BRB No. 11-0442

JOSEPH R. FARLOW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 02/16/2012
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Employer's Motion for Modification of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Employer's Motion for Modification (2009-LHC-01079) of Administrative Law Judge Jonathan C. Calianos 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 if they 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 neck on February 28, 1995, during the course of his employment for employer as a welder. He was laid off by employer in April 1996. Claimant obtained work through a temporary employment agency until January 1997, at which time employer commenced voluntary payments of compensation for temporary total disability. 33 U.S.C. §908(b). Claimant began taking computer classes at a

community college in September 2001 under a rehabilitation plan approved by the Office of Workers' Compensation Programs. In his decision issued in July 2002, Administrative Law Judge Sutton found, *inter alia*, that claimant is unable to return to his usual employment and that employer established the availability of suitable alternate employment, but that claimant's entitlement to total disability benefits resumed when he started taking computer classes, pursuant to *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Accordingly, he awarded claimant compensation for temporary total disability from January 20, 1997, to July 27, 1998, permanent total disability compensation from July 28, 1998, to September 17, 2000, 33 U.S.C. §908(a), permanent partial disability compensation from September 18, 2000, until the date in September 2001 when claimant's computer classes began, 33 U.S.C. §908(c) (21), and continuing compensation for permanent total disability from the date classes commenced. EX 1 at 23.

Employer subsequently filed for Section 22 modification, 33 U.S.C. §922, contending that claimant's compensation benefits should be reduced from total to partial disability as of May 2004, when claimant completed his computer training. Alternatively, employer contended that it established the availability of suitable alternate employment.

In his decision on modification, Administrative Law Judge Calianos (the administrative law judge) stated it is undisputed that claimant's neck condition reached maximum medical improvement on July 28, 1998, and he found that claimant remains unable to return to his usual employment for employer as a welder. The administrative law judge rejected employer's contention that claimant's compensation should automatically change from permanent total disability to permanent partial disability upon completion of the vocational rehabilitation plan in May 2004. The administrative law judge found there is no evidence that the jobs Judge Sutton found suitable and available in September 2000 remained so in May 2004. Moreover, the administrative law judge found employer's argument undermined by its waiting approximately five years to move for modification on this basis in 2009. The administrative law judge also discredited as evidence of suitable alternate employment four labor market surveys undertaken from 2007 to 2009. The administrative law judge found that the vocational consultants who conducted the surveys failed to consider claimant's narcotic pain medication as a medical limitation. In this regard, the administrative law judge found that claimant is prescribed 120 Percocet pills per month and that he takes three or four 10 mg pills per day to control neck and cervical spine pain. Decision and Order at 21; *see* Tr. at 21-24, CX 27 at 12. Accordingly, the administrative law judge found that employer did not establish the availability of suitable alternate employment, and he denied employer's motion for modification.

On appeal, employer challenges the administrative law judge's rejection of its vocational evidence and his denial of its petition for modification. Claimant responds, urging affirmance of the administrative law judge's finding that employer did not establish the availability of suitable alternate employment.

Employer contends that, since the medical evidence of record does not impose any work restrictions on claimant due to his drug regimen, the administrative law judge erred by imposing on its vocational consultants the additional burden of showing the effect claimant's drug regimen may have on the availability of suitable alternate employment.

Section 22 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). The party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The standard for determining the extent of claimant's permanent disability is the same in a modification proceeding as in the initial proceeding. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21CRT) (11th Cir. 2009)*; Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Accordingly, once the administrative law judge found that claimant is unable to return to his usual employment as a welder, the burden shifted to employer to establish the availability of suitable alternate employment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1041, 31 BRBS 84, 88(CRT) (2d Cir. 1997). In order to meet this burden, employer must demonstrate that within the geographic area where claimant resides, jobs are available which claimant, by virtue of his age, education, work experience and physical restrictions can perform and which he can compete for and reasonably secure. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In his decision, the administrative law judge addressed only claimant's narcotic pain regimen in determining whether employer established the availability of suitable alternate employment. The administrative law judge found that the statement in Dr. Clarke's October 30, 2006, letter that, "there is no evidence to support a causal relationship between this gentleman's medical regimen and his ability to obtain work as an electronic technician," was written over four years ago and addressed the use of the opiate "MS Contin," and made no mention of Percocet or the dose claimant was taking at that time. Decision and Order at 22; *see* CX 7. The administrative law judge found that this letter "does nothing to help me understand" the relationship between the extent of claimant's current Percocet usage and his ability to work. *Id*. The administrative law

judge also found that there is no information whether the side effects from Percocet can be intensified by the other daily medications claimant takes.[1] The administrative law judge next addressed Dr. Staub's comments regarding claimant's narcotic use and its effect on his not obtaining work. Specifically, in his October 3, 2006, report, Dr. Staub noted that claimant advised him that he could not find a job because he could not pass a drug test. EX 4 at 2. Dr. Staub posited that, "[P]erhaps his comments about drug intake are legitimate… I would be concerned that he could become addicted to these drugs and if they are, indeed, mitigating against his ability to find work, then something should be done to modify these medications." *Id*. at 4. The administrative law judge concluded, based on these notations, that Dr. Staub recognized claimant's pain medication "could create a serious hurdle to finding employment" and "they should be considered a medical restriction to employment." Decision and Order at 22-23.

The administrative law judge further found that employer's vocational experts did not "fully take into account" claimant's use of narcotic pain relievers when searching for suitable alternate employment. The administrative law judge noted that in his March 30, 2007, assessment, Mr. Calandra recorded that claimant was prescribed 60 mg of morphine per day and that "Dr. Bryan (in May 2001) …did not believe Mr. Farlow was able to work secondary to his chronic pain as well as side effects from medications." Decision and Order at 24; *see* EX 6 at 1-1. The administrative law judge found that only six of thirteen positions in Mr. Calandra's April 17, 2007, labor market survey indicated whether a background check or drug test was required, and, of the six, only two positions did not require a drug test. EX 7 at 2-5. The administrative law judge further found that these two positions are not suitable since Mr. Calandra noted claimant's use of morphine, rather than claimant's current Percocet usage; therefore, the administrative law judge concluded that these positions do not take into account claimant's current narcotic regimen. Decision and Order at 24. The administrative law judge found that Mr. Calandra's other two surveys (conducted on October 28 and November 26, 2008) and the January 4, 2007, labor market survey conducted by Mr. Santello do not support a finding of suitable alternate employment because they do not address whether the employers required a drug test, conducted a background investigation, or had a policy on the use of narcotic pain medication in the workplace. *Id*. at 24-25.

The administrative law judge found that even if Dr. Staub did not consider claimant's use of narcotics a medical limitation, claimant's Percocet usage, "in and of itself" is enough to put a vocational expert on notice that it may affect his obtaining suitable alternate employment. Decision and Order at 25. The administrative law judge

[1]Dr. Clarke testified that claimant also was prescribed Lyrica, Flexeril, a Lidoderm patch, and lisinopril for hypertension. Decision and Order at 5; see Tr. at 21-23; CX 27 at 12.

found that, where claimant is prescribed narcotic pain medication, the vocational expert must consider the restrictions such medications impose on the individual as well as any restrictions prospective employers may impose "with regard to hiring individuals who are under such treatment regimes." *Id.* The administrative law judge found that, since Mr. Calandra and Mr. Santello did not fully conduct this inquiry, their surveys cannot establish the availability of suitable alternate employment. Therefore, the administrative law judge concluded that claimant remains permanently totally disabled, and he denied employer's motion for modification. We cannot affirm this finding. For the reasons that follow, we remand this case for consideration of employer's labor market surveys.

In determining whether an employer establishes the availability of suitable alternate employment, the administrative law judge must compare the specific requirements of the jobs identified with the claimant's physical restrictions and vocational factors to determine whether they are suitable. *See, e.g., Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). In his decision, the administrative law judge stated that, pursuant to *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992), a claimant's medical restrictions necessarily include the effects of prescribed narcotic pain medication. In *Bryant*, the employer's vocational consultant testified that the claimant's use of Tylenol 3 with codeine could affect his driving and limit his ability to obtain courier jobs, which was the only occupation the administrative law judge otherwise found suitable for the claimant. *Bryant*, 25 BRBS at 297. Accordingly, the Board vacated the administrative law judge's finding that the employer established the availability of suitable alternate employment and remanded for the administrative law judge to consider the effect claimant's use of Tylenol 3 with codeine may have had on his employability as a courier. Unlike *Bryant*, however, in this case there is no evidence of specific work restrictions associated with claimant's use of narcotic medication. Claimant's primary care physician, Dr. Clarke, completed a Work Capacity Evaluation, OWCP Form-5c, on October 19, 2008, in which he imposed permanent work restrictions on activities that included driving, continuously sitting longer than two hours, and reaching, twisting, bending and stooping. CX 20. In October 2006 and again in October 2009, Dr. Clarke opined that claimant's pain medication regimen would not preclude him from working. CXs 7, 27 at 35. Dr. Staub examined claimant at employer's request in 2001, 2004 and 2006. In his October 2006 report, Dr. Staub opined that claimant could perform sedentary work with a 40-pound lifting restriction.[2] EX 4 at 3. Notwithstanding the administrative

[2]The record also contains a physical capacity assessment by Dr. Ligham, who is Board-certified in anesthesiology/pain management. EX 19 at 4. He examined claimant at employer's request in June 2009. Dr Ligham noted that claimant is taking four to six Percocet per day. EX 13 at 1. He opined that claimant could perform sedentary to light-duty work, with specific one-hour limitations on sitting, standing, and lifting over 10 pounds. EX 19 at 15, 21-22, 31.

law judge's inference that Dr. Staub considered claimant's drug regimen a medical restriction to employment, Dr. Staub did not explicitly impose any work restrictions related to claimant's use of prescription medication. Thus, *Bryant* is not on point with the facts presented in this case.

Employer's vocational consultants, Stephen Santello and Edmond Calandra, provided labor market surveys based on Dr. Staub's work restrictions. EXs 5 at 1, 6 at 2. The administrative law judge found that their labor market surveys cannot establish the availability of suitable alternate employment because they did not "inquire into the willingness of employers to hire individuals on narcotic pain medication." Decision and Order at 25. This finding is not in accordance with law, as a vocational counselor is not required to actually contact prospective employers to inquire of them whether claimant's use of legal prescription medications would preclude his ability to pass drug testing and thus, disqualify him from otherwise suitable employment. *See Palombo*, 937 F.2d at 74, 25 BRBS at 6(CRT); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In addition, the administrative law judge erred in finding that two positions identified in Mr. Calandra's April 17, 2007, labor market survey that did not require a drug test are not suitable on the basis that Mr. Calandra noted claimant's use of morphine, rather than his current Percocet usage. Since these employers did not require any drug test at all, it is irrelevant which particular narcotic medication claimant was taking.

Moreover, on the facts of this case, we cannot affirm the finding that it is employer's burden to establish that claimant will not have to take a pre-employment drug test or could pass one if he did. Claimant, through his testimony, has raised the specter that his lawful use of a prescribed medication will cause him to fail a drug test and prevent his employment. However, there is no suggestion, other than claimant's testimony, that employers are testing prospective disabled employees for legal, prescription drugs. *See generally* 29 C.F.R. §§1630.11, 1630.13, 1630-14, 1630.16 (describing prohibited and permitted pre-employment medical tests when the Americans With Disabilities Act applies).[3] Claimant simply asserts that "he cannot pass" a drug test; there is no evidence that he has taken one in the past and has failed it and been denied employment as a result. Rather, it appears that claimant simply did not apply for jobs that required a drug test based on his supposition that he will not pass it and be denied employment as a result. Dr. Staub's assumption that a drug test may be the impediment to claimant's employment similarly is based only on claimant's telling him he "cannot pass" a drug test.

[3]We note that many disabled employees take narcotic and other prescription medication for their injuries.

In this case, claimant has physical restrictions resulting from his work injury, but the doctors have not placed restrictions on claimant's employability due to his medication regimen, and the administrative law judge did not rely on claimant's testimony to identify any physical restrictions due to the medications. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Under these circumstances, the effects of claimant's medications on his employability are best assessed when claimant engages in a diligent job search from among the jobs employer successfully identifies as suitable, as well as similar jobs. *See* discussion, *infra; see generally Fox*, 31 BRBS 118. Therefore, we vacate the administrative law judge's finding that employer did not establish the availability of suitable alternate employment. We remand the case for the administrative law judge to determine claimant's physical restrictions and vocational factors and compare them to the requirements of the jobs identified in employer's labor market surveys in order to determine whether employer has established the availability of suitable alternate employment. *Palombo*, 841 F.2d 540, 21 BRBS 10(CRT).

Should the administrative law judge find that employer established the availability of suitable alternate employment, claimant can rebut employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see also Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *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). Based on the facts of this case as described above, it is at this point in the extent of disability query that the issue of drug testing becomes relevant. In his decision, the administrative law judge noted that claimant's own records state he could not obtain work due to a drug test requirement or the prospective employer had a restriction against workers reporting to work while on narcotics.[4] Decision and Order at 23; *see* Tr. at 44-45, CX 28; EXs 11, 17 at 18. However, as this case involves legal prescription medication, more than claimant's subjective belief that he could not pass a drug test due to his legal medication use is required to rebut employer's showing of suitable alternate employment. If claimant is

[4]Employer submitted into evidence claimant's handwritten list of job contacts made between May 2007 and January 2009. EX 11. At the hearing, claimant produced a hand-written list representing job inquiries he stated he made between October 2008 and March 2009. Tr. at 39. These lists stated the reasons he was not hired, which included for some positions, that he could not pass a drug test. CX 28. The administrative law judge found the hand-written list in CX 28 to be unreliable, but he did not assess the reliability of the first list. Decision and Order at 12 n.3. Claimant testified that, subsequently, he also was told by Verizon that he would not pass their drug test. Tr. at 45.

denied employment due to his taking prescribed medications or because he otherwise was not hired, then he may retain entitlement to total disability benefits. *See generally Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Fox*, 31 BRBS 118.

Accordingly, the administrative law judge's Decision and Order Denying Employer's Motion for Modification is vacated, and the case is remanded for further proceedings in accordance 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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JUDITH S. BOGGS
Administrative Appeals Judge