrative law judge erred in finding that the unarmed security guard jobs it identified are not suitable for claimant.[1] At the hearing on modification, employer presented the testimony of prospective employers for the security guard positions and the testimony of Mr. Kay, employer's vocational expert.[2] *See* 2002 Tr. at 30, 54, 64-65, 80, 86-87.

Contrary to claimant's contention, the administrative law judge properly found that employer's right to seek modification is not limited merely because the evidence it seeks to introduce on modification could have been developed prior to the initial hearing. *See Banks*, 390 U.S. 459; *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT). Section 22 displaces notions of finality and evinces the Act's preference for accuracy unless modifying the earlier decision would not render "justice under the Act." *Old Ben Coal Co.*, 292 F.3d 533, 36 BRBS 35(CRT); *see also Jensen*, 346 F.3d 273, 37 BRBS 99(CRT); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Employer is not required to proffer, as a threshold matter, newly discovered evidence before the administrative law judge considers its modification request. *Jensen*, 346 F.3d at 277, 37 BRBS at 101-102(CRT). Moreover, claimant did not suggest to the administrative law judge any extenuating circumstances that would warrant denial of employer's modification request prior to the administrative law judge's addressing employer's evidence. *See McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). Thus, we hold that the administrative law judge's consideration of employer's modification request was proper. *See Consolidated Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-291, 2-296 (6th Cir. 1994); *Jessee*, 5 F.3d at 724, 18

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[1] In his original decision, the administrative law judge found that employer identified one suitable alternate position, as a donation center attendant with Goodwill Industries. Pursuant to *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), the administrative law judge found that the identification of only one alternate position is insufficient to satisfy employer's burden of establishing suitable alternate employment.

[2] Employer's documentary evidence on modification included policies from three different universities indicating the types of intelligence testing they would require to make accommodation decisions for disabled students, specifically rejecting the Slosson Intelligence Test (SIT) which Mr. DeMark used to assess claimant's IQ. Emp. Exs. 6M-8M. Employer also submitted three workers' compensation cases which indicated that a claimant would not be found disabled based on a low IQ score alone. Emp. Exs. 9M-11M. Also included were claimant's elementary and high school report cards indicating passing grades in all subjects with no special education classes noted. Emp. Ex. 14M.

BLR at 2-28.

We next address employer's appeal of the administrative law judge's finding on modification that it did not establish the availability of suitable alternate employment. Employer asserts that the jobs it identified in customer service, as a driver, and as an unarmed security guard are suitable for claimant. Employer also contends that the administrative law judge erred in finding that claimant established diligence in pursuing alternate employment opportunities. Once claimant establishes an inability to perform his usual employment because of a job-related injury, as stipulated by the parties in the instant case, the burden shifts to employer to establish the availability of a range of suitable alternate employment opportunities. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). In order to defeat employer's showing of the availability of suitable alternate employment and retain eligibility for total disability benefits, claimant must establish he diligently sought, but was unable to obtain, alternate employment opportunities of the type shown by employer to be suitable and available. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74(CRT)(4th Cir. 1984); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991). We reject employer's contentions of error, as the administrative law judge thoroughly addressed each of employer's contentions on modification and his decision is rational and supported by substantial evidence.

The administrative law judge rationally found the jobs identified by employer are not suitable based on the opinion of Mr. DeMark, claimant's vocational expert, that claimant does not have the skills or abilities to be competitive in today's labor market due to his vocational deficits. *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); 2001 Tr. at 129-135; Cl. Ex. 11 at 3. Mr. DeMark took into account the results of claimant's intelligence and vocational testing, claimant's transferable skills and physical restrictions, and the descriptions of the specific jobs identified, as well as these jobs' general definitions from the *Dictionary of Occupational Titles* (*DOT*). The administrative law judge rationally found that intelligence testing plays a role in assessing the ability of claimant to realistically perform a job, and that

employer must establish such ability in order to prove suitable alternate employment.[3] *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); 2003 Decision and Order at 13. In this regard, the administrative law judge painstakingly addressed employer's contentions regarding claimant's ability to perform alternate jobs because his pre-injury job with employer had a "specific vocational preparation" (SVP)[4] of eight years, and employer has not cited any errors in the administrative law judge's reasoning. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); 2003 Decision and Order at 14-15. The administrative law judge also rationally relied on Mr. DeMark's explanation of claimant's receipt of a high school diploma despite his intellectual limits, as Mr. DeMark testified that claimant may have been enrolled in special education classes or was socially promoted. *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); 2003 Decision and Order at 12-13; 2001 Tr. at 119.

Additionally, the administrative law judge acted within his discretion in rejecting the opinion of employer's vocational expert, Mr. Kay, because he relied upon the *DOT* to assign strength ratings and physical job descriptions but would not rely on the *DOT*'s statement that the jobs he identified require "average" intelligence. *See generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 2003 Decision and Order at 13; Emp. Ex. 12 at 10-13; 2002 Tr. at 80. In addition to crediting Mr. DeMark's testimony, the administrative law judge rationally rejected the security jobs because of the possibility that claimant would be unable to handle physical confrontation in emergencies, although the administrative law judge acknowledged the testimony of the three prospective employers that physical confrontation was rare. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); 2003 Decision and Order at 17, 19; 20; 2002 Tr. at 36-37, 57-58; Cl. Ex. 21 at 14-16. Thus, as the administrative law judge fully addressed employer's contentions on modification and as his finding that employer did not establish suitable alternate employment is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer did not show a mistake in fact in the initial decision. The award of

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[3] Thus, the administrative law judge rationally discounted the testimony of prospective employers, Messrs. Cote and Hill, that they would not consider claimant's IQ score in their *hiring* decisions, as the administrative law judge found that this factor was more relevant to claimant's ability to *perform* the jobs.

[4] SVP is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job situation. 2003 Decision and Order at 11 n. 6.

total disability benefits is affirmed.[5]

Accordingly, the administrative law judge's Decision and Order on modification awarding claimant disability benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5] We also affirm the administrative law judge's alternative finding that assuming, *arguendo*, employer established the availability of suitable alternate employment, claimant established diligence in seeking alternate employment opportunities. The administrative law judge rationally found that claimant established diligence in seeking alternate employment based on his desire for employment and his job search. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT); *see also Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); 2003 Decision and Order at 20-21; Cl. Ex. 14; 2001 Tr. at 36-44.