BRB No. 96-1447

DONALD R. TRISLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RYAN-WALSH STEVEDORING, INCORPORATED	)	DATE ISSUED: _____
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Modifying Award of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Cameron C. Gamble, P.C. , New Orleans, Louisiana, for claimant.

Scott M. McQuaig and W. Chad Stelly (Scott W. McQuaig, APLC), Metarie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Modifying Award (92-LHC-3095) of Administrative Law Judge Quentin P. McColgin 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On June 24, 1990, claimant sustained injuries to his right forearm and neck while working as an electrician for employer when he cut the end of a cable with a power saw which apparently struck a live wire causing an electrical explosion which threw him against an electrical hatch cover. Claimant's injuries in this accident aggravated previous injuries he sustained while working for a different employer. Claimant sought permanent total disability compensation under the Act.

In his initial decision dated June 9,1994, the administrative law judge found that claimant sustained injuries to his hand and neck while working for employer, resulting in a disability which, in combination with a pre-existing 1965 injury to his right hand, rendered him unable to perform his usual work as an electrician. The administrative law judge further determined that employer did not meet its burden of establishing the availability of suitable alternate employment, in that although employer' vocational expert, Ms. Favaloro, did identify specific available job opportunities, she failed to describe the physical requirements of the jobs with sufficient particularity to permit an independent evaluation of their suitability. Accordingly, he awarded claimant temporary total disability compensation from June 24, 1990 until December 15, 1992, and permanent total disability compensation thereafter.

On October 14, 1994, employer sought modification, alleging that the administrative law judge's award of permanent total disability compensation was premised on a mistake in the determination of fact regarding the availability of suitable alternate employment, or alternatively that there had been a change in claimant's wage-earning capacity such that he was no longer totally disabled. In a Decision and Order Modifying Award dated July 2, 1996, the administrative law judge, crediting new labor market surveys performed by Ms. Favaloro rather than the testimony of claimant's vocational expert, Mr. Roberts, found that employer established the availability of ten suitable alternate jobs opportunities which paid an average of $206 per week. Utilizing the national average weekly wage to adjust this figure for inflation, the administrative law judge found that claimant had a post-injury wage-earning capacity of $178.81 per week and accordingly modified his prior award to reflect that claimant was entitled to permanent partial disability compensation commencing November 22, 1994. Claimant appeals the administrative law judge's Decision and Order Modifying Award on various grounds. Employer responds, urging affirmance.

Claimant initially argues that the administrative law judge erred in granting modification because the vocational evidence submitted by employer during the modification proceedings was cumulative. Contrary to claimant's assertions, however, Section 22 of the Act, 33 U.S.C. §922, vests the fact-finder with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection of evidence initially submitted. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). In addition, a disability award may be modified under Section 22 where there is a change in the employee's wage-earning capacity, even in the absence of a change in his physical condition. *Rambo*, 515 U.S. at 2150, 30 BRBS at 45 (CRT); *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). Claimant's argument is therefore rejected.

After consideration of claimant's contentions in light of the record evidence, we affirm the administrative law judge's decision on modification. As it is uncontested that claimant is unable to return to his usual work for employer, claimant established a *prima facie* case of total disability and the burden shifted to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). Claimant initially argues on appeal that Ms. Favaloro's labor market surveys are insufficient to meet employer's burden because she was unaware of claimant's physical problems. We disagree. At the hearing, Ms. Favaloro testified that in assessing claimant's employability, she considered his medical restrictions, which included no lifting, pushing, or pulling over 35 pounds due to his cervical injury and the fact that he had very limited, if any, use of the right hand. Tr. at 20. After reviewing claimant's education, work history and medical reports, Ms. Favaloro conducted several labor market surveys and was able to identify a number of alternate job opportunities which she felt were consistent with claimant's hand, arm, and cervical limitations, and which she felt he could reasonably secure. Tr. at 19-21. After comparing these jobs with claimants's medical restrictions,[1] the administrative law judge rejected two sales jobs with Helm Paint & Supply and Armstrong Supply Company as inconsistent with claimant's lifting restrictions. He determined, however, that the remaining jobs of gate guard at Guardsmark, toll both operator on the Sunshine Bridge, rental agent at Alamo Rent-A-Car, inside sales jobs at Bayou Boeuf and Notoco Industries, and two management trainee positions at Sound Warehouse in Harahan and Radio Shack were suitable. Claimant's argument that Ms. Favaloro's testimony should be disregarded because she did not personally contact certain employers or inform prospective employers that claimant was still on pain medication is rejected, as there is no requirement that a vocational expert contact prospective employers directly. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290, 292 (1990). Moreover, we note that in the present case the prospective employers were provided with a vocational profile by Ms. Favaloro's co-workers. *See* Tr. at 21-27.

[1]The restrictions as set by Dr. Vogel were no lifting, pushing or pulling greater than 35 pounds. EXS-9, 10. Dr. Williams also noted that claimant's right hand was virtually useless. EX-2.

Claimant's assertion that he did not have the transferrable skills or experience necessary to obtain these jobs is also rejected because it is lacking any evidentiary support in the record. Most of the jobs identified by Ms. Favaloro offered on-the-job training. Moreover, at least two of the jobs -- the position as a gate guard and the toll collector position -- did not require any transferrable skills.

Claimant's contention that testing performed by his vocational expert, Mr. Roberts, establishes that he is not physically capable of performing the alternate jobs identified by Ms. Favaloro is similarly without merit. After performing functional capabilities testing, Mr. Roberts opined that claimant was not capable of returning to gainful employment because he lacked the functional ability to perform even sedentary work. The administrative law judge, however, found that Mr. Roberts's opinion was entitled to less weight than Ms. Favaloro's contrary opinion because he was not a licensed vocational rehabilitation counselor, and because the results of his testing, which indicated that claimant's educational skills have increased and that he has above average strength in his left hand, were inconsistent with his opinion that claimant is totally disabled.[2] As it is solely within the discretion of the administrative law judge to accept or reject all or any part of any testimony and claimant has failed to establish that the administrative law judge's rejection of Mr. Roberts's testimony is either inherently incredible or patently unreasonable, this credibility determination is affirmed. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).[3]

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[2]Furthermore, the administrative law judge noted that, in any event, Mr. Roberts only specifically discussed three of the jobs listed in Ms Favaloro's reports. Decision and Order Modifying Award at 6-7.

[3]Claimant's arguments relating to the testimony provided by Frederich Memlab, a vocational counselor with the Louisiana Rehabilitation Services, and Roberta Bell, a psychologist who recommended the vocational testing that Mr. Roberts performed, need not be addressed as claimant is raising these arguments for the first time on appeal. *See generally Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT) (5th Cir. 1991).

We also reject claimant's assertion that the administrative law judge committed reversible error in refusing to allow the admission of evidence relating to a disability determination by the Social Security Administration. Any error the administrative law judge may have made in this regard is harmless; a determination of disability by the Social Security Administration involves the application of standards which differ from those applicable under the Longshore Act. *See Jones v. Midwest Machinery Movers,* 15 BRBS 70, 73 (1982).

Finally, we reject claimant's alternate argument that he is entitled to permanent total disability compensation because he diligently tried but was unable to secure alternate work. Once employer has established the availability of suitable alternate employment, claimant can still prevail if he demonstrates that he diligently tried and was unable to secure such employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). In the present case, however, the administrative law judge rationally found that, although claimant applied for 4 of the 9 jobs originally identified by Ms. Favaloro, this did not equate to due diligence because claimant requested a salary of $48,000 per year, an impractical request which probably adversely impacted his chances of being hired. Moreover, the administrative law judge noted that since the time of the initial hearing, claimant had not made any effort to obtain alternate work. Inasmuch as the administrative law judge's finding that claimant did not make a diligent effort to obtain alternate work is rational and supported by substantial evidence, we affirm this determination. *See generally Dangerfield v. Todd Pacific Shipy ards Corp.*, 22 BRBS 104 (1989). As claimant has failed to demonstrate any reversible error made by the administrative law judge, his award of permanent partial disability compensation on modification is affirmed.

Accordingly, the Decision and Order Modifying Award is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge