BRB No. 00-0485

EMMA MONSANTO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES MARINE CORPS/ MWR	)	DATE ISSUED:
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Gretchen Guzman (Cantrell, Green, Pekich, Cruz & McCort), Long Beach, California, for claimant.

William N. Brooks, II (Law Offices of James P. Aleccia), Long Beach, California, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (97-LHC-1007, 97-LHC-1008) of Administrative Law Judge Henry B. Lasky 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge 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).

Claimant, on June 7, 1994 and July 17, 1995, sustained injuries to her low back while

working for employer as a child care program assistant. In his Decision and Order Awarding Benefits, the administrative law judge found that claimant was incapable of resuming her usual employment duties with employer and that employer's vocational evidence failed to establish the availability of suitable alternate employment; thus, the administrative law judge found claimant to be entitled to continuing payments of permanent total disability compensation. 33 U.S.C. §908(a).

Subsequent to this decision, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. In support of its request for modification based on a change in claimant's condition, employer submitted a medical report and testimony of Dr. London and contemporaneous vocational evidence regarding the availability of suitable alternate employment. In his Decision and Order Granting Modification, the administrative law judge determined that employer established a change in both claimant's physical and economic conditions; specifically, the administrative law judge found that claimant was capable of performing her usual employment duties with employer and that, alternatively, employer established the availability of suitable alternate employment. Thus, the administrative law judge granted employer's motion for modification and terminated claimant's award of permanent total disability compensation.

On appeal, claimant challenges the administrative law judge's termination of benefits; specifically, claimant contends that there has been no change in her condition, either physical or economic, and that the administrative law judge erred in so finding. Alternatively, claimant avers that the administrative law judge erred in failing to find her entitled to a nominal 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). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *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). Modification based on a change in condition may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *See Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Thus, the Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment.[1] *See, e.g., Delay v. Jones*

[1]Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo I,*

Washington Stevedoring Co., 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1, 8 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52 (1989); *Blake v. Ceres Inc.*, 19 BRBS 219, 221 (1987). In seeking modification, however, employer must offer evidence that demonstrates that there was, in fact, a change in the claimant's physical or economic condition from the time of the initial award to the time modification is sought. *Compare Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998) *with Delay*, 31 BRBS at 204, *Moore*, 23 BRBS at 52, and *Blake*, 19 BRBS at 220-221.

In the instant case, claimant initially contends that the administrative law judge erred in granting employer's motion for modification since employer merely presented new experts in an attempt to relitigate an issue previously decided by stipulation, specifically claimant's inability to resume her usual employment duties with employer. As claimant correctly contends on appeal, it is well-established that Section 22 is not intended to be a back door for retrying a case or litigating an issue which could have been raised in the initial proceedings. *See McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976). In the instant case, however, the extent of claimant's disability was presented for adjudication before the administrative law judge during the initial proceedings. Following the entry of an award to claimant in January 1999, claimant was examined by Dr. London, who thereafter offered an opinion as to the extent of her disability at that time. Post-decision employer developed additional vocational evidence, taking into consideration the contemporaneous information available to it regarding claimant's condition. On these facts, we conclude that it was not an abuse of the administrative law judge's discretion to consider this evidence, as it is supportive of employer's assertion that there has been a change in claimant's condition subsequent to the issuance of the administrative law judge's award of benefits; accordingly, we affirm the administrative law judge's consideration of the claim pursuant to Section 22 of the Act. *See Ramos v. Global Terminal & Container Services, Inc.*, BRBS , BRB No. 99-0134 (Oct. 7, 1999); *Delay*, 31 BRBS at 197.

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515 U.S. at 296, 30 BRBS at 3 (CRT); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 204 (1998); *Vasquez*, 23 BRBS at 431.

Claimant next contends that the administrative law judge erred in concluding that there has been a change in her condition subsequent to the issuance of the administrative law judge's decision awarding claimant permanent total disability compensation. We disagree. In addressing this issue, the administrative law judge set forth and discussed at length the opinions of Drs. London and Nelson. In this regard, Dr. London, who examined claimant in January 1999, noted a lack of objective findings which would explain claimant's ongoing subjective complaints. Based upon his physical examination of claimant as well as his review of claimant's 1995 lumbar spine MRI and 1999 x-rays, Dr. London concluded that claimant was physically capable of performing her usual and customary pre-injury employment duties with employer without restrictions. *See* EX 4. In contrast, Dr. Nelson, who examined claimant in June 1999, concluded that his previously placed work restrictions on claimant were still valid and that those restrictions would prohibit claimant from returning to work. *See* CX 3. After considering the testimony of these two physicians, the administrative law judge credited the opinion of Dr. London over that of Dr. Nelson in concluding that employer established that claimant suffers from no continuing disability; this weighing of the evidence is within his discretion any authority.[2] *See Perini Corp. v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969); *see generally Delay*, 31 BRBS at 197. Specifically, in rendering this determination, the administrative law judge found that Dr. London clearly and cogently set forth the inconsistencies in claimant's physical examination, as well as claimant's unexplained subjective symptomatology, while Dr. Nelson's brief and conclusory

[2]Contrary to claimant's contention, the administrative law judge acknowledged the opinions of Drs. Tanzer and Danzig in his decision. Specifically, as these two physicians last saw claimant approximately three years prior to the time employer sought modification, the administrative law judge found that their respective opinions "shed very little evidentiary light on the instant proceeding, as neither provide whether claimant has undergone a change in physical condition since the original hearing." *See* Decision and Order at 6.

opinion failed to address these inconsistencies. *See* Decision and Order at 5. As this opinion constitutes substantial evidence in support of the administrative law judge's finding that claimant is no longer disabled, that finding is affirmed.[3] *See Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

We next address claimant's challenge to the administrative law judge's failure to find claimant entitled to a nominal award. In support of this contention of error, claimant asserts that the administrative law judge erred in failing to take into account a prior medical report which indicated that claimant would be required to use anti-inflammatory medications from time to time. A nominal award is appropriate where claimant has not established a present loss in wage-earning capacity under Section 8(c)(21), (h) of the Act, 33 U.S.C. §908(c)(21), (h), but has established that there is a significant possibility of future economic harm as a result of the injury. *See Rambo II*, 521 U.S. at 121, 31 BRBS at 54 (CRT); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989). In the instant case, the administrative law judge determined that claimant failed to provide any evidence that there is a significant potential that her injury will cause a diminished capacity under future conditions. *See* Decision and Order at 6-7. Although, as claimant alleges, the administrative law judge failed to consider Dr. Tanzer's February 1995 report which referenced claimant's possible use of anti-inflammatory medications in the future, we hold that his error is harmless, as Dr. Tanzer's report additionally states that work restrictions are not indicated and that claimant should be able to return to her previous work duties. *See* CX 4 at 52. Thus, as the totality of Dr. Tanzer's report does not support a finding that there is a significant possibility that claimant will sustain future economic harm as a result of her injury, we affirm the administrative law judge's denial of a *de minimis* award. *See Buckland v. Dept. of the*

[3]We reject claimant's assertion that the administrative law judge erred in finding that employer established the availability of suitable alternate employment based upon jobs paying the minimum wage since the administrative law judge's finding on this issue is supported by substantial evidence and is consistent with law. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Army, 32 BRBS 99 (1997).

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge