BRB No. 13-0585

BETTY J. BOREL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PMB SAFETY AND REGULATORY, INCORPORATED	)	
	)	
	)	DATE ISSUED: June 25, 2014
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Employer/Carrier's Motion for Modification of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

David C. Whitmore (Scheuermann & Jones, LLC), New Orleans, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Employer/Carrier's Motion for Modification (2013-LHC-00510) 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 U.S.C. §1301 *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 injured her lower back on December 7, 2007, during the course of her employment for employer as a galley hand on a fixed platform in the Gulf of Mexico. In his original decision, the administrative law judge awarded claimant temporary total disability benefits commencing December 7, 2007, as well as medical benefits. In September 2009, Dr. Blanda, claimant's orthopedic surgeon, performed surgery on claimant's back. CX 1 at 4. Based on a functional capacity evaluation (FCE), CX 2, Dr. Blanda released claimant to light-duty work on December 30, 2010. He also concluded that her back condition had reached maximum medical improvement. CX 1 at 16; EX 1 at 7-8. In 2013, employer filed a motion for modification of the prior decision under Section 22 of the Act, 33 U.S.C. §922, alleging that claimant's disability changed from total to partial, as she is capable of returning to light-duty work and it established the availability of suitable alternate employment.

In his Decision and Order on Modification, the administrative law judge rejected employer's assertion that claimant is only partially disabled. He found that, although claimant had been medically cleared to perform light-duty work based on her physical abilities, her lack of experience and education and her overall intellectual capabilities preclude her from returning to the workforce. Therefore, the administrative law judge found that employer failed to establish the availability of alternate employment that claimant is capable of performing. Decision and Order on Modif. at 9-10. However, because the parties stipulated that claimant's back condition became permanent on December 30, 2010, he modified his previous decision to reflect claimant's entitlement to ongoing permanent total disability benefits as of that date. *Id.* at 10. Employer appeals the administrative law judge's decision, and claimant responds, urging affirmance.

Section 22 of the Act provides the only means for re-opening a claim that has been finally adjudicated, as it allows the modification of a prior decision on the grounds that there has been a change of conditions or a mistake in the determination of fact. 33 U.S.C. §922; *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). The party moving for modification, here employer, has the burden of establishing the mistake or change. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Employer asserts that claimant is no longer totally disabled. The standard for determining the extent of a claimant's disability in a modification proceeding is the same as in the original proceeding. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428(1990). Thus, where a claimant is unable to return to her usual employment, the

employer bears the burden of establishing that she is only partially disabled by demonstrating the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, the employer must establish that job opportunities are available within the geographic area in which the claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could realistically secure if she diligently tried. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Turner*, 661 F.2d 1031, 14 BRBS 156.

In challenging the finding that it did not establish the availability of suitable alternate employment, employer contends the administrative law judge erred in crediting the opinion of claimant's vocational expert, Mr. Fentress, that the jobs identified by employer's vocational expert, Mr. Arceneaux, are unsuitable. Employer asserts that the jobs are within claimant's physical restrictions and were approved by Dr. Blanda.[1] We reject employer's contention that the administrative law judge erred.

Initially, employer is correct that the positions identified by Mr. Arceneaux accounted for claimant's physical restrictions and were approved by her treating physician, which the administrative law judge acknowledged. Decision and Order on Modif. at 9; CX 1 at 16; EX 3. However, as the administrative law judge found, it is well established that the extent of a claimant's disability is based on more than her physical condition. The administrative law judge also must take into account vocational factors relevant to the claimant's employability. *See Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Ledet*, 163 F.3d 901, 32 BRBS 212(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156. Mr. Fentress met with claimant on May 13, 2011, for a clinical interview and testing. He administered the Wide Range Achievement Test-4 and reviewed a multitude of records, including medical records and the FCE.[2] CX 2 at 4. The testing revealed "deficient reading skills, borderline spelling skills, [and] low-average arithmetic skills[,]" and Mr. Fentress determined that claimant is a "very poor candidate" for handling clerical work or monetary transactions, or for additional formal education or vocational retraining. *Id.* at 9. As claimant's experience and transferrable skills come from a level of labor she can

[1] Mr. Arceneaux submitted several labor market surveys in 2011 and 2012, identifying numerous light-duty jobs such as cashier, front desk clerk, car transporter, and operator. EX 3.

[2] Thus, contrary to employer's assertion, Mr. Fentress conducted vocational testing and rendered an opinion which encompassed more than a critique of Mr. Arceneaux's efforts.

no longer perform physically, Mr. Fentress concluded that claimant is a very poor candidate for returning to her galley work or for re-entering the workforce and sustaining gainful employment. *Id.* at 10-11.

The administrative law judge specifically found that the jobs identified by Mr. Arceneaux "do not match Claimant's experience or mental capabilities." Decision and Order on Modif. at 9. He stated that her work history involved only unskilled manual labor, she cannot use a computer, she has no customer service or clerical experience, she relies on others for transportation, and she takes pain medication daily.[3] Additionally, the administrative law judge noted that tests conducted by both vocational experts revealed that claimant's intellectual abilities are well below average. Considering all the factors, the administrative law judge agreed with Mr. Fentress that claimant is a poor candidate for re-entering the workforce. *Id.* at 9-10. As the identified jobs did not "look beyond" the physical restrictions, he concluded that employer did not establish the availability of suitable alternate employment. *Id.* at 10.

The administrative law judge's weighing of the conflicting vocational evidence is within his discretion, and his findings are rational, supported by substantial evidence, and in accordance with law.[4] *Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *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). As employer did not establish the availability of suitable alternate employment, the administrative law judge properly found that claimant remains totally disabled. *Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). Therefore, we affirm the administrative law judge's denial of employer's motion for modification of claimant's total disability award. However, as the parties stipulated that claimant's condition reached maximum medical improvement on December 30, 2010, the administrative law judge properly modified his prior decision to reflect claimant's entitlement to permanent total disability benefits commencing on that

[3] Claimant testified that she did not finish high school or have a GED and that her work experience was limited to field work, cooking, and cleaning. Tr. at 43-46. The administrative law judge acknowledged this work history in his summary of the evidence. Decision and Order on Modif. at 3.

[4] To the extent employer seeks a re-weighing of the evidence, it is beyond the Board's scope of review. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

date. 33 U.S.C. §§908(a); 922; *see generally Buttermore v. Electric Boat Corp.*, 46 BRBS 41 (2012); 20 C.F.R. §702.373.

Accordingly, the administrative law judge's Decision and Order on Employer/Carrier's Motion for Modification is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge