BRB No. 04-0691

IRA ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WILMINGTON STEVEDORES	)	DATE ISSUED:May 10, 2005
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Ira M. Anderson, II, Wilmington, Delaware, *pro se.*

Christopher J. Field (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order Denying Modification (03-LHC-0919) of Administrative Law Judge Ralph A. Romano 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). In an appeal by a claimant without legal representation, we will review the findings of fact and conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant, a longshoreman, suffered an injury on June 14, 1995,[1] and in 1998 was awarded ongoing permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). In 2003, claimant sought modification of that award, contending his condition has degraded and he is now permanently totally disabled.[2] 33 U.S.C. §922.

In his Decision and Order Denying Modification, the administrative law judge found that claimant continues to be capable of performing the suitable alternate employment demonstrated by employer at or above the wage-earning capacity found in the first proceeding. Accordingly, he denied modification. Claimant appeals, and employer responds, urging affirmance.

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). It is well established that the party requesting modification has the burden of showing the change in condition or mistake in fact. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Claimant argues that his condition has deteriorated to the point that he is totally disabled from all work. The administrative law judge determined that although claimant's condition may have worsened, claimant is not totally disabled. In his decision, the administrative law judge addressed both the medical and vocational evidence. There are two medical opinions of record, those of Dr. Crain, claimant's treating physician, CX 4, and Dr. Didizian, a board-certified orthopedic surgeon. EXs 2, 3. Both doctors place restrictions upon claimant's physical capabilities. Dr. Crain assigned a 30 percent left upper extremity impairment and restricted claimant from lifting anything more than 15 pounds and doing anything above waist high. CX 4. Dr. Didizian limited claimant from lifting more than 20 pounds on an intermittent basis and from performing repetitive motions above the shoulder level. EX 5. Both physicians recommended shoulder surgery, but claimant is reluctant to undergo such a procedure. HT at 28-30, 47-48.

[1] Claimant was injured when a crate of apples fell on his left shoulder; he suffers from degenerative arthritis with avascular necrosis. Teitler Decision and Order at 2, 7.

[2] Following his work injury, claimant was employed as a maintenance supervisor but quit work in December 1999 when the company was sold and his job duties became more strenuous. In May 2000, claimant suffered a heart attack.

Neither physician opined that claimant was incapable of any work.[3] Based upon these medical opinions, we affirm the administrative law judge's finding that claimant is capable of working with these physical restrictions.

The administrative law judge then analyzed the vocational evidence of record to determine if employer established the availability of suitable alternate employment based upon claimant's current physical condition. *See Norfolk Shipbuilding & Dry Dock Corp. v. Hord,* 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Two vocational experts offered conflicting opinions of claimant's employability. Dennis Mohn, claimant's certified rehabilitation counselor, opined that claimant would not be able to find employment, even with reasonable accommodations. CX 6. Robert Pare, employer's vocational consultant, prepared of list of eleven positions he identified as suitable alternate employment. EX 4. Dr. Didizian approved these positions as within claimant's physical restrictions. EX 5. The administrative law judge observed that although Mr. Mohn thought claimant is unable to work at this time, Mr. Mohn offered no objections to two of the listed positions which the administrative law judge also found to be within claimant's abilities.[4] As the administrative law judge's finding that employer established the availability of suitable alternate employment based on the opinions of Dr. Didizian and Mr. Crain is rational, supported by substantial evidence and in accordance with applicable law, we affirm his determination that claimant remains partially disabled. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

However, a change in claimant's wage-earning capacity also will support modification of a prior decision. *Rambo I*, 515 U.S. 121, 31 BRBS 54(CRT). In his Decision and Order, the administrative law judge found that the proffered positions paid more than claimant's wage-earning capacity as found in the earlier decision. The two jobs found suitable by the administrative law judge paid $280 and $320 per week respectively. EX 4. Judge Teitler found that claimant previously had a residual wage earning capacity of $280 per week. Teitler Decision and Order at 13. Based upon these figures, the administrative law judge found that claimant did not establish a worsening in his economic condition sufficient for modification. The wages presented by Mr. Pare,

[3] Evidence from the first proceeding reflects that Dr. Raisis limited claimant to sedentary work; Dr. Fenlin opined claimant should not lift ten pounds repetitively or work with his arm in an elevated position; and Dr. Horwitz restricted claimant's use of his left upper extremity to five pounds at waist level with no repetitive motion of the shoulder. Teitler Decision and Order at 7-11.

[4] The positions are as cashiers with Colonial Parking and Smart Park. EX 4.

however, represent the wages paid in these positions at the time of his survey in 2003. EX 4. The fact that claimant's wage-earning capacity remains approximately the same, *i.e.*, $7.00-$8.00 per hour, in 2004 as it did in 1998 may reflect a deterioration in claimant's economic condition. In order to neutralize the effects of inflation, the administrative law judge must adjust these wages to the level paid in these positions at the time of the injury. *See Sestich v. Lory Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Cook v. Seattle Stevedore Co*., 21 BRBS 4 (1988). Accordingly, the administrative law judge's conclusion that claimant has suffered no change in his economic condition is unsupported by the record and must be vacated. On remand, the administrative law judge must determine the wages paid in these cashier positions in 1998, and compare this figure with claimant's wage-earning capacity as found by Judge Teitler to determine if claimant has suffered a change in his economic condition and is entitled to modification.

Claimant's contention that the administrative law judge made erroneous statements concerning the medication claimant takes is without merit. Claimant testified both that he ceased taking pain medication because of the complications that could result from continued use and from his personal decision not to mix medications. HT at 41-42. As the administrative law judge did not base his decision on claimant's use or non-use of any medication, any misstatements the administrative law judge may have made in discussing claimant's testimony at the hearing constitute harmless error.

Claimant further alleges that "updated information" from his doctors was not requested.[5] Claimant must obtain his own evidence and offer it into evidence before the administrative law judge. If claimant obtains new evidence, he may file another claim for modification pursuant to Section 22 of the Act.

[5] Dr. Crain's report was prepared in August 2001. Dr. Didizian prepared his reports in August 2001 and September 2003, and he testified by deposition in November 2003. The formal hearing was held on October 2, 2003.

Accordingly, the administrative law judge's Decision and Order Denying Modification is vacated in part, and the case is remanded to the administrative law judge to determine if claimant has suffered a change in his economic condition. In all other respects the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge