BRB No. 05-0864

CARL V. LAROSA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KING AND COMPANY	)	DATE ISSUED: 07/19/2006
	)	
and	)	
	)	
ST. PAUL FIRE AND MARINE (FORMERLY UNITED STATES FIDELITY AND GUARANTY COMPANY)	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Section 22 Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Carl LaRosa, Slidell, Louisiana, *pro se*.

Donald P. Moore (Franke, Rainey & Salloum, P.C.), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Section 22 Modification (2004-LHC-1391) of Administrative Law Judge Lee J. Romero, Jr., 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). In an appeal by a *pro se* claimant, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are

rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant fractured his right ankle in 1993 while working for employer as a carpenter, and he underwent surgery to install supportive hardware. In his initial decision, the administrative law judge found that claimant is entitled to temporary total disability benefits from November 15, 1993, until June 7, 1995, when his condition reached maximum medical improvement, and permanent partial disability benefits under the schedule thereafter for 61.5 weeks for a 30 percent permanent impairment. The administrative law judge also found that claimant could return to work with restrictions. Employer paid claimant's benefits pursuant to this award. Decision and Order I at 7, 18-19; Emp. Ex. 1. In 1997, claimant was advised to have surgery to remove the hardware from his ankle. He underwent this surgery on June 26, 1997. Employer voluntarily paid claimant temporary total disability benefits from June 26, 1997 through March 15, 1998.

Claimant subsequently filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, contending his ankle condition had changed entitling him to additional benefits. Employer argued that there was no change in claimant's condition and, alternatively, if there was, it is entitled to a credit against benefits it has already paid. The administrative law judge found that, subsequent to the original Decision and Order, claimant underwent surgery, which disabled him for a period, and his condition reached maximum medical improvement on September 11, 1997, leaving him with a reduced impairment of 25 percent. Because he found claimant's condition had changed, the administrative law judge granted claimant's motion for modification. Decision and Order II at 16; Emp. Ex. 3 at 35. The administrative law judge found that claimant is entitled to permanent total disability benefits from June 26 through September 10, 1997, February 7 through May 13, 2001, and May 26, 2003 through March 31, 2004, and he found that claimant's permanent disability was only partial from September 11, 1997 through February 6, 2001, May 14, 2001 through June 25, 2003, and April 1, 2004 and continuing.[1] Decision and Order II at 19-23. Because claimant's injury was to a

[1]The administrative law judge found that claimant's ankle condition reached maximum medical improvement on September 11, 1997, and that Dr. Brunet stated in February 2001 that claimant cannot work until a functional capacity evaluation (FCE) is performed. Decision and Order II at 19-20; Emp. Ex. 3 at 46. On May 14, 2001, claimant was given a work status summary that said he could not return to work due to an unrelated injury, and on June 26, 2003 Dr. Brunet stated that claimant must stop working because he still had not undergone an FCE. Decision and Order II at 9, 11, 21; Cl. Ex. 1 at 3; Cl. Ex. 3 at 2. On April 1, 2004, Dr. Brunet reviewed claimant's February 17, 2004 FCE. Decision and Order II at 20-23; Emp. Ex. 3 at 49. Thus, the administrative law judge found that claimant was capable of working from September 11, 1997 through

scheduled member and because he had been paid for his 30 percent impairment previously, the administrative law judge did not award benefits for the periods of partial disability. Decision and Order II at 20-23. Additionally, the administrative law judge found that employer is entitled to a credit for its overpayment of temporary total disability benefits from September 11, 1997 through March 15, 1998, and for its "overpayment" of permanent partial disability benefits because claimant's condition had improved by five percentage points. Decision and Order II at 23-24. Claimant, without legal representation, appeals the administrative law judge's decision, and employer responds, urging affirmance.

Extent of Disability

To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). If a claimant establishes a *prima facie* case of total disability, then he is considered totally disabled unless and until his employer satisfies its burden of establishing the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether a job is realistically available and suitable for the claimant. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). Merely alleging such work is available will not suffice. *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). In ascertaining the suitability of a job, the administrative law judge must compare the duties of the position with the claimant's restrictions. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). If the employer establishes the availability of suitable alternate employment, then the claimant is, at most, partially disabled, unless he establishes he diligently tried but failed to obtain work. *Turner*, 661 F.2d 1031, 14 BRBS 156.

In this case, the administrative law judge found that employer presented evidence of the availability of suitable alternate employment in September 1995 following the initial injury and surgery. Decision and Order I at 9. He also found that Dr. Brunet advised claimant not to return to his usual work after his 1997 surgery, Emp. Ex. 3 at 35;

February 6, 2001, May 14, 2001 through June 25, 2003, and April 1, 2004 and continuing.

Emp. Ex. 4 at 5, that employer established the availability of suitable alternate employment in August 2004, and that claimant did not diligently pursue alternate employment, Tr. at 27-28, 44-45, 61-62, but claimant continued to seek work through the union, obtaining jobs as a carpenter on an irregular basis after 1997, and as late as January 2005, before the hearing in March 2005, Tr. at 45, 63, 65. Decision and Order II at 19-23.

In determining that claimant was not totally disabled during three periods between 1997 and 2004, the administrative law judge relied on the testimony of Dr. Brunet, who stated that claimant cannot return to his usual work of carpentry but has transferable skills and was released to perform light to medium work during these periods. Decision and Order II at 19-23; Emp. Ex. 3 at 46, 49. However, medical evidence regarding claimant's work capabilities, such as the statements by Dr. Brunet, is insufficient alone to meet employer's burden of establishing the availability of suitable alternate employment. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Moreover, the administrative law judge did not discuss whether claimant's actual irregular work after 1997 constituted suitable alternate employment. Decision and Order II at 20 n.12; Tr. at 30, 65, Although the administrative law judge found that the jobs presented by employer in August 2004 constituted suitable alternate employment and that claimant refused to try to obtain those jobs, showing a lack of diligence, he did not discuss whether employer established suitable alternate employment between September 11, 1997 and August 31, 2004, or whether the jobs identified by employer in 1995 remained suitable and available following claimant's second surgery.[2] As a disability changes from total to partial on the date the availability of suitable alternate employment is established, and as the administrative law judge discussed only Dr. Brunet's statements, we cannot affirm the finding that claimant was only partially disabled during the three periods between 1997 and August 31, 2004. *See Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990). As the administrative law judge's finding that claimant could not return to his usual work after

[2]Although the administrative law judge summarized the February 17, 2004, FCE and the August 31, 2004, labor market survey (LMS), Decision and Order II at 11-12, and he summarized the medical evidence, *id.* at 7-11, he did not make any specific findings regarding claimant's physical work restrictions after the 1997 surgery and until 2004. The FCE stated that claimant can do medium work, Emp. Ex. 5, and the vocational consultant concluded that claimant has essentially the same physical limitations as he had in 1995, except that he now has a daily four-hour limit on standing and walking. Emp. Ex. 17 at 15-16. The LMS stated that the consultant was unable to determine any specific jobs available in February 2001, but that cashier positions opened every few months. Emp. Ex. 17 at 16.

his 1997 surgery is supported by substantial evidence, employer was required to establish the availability of suitable alternate employment during the relevant periods in order to reduce claimant's entitlement from total disability to partial.[3] *See generally Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988).

We vacate the administrative law judge's determination that claimant was permanently partially disabled for three periods between September 11, 1997, and August 31, 2004, and we remand the case for the administrative law judge to fully address the extent of claimant's disability during these periods by properly addressing the availability of suitable alternate employment. Upon remand, the administrative law judge must make the appropriate comparisons between claimant's work restrictions and his job duties to determine whether the positions in which he worked during the periods in question were suitable for him. He must also determine whether the jobs identified by employer in 1995 remained suitable and available following the 1997 surgery. If the administrative law judge finds that the jobs claimant performed and employer identified in 1995 were not suitable, then claimant is entitled to permanent total disability benefits for those periods prior to August 31, 2004. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). If, on remand, the administrative law judge finds that employer has demonstrated the availability of suitable alternate employment and claimant lacked diligence in returning to work, then claimant would be permanently partially disabled but would not be entitled to additional permanent partial disability benefits because he has been fully paid under the schedule. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). However, as the administrative law judge rationally found that three cashier positions identified by employer in August 2004 were suitable for claimant because they complied with claimant's lifting restrictions and allowed for alternating sitting, standing and walking, and as claimant testified that he did not diligently pursue this employment, we hold that claimant's condition became partial as of August 31, 2004. *Turner*, 661 F.2d 1031, 14 BRBS 156.

Credit

[3]Only after employer establishes the availability of suitable alternate employment is the question of claimant's diligence in seeking work reached. *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); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

We next address the administrative law judge's grant to employer of a credit for compensation paid pursuant to the original decision and for compensation voluntarily paid following the 1997 surgery. Employer asserts that the administrative law judge properly found it to be entitled to a credit for all compensation previously paid. Because payment of benefits has occurred in two manners, voluntarily and pursuant to an award, we must consider the applicability of two types of credit in this case. First, Section 14(j) permits an employer who has made advanced payments of compensation to be reimbursed out of any unpaid installments of compensation due. 33 U.S.C. §914(j); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992); *Nichols v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 710 (1978); *see generally Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78(CRT) (5th Cir. 1994). "Advanced" payments are those made voluntarily, prior to any award. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *see, e.g., Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990) (payments made pursuant to unapproved settlement considered voluntary); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); *Hubert v. Bath Iron Works Corp.*, 11 BRBS 143 (1979); *Scott v. Transworld Airlines*, 5 BRBS 141 (1976). Next, Section 22 permits modification of a previous award, and if an award is decreased, the payments made prior to the decrease shall be deducted from any unpaid compensation due. 33 U.S.C. §922; *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). Any credit to which an employer is entitled must be calculated on a dollar-for-dollar basis. *Balzer v. General Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc*, 23 BRBS 241 (1990) (Brown, J., dissenting on other grounds); *Hubert*, 11 BRBS 143.

In this case, the administrative law judge modified the previous decision and found that claimant is entitled to additional permanent total disability benefits. Accordingly, he awarded employer a credit against all benefits previously "overpaid." Decision and Order II at 23-24. The administrative law judge found that employer voluntarily paid temporary total disability benefits from June 25, 1997, until March 15, 1998; however, because claimant was entitled to temporary total disability benefits only through September 11, 1997, employer is entitled to a credit for the overpayment of all temporary total disability benefits made thereafter through March 15, 1998. Decision and Order at 23. As the temporary total disability benefits were paid voluntarily in advance of any award on modification, Section 14(j) applies. We affirm the administrative law judge's finding that employer is entitled to a credit for any overpayment of temporary total disability benefits after September 11, 1997, against its liability for permanent total disability benefits awarded in the decision on modification. *Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT). Nevertheless, the case must be remanded for the administrative law judge to calculate the dollar amount of employer's credit in light of the findings regarding suitable alternate employment on remand. *Balzer*, 22 BRBS 447.

The administrative law judge also found that employer paid claimant permanent partial disability benefits under the schedule for an impairment of 30 percent pursuant to the initial decision. As claimant has already been paid for a 30 percent impairment to his ankle, pursuant to the credit doctrine, *see Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*), employer is entitled to a dollar-for-dollar credit against any further permanent partial disability to prevent double recovery of the scheduled benefits for injury to the same body part. In this case, no additional permanent partial disability benefits are due, because, in the decision on modification, the administrative law judge found that claimant's impairment was reduced to 25 percent as a result of the additional surgery. Thus, he concluded that employer "overpaid" by five percentage points, and he awarded employer a credit for this difference.[4] Decision and Order II at 23. The issue before us, therefore, is whether the benefits previously paid for that remaining five percentage points of disability, in dollars, can be credited against employer's current liability for permanent total disability benefits. Because the new, reduced, award arose from the modification of a previous award, Section 22 applies to this issue.

Section 22, in pertinent part, specifically states:

> Such new order *shall not affect any compensation previously paid, except* that an award increasing the compensation rate may be made effective from the date of the injury, and *if any part of the compensation due or to become due is unpaid*, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

33 U.S.C. §922 (emphasis added). The United States Court of Appeals for the Second Circuit addressed this portion of Section 22 in *Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT).[5] In so doing, the court stated that Section 22 provides that a new order "shall not affect any compensation previously paid" with two exceptions. First, if there is an increased award, the award could be made retroactive to the date of injury, permitting a claimant to receive increased compensation from the start. Second, if the award is decreased, an offset is permitted against unpaid compensation. *Spitalieri*, 226 F.3d at 172-173, 34 BRBS at 88(CRT).

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[4]The administrative law judge also did not compute a dollar figure for this credit.

[5]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has not specifically addressed the issue.

In *Spitalieri*, the administrative law judge initially awarded the claimant temporary total disability benefits for orthopedic and psychiatric problems and employer paid those benefits through January 20, 1998. On modification, the administrative law judge found that the claimant was no longer disabled after February 21, 1996, except that he found the claimant entitled to scheduled benefits for a hearing loss arising from the same incident. The Second Circuit interpreted Section 22's reference to a "decrease" as including the termination of the temporary total disability benefits to zero, and it interpreted Section 22's reference to an "increase" as including the new award of scheduled benefits. As there were benefits overpaid and benefits still owing, the court held that the scheduled award of $7,495 was to be offset against the approximately $54,000 employer had overpaid in temporary total disability benefits. *Id.*, 226 F.3d at 173, 34 BRBS at 88(CRT).

In this case, the administrative law judge awarded claimant additional permanent total disability benefits; however, he awarded a reduced amount of permanent partial disability benefits. The decision in *Spitalieri* supports the administrative law judge's award of a credit for the "excess" five percentage points of permanent partial disability benefits it paid against the unpaid award of permanent total disability benefits. Therefore, we affirm the administrative law judge's award of a credit for the overpayment of benefits paid under the schedule against the permanent total disability benefits due. *Spitalieri*, 226 F.3d at 170-173, 34 BRBS at 86-88(CRT). Because the administrative law judge did not compute the credit on a dollar-for-dollar basis, on remand he must make the appropriate calculations. *Id.*, 226 F.3d at 173-174, 34 BRBS at 89(CRT); *Balzer*, 22 BRBS 447.

Accordingly, the administrative law judge's finding that claimant was permanently partially disabled during three periods between 1997 and 2004 is vacated, and the case is remanded for further consideration of the extent of claimant's disability consistent with this opinion. Additionally, on remand, the administrative law judge must compute employer's credit for benefits paid on a dollar-for-dollar basis. In all other respects, the Decision and Order on Section 22 Modification is affirmed.

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