BRB No. 90-1419

DORIS M. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Theodor P. Von Brand, Administrative Law Judge, United States Department of Labor.

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

Jonathan H. Walker (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-1112) of Administrative Law Judge Theodor P. Von Brand 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 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, who began working for employer in 1977, was

transferred to its welding department in 1979 where worked as a linesman using pneumatic tools. In May 1979, claimant sustained a wrist injury and began to experience numbness in both hands with shooting pain into her arms. She was treated for tendinitis and assigned to employer's Material Reclamation and Assembly (MRI) shop, performing light-duty work. Claimant consulted numerous specialists over the next few years. When various tests produced no objective explanation for her pain, Dr. Garner, a neurosurgeon, performed a cervical myelogram to rule out nerve root compression which proved normal. Following this test, however, claimant began to complain of pain in her lower back and legs. Dr. Stiles, an orthopedic surgeon, and claimant's treating physician, thought that these symptoms were suggestive of post myelographic arachnoiditis, an irritation of the tissue that surrounds the nerve roots within the spinal canal. In 1986, Dr. Stiles performed a carpal tunnel release on both of claimant's wrists and assigned a 10 percent permanent disability to both upper extremities. He also referred claimant to a psychologist for an evaluation of her chronic pain condition. Claimant returned to work in the MRI shop for about a year but was ultimately laid off on November 5, 1987, when no work was available within the permanent light duty restrictions imposed by Dr. Stiles and the shipyard in October 1987.

Following her lay-off, claimant worked with two vocational counselors, but did not obtain a job. Subsequently, however, through an acquaintance, she obtained part-time work as a catering attendant but was allegedly dismissed from this job on June 29,

1989 when a representative from employer's shipyard called and informed her boss about the work injury. Claimant has not worked again since. Her complaints include arm, back and leg pains, and she has experienced periods of depression and alcohol abuse.

On April 3, 1987, the deputy commissioner issued a compensation order awarding claimant benefits for a ten percent permanent disability to each hand pursuant to Section 8(c)(3), 33 U.S.C. §908(c)(3), pursuant to the stipulation of the parties.[1]

Subsequently, claimant sought modification of the deputy commissioner's compensation order awarding benefits pursuant to Section 22, 33 U.S.C. §922, arguing that he was permanently totally disabled as of November 5, 1987 due to his wrist injury and post-myelographic arachnoiditis. In the alternative, claimant argued that the deputy commissioner's award of compensation for a 10 percent disability of the hand was premised on a mistake in fact in that Dr. Stiles, whose opinion formed the basis for the parties' stipulation, had rated claimant's disability as 10 percent of both upper extremities. Accordingly, claimant asserted that compensation for his wrist injury should have been awarded pursuant to Section 8(c)(1), 33 U.S.C. §908(c)(1), rather that pursuant to Section 8(c)(3) as awarded by the deputy commissioner.

In a Decision and Order dated April 19, 1990, the

[1]Claimant has received compensation benefits for various periods of disability in the amount of $14, 194.36.

administrative law judge denied claimant's modification request finding that the question of whether claimant's wrist injury was compensable under Section 8(c)(1) or Section 8(c)(3) was purely a legal determination and that a legal error does not provide proper grounds for modification. In addition, the administrative law judge determined that claimant did not have post-myelographic arachnoiditis or any other work-related impairment of the lower back or legs. Finally, the administrative law judge determined that claimant was not entitled to permanent total disability compensation because he failed to establish that his inability to perform his usual work was due to the work-related injury and that accordingly the question of suitable alternate employment and employer's entitlement to Section 8(f), 33 U.S.C. §908(f) relief need not be addressed.

Claimant appeals the denial of his petition for modification arguing that the administrative law judge erred in determining that she was not permanently totally disabled as of November 5, 1987 as it is undisputed that she is unable to perform her usual work and employer has failed to establish the availability of suitable alternate employment. In addition, claimant avers that the administrative law judge erred in finding that claimant did not have post-myelographic arachnoiditis because he credited the opinions of the consulting neurosurgeons over the opinion of claimant's treating physician, Dr. Stiles. Finally, claimant avers that, if in fact, claimant is limited to an award of

permanent partial disability under the schedule, this disability is compensable pursuant to Section 8(c)(1) rather than Section 8(c)(3) because stipulation agreements between the parties are subject to modification and the administrative law judge erred in finding that there had been no mistake in the determination of fact. Employer responds, urging affirmance.

Initially, we direct our attention to claimant's argument that the administrative law judge erred in denying her claim for permanent total disability as of November 5, 1987. Claimant avers that the administrative law judge's finding that she was not permanently totally disabled is not supported by substantial evidence because it is undisputed that she is unable to perform her usual work, employer has failed to establish the availability of suitable alternate employment, and that her own diligent efforts to obtain alternate work have been unsuccessful. Claimant further asserts that the fact that she was able to obtain a short-term catering job does not preclude a finding of permanent total disability because this was sheltered employment provided by a beneficent employer. In addition, claimant asserts that this job is, in any event, not currently available to claimant as she was ultimately fired from this position when the shipyard informed her boss of the work injury.

To establish a prima facie case of total disability, the claimant must show that she cannot return to her regular or usual employment due to her work-related injury. See Manigault v.

Stevens Shipping Co., 22 BRBS 332 (1989). Once a claimant establishes that she is unable to do her usual work, she has established a prima facie case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment which the claimant is capable of performing. See Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); Lentz v. The Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). Once employer shows that suitable alternate employment exists, claimant can still prevail if he demonstrates that he diligently tried and was unable to secure such employment. See Rodgers Terminal and Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT)(5th cir. 1986), cert. denied, 479 U.S. 826 (1986). Where, however, claimant performs actual post-injury work which is suitable and stops working for reasons unrelated to the work injury, employer has established the availability of suitable alternate employment and claimant's diligence in seeking work elsewhere is irrelevant. Edwards v. Todd Shipyards Corp., 25 BRBS 49 (1991), appeal pending No. 91-70648 (9th Cir. Oct. 24, 1991); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980).

In the present case claimant succeeded in establishing a prima facie case of total disability because it was undisputed that she could not return to her usual job as welder's helper due to her work-related wrist injury. The administrative law judge in

the present case, however, never reached the question of whether employer had established the availability of suitable alternate employment apparently because he erroneously believed that claimant was required to prove that her inability to perform her usual work was related to the wrist injury as part of her prima facie case of total disability. Although as the administrative law judge noted, the Section 20(a), 33 U.S.C. §920(a), presumption does not aid claimant in establishing the nature and extent of disability, see Holten v. Independent Stevedoring Co., 14 BRBS 441, 443 (1982), the presumption does apply in establishing the cause of claimant's disability.[2] Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1990). Moreover, in this case, causation is undisputed; the shipyard's restrictions necessitated by the work injury prohibit ladder climbing, lifting over 8 pounds and the use of pneumatic tools.[3] Accordingly, as claimant established a prima facie case of total disability, the administrative law judge erred in failing to address the question the suitable alternate employment.

[2]Section 20(a) provides claimant with the presumption that his disabling condition is causally related to the work injury if he shows that he suffered a harm and that employment conditions existed, or an accident occurred which could have caused the harm. See Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991).

[3]The administrative law judge specifically found that although claimant did not have carpal tunnel syndrome, she probably did have tendinitis as a result of working with pneumatic tools. The administrative law judge failed to make any factual findings which would support a determination that claimant's inability to perform her usual work was not due to his work related hand injury.

The evidence as to the availability of suitable alternate employment is conflicting. The record reflects, that claimant worked with two vocational experts who identified numerous jobs which they considered suitable for claimant. Claimant testified, however, that some of these jobs were not suitable and that her diligent attempts to obtain alternate employment has proven fruitless. Furthermore, it is undisputed that claimant actually performed post-injury work as a catering attendant for a short time. Although some of the duties involved in this job may have exceeded her physical restrictions, claimant was able to perform this work by virtue of the help of her co-workers and the part-time nature of the job. Moreover, claimant's treating physician, Dr. Stiles, ultimately approved this position as being within her restrictions. Although claimant alleges that she was fired from the catering job when the shipyard informed her boss of the work injury, it is unclear from the record why claimant was dismissed from this position. Because the administrative law judge made no findings as to whether employer established suitable alternate employment, we vacate his denial of permanent total disability compensation, and remand to allow him to consider this issue in light of the conflicting evidence in the record.[4] See Tann, supra;

[4]Claimant contends that because she received help from her co-workers while she worked as a catering attendant, this position was "sheltered" work. Where claimant is capable of performing a job, the work is necessary, and others are doing the same work, it is not sheltered. See Walker v. Sun Shipbuilding and Dry Dock Co., 19 BRBS 171 (1986). Moreover, contrary to claimant's

Lentz, supra.

Claimant's argument that the administrative law judge erred in refusing to modify her award for disability of the hands under Section 8(c)(3) to one of disability of the arms under Section 8(c)(1) is rejected. Under Section 22, an aggrieved party may seek modification within a year of the date of the last payment of compensation or within one year of the denial of the claim based on a change in condition or mistake of fact. 33 U.S.C. §922. An award of benefits based on the agreements and stipulations of the parties is subject to modification under Section 22 based on a mistake in fact or change in condition, See Norton v. National Steel & Shipbuilding Co., 25 BRBS 79, 84 (1991). Although claimant argues that the deputy commissioner's award was based on a mistake in the determination of fact, the administrative law judge in the present case properly determined that the question of whether Section 8(c)(1) or Section 8(c)(3) is applicable is a purely a question of law which cannot serve as a basis for modification under Section 22. Stokes v. George Hyman Construction Co., 19 BRBS 110, 113 (1986). See also O'Keeffe v. Aerojet-General Shipyards, Inc., 404 U.S. 254 (1971); Maples v. Marine Disposal Co., 16 BRBS 241 (1984). Additionally, as Dr.

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contention, employer need not show that a position is currently available in order to meet its burden of establishing suitable alternate; the position need only have been available during the critical period where claimant was able to work. See Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT)(9th Cir. 1988).

Stiles assigned claimant a ten percent permanent disability to both upper extremities prior to the issuance of the deputy commissioner's April 2, 1987 compensation order, claimant is attempting to litigate an issue which could have been raised in the initial proceedings.[5] Accordingly, in the event that the administrative law judge determines on remand that claimant is not permanently totally disabled and is therefore limited to permanent partial disability under the schedule, he should reaffirm the deputy commissioner's prior award of compensation for a 10 percent permanent impairment of the both hands pursuant to Section 8(c)(3).[6] See Potomac Electric Power Co. v. Director, OWCP,, 449 U.S. 268, 14 BRBS 363 (1980); See generally Andrews v. Jeffboat, Inc., 23 BRBS 169 (1990).

Claimant's argument that the administrative law judge erred in failing to accord determinative weight to the opinion of claimant's treating physician, Dr. Stiles, in finding that claimant did not have post-myelographic arachnoiditis is similarly without merit. While acknowledging that a treating physician's

[5]Claimant alleges that the parties did not discuss the issue and that she had not seen the report of Dr. Stiles prior to Lentz the stipulation on which the compensation order was based. We note, however, that claimant was represented by counsel and that claimant's counsel signed the stipulation agreement.

[6]Claimant maintains that this case is analogous to Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989), where the Board held that a stipulation agreement is subject to modification under Section 22. Finch, however, involved a potential mistake in a mixed question of law and fact which is properly the subject of a Section 22 modification and is therefore distinguishable. Finch, 22 BRBS at 201.

opinion is normally entitled to greater weight than the opinion of a consulting physician, the administrative law judge in the present case declined to credit Dr. Stiles' opinion that claimant had possible post-myelographic arachnoiditis over the contrary opinions of the consulting neurosurgeons, Drs. Foer, Neff, and Tourian. In so concluding the administrative law judge noted that Dr. Stiles' testimony was at best equivocal and that he himself had conceded that a neurosurgeon could provide a more accurate diagnosis of this condition. Inasmuch as arachnoiditis is a neurological problem, the administrative law judge found the opinions of the three neurological surgeons more persuasive than Dr. Stiles' opinion and accordingly determined that the weight of the evidence established that claimant does not have post-myelographic arachnoiditis. Inasmuch as credibility determinations are within the discretion of the trier-of-fact and claimant has failed to establish that the administrative law judge's decision not to credit Dr. Stiles' opinion was inherently incredible or patently unreasonable, this credibility determination is affirmed. See generally Thompson v. Northwest Enviro Services, Inc., 26 BRBS 53 (1992); Uglesich v. Stevedoring Services of America, 24 BRBS 180, 185 (1991).

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Accordingly, the Decision and Order of the administrative law judge denying claimant permanent total disability compensation is vacated and the case is remanded for further consideration

consistent with this opinion. The Decision and Order denying modification of the award for the scheduled injury and denying compensation for post-myelographic arachnoiditis is otherwise affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge