

T.R.)	
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Claimant-Petitioner)	
)	
v.)	
)	
P & O PORTS NORTH AMERICA,)	DATE ISSUED: 10/21/2008
INCORPORATED)	
)	
and)	
)	
PORTS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order and Amended Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

T.R., Staten Island, New York, *pro se*.

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order and Amended Decision and Order (2006-LHC-00900) of Administrative Law Judge Janice K. Bullard 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 representation by counsel, 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

Claimant sustained work-related injuries to his right shoulder on July 5, 1998, and July 14, 1998, albeit with different employers. Administrative Law Judge Kaplan issued a decision in December 1999, finding that the second accident aggravated claimant's shoulder injury such that the second employer was liable for the payment of claimant's benefits. Employer did not dispute that claimant was temporarily totally disabled. Judge Kaplan awarded claimant continuing temporary total disability benefits, beginning July 15, 1998, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. EX 1. Claimant has not returned to employment in any capacity since his July 14, 1998, injury.

On July 19, 2000, claimant underwent surgical repair of his right rotator cuff injury, performed by Dr. Bigliani. EX 5. Dr. Greifinger, a board-certified orthopedic surgeon, evaluated claimant on August 1, 2001 and August 23, 2005. Dr. Greifinger restricted claimant from frequent overhead reaching and lifting, but opined that he could work an eight-hour day. EXs 5, 6, 7. Dr. Bigliani agreed that claimant should avoid heavy lifting and overhead activity, but could perform sedentary employment which did not put undue stress on his right shoulder. EX 6.

Employer filed a petition for modification in 2005 pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a change in claimant's condition. Employer contended that claimant is able to perform alternate work following his recovery from his surgery. A formal hearing was held on June 13, 2007, before Administrative Law Judge Bullard (the administrative law judge).

In her Decision and Order the administrative law judge found that employer established a change in claimant's physical condition as claimant's shoulder had improved following his surgery such that he is now able to perform some work. The administrative law judge found that claimant's condition reached maximum medical improvement on August 1, 2001, and that the parties agree that claimant remains unable to return to his usual employment as a longshoreman. The administrative law judge found, however, that employer established the availability of suitable alternate employment, based on cashier positions at three parking garages, and that claimant was not diligent in seeking alternate employment. Accordingly, the administrative law judge found a change in claimant's economic employment and modified claimant's award to reflect his entitlement to permanent partial disability benefits as of April 5, 2002, the date employer first established the availability of suitable alternate employment as a cashier. Decision and Order at 30; EX 2. The administrative law judge found that claimant's post-injury wage-earning capacity, adjusted for inflation, is \$259.52 per week. 33 U.S.C. §908(c)(21), (h).

Claimant, without the benefit of counsel, appeals the administrative law judge's decision modifying his total disability award to a partial disability award. 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); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003). 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).

We first address the administrative law judge's finding that employer established a change in claimant's physical condition such that he is now able to work. At the time of the initial hearing on May 19, 1999, it was uncontested that claimant was physically unable to work. Dr. Greifinger, in August 2001 and August 2005, and Dr. Bigliani in November 2001, stated that claimant is able to work an eight-hour day with certain restrictions on lifting, reaching, pulling and pushing. EXs 3, 4, 6, 7. Claimant testified that his arm movement improved following surgery and physical therapy. Tr. at 29. Therefore, as substantial evidence supports the administrative law judge's finding that claimant's physical condition has improved, we affirm this finding. *Ramos v. Global Terminal & Container Serv., Inc.*, 34 BRBS 83 (1992); *Spitalieri v. Universal Maritime Services*, 33 BRBS 61, *aff'd on recon. en banc*, 33 BRBS 164 (1999) (Brown & McGranery, JJ., dissenting on other grounds), *rev'd on other grounds*, 226 F.3d 167, 34 BRBS 85(CRT) (2^d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

We next address the administrative law judge's finding that employer established the availability of suitable alternate employment such that there is a change in claimant's economic condition. Once, as here, claimant establishes his inability to perform his usual work, the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides that claimant can perform given his age, education, physical restrictions, and vocational capabilities. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997); *see also New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). A claimant's partial disability commences on the date employer establishes the availability of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991). A claimant can retain entitlement to total disability benefits, notwithstanding the showing of suitable alternate employment, if he shows that he diligently yet unsuccessfully sought alternate employment. *Id.*

The administrative law judge declined to credit the opinion of claimant's vocational expert, Charles Kincaid, Ph.D, that claimant is "not employable" due to his limited skills, age (69), and gruff temperament. CXs 2, 3. The administrative law judge observed claimant's demeanor at the hearing and found that he answered questions appropriately and patiently. *See generally 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 also noted claimant's successful career as a longshoreman and his acknowledged sociality. Tr. at 34. The administrative law judge also gave less weight to Dr. Kincaid's opinion that claimant's problems with sleeping and pain would make it difficult for him to perform sedentary work for eight-hour periods. The administrative law judge noted that the medical evidence did not indicate a sleep disorder or any other impairment relating to his sleeping patterns and that claimant testified he continues to drive, although he takes over-the-counter pain medication. *Id.* at 49-51. The administrative law judge acknowledged the difficulty claimant might have obtaining a job because of his age, but the judge relied on the vocational opinion of Robert Cipko, Ph.D, that there are employers who will hire older workers. EX 13 at 88, 132; Decision and Order at 25.

The administrative law judge found that employer identified as suitable cashier positions with three different parking companies. EXs 2, 10. Drs. Bigliani and Greifinger approved these positions as within claimant's restrictions. EXs 3, 4. Dr. Kincaid stated claimant's mathematics skills are sufficient for this position. CX 3 at 48.¹ In addition, the administrative law judge found the jobs are within a reasonable commuting distance from claimant's home, given claimant's testimony that he continues to drive and to use public transportation without difficulty. Tr. at 49-51.

We affirm the administrative law judge's finding that the cashier positions constitute suitable alternate employment as it is supported by substantial evidence. *Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2008). Claimant's physicians approved the positions as physically suitable for him, and the administrative law judge appropriately accounted for claimant's vocational skills, age, and ability to commute to the positions. *See, e.g., Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999). Moreover, the administrative law judge rationally found that claimant's disability became partial on April 5, 2002, as Dr. Cipko first identified the availability of an actual suitable position on that date. EX 2; *Palombo*, 937 F.2d 70, 25

¹ The administrative law judge further found that Dr. Kincaid acknowledged that claimant's personality would not make him "incapable of conducting himself as a cashier in a parking lot." CX 3 at 58-59. The administrative law judge noted that Dr. Kincaid admitted that if a cashier position were sedentary then it would be within claimant's capabilities. *Id.*

BRBS 1(CRT). In addition, we affirm the administrative law judge's finding that claimant did not diligently seek alternate employment. *Berezin v. Carcade General, Inc.*, 34 BRBS 163 (2000). The administrative law judge relied on claimant's admission that he has not looked for any job since November 2001. Decision and Order at 31; Tr. at 46. As employer established the availability of suitable alternate employment, which claimant did not rebut, we affirm the administrative law judge's award of permanent partial disability benefits as of April 5, 2002.²

Lastly, we address the administrative law judge's finding regarding claimant's post-injury wage-earning capacity. The administrative law judge rationally found that the average pay of the three positions is \$7.50 per hour, such that claimant's wage-earning capacity is \$300 per week.³ *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997). The administrative law judge appropriately accounted for inflation by using the percentage change in the national average weekly wage from 1998 to 2002 to conclude that claimant's adjusted post-injury wage-earning capacity is \$259.52. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); 33 U.S.C. §908(h). As it is rational, supported by substantial evidence, and in accordance with law, we affirm the award of permanent partial disability benefits based on two-thirds of the difference between claimant's average weekly wage of \$913.46 and his post-injury wage-earning capacity of \$259.52. 33 U.S.C. §908(c)(21).

The administrative law judge's findings that claimant is able to work, that employer established the availability of suitable alternate employment, and that claimant is only partially disabled, have been affirmed as they are supported by substantial evidence. Therefore, we affirm the administrative law judge's grant of employer's

² In her Decision and Order, the administrative law judge found that employer established suitable alternate employment as of April 5, 2002, when Dr. Cipko identified the first available, suitable opening as a cashier. EX 2. In her Amended Decision and Order discussing claimant's wage-earning capacity, the administrative law judge stated, without discussion, that she had ordered that claimant's partial disability award commence on February 13, 2002. *See* Amended Decision and Order at 2-3. This is the earliest availability date of any of the positions identified by Dr. Cipko. The administrative law judge found, however, that the telemarketer position available on that date was unsuitable for claimant. Thus, claimant's partial disability award cannot commence on that date. The finding in the administrative law judge's original Decision and Order is supported by substantial evidence and her amended Decision and Order is modified to commence claimant's permanent partial disability award on April 5, 2002.

³ The positions at Rapid Parking and PF Parking pay \$7.00 per hour and the position at Five Star Parking pays \$8.50 per hour. EXs 3, 10.

motion for modification as employer established a change in claimant's physical and economic conditions. 33 U.S.C. §922; *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *Ramos*, 34 BRBS at 84.

Accordingly, we affirm the administrative law judge's Decision and Order and Amended Decision and Order modifying the award of temporary total disability benefits to permanent partial disability benefits. The administrative law judge's Amended Decision and Order is modified as stated herein.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge