BRB No. 00-1076

GEANETT A. TYLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Modification of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Geanett A. Tyler, Fort Washington, Maryland, *pro se*.

Alan D. Sundburg (Friedlander, Misler, Sloan, Kletzkin & Ochsman, PLLC), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Granting Modification (1985-DCW-0284) of Administrative Law Judge Pamela Lakes Wood 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*. (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (the Act). In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §802.211(e). If they are, they must be affirmed.

This case in on appeal to the Board for the fourth time. Claimant, a bus driver, injured

her abdomen and coccyx as a result of two work accidents in 1975 and 1976. Employer voluntarily paid claimant temporary total disability benefits from March 17, 1976, through November 3, 1976. Claimant has never returned to work. In 1986, Administrative Law Judge Feldman denied claimant's claim for permanent total disability benefits, finding that claimant did not establish a causal relationship between her injuries and her work accidents.

In *Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 87-288 (Dec. 30, 1988)(unpub.), upon claimant's *pro se* appeal, the Board affirmed Judge Feldman's denial, and subsequently denied claimant's motion for reconsideration by order dated March 16, 1989. Claimant appealed to the United States Court of Appeals for the District of Columbia Circuit, and the court vacated the denial of benefits and remanded the case for further consideration of whether claimant's disability was work-related. *Tyler v. Washington Metropolitan Area Transit Authority*, No. 89-1309 (D.C. Cir. Oct. 16, 1990)(per curiam). In February 1993, Judge Feldman found claimant's disabling condition to be work-related, and awarded claimant permanent partial disability benefits in the amount of 30 percent of her average weekly wage.

In *Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 93-1646 (Nov. 26, 1993)(unpub.), upon claimant's *pro se* second appeal, the Board modified the permanent partial disability award to one for permanent total disability, and remanded the case for consideration of claimant's entitlement to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. In August 1994, Administrative Law Judge Rippey, to whom the case was reassigned, awarded claimant medical benefits. He did not, however, address employer's motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, filed in February 1994 as it was not initiated before the district director. Subsequently, in 1996, employer re-filed its motion for modification, and Judge Rippey denied employer's motion, finding the new evidence submitted insufficient to establish either a change in claimant's condition or a mistake in fact.

In *Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 96-1464 (Jun. 30, 1997)(unpub.), upon employer's appeal, the Board vacated Judge Rippey's denial of employer's motion for modification, and remanded the case for consideration of employer's newly submitted medical and vocational evidence. Specifically, the Board stated that the administrative law judge should reconsider Dr. Collins's opinion regarding claimant's physical condition, and employer's evidence of suitable alternate employment.[1]

[1]The Board held that the administrative law judge erred in declining to address employer's evidence of suitable alternate employment solely because the evidence was devoid of the wages the jobs paid at the time of injury. The Board noted that under such circumstances it is appropriate to use the percentage change in the national average weekly wage to factor out inflation. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327

Subsequently, the Board summarily denied claimant's *pro se* motion for reconsideration in an Order dated September 8, 1997. Upon claimant's appeal, the United States Court of Appeals for the District of Columbia Circuit granted employer's motion to dismiss as the Board's 1997 remand order did not constitute a final appealable order, and denied claimant's petitions for rehearing. *Tyler v. Director, OWCP*, No. 98-1038 (D.C. Cir. May 1, 1998)(per curiam), *pets. for reh'g denied*, July 10, 1998, and October 2, 1998.

On remand, Administrative Law Judge Wood, to whom the case was reassigned, granted employer's motion for modification and modified claimant's award from permanent total to permanent partial disability benefits effective May 19, 1994. The administrative law judge found that employer established a change in claimant's economic condition. Specifically, the administrative law judge found that although claimant established her *prima facie* case of total disability, employer established the availability of suitable alternate employment, and claimant did not establish she was unable to obtain alternate employment despite a diligent search.

In the instant appeal, claimant challenges the administrative law judge's decision on remand modifying the award from total to partial disability benefits. Employer responds in support of the administrative law judge's decision granting its motion for modification.

(1990).

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition.[2] *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995); *see also 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). The Board has held that an employer may attempt to modify a total disability award to one for partial disability by offering evidence establishing the availability of suitable alternate employment. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 204 (1998); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52 (1989); *Blake v. Ceres, Inc.*, 19 BRBS 219 (1987). Once, as here, claimant establishes her inability to perform her usual work, the burden shifts to employer to establish the availability of suitable alternate employment by identifying jobs which claimant is capable of performing given her age, education, vocational background and physical restrictions. *See McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45 (CRT)(D.C. Cir. 1988); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984). A claimant may retain her entitlement to total disability benefits by demonstrating she diligently, yet unsuccessfully, tried to obtain alternate work of the general type shown by employer to be suitable and available. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991).

In the instant case, employer requested modification based on a labor market survey performed by Mr. Brown, its vocational expert, in response to new medical evidence submitted by both employer and claimant.[3] Mr. Brown identified jobs as hostess, cashier, dispatcher, switchboard operator, and greeter as suitable for claimant given the most recent physical restrictions imposed by Dr. Azer. Emp. Ex. 6; 2 Cl. Ex. 3; 1994 Tr. at 53-55. The administrative law judge discussed and weighed the testimony and labor market surveys of Mr. Brown, along with the most recent physical restrictions imposed by Dr. Azer, and rationally found that the positions identified in the May 19, 1994 labor market survey are

[2]In a statement filed with the Board on August 11, 2000, claimant asserted that her award is final and, pursuant to the principle of *res judicata,* cannot be set aside. However, Section 22 displaces traditional concepts of finality such as *res judicata. See, e.g., Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984).

[3]Employer submitted the July 1993 and January 1994 opinion of Dr. Collins that claimant can return to her usual employment as a bus driver. Emp. Ex. 5. Claimant submitted the October 1993 opinion of Dr. Azer, her treating physician, who imposed permanent physical restrictions against bending, stooping, kneeling, squatting, pushing, pulling, lifting heavy objects, working at unprotected heights, prolonged sitting, and sitting on firm and hard surfaces. 2 Cl. Ex. 3.

suitable for claimant.[4] *See Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51 (CRT)(D.C. Cir. 1991); *Lacey v. Raley's Emergency Road Serv.*, 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991); Decision and Order on Remand Granting Modification at 16; Emp. Ex. 6; 2 Cl. Ex. 3; 1994 Tr. at 53-55. Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment as of May 19, 1994.

[4]Mr. Brown performed a second labor market survey in 1995. Emp. Remand Ex. 4.

We also affirm the administrative law judge's finding that claimant failed to establish diligence in pursuing alternate employment. In order to defeat employer's showing of the availability of suitable alternate employment, claimant must establish that she diligently pursued alternate employment opportunities but was unable to secure a position. *See Palombo,* 937 F.2d 70, 25 BRBS 1 (CRT); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). In the instant case, the administrative law judge acted within her discretion in finding that claimant did not diligently pursue alternate employment as she found that claimant's actions have not reflected a diligent search and as claimant appeared reluctant to accept any employment.[5] *See generally Wilson v. Dravo Corp.*, 22 BRBS 463 (1989)(Lawrence, J., dissenting); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986); Decision and Order on Remand Granting Modification at 16-17; June 1986 Tr. at 49. Thus, we affirm the administrative law judge's finding that claimant did not establish that she diligently pursued alternate employment as it is rational and supported by substantial evidence. Based on our affirmance of the administrative law judge's findings that employer established the availability of suitable alternate employment on May 19, 1994, and that claimant did not establish a diligent pursuit of alternate employment, we affirm the administrative law judge's modification of claimant's benefits from permanent total to permanent partial as of May 19, 1994.[6] 33 U.S.C. §922; *Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

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[5]Claimant testified that she has, "put in an application for like something mild. But basically just taking care of my three children is enough work in and of itself, with the coccyx that I have." June 1986 Tr. at 49. Moreover, the administrative law judge noted that claimant has refused to cooperate with employer's vocational expert since December 1993. Emp. Ex. 6; Emp. Remand Ex. 4.

[6]We need not address the administrative law judge's finding concerning claimant's post-injury wage-earning capacity, as this issue was decided in claimant's favor. 33 U.S.C. §908(h).

Accordingly, the administrative law judge's Decision and Order on Remand 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