LARRY T. WYATT	)	BRB No. 12-0647
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CP & O, LLC	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	DATE ISSUED: 07/08/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	
	)	
	)	
LARRY T. WYATT	)	BRB No. 13-0138
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CP & O, LLC	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Order for Authorization of Medical Treatment of T. A. Magyar, District Director, United States Department of Labor, and of the

Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker, & Hedrick, P.C.), Newport News, Virginia, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order for Authorization of Medical Treatment (Case No. 05-127005) of District Director T. A. Magyar and claimant appeals the Decision and Order (2012-LHC-00606) of Administrative Law Judge Kenneth A. Krantz 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 review the district director's findings under the abuse of discretion standard. *Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained an injury to his left leg and back while working for employer on February 13, 2008. On February 21, 2008, claimant began treatment with Dr. Carlson, who performed a left L5-S1 microdiskectomy on July 23, 2008, and an L5-S1 revision with decompression and fusion and posterior lumbar interbody fusion on February 4, 2009. On October 26, 2009, claimant underwent a functional capacity evaluation, and on November 30, 2009, Dr. Carlson assigned permanent restrictions against driving a hustler, and limited claimant's peak material handling to 50 pounds, occasional floor-to-shoulder material handling to 35 pounds, and frequent handling to 10 pounds. CX 2. Based upon this evidence, the parties stipulated that claimant had a residual wage-earning capacity and was entitled to permanent partial disability benefits. Pursuant to the stipulations, the administrative law judge awarded claimant temporary total disability benefits from February 14, 2008 through March 24, 2010, and permanent partial disability benefits from March 25, 2010, based on a residual wage-earning capacity of $181.25 per week. EX 1.

After his surgeries, claimant continued to have complaints of pain related to his work injury, and Dr. Carlson referred him to Dr. Andrus, a pain medicine physician. On May 6, 2010, Dr. Andrus diagnosed failed back surgery syndrome with persistent back and left lower extremity pain, and lumbar degenerative disc disease. CX 1-74, 1-74. Dr. Carlson did not believe further surgery would benefit claimant based upon his failure to respond to the prior surgeries. Claimant sought second opinions with Drs. Fiore and Byrd, both of whom considered surgery an option in claimant's treatment. CXs 24-3, 38-4. Based on these surgical recommendations, claimant sought modification of his prior award as well as a change in his treating physician.

BRB No. 12-0467

In an informal conference with the district director in January 2011, claimant requested a change of treating physician pursuant to Section 7(b) of the Act, 33 U.S.C. §907(b). The initial recommendation of the district director denied the request, finding that claimant failed to show good cause for the change. On October 26, 2011, the district director held another informal conference; she issued a formal order on December 13, 2011, again denying claimant's request to change his treating physician from Dr. Carlson to Dr. Byrd because claimant did not show good cause for a change of physician.[1] On August 16, 2012, based "upon further review," and without explanation, the district director issued an Order approving claimant's request to change his treating physician to Dr. Byrd. Employer appeals, contending that the district director's granting claimant a change in physicians is arbitrary, as she provided no reason for her decision. The Director, Office of Workers' Compensation Programs (the Director) responds, conceding error, as the district director did not provide any rationale for her revised position on claimant's request to change physicians. Claimant responds, urging affirmance of the district director's Order.

The district director has authority to order a change of physicians pursuant to Section 7(b) of the Act, 33 U.S.C. §907(b). *Jackson,* 31 BRBS 103. The implementing regulation at Section 702.406(b) provides: "The district director . . . may order a change of physicians or hospitals when such a change is found to be necessary or desirable. . . ." 20 C.F.R. §702.406(b). Twice in this case the district director denied claimant's request for a change of physicians explaining that claimant had not shown good cause for such

[1]Claimant initially sought to change his treating physician from Dr. Carlson to Dr. Fiore, but changed his request to Dr. Byrd because Dr. Byrd's office was closer to his home. The district director denied the request for a change because: (1) claimant sought second and third opinions without the consent of employer or the district director; (2) there was no evidence that Dr. Carlson refused to treat claimant or was not an appropriate specialist; and (3) Dr. Fiore agreed that there were a variety of valid treatment options for back injuries. Dec. 13, 2011, Order at 5-6.

change. The district director then summarily granted the request for a change to Dr. Byrd without any explanation. As the district director provided no rationale pursuant to the Act and regulations which may be reviewed by the Board, and the Director concedes error, we vacate the district director's order authorizing a change of physician. We remand this case to the district director to address whether claimant's request for a change in physician is "desirable or necessary in the interest of [claimant]" and to fully explain her reasons therefor. 33 U.S.C. §907(b); *Jackson*, 31 BRBS at 107-108.

BRB No. 13-0138

Claimant sought modification of the administrative law judge's award of permanent partial disability benefits. Claimant argued before the administrative law judge that, as of October 14, 2010, he did not have the residual functional capacity to perform any work, that Mr. DeMark's vocational evidence establishes claimant is unemployable, that employer's labor market survey does not establish the availability of suitable alternate employment, and that claimant diligently sought, but was unable to obtain, alternate work. Thus, claimant asserted he established a change in his physical and economic conditions and is entitled to total disability benefits commencing October 14, 2010. The administrative law judge characterized claimant's argument as contending he is entitled to modification because his condition requires further surgery. Addressing the argument in this manner, the administrative law judge found the preponderance of evidence does not establish that claimant needs further surgery; therefore, he found that claimant did not establish a change in his physical condition. Further, the administrative law judge summarily found that claimant did not present evidence of a change in his economic condition and he denied modification. Claimant appeals the denial of his petition for modification. Employer has not responded to this appeal.

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 showing of a mistake of fact in the initial decision or a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The moving party, claimant in this case, bears the burden of showing that the claim comes within the scope of Section 22. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*), 521 U.S. 121, 31 BRBS 54(CRT) (1997). The standard for determining disability is the same for a Section 22 modification proceeding as it is for an initial proceeding under the Act. *See, e.g., Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). "[T]the modification process is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497-498 (4th Cir. 1999).

Claimant contends the prior decision should be modified, irrespective of whether additional surgery is appropriate for his condition, because he is unable to perform any work due to pain from the work injury.[2] While the necessity of additional surgery is a factor in assessing claimant's physical condition, there is other evidence that claimant sustained a change in his physical and/or economic condition. Mr. DeMark, claimant's vocational consultant testified on deposition that claimant does not have the necessary skills to compete for certain entry level positions and that commuting over 20 to 30 miles for a minimum wage job is unreasonable.[3] CX 20 at 25, 32. Mr. DeMark stated claimant is not competitive for any of the jobs identified in Mr. Albert's amended labor market survey. CX 18 at 1. Similarly, Ms. Chaney, a vocational counselor stated that claimant's "lack of transferable skills and his poor educational background make him a poor candidate for returning to work within his restrictions." CX 14 at 4. Dr. Fiore stated that claimant should not perform anything greater than light-duty work due to claimant's pain. CX 36 at 12. Dr. Byrd stated that claimant is not capable of working because of his pain. CX 38 at 4.

In contrast, Dr. Carlson stated claimant did not have a change in his symptoms or complaints. CX 37 at 23. Dr. Andrus stated claimant could continue to work at the medium physical demand level per the October 2009 functional capacity evaluation. EX 4 at 13. Employer offered two labor market surveys, dated June 2010 and July 2011. EX 16. Dr. Carlson approved the jobs in the July 2011 survey. EX 7 at 5-19.

The administrative law judge did not address this evidence in terms of whether claimant's physical condition deteriorated such that he cannot perform alternate work. The administrative law judge also did not address the vocational evidence proffered by the parties. Evidence that alternate employment is or is not suitable or available may provide grounds for modifying prior awards. *See Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). Therefore, we vacate the administrative law judge's finding that the prior

[2]In this case, the parties stipulated that claimant was permanently partially disabled as of March 25, 2010, and retained a residual wage-earning capacity of $181.25 per week. An award based on the parties' stipulations is subject to modification. *Buttermore v. Electric Boat Corp.*, 46 BRBS 41 (2012); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

[3]In this respect, claimant avers that employer's consultant, Mr. Albert, resides in Florida and does not have a sense of the Hampton Roads region and the reasonableness of commuting distances for minimum wage jobs.

award should not be modified and we remand the case for further discussion of claimant's motion for modification.[4]

Accordingly, the District Director's Order Regarding Medical Treatment and the Decision and Order of the administrative law judge are vacated and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[4]If the administrative law judge finds the availability of suitable alternate employment established, he should address whether claimant conducted a diligent yet unsuccessful search for employment. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).