

BRB No. 04-0255

WILBUR S. JOHNSON, JR.)
)
 Claimant-Respondent)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: 11/22/2004
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order on Remand of Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Klein Camden
LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, 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 on Remand (2000-LHC-3054) of
Administrative Law Judge Fletcher E. Campbell, Jr., 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 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).

This case is before the Board for the third time. Claimant, a cable puller, injured his
right shoulder on September 25, 1992, and last worked for employer in June 1995. Employer
voluntarily paid claimant temporary total and partial disability benefits. Claimant sought
ongoing total disability benefits from January 6, 1996. The administrative law judge
awarded claimant ongoing permanent partial disability benefits from January 9, 1996

pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), and denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Upon employer's appeal, the Board affirmed the administrative law judge's denial of Section 8(f). *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 98-1341 (July 2, 1999)(unpub.).

In 2002, the administrative law judge denied claimant's request for modification of his right shoulder claim, as well as benefits on a claim filed subsequently for a hearing loss. Upon claimant's appeal, the Board affirmed the administrative law judge's denial of claimant's hearing loss claim, but vacated the administrative law judge's denial of claimant's modification request. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 02-0373 (Feb. 19, 2003)(unpub.). The Board remanded the case for the administrative law judge to reconsider whether the opinions of Drs. Parent and Cohn establish a change in claimant's physical condition.

On remand, the administrative law judge determined that the opinions of Drs. Parent and Cohn establish a change in claimant's physical condition, and that employer can no longer establish the availability of suitable alternate employment. The administrative law judge consequently awarded claimant ongoing permanent total disability benefits from November 5, 2003.

In the current appeal, employer challenges the administrative law judge's finding that claimant is totally disabled. Claimant filed a response brief in support of the administrative law judge's finding that claimant is permanently totally disabled, but notes that he disagrees with the date on which the administrative law judge's award of total disability benefits begins. *See* Cl. Br. at 2 n. 1; 10. We decline to address claimant's challenge in this regard as he did not file a cross-appeal and his contention does not support the administrative law judge's award.¹ *See Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2^d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *Ravalli v. Pasha Mar. Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

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 upon showing a mistake of fact in the initial determination or a change in claimant's physical or economic condition.² *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS

¹Claimant subsequently requested modification of the date of onset of total disability benefits. This motion is pending.

²The administrative law judge accurately stated that claimant need establish only a "change in condition" but then purported to apply a "material change in conditions" standard in his findings. Decision and Order on Remand at 2-5. Contrary to the administrative law

1(CRT) (1995). The party seeking modification has the burden of proof in demonstrating the mistake in fact or change in conditions. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In this case, claimant attempted to establish that his physical condition had changed so that he can no longer perform the jobs previously found suitable for him.

Employer initially contends that the administrative law judge erred in finding a change in claimant's condition based on the opinions of Drs. Parent and Cohn. Employer contends that Dr. Parent opined that claimant had been totally disabled since 1998, and that Dr. Cohn's March 21, 2001, restrictions are the same as those imposed by Dr. Parent in 1996. The administrative law judge's finding on remand that the opinions of Drs. Parent and Cohn establish a change in claimant's physical condition is rational and supported by substantial evidence. Although Dr. Parent had believed that claimant was totally disabled since their first interview, Dr. Parent most recently testified that claimant's range of motion and shoulder stiffness had remained the same or worsened over the years, and this latter opinion is sufficient to establish a change in claimant's physical condition. *See* Decision and Order on Remand at 3-4; Cl. Ex. 1 at 8, 16 (2001 exhibits). Moreover, the administrative law judge rationally credited Dr. Parent's most recent deposition testimony that claimant is not malingering and accepted the Board's holding, as he is bound to under the law of the case doctrine, that Dr. Parent's opinion of total disability cannot be discounted on the basis that he did not address claimant's ability to perform the jobs identified by employer as suitable. *Ravalli*, 36 BRBS 91; *Johnson*, BRB No. 02-0373, slip op. at 4; Decision and Order on Remand at 4; Cl. Ex. 1 at 7-10 (2001 exhibits). While Dr. Cohn's 2001 restrictions are similar to Dr. Parent's 1996 restrictions, they are not exactly the same since Dr. Cohn added the restriction against right-handed work and claimant is right-handed.³ *Compare* Emp. Ex. 4 to Emp. Ex. 1 (2001 exhibits). Dr. Cohn's restriction limiting claimant to left-handed work is sufficient to establish a change in claimant's condition.⁴ Decision and Order on Remand at

judge's statement, *any* change in condition or mistake in fact may be the basis for modification. 33 U.S.C. §922; *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). Any error in the administrative law judge's recitation of a more stringent standard is harmless, however. *See* discussion *infra*.

³In 1996, Dr. Parent restricted claimant from lifting, climbing, pushing and pulling, fine hand manipulation, and reaching above shoulder level. Emp. Ex. 1 (2001 exhibits); Emp. Ex. 8 (1998 exhibits). In 2001, Dr. Cohn restricted claimant from using ladders and from crawling, from pushing and pulling, simple and firm grasping, using vibratory tools, and from work above shoulder level with the right arm. Emp. Ex. 4 (2001 exhibits). Dr. Cohn added that claimant was fit only for a left-handed sedentary job. *Id.*

⁴We reject employer's contention that the Board exceeded its scope of review in its

4-5; Emp. Ex. 4 (2001 exhibits). As substantial evidence supports the administrative law judge's finding that there has been a change in claimant's condition, this finding is affirmed. *See generally Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

Employer next contends that the administrative law judge erred in finding that the six jobs initially found suitable for claimant are no longer suitable given Dr. Cohn's restriction against right arm use. Where, as here, claimant is unable to return to his usual employment because of a job-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The standards for establishing the availability of suitable alternate employment are the same in modification proceedings as they are in initial adjudications. *See Vasquez v. Cont'l Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990).

The administrative law judge rationally found that employer did not establish the availability of suitable alternate employment based on the six jobs previously found to be suitable as employer did not rebut Dr. Parent's opinion that claimant is totally disabled.⁵ If claimant is unable to do any work, he is entitled to total disability benefits. *Lostanau v. Campbell Indus., Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). The administrative law judge also rationally found that employer did not establish that the jobs remain suitable in light of Dr. Cohn's additional restriction against right-arm work. *See generally Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); Decision and Order on Remand at 5-6; Cl. Ex. 1 at 17; Emp. Ex. 4 (2001 exhibits). The administrative law judge accurately pointed out that the labor market survey does not address whether the prospective employers would accommodate Dr. Cohn's additional restriction against right arm work. Decision and Order on Remand at 5, 6. Employer's assertion on appeal that claimant could perform these jobs, with just his left hand and arm, lacks merit as employer presented no evidence to support this assertion, which the administrative law judge observed in his decision. Decision and Order on Remand at 5, 6; Emp. Br. at 11. Moreover, the Board noted in its 2003 decision, as did the administrative law

previous decision by instructing the administrative law judge to credit the opinions of Drs. Parent and Cohn on remand. Emp. Br. at 15. The Board held that the administrative law judge provided improper reasons for rejecting the opinions of Drs. Parent and Cohn and instructed him on remand to provide proper reasons for accepting or rejecting the opinions. *See Johnson*, BRB No. 02-0373, slip op. at 3-5.

⁵The six jobs previously found suitable were a security guard with Clemons Security, a cashier at a Salvation Army Thrift Store, two positions as a door greeter at Wal-Mart, an unarmed security guard with Farm Fresh, and a donation center attendant with Goodwill Industries. Emp. Ex. 14 (1998 exhibits).

judge on remand, that employer did not submit an updated labor market survey or vocational testimony in response to claimant's motion for modification. *Johnson*, BRB No. 02-0373, slip op. at 5 n. 5; Decision and Order on Remand at 2 n. 1. As the administrative law judge's findings that claimant established a change in his physical condition and that employer did not establish the availability of suitable alternate employment are rational and supported by substantial evidence, we affirm the administrative law judge's award of total disability benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding total disability benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge