BRB No. 13-0479

DARRYLL LYONS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: May 13, 2014
	)	
EAGLE MARINE SERVICES	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Order Granting in Part the Employer's Section 22 Petition for Modification of William Dorsey, Administrative Law Judge, United States Department of Labor.

Darryll Lyons, Long Beach, California, pro se.

Daniel F. Valenzuela and Shana L. Prechtl (Samuelson, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for self-insured employer.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Granting in Part the Employer's Section 22 Petition for Modification (2012-LHC-01177) of Administrative Law Judge William Dorsey 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, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his back and lower extremities on January 9, 2005, while working as a hustler driver for Eagle Marine, and a torn right knee meniscus, on March 25, 2007, after falling while visiting his mother.[1] He stopped working as a result of his injuries on May 27, 2007, following a stint as a yard clerk for International Transportation Services (ITS). Claimant filed claims against both employers, contending his knee condition was the result of the initial injury in January 2005 with Eagle Marine or that it may have been due to cumulative trauma while working, ending with his employment with ITS.

Administrative Law Judge Steven B. Berlin found that claimant's injury is compensable, and that all of claimant's injuries stemmed from the natural progression of the initial back injury, and thus, that Eagle Marine is the responsible employer. He awarded claimant medical benefits, temporary total disability benefits from January 9, 2005 through September 4, 2006, temporary partial disability benefits from September 5, 2006 through May 27, 2007, and ongoing temporary total disability benefits from May 28, 2007. 33 U.S.C. §§907, 908(b), (e). Judge Berlin also awarded a lien against claimant's benefits to the ILWU-PMA Welfare Fund pursuant to 33 U.S.C. §917. Judge Berlin's decision was affirmed by the Board. *Lyons v. Eagle Marine Services*, BRB No. 09-0579 (Dec. 1, 2011)(unpub.).

Eagle Marine (employer) subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that claimant's work-related injuries had reached maximum medical improvement and that he had recovered sufficiently to return to work. Administrative Law Judge William Dorsey (the administrative law judge) found that claimant's conditions had reached maximum medical improvement, and that claimant was capable of returning to modified work as of March 13, 2012, two days per week. He thus granted employer's motion for modification and modified claimant's existing temporary total disability award to a scheduled permanent partial disability award under Section 8(c)(2) for 5.76 weeks of benefits for a two percent impairment of claimant's right leg, and an ongoing award of permanent partial disability benefits pursuant to Section 8(c)(21) for the back injury based on a weekly loss of wage-earning capacity of $504.74. 33 U.S.C. §908(c)(2), (19), (21), (h).

Claimant, without legal representation, appeals the administrative law judge's decision on modification. Employer responds, urging affirmance.

Claimant initially contends he had ineffective representation by his former counsel before the administrative law judge. We reject this contention. The record reflects that

[1]Claimant was diagnosed with a low back strain and radiculitis, and he complained of buckling knees, which often caused him to fall. CX 4.

his former counsel adequately countered employer's petition for modification. In response to employer's petition for modification, claimant's counsel offered: a pre-trial statement; 41 exhibits, including new medical reports authored by Drs. Hunt, Capen and Delman, and deposition testimony of claimant and Dr. Hunt; and a trial brief. Counsel argued that Dr. Hunt's opinion and claimant's testimony regarding his inability to work regularly, and the PMA records showing the actual sporadic nature of claimant's post-injury work, supported a denial of employer's motion for modification. That employer prevailed does not establish that counsel's representation was ineffective. *See generally Strickland v. Washington*, 466 U.S. 668, 687 (1984) (proper standard for counsel's performance is that of reasonableness).

Section 22 of the Act provides that any party in interest may seek review of a compensation case on the ground of a change in conditions or mistake in fact at any time prior to one year after the date of the last payment of compensation or one year after the rejection of a claim. 33 U.S.C. §922. As claimant was receiving compensation for temporary total disability as of the date employer sought modification based on a change in conditions, employer's request for modification was timely filed. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). A party requesting modification due to a change in condition has the burden of showing the change in condition. *Id.*; *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The standards for determining the extent of disability in a modification proceeding are the same as in the initial proceeding. *See Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

Judge Berlin concluded that claimant was unable to perform any work and thus was entitled to temporary total disability benefits. Consequently, evidence that claimant's condition became permanent, or that claimant is able to perform his usual or suitable alternate work, may be sufficient to establish a change in conditions for purposes of Section 22. *See, e.g., R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009); *Ramos*, 34 BRBS 83. In support of its petition for modification, employer submitted into evidence the opinions of Dr. Hunt, who released claimant to return to modified work as of January 30, 2012, and Dr. Delman, who stated that claimant's work-related conditions were permanent as of June 24, 2011; in a report dated October 10, 2012, Dr. Delman reiterated the work restrictions in his July 18, 2011 report, and expressly opined that claimant could work as a marine clerk. The administrative law judge found that the opinions of Drs. Delman and Hunt, as supported by claimant's actual return to modified work, constitute evidence of a change in claimant's physical and economic condition since the issuance of Judge Berlin's compensation order. The administrative law judge thus modified Judge Berlin's award of temporary total disability benefits to scheduled and unscheduled awards of permanent partial disability benefits as of March 13, 2012, when suitable work actually became available to claimant.

The administrative law judge found that claimant's work-related conditions injuries had reached maximum medical improvement. Order at 14-15. A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, or when the medical evidence establishes it reached maximum medical improvement. *See Hawaii Stevedores, Inc. v. Ogawa,* 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Dr. Delman, the only physician to specifically address the nature of claimant's work-related conditions, opined in his July 18, 2011 report, that claimant's injuries "have reached a permanent and stationary status." EX 2. Dr. Delman reiterated this opinion in his follow-up reports dated October 7 and 10, 2012. EXs 10, 11. Consequently, substantial evidence supports the administrative law judge's finding that claimant's disability changed from temporary to permanent, and we affirm this finding. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

The administrative law judge also found that claimant's disability changed from total to partial as of March 13, 2012.[2] Where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to return to his usual employment as a hustler driver due to his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). An employer can establish suitable alternate employment by offering an injured employee a light-duty job at its facility which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing it. *Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Moreover, an employer may fulfill its burden by showing that claimant is actually working within his work restrictions. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The administrative law judge found that both claimant's treating doctor, Dr. Hunt, and the agreed upon examining expert, Dr. Delman, agree that claimant is capable of working with restrictions, and that the tower clerk position claimant actually performed

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[2]Employer sought to modify the award as of this date.

several times after March 2012 satisfies those restrictions.[3] Drs. Delman and Hunt each opined that claimant is capable of returning to work as a marine clerk within his restrictions. EXs 3,10; CX 17. At his December 4, 2012 deposition, Dr. Hunt reiterated his belief that claimant "can do tower clerk work," although he stated it was reasonable that claimant restrict his work activity due to his pain. CX 41 at 20-25. The tower clerk position involves work at a computer terminal and allows sitting or standing at will; claimant also testified that gate clerk work is consistent with his restrictions. CX 33 at 57-60. The administrative law judge acknowledged claimant's pain, but declined to credit his testimony that he can work only one day per month as it inconsistent with the objective medical evidence and with claimant's testimony that he requires two to five days to recover after he works. *See* CX 33 at 67. Accounting for claimant's pain, the administrative law judge concluded that claimant is capable of working within his restrictions two days per week. Order at 2, 13.

The administrative law judge also found, based on the PMA records and the vocational report of Mr. Katzen, that suitable work was regularly available to claimant two days per week commencing March 13, 2012. Claimant has an accommodation under the Americans With Disabilities Act that permits him to select jobs through the Casualty Board. CX 33 at 56-57. The PMA availability report reflects that for the 143 days between March 13 and August 3, 2012, claimant made himself available to work a total of five days, that he actually worked four hours or more on four days (March 13 and 19, April 24, and July 19, 2012), that he passed on jobs on 92 days,[4] and that he was otherwise unavailable for work on 42 days. EX 5. Mr. Katzen reviewed general dispatch records for two weeks when claimant turned down work (April 28-May 4 and July 14-20, 2012) and he found that on 9 of the 14 days, there were between 2 to 16 tower clerk jobs available.[5] X 7. Mr. Katzen estimated that, based on his review of the sedentary-light

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[3]On July 18, 2011, Dr. Delman stated claimant should avoid: heavy lifting, frequent forward bending, stooping and squatting, and excessive stair and ladder climbing. EX 2 at 39. Dr. Hunt gave claimant the following restrictions on January 17, 2012: no lifting, pushing, pulling or carrying more than 10 pounds; no standing for more than one hour without a five minute break; no walking more than 40 minutes without a five minute break; no repetitive lifting objects above shoulder level; no repetitive bending, stooping, squatting or kneeling; but requires a sit/stand option. CX 15 at 127.

[4]This belies claimant's assertion that sufficient work is not offered to members of the union to which claimant belongs.

[5]Claimant alleges that "tower clerk positions are offered Monday through Thursday," such that "he could not work a second day that week because of his disability" given the administrative law judge's alleged mandate of five days off between work days, and thus, that "it is wholly impracticable for [claimant] to be expected to

duty restrictions imposed by Drs. Hunt and Delman and the PMA dispatch records, and considering claimant's union membership and inclusion on the Casualty Board, claimant would be able to work two to three days per week as a marine clerk, accepting suitable positions such as a tower clerk.[6] *Id.* The administrative law judge therefore concluded that suitable work was regularly available to claimant two days per week as of March 13, 2012, when claimant was cleared by his union to obtain modified work.

It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses, to weigh the evidence, and to draw his own inferences and conclusions from the evidence, and that the Board is not empowered to reweigh the evidence. *See Hawaii Stevedores, Inc.,* 608 F.3d 642, 44 BRBS 47(CRT). The administrative law judge gave a rational reason for concluding claimant is able to work two days per week. *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). The administrative law judge's findings that claimant is capable of returning to work two days per week, and that suitable work was available to claimant two days per week beginning March 13, 2012, are rational and supported by substantial evidence. *See Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Therefore, we reject claimant's contentions of error and we affirm the administrative law judge's finding that employer established that claimant's disability became partial on March 13, 2012. *Stevens,* 909 F.2d 1256, 23 BRBS 89(CRT).

Under the Act, claimant is compensated for the amount of wage-earning capacity lost as a result of the injury. 33 U.S.C. §902(10). A partial disability award under Section 8(c)(21) is based on two-thirds of the difference between claimant's average weekly wage at the time of the injury and his wage-earning capacity after the injury. 33 U.S.C. §908(c)(21), (h); *see Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). Using claimant's pre-injury average weekly

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work more than one day a week." Pro Se Brief at 9-10. We reject claimant's contention, as the administrative law judge's finding that working two days "leaves the claimant five days for recovery per week," does not require that claimant have five consecutive days off between work days. *See* Order at 2, 13.

[6]Contrary to claimant's contention, Mr. Katzen's report reveals that he was aware of the medications claimant was taking and that he factored that into his overall assessment of claimant's ability to perform suitable alternate work.

wage of $1,504.74 and post-injury wage-earning capacity of $1,000,[7] the administrative law judge calculated claimant's loss in wage-earning capacity as $504.74, and consequently, modified Judge Berlin's award of temporary total disability benefits to reflect claimant's entitlement to an ongoing award of permanent partial disability benefits from March13, 2012, at a weekly compensation rate of $336.16.

Section 8(c)(21), (h) requires that claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages the post-injury job paid at the time of his injury to insure that claimant's wage-earning capacity is considered on an equal footing with the his average weekly wage at the time of the injury. *See Petitt v. Sause Bros.,* 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). The administrative law judge, in this case, did not adjust claimant's post-injury wage-earning capacity to account for inflation. The Board held in *Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990), that when the record is devoid of evidence of the wages paid at the time of injury, the administrative law judge should use the percentage change in the National Average Weekly Wage (NAWW) to adjust the post-injury wages for inflation. *See also Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Quan v. Marine Power & Equipment Co.* 30 BRBS 124 (1996).

The record lacks evidence of the salary of the tower clerk position at the time of injury, as the parties agreed before Judge Berlin to an average weekly wage of $1,504.74. Based on the percentage change in the NAWW between January 2005 and March 2012, 23.7 percent,[8] claimant's 2012 post-injury wage-earning capacity of $1,000 reflects an inflation adjusted wage-earning capacity of $763, which, in turn, results in a loss in wage-earning capacity of $741.74 and a compensation rate of $494.74. 33 U.S.C. §908(c)(21). Consequently, we modify the administrative law judge's award of ongoing permanent partial disability benefits to reflect a compensation rate of $494.74 rather than $336.16. *Quan,* 30 BRBS 124.

As for the scheduled award, the administrative law judge awarded claimant 5.76 weeks of permanent partial disability benefits at the rate of $1,002.15 per week (2/3 of claimant's average weekly wage of $1,504.74) based on the two percent permanent

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[7]The administrative law judge rationally concluded that claimant has a post-injury wage-earning capacity of $1,000 per week based on claimant's ability to perform modified work two days per week and Mr. Katzen's estimate that claimant could earn $500 per day in such employment. Order at 15; EX 7 at 74.

[8]The NAWW was $523.58 in January 2005 and was $647.50 in March 2012. *See* http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm.

impairment rating to claimant's leg provided by Dr. Delman. 33 U.S.C. 908(c)(2), (19). This award is supported by substantial evidence and is in accordance with law. *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 14 BRBS 363 (1980); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Cotton v. Army & Air Force Exch. Services,* 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154 (1993). The record contains no evidence of a higher permanent impairment rating to claimant's right leg. Consequently, we affirm the scheduled permanent partial disability award.

Accordingly, the administrative law judge's award of ongoing permanent partial disability benefits pursuant to Section 8(c)(21) is modified to reflect a compensation rate of $494.74 rather than $336.16. In all other regards, the administrative law judge's Order Granting in Part the Employer's Section 22 Petition for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge