BRB No. 04-0688

CURTIS C. KEEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXXON CORPORATION	)	DATE ISSUED: May 26, 2005
	)	
and	)	
	)	
PETROLEUM CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Frischhertz & Associates, L.L.C.), New Orleans, Louisiana, for claimant.

Ira J. Rosenzweig (Adams, Hoefer, Holwadel & Eldridge, L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-1107) of Administrative Law Judge C. Richard Avery 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*., as extended by the Outer Continental Shelf Lands Act, 43.S.C. §1331 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a back injury in the course of his employment as a roustabout for employer on November 21, 1983. Employer voluntarily paid claimant temporary

total disability compensation from November 11, 1984, through January 27, 1988, and temporary partial disability compensation from January 28, 1988 through September 15, 1988. 33 U.S.C. §908(b), (e). Claimant sought an award of permanent total disability benefits, and a formal hearing was held on December 1, 1988 and March 29, 1989. In a Decision and Order issued on February 9, 1990, Administrative Law Judge Ben H. Walley found that claimant's back condition was causally related to his employment, that claimant reached maximum medical improvement on March 18, 1986, and that claimant was incapable of performing his previous employment duties with employer. After further finding that employer failed to establish the availability of suitable alternate employment, Judge Walley awarded claimant temporary total disability compensation from November 21, 1983, through March 17, 1986, and permanent total disability compensation thereafter. 33 U.S.C. §908(a), (b). Employer appealed this decision to the Board, which affirmed Judge Walley's decision. *Keen v. Exxon Corp.,* BRB No. 90-1028 (Jan. 28, 1992)(unpub.).

On November 1, 2002, employer sought modification of Judge Walley's February 9, 1990, Decision and Order pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting that it established a change in claimant's economic condition by its submission of a new labor market survey showing the availability of suitable alternate employment for claimant. The case was assigned to Administrative Law Judge C. Richard Avery (the administrative law judge), and a formal hearing was held on January 23, 2004, at which time new evidence was admitted into the record. In a Decision and Order issued on May 17, 2004, the administrative law judge granted employer's request for modification, finding that employer established the availability of suitable alternate employment and that claimant failed to show reasonable diligence in attempting to secure such employment. The administrative law judge determined that claimant has a residual wage-earning capacity of $137.80 per week commencing December 30, 2003, and accordingly awarded claimant permanent partial disability compensation from December 30, 2003, and continuing. 33 U.S.C. §908(c)(21), (h).

On appeal, claimant contends that the administrative law judge erred in granting employer's request for modification and in finding, on modification, that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

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 upon a mistake of fact in the initial decision or 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). It is well established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See 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 meet this burden with evidence demonstrating the

availability of suitable alternate employment. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989); *Blake v. Ceres Inc.*, 19 BRBS 219 (1987). Once employer shows a change in condition, the standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. *Vasquez*, 23 BRBS 428. Where, as in this case, claimant is incapable of resuming his usual employment duties, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions, and which he could realistically secure if he diligently tried. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability 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); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

Claimant initially contends on appeal that the administrative law judge's consideration of employer's Section 22 modification request was legally erroneous. *See* Cl. br. at 7-11. Specifically, claimant first avers that the administrative law judge was foreclosed from reopening the original compensation order by the legal doctrine of *res judicata*. This argument is unavailing, as Section 22 displaces traditional concepts of finality such as *res judicata. Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). Similarly, we reject claimant's argument that the administrative law judge was proscribed from engaging in a *de novo* review of the evidence in the modification proceeding; it is well established that a modification hearing is *de novo*, and the administrative law judge is not bound by any previous findings of fact. *Jensen*, 346 F.3d at 277, 37 BRBS at 101(CRT); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). We also reject claimant's contention that the administrative law judge employed the incorrect burden of proof in this case. In asserting that the administrative law judge erroneously imposed upon claimant the burden "to demonstrate a continuing disability. . .," Decision and Order at 11, claimant takes the quoted words out of context. When read as a whole, the administrative law judge's decision properly places the burden of proof on employer to establish the availability of suitable alternate employment. *See* Decision and Order at 10-11; *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340, 342 (1982). Lastly, we are not persuaded by claimant's arguments regarding the legal standards for

demonstrating a change in economic condition for purposes of Section 22 modification.[1] The Board has consistently held that an employer may attempt to establish a change in claimant's economic condition with evidence of suitable alternate employment, and the reasoning underlying the Board's position is consistent with the Supreme Court's decision in *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT). *See*, *e.g.*, *Blake*, 19 BRBS at 221. Contrary to claimant's reading of the Supreme Court's decision in *Rambo I*, we do not construe *Rambo I* so narrowly that modification based on a change in a claimant's economic condition could be granted *only* where the claimant has acquired new employment skills leading to a permanent increase in his wage-earning capabilities. *See* 515 U.S. 291, 30 BRBS 1(CRT). We therefore reject claimant's legal challenge to the administrative law judge's consideration of employer's modification petition.

Claimant next contends that the administrative law judge's finding that employer established the availability of suitable alternate employment is not supported by substantial evidence. *See* Cl. br. at 11-21. We disagree. In concluding that employer met its burden of establishing suitable alternate employment in this case, the administrative law judge credited the opinions of Dr. Swift, an occupational medicine specialist, and Michael McNeil, a physical therapist who conducted a functional capacity evaluation of claimant, that claimant is capable of performing light-duty work. The administrative law judge also credited the testimony of Nancy Favaloro, employer's vocational expert, over the contrary opinion of claimant's vocational expert Thomas Meunier. Decision and Order at 11-13. Specifically, the administrative law judge found that claimant is capable, from an intellectual and physical standpoint, of performing four of the positions listed in Ms. Favaloro's December 30, 2003, labor market survey and that these positions were available to claimant.[2] These positions, which were approved by Dr. Swift, included a Wal-Mart service greeter position located in Columbia, Mississippi, a part-time cashier position at a McDonald's restaurant in Columbia, an unarmed security guard position with Professional Security in Hattiesburg, Mississippi, and an assembler

[1] Claimant's arguments with respect to a change in claimant's *physical* condition need not be considered as employer's modification request was based on a change in claimant's economic condition. Contrary to claimant's suggestion, modification may be appropriately granted even where a claimant's physical condition has not improved. *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT).

[2] Two other positions listed in the December 30, 2003 labor market survey, Radio Shack sales associate and Citifinancial customer service representative, were not found by the administrative law judge to constitute suitable alternate employment. Decision and Order at 4, 6; EX 3. In addition, the administrative law judge did not rely on the jobs listed in an earlier labor market survey conducted by Ms. Favaloro in October 2002, in finding that employer established the availability of suitable alternate employment. Decision and Order at 13 n.12; EX 3.

position with Kohler in Hattiesburg.[3] Decision and Order at 13; EX 3; Hearing Tr. at 19-21, 29-32, 45-59. In finding that these positions affirmatively established the availability of suitable alternate employment, the administrative law judge found that the jobs identified were unskilled positions requiring little training and that these prospective employers were willing to accommodate claimant's physical restrictions. Decision and Order at 13. Additionally, the administrative law judge evaluated and took into consideration all of the relevant record evidence, including claimant's medical records, academic testing, the hearing testimony of claimant and his wife, and the testimony of vocational experts Ms. Favaloro and Mr. Meunier, in rendering his decision.[4] Decision and Order at 3-9, 11-13; EXs 3-8; CXs 1-3; Hearing Tr. at 14-16, 19-21, 23-32, 45-68; 71-86, 92-93; 94-98; 100-102; 105-108; 112-129, 134-139, 144-161.

Claimant urges reversal of the administrative law judge's finding of suitable alternate employment based on Mr. Meunier's testimony that claimant's physical condition, age, significant gap in employment, and lack of transferable job skills render him unemployable. The administrative law judge, however, acted in his discretion in crediting Ms. Favaloro's testimony, especially in light of the approval of the identified alternate jobs by Dr. Swift and Mr. McNeil, over that of Mr. Meunier, claimant and his wife. *See, e.g., Mendoza v. Marine Personnel Company, Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). *See also Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Next, claimant presents specific arguments with respect to the four jobs found by the administrative law judge to meet employer's burden of establishing the availability of suitable alternate employment. Cl. br. at 18-19. In this regard, claimant first objects to

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[3] Mr. McNeil, the physical therapist, approved all of these positions except the assembler position, which he stated he would not approve unless claimant could sit occasionally during the day. EX 3. Any error by the administrative law judge in finding that the assembler job with Kohler is suitable for claimant would not be a basis for reversal as the remaining positions as unarmed security guard, cashier and service greeter are sufficient to meet employer's burden of demonstrating suitable alternate employment.

[4] We disagree with claimant that the administrative law judge erred by failing to account for claimant's anxiety and depression and his hearing loss in finding that claimant could perform the identified positions. The administrative law judge fully evaluated the record evidence regarding these conditions, and determined that as claimant had not sought treatment for them from a medical specialist, they were not severe enough to affect claimant's ability to perform the jobs identified. Decision and Order at 3-4, 6-7, 12-13; Hearing Tr. at 61-62, 65-68, 75-77, 93, 100-102, 107-108, 112-114, 126, 129; EX 7. As the administrative law judge fully considered the record evidence and drew reasonable inferences from the evidence, his findings regarding these conditions are upheld. *See Mendoza v. Marine Personnel Company, Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). *See also Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

the unarmed security guard and assembler positions located in Hattiesburg on the basis that they are too distant from claimant's residence. The administrative law judge fully considered the record evidence regarding the commuting distance between claimant's home and these two positions, including the testimony of vocational experts Ms. Favaloro and Mr. Meunier as well as the testimony of claimant and his wife regarding claimant's driving activity and his wife's employment in Hattiesburg, and reasonably found that Hattiesburg is not prohibitively far from claimant's residence. Decision and Order at 3, 7, 13 n.13; Hearing Tr. at 52-53, 84-86, 97-98, 102-103, 108, 115-116, 156. *See generally See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 383-84, 28 BRBS 96, 105(CRT) (4th Cir. 1994). Furthermore, contrary to claimant's contention, the administrative law judge was not required to find that the McDonald's cashier job does not qualify as suitable alternate employment on the basis of its part-time status. *See Royce v. Elrich Constr. Co.,* 17 BRBS 157 (1985). We further disagree that the administrative law judge erred in crediting Ms. Favaloro's testimony that the prospective employers were willing to accommodate claimant's physical restrictions. Contrary to claimant's contentions, Ms. Favaloro was not required to specifically inquire of the employers identified in the labor market survey whether they would actually hire claimant. *Avondale Shipyards, Inc.*, 967 F.2d 1039, 26 BRBS 30(CRT); *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT); *Turner,* 661 F.2d 1031, 14 BRBS 156; *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Thus, as the administrative law judge's conclusion that employer met its burden of establishing the availability of suitable alternate employment is supported by substantial evidence and consistent with the applicable legal standards, it is affirmed. *See, e.g., Seguro v. Universal Maritime Serv. Corp.,* 36 BRBS 28, 32 (2002).

Lastly, we reject claimant's assignment of error to the administrative law judge's finding that claimant failed to establish due diligence in pursuing alternate employment. Decision and Order at 13; Cl. br. at 20-21. In order to defeat employer's showing of the availability of suitable alternate employment, claimant must show that he diligently pursued alternate employment opportunities but was unable to secure a position. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Roger's Terminal,* 784 F.2d 687, 18 BRBS 79(CRT); *Turner,* 661 F.2d 1031, 14 BRBS 156; *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has described claimant's burden as one of "establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. . . . Job availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person *genuinely* seeking work with his determined capabilities." *Turner,* 661 F.2d at 1043, 14 BRBS at 165 (emphasis in original).

In support of his contention that he established due diligence in pursuing alternate employment, claimant avers that his efforts in this regard were impeded by employer's withholding of the identities of the actual employers for the positions listed in Ms.

Favaloro's labor market survey until two days prior to the hearing.[5] Cl. br. at 21. We reject claimant's contention of error as employer is not required to convey to claimant information about specific job vacancies. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Fortier*, 38 BRBS 75.

Additionally, in concluding that claimant failed to establish due diligence in pursuing alternate employment, the administrative law judge determined that claimant's "efforts to search for employment were minimal at best, . . ." Decision and Order at 13. The administrative law judge inferred from the record evidence that claimant's efforts to follow up on the positions identified by Ms. Favaloro did not demonstrate a *genuine* search for work within his capabilities. *See Turner*, 661 F.2d at 1043, 14 BRBS at 165. In this regard, the administrative law judge made reference to claimant's belief that he is incapable of working and to his failure to complete job applications for some of the jobs identified by Ms. Favaloro.[6] Decision and Order at 13; *see also* Decision and Order at 3-4; Hearing Tr. at 86-93, 102. The Board is not empowered to substitute its judgment for that of the administrative law judge or reweigh or reappraise the evidence. *See Pool Co. v. Cooper*, 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001). As the administrative law judge's credibility determinations and selection among inferences are reasonable and supported by substantial evidence, his determination that claimant did not establish due diligence in pursuing alternate employment is upheld. *See generally Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *Fox*, 31 BRBS 118. Therefore, based on our affirmance of the administrative law judge's findings that employer established the availability of suitable alternate employment on December 30, 2003, and that claimant did not establish a diligent pursuit of employment, we affirm the administrative law judge's modification of claimant's compensation award from permanent total to permanent partial disability as of December 30, 2003.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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[5] Employer correctly points out that claimant's vocational expert Mr. Meunier was deposed on January 7, 2004, two weeks prior to the hearing, and testified that he had just been provided with Ms. Favaloro's December 30, 2003 labor market survey identifying the actual employers. Emp. br at 17; CX 2 at 11, 27.

[6] During the hearing, claimant was asked whether he thought he could work, and he responded, "No, Sir, I absolutely don't." Hearing Tr. at 92. Moreover, in deposition testimony, claimant's vocational expert Mr. Meunier stated that ". . . [claimant] is convinced that no one would hire him, and I think for that reason there's not any particular incentive or motivation for him to go out and look." CX 2 at 27.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge