BRB Nos. 88-2249
and 90-2228

MOSES RAMIREZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LANE CONSTRUCTION COMPANY	)	DATE ISSUED
	)	
and	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order, Order Denying Motion for Reconsideration, Amended Order Denying Motion for Reconsideration, and Order Denying Claimant's Request for Modification of David A. Clarke, Jr., Administrative Law Judge, United States Department of Labor.

Moses Ramirez, Coral Gables, Florida, *pro se*.

Jeffrey R. Miller (Ward, Klein & Miller), Gaithersburg, Maryland, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order, Order Denying Motion for Reconsideration, Amended Order Denying Motion for Reconsideration and Order Denying Claimant's Request for Modification (87-DCWC-46) of Administrative Law Judge David A. Clarke, 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*., as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the Act). In reviewing these *pro se* appeals, the Board 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).

This is the fourth time that this case has been before the Board. Claimant sustained various injuries when, on November 22, 1974, he fell from a truck while working for employer as a construction worker. In a Decision and Order dated February 1, 1978, Administrative Law Judge

Robert S. Amery awarded claimant temporary total disability benefits from November 23, 1974, through October 29, 1977, and permanent partial disability benefits thereafter. 33 U.S.C. §908(b), (c)(21). Claimant appealed this decision to the Board. *See Ramirez v. Lane Construction Co.*, 9 BRBS 645 (1979). The Board held that the administrative law judge erred in calculating claimant's temporary total disability award and post-injury wage-earning capacity; the Board, therefore, remanded the case for further findings by the administrative law judge. 9 BRBS at 646-650.

In a Decision and Order on Remand dated January 21, 1980, Judge Amery recalculated claimant's temporary total disability award, and thereafter found claimant entitled to permanent total disability compensation commencing October 30, 1977. 33 U.S.C. §908(a). Claimant appealed this decision to the Board. In a Decision and Order dated March 31, 1981, the Board affirmed Judge Amery's Decision and Order on Remand. *Ramirez v. Lane Construction Co.*, BRB No. 80-0224 (March 31, 1981)(unpublished).

Employer thereafter sought modification of Judge Amery's Decision and Order on Remand pursuant to Section 22 of the Act, 33 U.S.C. §922. In seeking modification, employer alleged a change in claimant's economic condition. In a Decision and Order issued May 6, 1988, Administrative Law Judge David A. Clarke, Jr., determined that, as claimant is now capable of performing certain specific minimum wage jobs, there had been a change in claimant's condition. The administrative law judge accordingly found claimant entitled to permanent partial disability compensation as of June 18, 1987, the date upon which he reached maximum medical improvement. Claimant's motion for reconsideration was subsequently denied by the administrative law judge on June 2, 1988; on June 28, 1988, the administrative law judge issued an Amended Order Denying Motion for Reconsideration, in which he corrected the caption in this case. Claimant also thereafter appealed the administrative law judge's decision to the Board. BRB No. 88-2249. On June 7, 1989, claimant filed a Request for Modification with the administrative law judge; in an Order dated August 31, 1989, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings. In an Order Denying Claimant's Request for Modification dated February 8, 1990, the administrative law judge denied the relief sought by claimant.

Claimant appealed the administrative law judge's Order Denying Claimant's Request for Modification to the Board. By Order dated September 28, 1990, the Board acknowledged receipt of this appeal, BRB No. 90-2228, reinstated claimant's prior appeal, BRB No. 88-2249, and consolidated these appeals for purposes of decision. On appeal, claimant, appearing *pro se*, challenges the administrative law judge's decision to award permanent partial, rather than permanent total, disability compensation. Employer responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification of a prior decision is permitted at any time prior to one year after the last payment of compensation or the rejection of a claim, based on a mistake of fact in the initial decision or where claimant's physical or economic condition has improved or deteriorated. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196

(1989). A request for modification pursuant to Section 22 may be based upon a change in a claimant's wage-earning capacity; thus, an employer may attempt to modify a total disability award pursuant to Section 22 by establishing the availability of suitable alternate employment. *See Blake v. Ceres, Inc.*, 19 BRBS 219 (1987). The party requesting modification based on a change in condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

We first address BRB No. 88-2249, in which claimant appeals the administrative law judge's Decision and Order, Order Denying Motion for Reconsideration, and Amended Order Denying Motion for Reconsideration. Claimant asserts that, contrary to the determination of the administrative law judge, he remains permanently totally disabled.

The standard for determining disability is the same during Section 22 modification proceedings as it is during initial adjudicatory proceedings under the Act. *See Vasquez*, 23 BRBS at 428. Thus where, as in the instant case, a claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), *rev'g in pertinent part*, 5 BRBS 418 (1977). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Employer must establish actual, not theoretical, job opportunities; however, the employer need not actually obtain a job for claimant. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of establishing the availability of suitable alternate employment. *See Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

In the instant case, the administrative law judge, based upon the labor market survey and testimony of Ms. Sampeck, a vocational consultant, and the opinion of Dr. Gordon, concluded that employer had established the availability of suitable alternate employment. Ms. Sampeck, in labor market surveys dated February 6, 1986, and July 7, 1987, set forth seven specific available positions with specific employers, such as a cashier, an assembler, a security guard, a stock inventory clerk, and three production positions, which she believed were within claimant's capabilities. *See* EX-9. Additionally, Ms. Sampeck noted that each contacted employer indicated a willingness to interview claimant. *See* Transcript at 76-78. Dr. Gordon examined claimant on June 18, 1987, and found that claimant's condition was stable. Specifically, Dr. Gordon opined that no physical evidence existed to support claimant's complaints and that claimant could perform the positions presented by the vocational consultant. *See* EX-1. In crediting Ms. Sampeck's testimony, the administrative law judge specifically noted that her conclusions were well-documented and were supported by a reasoned analysis, *see* Decision and Order at 9. Similarly, the administrative law judge granted great weight to the testimony and reports of Dr. Gordon due to those reports' extensive, well-reasoned, and well-documented nature. *Id.* at 8.

It is well-established that fact-finding functions reside with the administrative law judge,

who is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Based upon the extensive record before us, we cannot say that the administrative law judge's decision to credit the vocational testimony of Ms. Sampeck and the medical opinion of Dr. Gordon is either inherently incredible or patently unreasonable. We hold, therefore, that the administrative law judge's determination that employer established the availability of suitable alternate employment is supported by substantial evidence and is consistent with law. *See Turner*, 661 F.2d at 1031, 14 BRBS at 156; *Southern*, 17 BRBS at 64. Accordingly, we affirm the administrative law judge's finding on this issue and his consequent award of permanent partial disability compensation. *See generally Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

Next, in calculating claimant's post-injury wage-earning capacity, the administrative law judge determined that the wages paid by the specific positions identified by the vocational consultant paid between minimum wage and $5.00 per hour and, furthermore, that those positions paid at least the minimum wage at the time of claimant's work injury. Thus, based upon a forty-hour week, the administrative law judge concluded that claimant's post-injury wage-earning capacity was $80.00 per week. *See* Decision and Order at 10. As the administrative law judge's determination of claimant's post-injury wage-earning capacity is supported by substantial evidence and is in accordance with law, it is affirmed.[1] *See* 33 U.S.C. §908(h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988).

[1]We note that the administrative law judge committed no reversible error in commencing claimant's permanent partial disability award on June 18, 1987, the date upon which he determined claimant reached maximum medical improvement, since Ms. Sampeck's February 6, 1986, labor market survey, which was updated July 7, 1987, established that suitable alternate employment was available as of that date. *See Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989) and 16 BRBS 231 (1984); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), *vacating on recon.* BRB No. 88-1721 (January 29, 1991)(unpublished).

In BRB No. 90-2228, claimant appeals the administrative law judge's denial of his request for modification. As set forth *supra*, modification of a prior decision is permitted based on a mistake of fact or a change in claimant's condition. *See Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In order to reopen the record under Section 22, the moving party must allege a mistake of fact or a change of condition and assert that evidence to be produced or of record would bring the case within the scope of Section 22. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989).

In his Order Denying Claimant's Request for Modification, the administrative law judge determined that the evidence submitted by claimant, specifically a copy of claimant's naturalization papers and a prescription for Motrin, were not convincing evidence that establishes that claimant's disability had increased. Our review of the record indicates that claimant presented no evidence regarding a change in the extent of his disability.[2] Accordingly, we hold that the administrative law judge did not abuse his discretion in denying claimant's request. We, therefore, affirm the administrative law judge's denial of claimant's request for modification. *See generally O'Keeffe*, 380 U.S. at 359.

Accordingly, the administrative law judge's Decision and Order, Order Denying Reconsideration, Amended Order Denying Reconsideration, and Order Denying Claimant's Request for Modification are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]We note that claimant subsequently submitted a letter from Dr. Paul, who opined that claimant's condition is permanent. This conclusion, however, does not support claimant's contention that the extent of his disability has changed.