BRB No. 01-0549

MELVIN L. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 15, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Motion for Reconsideration (1998-LHC-0982) of Administrative Law Judge Richard K. Malamphy 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 rigger, injured his back at work on March 11, 1987. He returned to

light duty work with employer but was terminated on May 8, 1989. A district director issued a compensation order on October 24, 1990, based on the parties' stipulations, awarding claimant various periods of temporary total and partial disability benefits. Employer requested modification of this award on June 23, 1995, asserting that claimant's 1987 injury resolved by October 24, 1990. *See* 33 U.S.C. §922. Upon employer's request for modification, the administrative law judge found that claimant's symptoms from the 1987 injury had not completely resolved. The administrative law judge also found that employer established the availability of suitable alternate employment on November 17, 1993, that claimant reached maximum medical improvement on November 10, 1989, and he therefore modified the 1990 compensation order accordingly. The administrative law judge awarded claimant permanent total disability benefits from November 10, 1989, to November 16, 1993, and permanent partial disability benefits from November 17, 1993, and continuing. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's finding that claimant's injury had not completely resolved, and that it established the availability of suitable alternate employment only as of November 1993. Claimant responds in support of the administrative law judge's decision.

Employer contends that the administrative law judge erred in crediting the opinion of claimant's treating physician, Dr. Phillips, that claimant's back injury has not resolved, over the contrary opinions of its experts, Drs. Neal, Kirven, Lesnick, Porter, Clifton, Butterworth, Friedman, and Muizelaar, on the basis that its doctors had seen claimant only once. Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation, may request modification based on a mistake in fact or a change in claimant's physical or economic conditions. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT)(1995). Questions of witness credibility are for the administrative law judge as trier-of-fact, *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), and it is solely within the administrative law judge's discretion to accept or reject all or any part of any witnesses' testimony. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

In his Decision and Order, the administrative law judge found that claimant's symptoms from the 1987 injury had not completely resolved by October 24, 1990, because claimant's complaints remained constant after that date, and Dr. Phillips, who provided continuing treatment, did not believe that claimant's symptoms from the 1987 injury had resolved. The administrative law judge rejected the opinions of employer's doctors, that claimant's symptoms from the 1987 injury had resolved,

because employer's doctors were non-treating physicians who primarily examined claimant on a one-time basis. We affirm the administrative law judge's decision to credit Dr. Phillips's opinion because the administrative law judge discussed the medical evidence in detail, noted the qualifications and bases of all physicians' opinions, and acted within his discretion in relying on Dr. Phillips's opinion as claimant's treating physician. *See Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403; Decision and Order at 5-15; Cl. Ex. 15; Emp. Exs. 13-17, 19, 20, 23, 27, 41, 45. Thus, we affirm the finding that employer did not establish a change in claimant's physical condition.

Employer next contends that the administrative law judge erred in finding that it established the availability of suitable alternate employment only as of November 17, 1993. Employer asserts that the administrative law judge should have found that it established the availability of suitable alternate employment in 1990. Once claimant establishes an inability to perform his usual employment because of a job-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Employer may meets its burden of establishing the availability of suitable alternate employment by relying on a retrospective labor market survey so long as the jobs were available during the "critical period" during which claimant was able to work. *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 Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The date suitable alternate employment is established marks the end of claimant's entitlement to total disability benefits. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). These standards for establishing entitlement to disability compensation are the same in modification proceedings as they are in initial adjudications. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In his Decision and Order, the administrative law judge summarily rejected employer's argument that claimant could perform his pre-injury work as of October 1990, and merely stated, "The undersigned does not agree with a showing of SAE [suitable alternate employment] as of July 1991. It is felt that November 17, 1993 is a more appropriate date as [claimant] was offered a job at Wendy's at that time." Decision and Order at 16. We agree with employer that the administrative law judge erred in finding that employer established the availability of suitable alternate employment in 1993 without discussing and weighing relevant vocational evidence that supports the availability of suitable alternate employment in 1990. Vocational evidence provided by Ms. Whitfield and Mr. Klein indicates that in 1990 the positions available to claimant included cashier positions with Goodwill, Piccadilly Cafeteria,

and Old Dominion Shell; dispatcher at Associated Cabs; grinder/polisher at Custom Restorations, photograph laboratory assistant at MotoPhoto; unarmed security guard at Clemons Security, scheduler at DAV [Disabled American Veterans]; front desk clerk at Quality Inn; dispatcher at Jack's 24 Hour Wrecker Service; and telephone service employment with Purple Heart, DAV, and Goodwill. *See* Cl. Ex. 2-30 - 2-34; Emp. Exs. 31, 33, 34A, 43; Tr. at 174-193. We therefore vacate the administrative law judge's finding that employer established the availability of suitable alternate employment in 1993 and remand this case to the administrative law judge for further consideration of this issue. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). On remand, the administrative law judge must discuss and weigh all relevant vocational evidence and provide an adequate rationale for his findings with regard to when employer established the availability of suitable alternate employment. *Id.* Employer need not find a job for claimant but must only establish the availability of a range of jobs that claimant is physically and vocationally qualified to perform. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT)*; Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT)(4th Cir. 1988); *Tarner*, 731 F.2d 199, 16 BRBS 74(CRT).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Motion for Reconsideration awarding benefits are vacated with respect to the administrative law judge's finding that employer established the availability of suitable alternate employment on November 17, 1993, and the case is remanded for further consideration consistent with this opinion. In all other respects, the decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge