

BRB No. 96-0195

ROBERT L. THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED:
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-1993) of Administrative Law Judge Reno E. Bonfanti 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On October 10, 1980, claimant was diagnosed with asbestosis. Employer voluntarily paid claimant compensation for temporary total disability from August 18, 1980, to November 2, 1980. Claimant was unable to return to his former work due to his injury. When claimant did return to work with employer, he was given various light duty jobs in the Material Reclamation and Assembly (MRA) shop, in the X-42 Pipe Department where he purged pipes, in the nuclear department where he operated a crane, and in storerooms on the pier where he was responsible for checking out machines and tools to other employees for use in the shipyard and cleaning the machines and tools. Claimant was laid off from his most recent light duty job in the storeroom with employer on July 8, 1994.

In the initial Decision and Order in this case, Administrative Law Judge Glenn Robert

Lawrence awarded claimant permanent partial disability benefits in the amount of \$46.67 a week commencing November 3, 1980, interest and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Administrative Law Judge Lawrence also found that employer did not discriminate against claimant in violation of Section 49 of the Act, 33 U.S.C. §948a, and denied employer's request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Claimant requested modification of his award of permanent partial disability benefits, pursuant to Section 22 of the Act, 33 U.S.C. §922, to permanent total disability benefits after he was laid off from his light duty job with employer on July 8, 1994. In his Decision and Order on modification, Administrative Law Judge Reno E. Bonfanti (the administrative law judge) denied claimant's request for modification after concluding that claimant did not establish a significant change in his economic or physical condition. The administrative law judge found that claimant removed himself from the labor market by voluntary retirement. The administrative law judge concluded that retirement was in claimant's mind before he received the layoff notice although he had not decided on any specific date, that claimant only applied for other jobs in order to be able to receive unemployment compensation benefits, and he noted that following the diagnosis of asbestosis, claimant was able to work for employer in light duty jobs for over 12 years. The administrative law judge also concluded that the fact that claimant's light duty job was terminated on July 8, 1994, was not grounds to award him compensation for permanent total disability.

On appeal, claimant challenges the administrative law judge's denial of his request for modification and contends that the layoff from his light duty job on July 8, 1994, established an economic change in conditions which was sufficient to support an award of permanent total disability benefits.<sup>1</sup> Employer responds in support of the administrative law judge's denial of modification.<sup>2</sup>

Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification based on a mistake of fact or change in conditions. Modification based on a change in conditions may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995); *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); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Once claimant establishes a change in conditions and a

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<sup>1</sup>Claimant does not challenge the administrative law judge's finding that he did not establish a physical change in conditions.

<sup>2</sup>Employer filed his response brief on June 7, 1996, accompanied by a Motion for Extension of Time in Which to File Brief in Response to Claimant's Petition for Review. We grant employer's motion for extension of time and accept the response brief as part of the record. 20 C.F.R. §§802.212, 802.217.

continuing inability to perform his pre-injury job, the burden shifts to employer to establish the availability of suitable alternate employment. See *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989). Contrary to the administrative law judge's statement, claimant is not required to establish a *significant* change in conditions; claimant must only establish a change in conditions.<sup>3</sup> See *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

Claimant argues that the administrative law judge erred in denying his request for modification as the layoff from his light duty job on July 8, 1994, established an economic change in conditions. In determining that claimant did not establish an economic change in conditions, the administrative law judge summarily concluded that claimant removed himself from the labor market by voluntary retirement. Decision and Order at 3. Claimant testified that after he received the layoff notice dated May 9, 1994, he filed for retirement on May 10, 1994, because he felt that would probably be the only way he would have money coming in. Tr. of April 24, 1995 at 31-32. While claimant's layoff from his light duty job with employer was effective on July 8, 1994, his retirement was effective on August 1, 1994. Cl. Ex. 2; Emp. Exs. 6, 7; Tr. of April 24, 1995 at 31-32. Claimant also testified that although he had thought of retiring before he got the layoff notice, he never got to the point of saying he was going to retire in a certain number of days. Tr. of April 24, 1995 at 32. He acknowledged that he considered leaving because of breathing problems and headaches, but was not in a financial position to do so. *Id.* at 32, 35. Although the administrative law judge is not required to accept claimant's testimony as credible and may draw reasonable inferences from his testimony, the administrative law judge in this case summarily found that claimant voluntarily retired without fully discussing claimant's testimony. We therefore must vacate the administrative law judge's decision and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must discuss and weigh claimant's testimony and explain his bases for accepting or rejecting it in accordance with the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2) and 33 U.S.C. §919(d); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989)(The administrative law judge's disposition of a petition for modification must comport with the requirements of the APA.).

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<sup>3</sup>After recognizing that an award in a nonscheduled injury case may be modified where there has been a change in wage-earning capacity, the Court noted that its approach did not permit a change in wage-earning capacity with every variation in actual wages or transient change in the economy. *Rambo*, 115 S.Ct. at 2150, 30 BRBS at 5 (CRT).

If, on remand, the administrative law judge finds that claimant did not voluntarily retire and has established an economic change in conditions in accordance with *Rambo*, 115 S.Ct. at 2144, 30 BRBS at 1 (CRT), he must award permanent total disability benefits on the current record because, as claimant correctly asserts, claimant established a continuing inability to perform his pre-injury job by stipulation of the parties, and employer failed to establish suitable alternate employment. Contrary to the administrative law judge's finding, the fact that claimant's light duty job was terminated on July 8, 1994, is grounds to award claimant permanent total disability as employer made suitable alternate employment at its facility unavailable by laying claimant off. *See Vasquez*, 23 BRBS at 428; *see also Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). If, on remand, claimant is entitled to permanent total disability benefits, the administrative law judge must determine whether employer is entitled to relief from continuing compensation liability pursuant to Section 8(f).

Accordingly, the administrative law judge's Decision and Order on modification is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge