BRB No. 03-0106

REGINALD C. JORDAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 09/16/2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Breit, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for employer-carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (1999-LHC-2560, 1999-LHC-2561, 2001-LHC-1086, 2001-LHC-1087) of Administrative Law Judge Richard K. Malamphy 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 if they are supported by substantial evidence, are rational, and are 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 worked for employer as a burner and welder for 28 years. Tr. 1 at 15.[1] In April 1981, claimant injured his right knee during the course of his employment. Dr. Bryant, his treating physician, determined that the injury was the work-related exacerbation of pre-existing retropatellar arthritis, rated claimant as having a 10 percent permanent impairment to the right knee, and instructed him to permanently avoid squatting, kneeling, and repetitive climbing. Emp. Ex. 3. Employer paid claimant for a 10 percent disability to the right leg and medical benefits. Claimant returned to light duty work with the shipyard where he continued until December 1998 when employer determined it no longer had work available within claimant's restrictions.[2] Consequently, claimant filed a claim for total disability benefits.

The administrative law judge determined that claimant's condition was permanent, but he concluded that claimant was not entitled to additional benefits because employer established the availability of suitable alternate employment, thus limiting claimant's entitlement to the amount already paid pursuant to the schedule, 33 U.S.C. §908(c)(2). The administrative law judge also found that claimant failed to establish entitlement to a *de minimis* award. Decision and Order I at 6. Accordingly, he denied claimant benefits. Claimant appealed this decision to the Board; however, based on Dr. Greene's October 2000 statement that claimant is totally disabled from any work, claimant moved for modification of the administrative law judge's denial of benefits pursuant to Section 22 of the Act, 33 U.S.C. §922. Emp. Ex. 19. In light of claimant's motion for modification, the Board dismissed the appeal. BRB No. 00-1140.

In the motion for modification, claimant argued that he is entitled to permanent total disability benefits and that Dr. Greene's opinion is entitled to special weight in this regard. Employer disputed the claim, and the parties eventually agreed to have claimant examined by an independent medical examiner, Dr. Adelaar. Emp. Exs. 20-33. Dr. Adelaar disagreed with Dr. Greene's conclusion regarding the extent of claimant's disability, and the claim proceeded to a formal hearing. The administrative law judge gave greater weight to Dr. Adelaar's opinion, and he denied the motion for modification

[1]There were two hearings in this case. Tr. 1 refers to the transcript from the original hearing, held on April 13, 2000, and Tr. 2 refers to the transcript from the hearing on claimant's motion for modification, held on April 24, 2002. There is no conflict with the exhibit numbers.

[2]According to the administrative law judge's original Decision and Order in this case, dated August 18, 2000 (Decision and Order I), claimant sustained an injury to his left knee in October 1994, but that case was not ripe for adjudication, and the administrative law judge remanded it to the district director. Decision and Order I at 3. Also, according to claimant's testimony at the first hearing, he suffered a stroke prior to December 1998. Tr. 1 at 23.

because he found there had been no change in claimant's right knee condition following the issuance of his prior decision. Decision and Order II at 8-9. Claimant appeals the decision,[3] and employer responds, urging affirmance.

Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party seeking modification based on a change in conditions has the burden of establishing the change. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Claimant contends the administrative law judge erred in relying on the opinion of Dr. Adelaar, who examined claimant one time, over the opinion of his treating physician, Dr. Greene, and in finding there was no change in his condition. Specifically, claimant argues that Dr. Greene's opinion is unequivocal, rational, and is sufficient to support an award of total disability benefits. Dr. Greene examined claimant on October 3, 2000, following the issuance of the administrative law judge's initial Decision and Order, as a result of claimant's continued complaints of pain in his left knee. Dr. Greene concluded: Claimant "is disabled on his right side and this side is just as symptomatic" and "we think that he is totally and permanently disabled from any kind of work at this point in time." Further, Dr. Greene was willing to "certify that to anyone who needs to know. . . ." Emp. Ex. 19. Dr. Adelaar examined claimant on November 26, 2001. Although he agreed with Dr. Greene's conclusion that claimant cannot return to his usual work and his prediction that claimant would need knee-replacement surgery in the future, he believed that claimant retained a "functional capacity to work in light duty" and that an exercise program, a judicious diet and anti-inflammatory medication, combined with the work restrictions, were all that claimant needed. Emp. Ex. 30.

Finding there is contradictory evidence on the issue of the extent of claimant's disability, the administrative law judge declined to give "special weight" to Dr. Greene's opinion. Decision and Order II at 8. Rather, he discussed the lack of a detailed evaluation and explanation in Dr. Greene's report and compared it to the depth of Dr. Adelaar's examination and report, concluding that Dr. Adelaar's report was more thorough and persuasive. He then stated:

> Considering the two medical opinions on the record, and weighing the reports of both physicians, there is insufficient evidence to support Dr. Greene's determination that Mr. Jordan is now permanently disabled.

[3]Claimant did not seek reinstatement of his initial appeal.

Decision and Order II at 8.[4] It is within the administrative law judge's discretionary powers to determine how to credit and weigh the evidence of record, including the opinions of medical experts. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). We hold that the administrative law judge's decision to give greater weight to Dr. Adelaar's opinion is rational.[5] Thus, we affirm the finding that there has been no change in claimant's physical condition.

As the administrative law judge previously determined that employer had established the availability of suitable alternate employment,[6] Decision and Order I at 6, and as claimant has not established a change in condition necessary for modification of the prior decision, we affirm the administrative law judge's decision to deny the motion for modification. *See Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984); *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983).

[4]The nature of claimant's disability is not at issue; thus, the administrative law judge appears to have stated inadvertently "permanently disabled" instead of "totally disabled."

[5]Contrary to claimant's assertion, Dr. Greene's opinion regarding the extent of claimant's disability is not entitled to special weight, as it is has been contradicted by the opinion of Dr. Adelaar. A treating physician's opinion is not entitled to determinative weight where the administrative law judge finds other medical opinions more credible.

[6]Claimant's work restrictions, which have been permanent since the early 1980's, prohibit squatting, kneeling, and prolonged stair and ladder climbing. Emp. Exs. 3, 12. At the time of the first Decision and Order, Dr. Greene limited claimant to sedentary work, and employer established the availability of alternate work within claimant's restrictions. Following the first Decision and Order, in 2001, Dr. Adelaar believed claimant had a functional capacity for light duty work. Emp. Ex. 30. Thus, there is no evidence that the jobs identified by employer are no longer suitable.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge