BRB No. 12-0498

MICHAEL REYNOLDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC USA, INCORPORATED	)	DATE ISSUED: 06/12/2013
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Granting Section 22 Modification and Award of Medical Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Peter D. Quay (Law Offices of Peter D. Quay, L.L.C.), Taftville, Connecticut, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Section 22 Modification and Award of Medical Benefits (2011-LHC-01439) of Administrative Law Judge Timothy J. McGrath 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 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 injured his back on August 8, 2007, while working for employer. He was diagnosed with a lumbar sprain, disc degeneration, and a lumbosacral strain. Claimant has not returned to work. He filed a claim for temporary total disability benefits and medical benefits. In a Decision and Order dated May 7, 2009, Administrative Law Judge Donald W. Mosser found that claimant's work-related injury resulted in ongoing temporary total disability, beginning August 8, 2007. 33 U.S.C. §908(b). Judge Mosser also awarded claimant reasonable and necessary medical care, 33 U.S.C. §907, including an evaluation by an orthopedic specialist, assuming his chosen treating physician deemed such a referral necessary. Emp. Ex. 1.

Following Judge Mosser's decision, claimant treated with Dr. Mastroianni, an orthopedic surgeon. Based on an MRI administered in November 2009, Dr. Mastroianni diagnosed bulging discs at L3-4 and L4-5, and a herniation at L5-S1, and he recommended that claimant undergo a discectomy stabilization and fusion. Emp. Ex. 4 at 7. Surgery was authorized and set for June 2010; however, due to trepidation, claimant declined the surgery, and in August 2010 requested an alternative treatment. Dr. Mastroianni referred claimant to Dr. Bader for an epidural steroid injection in September 2010. In October 2010, employer requested that Dr. Mastroianni complete an OWCP-5 form, indicating claimant's work restrictions. Dr. Mastroianni stated that claimant had declined surgery and was released to light-duty work. He indicated that claimant's condition had not reached maximum medical improvement at that time, but that claimant could sit continuously, all other activities were to be intermittent, and lifting should be limited to 10-20 pounds. *Id.* at 26-27; Emp. Ex. 2 at 18-19. On November 4, 2010, claimant returned to Dr. Mastroianni's office complaining of pain, underwent another MRI on November 23, 2010, and agreed to reschedule surgery for December 2010. Again claimant cancelled the operation, and Dr. Mastroianni determined that, absent surgery, claimant's condition was at maximum medical improvement. Claimant later returned to Dr. Mastroianni, in pain and requesting surgery, which was scheduled for April 2011 and was again cancelled. At his deposition, Dr. Mastroianni stated claimant's condition had worsened between June 2010 and April 2011. He also clarified that he considered his doctor-patient relationship with claimant terminated. Emp. Ex. 4 at 8-14, 39-40.

Based on the OWCP-5 form, employer obtained a labor market survey identifying jobs claimant could perform which would pay greater than claimant's average weekly wage. On December 10, 2010, employer filed a motion for modification of Judge Mosser's award of temporary total disability benefits. Employer moved to terminate claimant's disability benefits on the ground that suitable alternate employment was available for claimant based on Dr. Mastroianni's opinion that claimant could work. Emp. Exs. 2, 12.

Administrative Law Judge McGrath (the administrative law judge) granted employer's motion for modification. He found that Dr. Mastroianni testified that claimant is physically capable of some employment, despite the lack of improvement of his physical condition. The administrative law judge also found that employer established the availability of suitable alternate employment, based on two entry-level cashier positions paying at least $173 per week, beginning July 26, 2011.[1] Decision on Modif. at 15, 18. Accordingly, the administrative law judge terminated claimant's disability benefits.[2] Claimant appeals the termination of his benefits, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in granting employer's motion for modification, arguing that his physical condition had not changed, and in fact deteriorated such that he could not perform any work. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; it allows the modification of a compensation award on the grounds of a change in a claimant's physical or economic condition or a mistake in the determination of a fact. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276, 37 BRBS 99, 101(CRT) (2d Cir. 2003). The standard for determining the extent of a claimant's disability is the same in a modification proceeding as in the initial proceeding. *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). Accordingly, once, as here, the administrative law judge finds that the claimant is unable to return to his usual employment as a longshoreman, the burden shifts to the employer to establish the availability of suitable alternate employment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Claimant contends the administrative law judge erred in finding that he could perform alternate work. Specifically, he asserts that the administrative law judge mischaracterized Dr. Mastroianni's testimony, which he avers supports his assertion that his physical condition has deteriorated rather than improved. Further, claimant contends the administrative law judge erred in failing to consider his credible complaints of pain in assessing his disability.

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[1]Claimant was receiving temporary total disability benefits of $143.50 per week. *See* 33 U.S.C. §906(b)(2).

[2]The administrative law judge also found that claimant's request for an MRI, pursuant to Dr. Zimmerman's October 27, 2011, evaluation is reasonable and necessary, regardless of who is ultimately authorized by either employer or the district director to be claimant's treating physician. Decision on Modif. at 20-22. This aspect of the decision has not been challenged on appeal and is, therefore, affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

The administrative law judge observed that the initial award of temporary total disability benefits was based on Judge Mosser's conclusion that such award was warranted "[u]ntil such time as the claimant is adequately evaluated and treated by his selected physician…." Emp. Ex. 1 at 7. The administrative law judge found that claimant was evaluated and treated by his physician, Dr. Mastroianni, who declared claimant's condition permanent and found him capable of sedentary work in view of his refusal to undergo surgery. Thus, the grant of modification was not premised solely on the fact of improvement in claimant's physical condition, but on the existence of new evidence regarding claimant's ability to work. *See generally Jensen*, 346 F.3d 273, 37 BRBS 99(CRT).

We reject claimant's assertion that the administrative law judge mischaracterized Dr. Mastroianni's deposition testimony concerning claimant's ability to work. It is well established that the administrative law judge is entitled to evaluate and weigh the evidence of record. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Despite Dr. Mastroianni's statements that claimant's condition has not improved and he still is in need of surgery, Dr. Mastroianni definitively stated he believed that claimant could perform sedentary work where he could sit for any amount of time and perform other activities for intermittent periods, including lifting less than 20 pounds. Emp. Ex. 4 at 26-27, 33, 41-42. Although Dr. Mastroianni also stated that claimant is not "practically" capable of employment, this assessment was based on claimant's age and relative lack of education, and the poor economy, in conjunction with claimant's physical limitations. *Id.* at 33. The administrative law judge accounted for claimant's education levels in assessing the suitability of the various jobs employer identified. *See* Decision on Modif. at 16-18; Emp. Ex. 12. Moreover, employer need not obtain a job for claimant; its burden is to "merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 6(CRT) (2d Cir. 1991). The administrative law judge also addressed claimant's likelihood of success in obtaining a job. Mr. Sabella, claimant's vocational consultant, found claimant unemployable due to his restrictions and chronic pain, but the administrative law judge relied on Mr. Sabella's concession that he has worked with a few people who returned to work with chronic pain. Emp. Ex. 15 at 24. Thus, the administrative law judge addressed those "practical" impediments to claimant's employability and his findings are rational and supported by substantial evidence. *See generally Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010). That other findings and inferences could have resulted from the evidence does not detract from those made by the administrative law judge. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993).

However, claimant correctly avers that the administrative law judge failed to assess his testimony and other evidence concerning his pain in addressing his ability to work. A claimant's credible complaints of pain, alone, may support an award of total disability benefits. *See, e.g., Devor v. Dept. of the Army,* 41 BRBS 77 (2007); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, claimant testified that his condition is "worse than ever." Tr. at 39. Claimant also explained that he cannot stand or walk very long without feeling pain, that he uses a cane for support when his side starts "burning," and that if he tries to bend, he suffers a shooting pain in his legs and back. He also stated that he must change positions regularly to avoid discomfort. *Id.* at 33-35. He testified that he does not believe he can work as a cashier. *Id.* at 64. Dr. Zimmerman reported that, on October 27, 2011, claimant was in "severe distress" with "incapacitating lumbar and bilateral buttock pain." Cl. Ex. 1.

In his summary of the testimony, the administrative law judge acknowledged claimant's statements of pain, but he did not note Dr. Zimmerman's report of claimant's complaints of pain. Decision on Modif. at 5, 10, 14. Additionally, the administrative law judge acknowledged that claimant is unable to take narcotic pain medications and his statement that he was afraid to undergo surgery with Dr. Mastroianni but he might undergo surgery if Dr. Zimmerman recommends it. *Id.* at 5-7. Nevertheless, with the exception of rejecting Mr. Sabella's conclusion concerning claimant's inability to work, the administrative law judge did not address the evidence of pain in discussing claimant's ability to return to any work. Decision on Modif. at 16-19. As claimant's disability may be established by credible complaints of pain, we vacate the administrative law judge's finding that claimant is no longer disabled, and we remand the case for the administrative law judge to specifically address whether claimant's pain prevents him from returning to any work.[3]

[3]If the administrative law judge finds that claimant's pain precludes any work, then claimant remains totally disabled. *See generally J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010) and is entitled to benefits. In the event the administrative law judge finds claimant's complaints are not credible or his pain does not preclude his working, we note that claimant does not otherwise challenge the finding that the cashier jobs constitute suitable alternate employment. Thus, the administrative law judge may again find that the prior award should be modified. *See Spitalieri v. Universal Maritime Services,* 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). The administrative law judge properly stated that claimant may seek modification if he should undergo surgery in the future or be unsuccessful in his attempts to find a job, given his background and physical limitations. Decision on Modif. at 19; *Ion v. Duluth, Missabe & Iron Range Ry. Co*., 32 BRBS 268

Accordingly, the administrative law judge's Decision and Order Granting Section 22 Modification is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

(1998); *Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).