BRB No. 08-0616

L. A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VESSEL REPAIR, INCORPORATED	)	DATE ISSUED:
	)	03/27/2009<u>2009</u>
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
		DECISION and ORDER

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

John D. McElroy (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

C. Douglas Wheat (Wheat, Oppermann & Meeks, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Modification (2007-LHC-01451) 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 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 his neck and back on April 25, 2003, during the course of his employment for employer as a shipfitter helper. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from May 15, 2003. The parties disputed the necessity of cervical fusion surgery recommended by claimant's treating physician, Dr. Francis. In the initial January 2006 decision, employer was ordered to pay claimant temporary total disability compensation from May 15, 2003, to pay for cervical fusion surgery, and to provide reasonable and necessary medical care that may arise in the future due to claimant's work injury.

In March 2007, employer sought modification of the administrative law judge's decision under Section 22 of the Act, 33 U.S.C. §922, alleging a change in claimant's condition. Specifically, employer argued that claimant is physically capable of full-time light-duty work and that it established the availability of suitable alternate employment. Moreover, employer contended that claimant is not entitled to pain management treatment recommended by Dr. Francis.

In his Decision and Order on Modification, the administrative law judge credited the parties' stipulation that claimant's work injury reached maximum medical improvement on November 16, 2006, to find that employer established a change in claimant's physical condition. The administrative law judge found that claimant has permanent work restrictions due to his injury and that claimant is unable to return to work as a shipfitter helper. The administrative law judge rejected employer's evidence of suitable alternate employment, and thus found that claimant remains totally disabled due to his work injury. The administrative law judge found that employer failed to rebut claimant's *prima facie* case that the pain management treatment recommended by Dr. Francis is reasonable and necessary. Accordingly, employer was ordered to pay claimant compensation for permanent total disability, 33 U.S.C. §908(a), commencing November 16, 2006, and to pay for all reasonable and necessary medical treatment, including pain management treatment recommended by Dr. Francis and prescription costs.

On appeal, employer challenges the administrative law judge's findings that it did not establish the availability of suitable alternate employment and that pain management treatment for claimant's work injury is reasonable and necessary. Claimant responds, urging affirmance.

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. *See id.; Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990). Accordingly, as is uncontested that claimant is unable to return to his usual employment as a shipfitter helper, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991). In order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he 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); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *Turner*, 661 F.2d 1031, 14 BRBS 156.

In determining claimant's physical restrictions, the administrative law judge credited a functional capacities examination (FCE) conducted on November 16, 2006, and the work restrictions recommended by Drs. Francis and Vanderweide.[1] The administrative law judge addressed the testimony of employer's vocational consultant, William Quintanilla, and the jobs he identified in view of these restrictions. The administrative law judge noted Mr. Quintanilla's testimony that he identified light-duty jobs despite the recommendation in the FCE that claimant is limited to sedentary work, including a restriction against lifting more than 10 pounds occasionally. Tr. at 73-74, EX 16 at 2. The administrative law judge found that light-duty jobs can involve lifting more than 10 pounds, and that Mr. Quintanilla admitted he never asked potential employers about lifting requirements. Decision and Order at 14; Tr. at 74-76. The administrative law judge found that Mr. Quintanilla was unsure of whether a dining attendant job required overhead lifting or how much walking was required for a parking attendant job. Tr. at 91-95. The administrative law judge found that none of the jobs identified in the labor market surveys takes into account claimant's third grade education and that he predominately speaks Spanish.[2] Tr. at 62-63. The administrative law judge found that

[1] The administrative law judge found that Dr. Francis placed restrictions that included a lifting limit of 12 to 15 pounds, no overhead work, no twisting, occasional squatting and bending, and the ability to change position as needed. Decision and Order at 14; *see* EX 4 at 14-18. Dr. Vanderweide stated that claimant should be completely restricted from lifting, carrying, pushing, pulling or twisting. Dr. Vanderweide stated claimant can climb ladders or stairs, and is best suited for a job where he can change positions frequently. EX 9 at 9-10, 27.

[2] The administrative law judge noted claimant's age of 64 and that he testified at the hearing through an interpreter. Decision and Order at 4.

Mr. Quintanilla was not sure whether claimant was required to speak English to perform the jobs identified in the labor market surveys. Tr. at 80, 86-89. The administrative law judge found that the jobs Mr. Quintanilla identified as a porter, dining room attendant and parking attendant would require English-speaking proficiency. The administrative law judge concluded that employer failed to establish that the jobs identified in the labor market surveys are realistic opportunities given claimant's physical restrictions and his inability to speak English, and therefore, that employer failed to establish the availability of suitable alternate employment. Decision and Order at 15.

In challenging the administrative law judge's finding that it did not establish the availability of suitable alternate employment, employer contends that the administrative law judge erred in stating that Dr. Francis restricted claimant to lifting 12 to 15 pounds because Dr. Francis testified that claimant could lift up to 25 pounds on an occasional basis. Employer argues that all of the jobs listed in the labor market surveys are therefore physically appropriate based on this lifting restriction. In addressing claimant's lifting restrictions, Dr. Francis testified at his deposition that he had no objection to a 10-pound lifting restriction, that claimant might be able to lift 12 to 15 pounds, and that he could occasionally lift up to 25 pounds. EX 4 at 16. The administrative law judge concluded, however, that the jobs employer offered as evidence of suitable alternate employment must also conform to the restrictions placed on claimant by the November 2006 FCE, which restricted claimant to lifting 10 pounds occasionally and five pounds regularly, and by Dr. Vanderweide who stated claimant should not lift at all. EX 16 at 2; EX 9 at 9. The administrative law judge relied on Mr. Quintanilla's testimony that light-duty jobs may require lifting more than 10 pounds and that he did not specifically inquire about the lifting requirements of the positions identified in the labor market surveys. Tr. at 74-75. Based on this evidence, the administrative law judge found that employer failed to establish that the identified jobs are physically suitable for claimant. We affirm this finding as it is rational and supported by substantial evidence. The administrative law judge rationally found that employer must identify jobs that conform to the strictest work restrictions, and therefore, rationally rejected the jobs identified because Mr. Quintanilla testified that he did not inquire as to the lifting requirements of the specific light-duty positions. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Employer also argues that the administrative law judge erred by finding that Mr. Quintanilla failed to take into account claimant's limited communication skills because he testified that none of the jobs identified in the labor market surveys requires that claimant read or write English. The inquiry concerning suitable alternate employment does not necessarily end should the employer identify jobs that the claimant is physically capable of performing. The Fifth Circuit has held that the inquiry also encompasses

consideration of whether the claimant can compete for, and realistically and likely secure, the positions if he diligently tried, given his age, education, and vocational background. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. In *Ledet*, for example, the Fifth Circuit held that the administrative law judge must consider whether the claimant had the mental ability or skills necessary to work successfully as a car salesman; that the job was physically suitable for the claimant was an insufficient basis on which to find that the employer established suitable alternate employment. *Ledet*, 163 F.2d at 905, 32 BRBS at 214-15(CRT). In *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997), a case in which the claimant had a significant psychiatric impairment as well as a physical impairment, the Second Circuit, in emphasizing that an employer must establish the availability of positions for which the claimant can realistically compete, stated that "[t]his requirement has particular relevance where the claimant's educational background, medical impairment and job qualifications are such that suitable job opportunities would be limited, at best." *Id.*, 119 F.3d at 1042, 31 BRBS at 89(CRT). Thus, the administrative law judge in this case validly questioned whether a functionally illiterate Spanish-speaking man with a third grade education could realistically compete for and obtain work as a porter, dining room attendant, or parking attendant. *See Ceres Marine Terminal*, 243 F.3d 222, 35 BRBS 7(CRT). Although Mr. Quintanilla testified that the jobs did not require that claimant read or write English, the administrative law judge rationally accounted for claimant's limited education and ability to *speak* English in assessing the jobs' suitability. *Id.* Thus, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. Therefore, we affirm the award of permanent total disability benefits.

Employer also contends the administrative law judge erred in finding that pain management treatment recommended by Dr. Francis is reasonable and necessary for claimant's work injury. Section 7(a) requires an employer to pay for all reasonable and necessary medical expenses arising from a work-related injury. 33 U.S.C. §907(a). Claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). The administrative law judge found that claimant established a *prima facie* case that pain management treatment is reasonable and necessary based on the recommendation of Dr. Francis, who opined that such is needed because there is nothing more that he can do for claimant from an orthopedic perspective. EX 4 at 19-20. The administrative law judge rejected Dr. Vanderweide's opinion that invasive pain management treatment is not necessary on the basis that Dr. Francis did not prescribe invasive treatment and because the administrative law judge had previously rejected Dr. Vanderweide's opinion that the disputed cervical fusion surgery was not necessary because claimant's condition was not related to the work injury. Decision and Order at 15-16; *see* EX 9 at 26; EX 10 at 10. As Dr. Francis opined that non-invasive pain

management treatment is necessary for claimant's work injury, we affirm the award as it is supported by substantial evidence. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge