BRB No. 98-0108

EUGENE KING	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
FRED F. NOONAN & COMPANY	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Edward Tylicki (Pozzi, Wilson, Atchison, L.L.P.), Portland, Oregon, for claimant.

Norman Cole (SAIF Corporation), Salem Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-1527) of Administrative Law Alexander Karst granting modification 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 findings of fact and the conclusions of law of the administrative law judge which 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).

The present case involves claimant's appeal of an administrative law judge's Decision and Order terminating his award of permanent partial disability pursuant to employer's motion for modification under Section 22 of the Act, 33 U.S.C. §922. On August 7, 1984, while working as a Class A longshoreman, claimant injured his head and neck in a work-related bus collision. After a period of conservative care, claimant returned to work, although he significantly modified his work activities, and also became a dispatcher for Local 8, an elected position. Claimant sought permanent partial disability compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21).

In a Decision and Order dated January 20, 1988, Administrative Law Judge Steven E. Halpern awarded claimant partial disability benefits during those periods in which he was performing general longshore work, finding that claimant's inability to perform certain types of jobs resulted in his working 10.82 fewer hours per week than he had prior to his injury. After accounting for inflation, the administrative law judge determined that this loss of hours translated into a loss of wage-earning capacity of $244.53 per week, and accordingly awarded claimant permanent partial disability compensation based on two-thirds of that amount, or $163.02 per week.

Following this award, until 1993 claimant continued his work as a dispatcher and as a general longshoreman. In addition, he began accepting some employment as a casual walking boss through Local 8, the general Longshoremen's local. In mid-1993, claimant was invited to become a registered walking boss, and join Local 92, the registered Walking Boss and Foremen's Union,[1] and he began a one-year probationary period during which time he was required to accept all employment. In this period, claimant did not do any dispatching, but worked a total of 2962.5 hours, performing all types of walking boss jobs on all shifts and locations and earning $120,196.28. After successfully completing his probationary year, claimant was elected to two one-year terms as a dispatcher for Local 92, a job he shared with another employee, working alternating two-week periods. In the remaining weeks during those terms, as well as since his last dispatcher term ended, claimant has worked as a walking boss for Roger's Stevedoring, a bulk loader at grain elevators. During all periods he worked as a walking boss, claimant was paid the weekly

[1]Both Local 8 and Local 92 are part of the International Longshoremen's and Warehousemen's Union. Local 8 provides the physical labor, while supervision is provided by either "registered" or "casual" walking bosses. The registered bosses belong to Local 92 and have first right to all walking boss jobs. If more bosses are needed than Local 92 can provide, employers may hire a "casual" boss from a list. These workers are dispatched by Local 8.

compensation awarded. Employer sought modification under Section 22, arguing that this award should be terminated as claimant had experienced a favorable change in his economic condition such that he was no longer permanently partially disabled.[2]

After conducting a hearing, Administrative Law Judge Alexander Karst found that as claimant's actual earnings as a walking boss reasonably represented his current earning capacity, claimant was no longer disabled. Accordingly, he granted modification and terminated claimant's disability award as of September 12, 1997, the date of his Decision and Order. Claimant appeals, arguing that the administrative law judge's determination on modification that he is no longer permanently partially disabled is not supported by substantial evidence. Employer responds, urging affirmance, and claimant replies, reiterating his prior arguments.

Section 22 provides that upon his own initiative or at the request of any party, on the grounds of a change in condition or mistake in a determination of fact, the factfinder may, at any time prior to one year after the denial of a claim or the last payment of benefits, reconsider the terms of an award or denial of benefits. Section 22 allows for modification of an award where there is change in claimant's wage-earning capacity, even in the absence of a change in his physical condition. *Metropolitan Stevedore Co. v. Rambo (Rambo I),* 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.,*776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985). Once the party seeking modification meets its burden of demonstrating a change in claimant's physical or economic condition or a mistake in a determination of fact, the standards for determining the extent of disability are the same as in the initial proceeding. *See 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).

Relying on *Rambo I,* claimant argues that a change in condition may only be established based on a showing of: 1) the acquisition of new job skills; 2) the restoration or improvement in claimant's wage-earning capacity; or 3) a change in the conditions on which the administrative law judge relied in awarding benefits. The administrative law judge findings address each of these contentions. As his conclusions that claimant obtained new training resulting in an increased earning capacity and thus a change in the conditions on which the initial administrative law

[2] Employer asserted that while the administrative law judge assumed in 1988 that claimant had a residual post-injury wage-earning capacity of $31,660, claimant was actually earning about $115,000 a year as a walking boss.

judge relied are supported by substantial evidence, we affirm the administrative law judge's decision.

Claimant initially contends that because the walking boss job did not require that he obtain any new job skills or training, the administrative law judge erred in relying on this job to conclude that claimant had experienced a change in his earning capacity sufficient to warrant modification. The administrative law judge considered claimant's argument in this regard, but he did not find it persuasive. Rather, crediting relevant provisions of the bargaining agreement between the Portland Area International Longshoremen's and Warehousemen's Union (ILWU) and the Pacific Maritime Association (PMA), EX-15 §8.26; EX-16 §§8.641-8.642, he rationally inferred that the ILWU and PMA had jointly created an elaborate system of on-the-job training and promotion of longshoremen desiring to be walking bosses which involved the acquisition of new skills. In so concluding, he found that the aspirant must have at least 10 years of experience as a Class A longshoreman and, after being nominated or appointed by a joint committee to become a casual walking boss, was required to serve a six-month probationary period during which time he was subject to removal by the joint committee. Moreover, he found that a casual walking boss may then be invited to become a registered walking boss in Local 92, where he faces a one-year probationary period during which time employers have the right to return him to general longshore status without the consent of the union. In addition, he found that the contract states that those promoted to registered walking boss shall be those who have best developed qualifications for responsible supervision, *i.e.*, good hours, superior work record, leadership, ability, competence in handling personnel, and operations skills, which can be only be acquired through extensive experience as a walking boss.

In addition, based on record evidence documenting a formalized one-week training session conducted for walking bosses in 1991, EX-13, and Section 9 of the 1993-1996 Pacific Coast Walking Bosses and Foremen's Agreement, EX-15, p.159, the administrative law judge rationally found that, in addition to on-the-job training, claimant and other walking bosses must periodically undergo mandatory instruction as a condition of their employment. Although claimant testified that the walking boss job involved no new skills or training, the administrative law judge acted within his discretionary authority in discrediting this testimony based on his determination that it was inherently implausible and self-serving.[3] *See Cordero v. Triple A*

[3]Claimant argues on appeal that inasmuch as walking bosses are required to attend classes no matter how many years they have been working the classes did not involve the acquisition of new skills. Section 9.2 of the contract, however, which the administrative law judge credited explicitly states that the PMA Training

Machine Shop, 580 F.2d 13331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, the administrative law judge rationally found that claimant obtained new skills in obtaining a position as a steady walking boss.

Department will conduct a supervisory training program for all new employees. EX-15, p. 159.

Claimant also argues that, rather than representing an increase in his earning capacity, his increased earnings as a walking boss merely reflect the routine progression or advancement of his career and his increased seniority. We disagree. The administrative law judge rationally relied on the fact that the contract states that while seniority shall be considered in the selection of casual bosses for elevation to registered status, it shall not be the primary determinant, EX-16, §8.643, the fact that employers can drop a probationary registered boss whom they deemed unqualified without the consent of the union, EX-15, §8.26, and Mr. Trachsel's testimony that there are many longshoremen with high amounts of seniority who would like to become registered walking bosses, but are not qualified to do so. Tr. at 117-118. These findings support the administrative law judge's conclusion that claimant's increased earnings were not merely a question of seniority.[4]

[4]Claimant also relies on the denial of modification in *Reiter v. Brady Hamilton Stevedore*, 30 BRBS 208 (ALJ) (1996), *aff'd,* BRB No. 96-1077 (Apr. 28, 1997), *aff'd mem.* No. 97-70783, 1998 WL 476119 (9th Cir. July 9, 1998). In *Reiter*, employer sought modification based on claimant's increased earnings as a walking boss, but the administrative law judge credited evidence demonstrating that the increased wages were due to his increased seniority rather than an increase in his wage-earning capacity. Although administrative law judge decisions and

unpublished cases lack precedential value, *see Lopez v. Southern Stevedores*, 23 BRBS 295 (1990), in any event the present case is factually distinguishable from *Reiter*. While the claimant in *Reiter* also became a walking boss in Local 92 post-injury, the administrative law judge credited evidence that this job was within his reach at the time of injury, as claimant had worked as a casual boss prior to the injury and was offered the registered job while convalescing. By contrast, in the present case claimant did not work as a casual walking boss prior to the initial award in 1988 and was invited to join Local 92 in 1993, years after his 1984 injury and return to work. Moreover, in *Reiter*, the administrative law judge found that claimant continued to suffer a 30 percent loss of wage-earning capacity while working as a walking boss because he had to turn down certain jobs because of his injury, whereas in the present case the administrative law judge found that claimant could perform any walking boss job and that he worked more hours than the average walking boss.

Claimant also asserts that despite his job as a walking boss, his work injury continues to affect his wage-earning capacity on the open market. In this regard, claimant contends that his physical condition is unchanged or has deteriorated and continues to affect both the type of jobs and the number of hours he is able to work. The administrative law judge recognized that claimant's assertion that his physical impairment has remained unchanged or has gotten worse is largely moot because modification can be based on change in economic condition alone, but he nonetheless addressed claimant's arguments regarding the alleged continued physical effects of his 1984 work injury. He initially rejected claimant's argument that his physical condition has deteriorated, noting that claimant introduced no medical evidence to support this claim and that the only relevant evidence, the testimony of claimant and his son was vague and self-serving. Moreover, he reasonably inferred that as claimant had been able to perform all types of work during his probationary year as a registered walking boss without the need for orthopedic treatment[5] and successfully completed the probationary period, claimant was physically capable of performing the full range of walking boss jobs. Accordingly, he rejected claimant's argument that he could be earning even more if he were not limited to lighter duty jobs, such as his steady job with Roger's Stevedoring, because of his injury. The administrative law judge found that, in any event, claimant averaged about 2,800 hours per year as a walking boss, the equivalent of the highest number of hours worked by his colleague, Mr. Trachsel, in a period of 10 years. Inasmuch as these findings are rational and supported by the record, and claimant has failed to raise any reversible error made by the administrative law judge, his finding that if claimant still has a residual physical impairment due to the 1984 work injury, it no longer affects his ability to earn wages in his new career is affirmed. *See O'Keeffe*, 380 U.S. at 359.

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[5]While claimant argues on appeal that he persevered in performing all jobs during the probationary period with difficulty in order to advance his career, this assertion is insufficient to establish that the administrative law judge's contrary inference constitutes reversible error. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994). *See also See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994).

Claimant's argument that modification is not appropriate because although he is earning substantially more as a walking boss, his actual wages do not reasonably represent his wage-earning capacity is thus rejected. The administrative law judge determined that claimant presented no evidence suggesting that his current job is either temporary, due to the beneficence of the employer, or otherwise due to some peculiar or unique distorting factor or circumstance. While claimant also argues that even though he is now a fully registered walking boss, he still could be ousted from Local 92 by joint committee and thus lose his job, the administrative law judge rationally dismissed this argument as unlikely based on claimant's testimony that this had not happened in the past 10 years, and that he expected his current earnings to continue and that his job is secure. Tr. at 64-65. Moreover, as three years had passed since claimant's probationary period the administrative law judge found no merit to claimant's argument that consideration of the question of a whether claimant's earning capacity had changed was premature.[6] Inasmuch as the administrative law judge rationally concluded that claimant's actual post-injury wages as a registered walking boss reasonably represent his earning capacity, and claimant has failed to demonstrate any reversible error, this determination is also affirmed. *See generally Cook v. Seattle Stevedore Co*., 21 BRBS 4 (1988).

Having determined that claimant's actual post-injury earnings as a walking boss reasonably represented his wage-earning capacity, the administrative law judge properly concluded that employer had introduced evidence sufficient to warrant termination of the 1988 compensation award based on a change in his economic condition. In so concluding, he stated that although the prior award was premised on the assumption that claimant would have a residual wage-earning capacity as a general longshoreman able to work 27 hours per week of about $31,660 per year, claimant's professional life had turned out much better than anticipated in that he currently holds a sedentary union protected job as a fully registered walking boss which is permanent and secure, wherein he is guaranteed 10 hours for each day he works and is able to earn about $115,000 per year. In light of these facts, the administrative law judge found that claimant was no longer disabled by his work injury and granted employer's motion for modification. Inasmuch as his findings are rational, supported by substantial evidence, and consistent with the Supreme Court's holding that modification must be based on a

[6] In so concluding, the administrative law judge stated that this period was sufficiently long to allow him to conclude that claimant's increased earnings were indicative of his earning capacity and not merely a transient change. Decision and Order at 12.

change in claimant's wage-earning capacity and not every variation in actual wages or transient change in the economy, *Rambo I*, 515 U.S. at 2150, 30 BRBS at 5 (CRT), his termination of claimant's award on modification is affirmed.[7] *See also Container Stevedoring Co., v. Director, OWCP [Gross]*, 935 F.2d. 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

[7]Claimant also argues that even if modification is warranted, he should be awarded a nominal award to preserve his right to seek modification in the future in the event he were to lose his job with Roger's Stevedoring or if the number of jobs available on the open market were to decrease. We will not address this argument, however, as it is being raised for the first time on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). In any event, the administrative law judge's findings regarding claimant's job security would support a conclusion that claimant has not demonstrated a significant possibility of future economic harm, as is required under *Rambo II.*

Accordingly, the administrative law judge's Decision and Order granting modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge