BRB No. 00-1004

OTIS LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PENNSYLVANIA TIDEWATER DOCK COMPANY	)	DATE ISSUED: July 9, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Aloysius J. Staud (Fine and Staud), Philadelphia, Pennsylvania, for claimant.

Michael D. Schaff (Naulty, Scaricamazza & McDevitt, Ltd.), Philadelphia, Pennsylvania, for self-insured employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Reconsideration (99-LHC-2449) of Administrative Law Judge Ralph A. Romano 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 administrative law judge's findings of fact and conclusions of law 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).

Claimant injured his left elbow and back on April 28, 1993, and his right wrist and lower back on November 20, 1993. Claimant has not returned to work since November 1993. Employer voluntarily paid claimant temporary total disability benefits from June 15, 1993, to July 19, 1993. 33 U.S.C. §908(b). In 1996, Administrative Law Judge Teitler awarded claimant permanent total disability benefits, 33 U.S.C. §908(a), from July 20, 1993, and continuing, finding that claimant established his *prima facie* case of total disability and that employer offered no evidence establishing the availability of suitable alternate employment. The administrative law judge awarded employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

In *Lewis v. Pennsylvania Tidewater Dock Co.,* BRB Nos. 96-0733/A (Feb. 25, 1997)(unpublished), the Board affirmed the administrative law judge's award of permanent total disability benefits. The Board, however, vacated the administrative law judge's findings regarding Section 8(f) relief. On remand, the administrative law judge again awarded Section 8(f) relief to employer. Subsequently, in *Lewis v. Pennsylvania Tidewater Dock Co.*, BRB No. 97-1583 (Aug. 11, 1998)(unpublished), the Board reversed the administrative law judge's award of Section 8(f) relief. The Board's decision on Section 8(f) relief was subsequently reversed by the United States Court of Appeals for the Third Circuit in *Pennsylvania Tidewater Dock Co. v. Director, OWCP*, 202 F.3d 656, 34 BRBS 55(CRT)(3d Cir. 2000).

In May 2000, upon employer's request for modification, Administrative Law Judge Romano found that claimant's physical condition had improved since Judge Teitler's initial award, based upon his decision to credit Dr. Horowitz's opinion that claimant has recovered from the work injuries to his back and is capable of sedentary work rather than that of Dr. Sedacca that claimant cannot perform his previous work with employer. Moreover, the administrative law judge found that employer established the availability of suitable alternate employment on October 8, 1999, based upon the jobs identified by Ms. Weinstein, employer's vocational expert, in the absence of contrary medical evidence that claimant is unable to perform these jobs. The administrative law judge also found that the highest paying of the suitable alternate jobs is $389 per week, and that claimant's compensation award should be decreased by this amount. Thus, the administrative law judge granted employer's modification request and decreased claimant's compensation to $391.92 per week as of October 8, 1999. 33 U.S.C. §§908(c)(21), 922. The administrative law judge denied summarily claimant's motion for reconsideration.

In the instant appeal, claimant challenges the administrative law judge's decision to modify the award from total to partial disability benefits. Employer

responds in support of the administrative law judge's decision granting its motion for modification.

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. *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, 221 (1987). Once, as here, claimant establishes his inability to perform his usual work, the burden shifts to employer to establish the availability of suitable alternate employment by identifying realistic job opportunities which claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If employer establishes the availability of suitable alternate employment, the wages which the alternate jobs would have paid at the time of injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss in wage-earning capacity. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

After consideration of claimant's arguments on appeal, employer's response, and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's findings that employer established a change in claimant's physical and economic condition. *See Rambo II*, 521 U.S. 121, 31 BRBS 54 (CRT); *Rambo I*, 515 U.S. 291, 30 BRBS 1 (CRT); *Fleetwood v. Newport New 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). Initially, the administrative law judge acted within his discretion in crediting Dr. Horowitz's opinion that claimant has fully recovered from his work-related back injury and can perform sedentary work, finding it to be detailed, documented, and well-reasoned. The administrative law judge found that the opinion of Dr. Sedacca, claimant's treating physician, states only that claimant remains unable to return to his usual work and does not address claimant's ability to perform lighter duty work.[1] *See Wynn*, 21 BRBS 290;

[1]Contrary to claimant's contention, the administrative law judge did not state that Dr. Sedacca agreed with Dr. Horowitz's opinion that claimant's back condition

Decision and Order at 4; Emp. Exs. 1-3, 10, 13 at 21; Cl. Ex. 3. Thus, substantial evidence supports the administrative law judge's finding that claimant's physical condition has improved.

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has resolved; rather, the administrative law judge stated that Dr. Sedacca agreed with Dr. Horowitz that claimant exacerbated his back condition after having been involved in a motor vehicle accident on February 18, 1997. *See* Decision and Order at 4 n. 4; Emp. Exs. 3, 10 at 2.

Moreover, the administrative law judge's finding that employer established the availability of suitable alternate employment on October 8, 1999, and thus a change in claimant's economic condition, is supported by substantial evidence. *See generally Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). Ms. Weinstein identified suitable jobs for claimant which she stated are within the restrictions imposed by Dr. Horowitz. The administrative law judge specifically noted the absence of medical evidence that claimant cannot perform these jobs, and the administrative law judge reasonably inferred that Dr. Horowitz's opinion supports the finding that claimant was capable of performing the specific jobs identified by Ms. Weinstein based on Dr. Horowitz's deposition testimony that as long as the jobs fell within his restrictions, claimant should be able to do them as the jobs appear to be sedentary. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 4; Emp. Exs. 4, 6, 10, 13 at 20, 35, 14 at 18-19, 48; Cl. Ex. 3.[2] Lastly, the administrative law judge acted within his discretion in finding that claimant's post-injury wage-earning capacity is $389 per week based on the highest paying of the suitable alternate employment jobs identified by Ms. Weinstein.[3] *See Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT); *Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT); Decision and Order at 4-5; Emp. Ex. 7. Consequently, we affirm the administrative law judge's modification of claimant's disability benefits from permanent total to permanent partial in the amount of $391.92 per week commencing October 8, 1999, and continuing. 33 U.S.C. §§922, 908(c)(21), (h).

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

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[2]Although claimant asserts that the jobs are outside his restrictions because the time getting to and from work was not taken into account, Dr. Horowitz imposed mild restrictions for driving but did not identify specific limits on driving, and Ms. Weinstein was aware of this restriction. *See* Emp. Exs. 4, 14 at 19, 37.

[3]Claimant's contention, that the only job that was within his restrictions was the parking lot job which paid $90 per week, is not an accurate reflection of the evidence of record. The parking lot job initially paid $170-184 per week with an average wage of $279 per week. Emp. Ex. 7. Although claimant asserts that he cannot do this job because it was not approved by Dr. Horowitz and requires counting money which he cannot do because of his rheumatoid arthritis, the administrative law judge reasonably inferred that Dr. Horowitz approved this job as within claimant's restrictions. Claimant is not restricted from using his hands for repetitive actions involving simple or firm grasping and fine manipulating. *See* Emp. Ex. 4.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge