BRB No. 03-0266

MELVIN J. STOUT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EQUITABLE/HALTER SHIPYARD, INCORPORATED	)	DATE ISSUED: Dec. 12, 2003
	)	
	)	
and	)	
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Jeremiah A. Sprague (Falcon Law Firm), Marrero, Louisiana, for claimant.

Collins C. Rossi, Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification and Awarding Benefits (2001-LHC-2520) of Administrative Law Judge Clement J. Kennington 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 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, a shipfitter, injured his back at work on February 13, 1992. Claimant was awarded continuing temporary total disability benefits from February 21, 1992, in a

1997 Decision and Order. In that decision, Administrative Law Judge Mills found that claimant established his *prima facie* case of total disability and that employer did not establish the availability of suitable alternate employment. Emp. Ex. 1. Employer requested modification on February 25, 1999, based on a change in claimant's condition, and submitted new evidence of suitable alternate employment. Emp. Ex. 2.

In his 2002 Decision and Order, Administrative Law Judge Kennington (the administrative law judge) found that employer established the availability of suitable alternate employment as of January 5, 1999, and that claimant did not engage in a diligent job search. The administrative law judge found that claimant reached maximum medical improvement on June 25, 1997. Consequently, the administrative law judge modified the prior temporary total disability award to reflect claimant's entitlement to permanent total disability benefits from June 26, 1997 to January 5, 1999, and to continuing permanent partial disability benefits commencing January 6, 1999. 33 U.S.C. §908(a), (c)(21).

On appeal, claimant challenges the administrative law judge's award of partial disability benefits on modification. Employer responds in support of the administrative law judge's decision.

Claimant contends that the administrative law judge erred in awarding partial disability benefits on modification because claimant's treating physicians, Drs. Flood and Rauchwerk, state that he is permanently totally disabled. Moreover, claimant contends that the administrative law judge erred in awarding partial disability benefits where he did not find that employer established the availability of suitable alternate employment. Assuming, *arguendo*, that employer established the availability of suitable alternate employment, claimant contends that the administrative law judge nonetheless should have awarded total disability benefits as claimant applied to every job identified as suitable by employer without success and also unsuccessfully engaged in self-employment.

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). An employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1, 8 (1994). Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of jobs within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and for which he can compete and reasonably secure. *See New Orleans*

(Gulfwide) Stevedores, Inc. v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Roger's Terminal & Shipping Corp.*, 748 F.2d 687, 18 BRBS 79(CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In order to defeat employer's showing of suitable alternate employment and retain entitlement to total disability benefits, the burden is on claimant to establish reasonable diligence in attempting to secure some type of suitable alternate employment with the compass of opportunities shown by employer to be reasonably attainable and available. *Turner*, 661 F.2d 1031, 14 BRBS 156; *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998); *see also Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT)(5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991).

In concluding that claimant is capable of performing sedentary work, the administrative law judge considered all relevant evidence including the opinions of Drs. Flood and Rauchwerk that claimant is totally disabled, the physical limitations previously set by Dr. Flood, both functional capacity evaluations of record, the investigative videotape, and claimant's deteriorating condition and subjective reports of pain. The administrative law judge credited the specific restrictions set by Dr. Flood and relied on claimant's sub-maximal effort during his functional capacity evaluations to conclude that claimant is able to work. As the administrative law judge considered all relevant evidence and was not required to accord greater weight to the opinions of Drs. Flood and Rauchwerk that claimant cannot work at all based on their status as claimant's treating physicians, we affirm the administrative law judge's finding that claimant is capable of sedentary to very light work until July 21, 1999, and to only sedentary work thereafter as it is rational and supported by substantial evidence. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); 2002 Decision and Order at 17-21; Cl. Exs. 1-3; Emp. Ex. 6.

The administrative law judge next found that only one of the 18 jobs identified by employer established the availability of suitable alternate employment within the restrictions set by Dr. Flood. 2002 Decision and Order at 25-26. Thus, claimant's initial argument on appeal is based on the mistaken impression that the administrative law judge did not find that employer identified any suitable jobs and must be rejected. The administrative law judge further found, however, that claimant did not establish diligence in searching for alternate employment, even though he applied to every position employer identified, because employer's vocational expert, Ms. Schilling, testified that claimant showed his medical restrictions to the prospective employers which led her to label claimant's effort at searching for alternate employment "half hearted." *See* August 27, 2002, Tr. at 61-63, 72.

We reject claimant's contention that the administrative law judge, generally, erred in finding that claimant's job search was not diligent as the administrative law judge rationally concluded that it was "half hearted" based on Ms. Schilling's testimony that claimant was presenting to prospective employers with his medical records and because claimant did not undertake any job search on his own initiative. *See generally Berezin v.*

Cascade General Inc., 34 BRBS 163 (2000). We cannot, however, affirm the administrative law judge's finding that claimant engaged in a diligent search for the one job the administrative law judge found suitable, the job as night attendant at Seven Acres Substance Abuse Clinic (Seven Acres). The administrative law judge did not discuss claimant's job search with regard to this position, and therefore we must remand the case. *See* discussion, *infra.*

Because this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit and the administrative law judge found that employer established the availability of suitable alternate employment based on a single job opportunity, in order to fully address claimant's argument, we must discuss the holding in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991), as claimant's diligence is viewed in relation to the types of jobs identified by employer. In *P & M Crane*, the Fifth Circuit held that employer may establish the availability of suitable alternate employment by identifying a single job opportunity if the employee has a reasonable likelihood of obtaining it "under appropriate circumstances." *Id.*, 930 F.2d at 431, 24 BRBS at 121(CRT). For example, the court stated that one job may be sufficient if the employee is highly skilled, the job found by the employer is specialized, and the number of workers with suitable qualifications in the local community is small. *Id.*, 930 F.2d at 431, 24 BRBS at 121-122(CRT); *see also Air America, Inc. v. Director, OWCP*, 397 F.2d 773, 10 BRBS 505 (1st Cir. 1979).

The Fifth Circuit elaborated on its holding in *P & M Crane* in a subsequent unpublished case.[1] In *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (5th Cir. Sep. 19, 1994), the court stated that the holding in *P & M Crane* establishes that more must be shown than the mere existence of a single job that claimant can perform. Specifically, the court stated that in a case where a single actual job opening has been identified, but the employer has not also identified the availability of suitable general job opportunities, employer must establish a reasonable likelihood that the claimant could obtain the single job identified. Since employer did not do so in *Diosdado*, the court held that employer did not establish the availability of suitable alternate employment based on the single job opening identified by the employer.

In *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998), the Board addressed the holdings in *P&M Crane* and *Diosdado.* The *Holland* case involved claimant's appeal of whether a single job opportunity satisfied employer's burden of establishing the availability of suitable alternate employment within the jurisdiction of the United States Court of Appeals for the Third Circuit. Because the Third Circuit had not yet issued a ruling on that issue, the Board discussed both Fourth and Fifth Circuit law. *See P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT)(4th Cir. 1988). In *Holland*, the Board reversed the administrative law

[1] The rules of the Fifth Circuit state that unpublished opinions issued prior to January 1, 1996, are precedent. U.S.Ct. of App. 5th Circuit Rule 47.5.3.

judge's finding that employer established the availability of suitable alternate employment based on the single job opportunity of parking lot cashier. Pursuant to *Lentz*, a single job opening does not satisfy employer's burden of establishing the existence of a "range of jobs" reasonably available to the claimant which he is realistically able to secure and perform. *Lentz*, 852 F.2d at 131, 21 BRBS at 112-113(CRT). The Board also held that the job was insufficient to establish suitable alternate employment under *P & M Crane* and *Diosdado* since the cashier position required no specialized skills, and employer proffered no evidence of the general availability of jobs claimant could perform and no evidence of a reasonable likelihood of claimant's obtaining this position. *Holland*, 32 BRBS at 181-182. Thus, the Board held in *Holland* that under either the Fourth or Fifth Circuit law, employer had not established the availability of suitable alternate employment, and thus modified the administrative law judge's decision to reflect claimant's entitlement to permanent total disability. *Id.*

On remand in this case, the administrative law judge must determine whether employer established the availability of suitable alternate employment by virtue of the single job opportunity at Seven Acres in light of the holding in *P & M Crane.* The administrative law judge must consider that the night attendant job at Seven Acres does not require a high school diploma or grade equivalency diploma or any specialized skill. Emp. Ex. 5 at 5, 24. Moreover, the administrative law judge must consider that employer did not proffer evidence of the general availability of suitable jobs which claimant could perform. Employer's vocational expert, Ms. Schilling, stated that the available jobs in claimant's local community consisted of fast food and construction work, truck driver/mechanic positions, and temporary Christmas stock personnel, which the administrative law judge found that claimant cannot perform. Emp. Ex. 5 at 56-57; 2002 Decision and Order at 14. Additionally, Ms. Schilling noted that claimant's job market is very competitive as 100 workers were recently laid off in his community. Emp. Ex. 5 at 48.

Furthermore, the administrative law judge must determine whether employer established that the Seven Acres job was reasonably available to claimant, and whether claimant diligently, but unsuccessfully, sought this position. Claimant testified that when he initially called about the job, he was told that he could not come to the facility to fill out an application because it was a secure facility and that he was not allowed in. June 10, 2002, Tr. at 37-38. When claimant called back about four or five days later, he was told that the job had been filled. *Id.* Thus, on remand, the administrative law judge must also reconsider whether this job was realistically available to claimant as well as whether he diligently but unsuccessfully attempted to obtain it.

Accordingly, the administrative law judge's Decision and Order Granting Modification and Awarding Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge