BRB No. 11-0214

JOYCE THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 09/30/2011
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Limited), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Modification (2010-LHC-1469) 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*. (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, a laminator trainee, fell from a ladder on October 5, 1994, injuring her hip and lower back. Claimant had left hip replacement surgery in 1995. In a Decision and Order dated June 2, 1997, Administrative Law Judge DiNardi awarded claimant temporary total disability compensation from October 6, 1994, through April 23, 1996, permanent total disability compensation from April 24 through June 13, 1996, and

permanent partial disability compensation from June 14, 1996 and continuing. CX 7. Judge DiNardi found that the fall caused an aggravation of claimant's pre-existing back condition, as well as claimant's hip injury. In 2010, both claimant and employer filed petitions for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that claimant's condition had changed. In her motion for modification, claimant contended that her physical condition had deteriorated so as to render her totally disabled; in contrast, employer argued that claimant's economic condition had improved.

In his Decision and Order on Modification, Administrative Law Judge Avery (the administrative law judge) granted claimant's motion for modification and awarded claimant permanent total disability compensation commencing August 16, 1999. 33 U.S.C. §908(a). On appeal, employer challenges the administrative law judge's decision to grant claimant motion for modification and award ongoing permanent total disability benefits. Claimant responds, urging affirmance of the administrative law judge's decision. Employer filed a reply brief.

Section 22 of the Act provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or 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). It is well established that 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); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

The administrative law judge found, based on medical opinions dated after the date of Judge DiNardi's Decision and Order, that claimant had a change in her condition due to her October 1994 back and hip injuries. Dr. Tsang has been claimant's treating pain management physician since 2006. Dr. Tsang reviewed claimant's medical records and opined in 2009 that:

> Claimant is only able to lift five pounds frequently and ten pounds occasionally. She cannot sit or stand for more than one hour at a time. Claimant must use a cane to get around and even then she cannot walk more than a block. Claimant is severely limited with respect to bending, stooping, kneeling, and crouching. Claimant cannot climb stairs. I agree with the Social Security Administration's ruling that Claimant has been permanently and totally disabled since August 16, 1999.

EX 3 at 81. Dr. Longnecker, who performed claimant's hip replacement surgery and was claimant's treating doctor before his retirement, opined in March 1999, January 24, 2000,

and November 2000 that claimant was disabled from "any and all forms of gainful employment." EX 2 at 43, 46, 48-50, 51-52. Employer did not offer any medical evidence to counter the opinions of Drs. Tsang and Longnecker, but did offer a labor market survey purporting to show jobs claimant could perform within the restrictions imposed by the physicians. The administrative law judge credited the medical opinions of Drs. Longnecker and Tsang, concluded that claimant has not been capable of any employment since August 16, 1999, and therefore modified the prior award by awarding ongoing permanent total disability benefits from that date.

In challenging the administrative law judge's award of permanent total disability benefits, employer contends that as claimant's physical restrictions have remained stable since the issuance of the initial decision in this claim, the administrative law judge erred in concluding that claimant met her burden of establishing a change in her condition and is totally disabled. Employer also contends that the administrative law judge misinterpreted the opinions of Drs. Tsang and Longnecker because their disability assessments are based on the totality of claimant's medical ailments, some of which are not work-related. Employer also contends the administrative law judge erred in failing to address its vocational evidence. We reject these contentions of error.

Although Dr. Tsang stated that, "I cannot state with certainty that [claimant] is permanently and totally disabled from any and all employment as a result of her industrial accident," he did state that claimant is totally disabled due to her severe limitations. EX 3 at 81. Employer did not identify any intervening cause of claimant's disability; in this regard, it is noted that Judge DiNardi found that claimant's pre-existing scoliosis was aggravated in the work accident that also caused the hip injury. *See generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). In addition, the administrative law judge relied on claimant's testimony that her long-time use of a cane for her work injury has caused wrist pain. Tr. at 47-49. Dr. Longnecker, in reports authored after Judge DiNardi issued his decision, specifically stated that claimant is totally disabled and he listed her disabling conditions as "total hip replacement, chronic deg. [degenerative] disc disease, deg [degenerative] disc L/S [lumbosacral] spine, HNP –C Spine." *See, e.g.*, EX 2 at 48, 51-52. However, the basis for Dr. Longnecker's repeated opinion that claimant cannot work is her inability to stand for long periods of time, to walk, climb, or do deep knee bends, which are restrictions initially imposed due to the hip injury alone. *Id.* at 26, 46.

The administrative law judge is entitled to weigh the evidence of record and to draw his own inferences and conclusions therefrom. *See 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). On appeal, employer seeks a reweighing of the evidence, which the

Board is not empowered to do. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). The administrative law judge did not err in crediting the uncontradicted reports of Drs. Tsang and Longnecker, and his inference from their reports, that the residuals from claimant's work injury totally disable claimant, is rational and within his discretionary authority. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge). Thus, as it is supported by substantial evidence, the administrative law judge's finding that claimant is incapable of returning to any gainful employment and is thus permanently and totally disabled is affirmed. *See Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010). Therefore, we affirm the administrative law judge's modification of the prior award of benefits and the award of permanent total disability compensation as of August 16, 1999.[1]

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[1]As we have affirmed the administrative law judge's finding that claimant is incapable of returning to any work, we need not address employer's contention that its proffered labor market surveys established the availability of suitable alternate employment. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).