BRB No. 02-0637

BOBBIE G. GILLUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: JUN 12, 2003
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting a De Minimis Award and Order Denying the Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting a De Minimis Award and Order Denying the Employer's Motion for Reconsideration (00-LHC-3182) of Administrative Law Judge Richard K. Malamphy 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 which 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 suffered a work related injury to her left knee on January 17, 1991, and received compensation for several periods of temporary total disability between the date of her injury and August 5, 1998. Pursuant to the parties' agreement, the district director

entered an award of temporary total disability benefits on November 6, 1998; employer's last payment was made on November 10, 1998.[1] CX 2; CX 3-69. On February 26, 1999, and March 11, 1999, claimant submitted to the Office of Workers' Compensation Programs (OWCP) additional medical documentation, noting the condition of her left knee. On August 11, 1999, claimant sent a letter to OWCP requesting a "minimal ongoing compensation award," citing the Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). CX 3-32. On August 29, 2000, claimant filed a claim seeking temporary total disability benefits from July 20 to July 24, 2000, following an injection to her knee. CX 3-14. Employer controverted claimant's claim for additional compensation on the ground that any claim is time-barred.[2]

In his Decision and Order, the administrative law judge first found that claimant's initial 1999 correspondence with OWCP constituted anticipatory filings, pursuant to *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996), and *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998), and therefore were not valid motions for modification pursuant to Section 22 of the Act, 33 U.S.C. §922.[3] The administrative law judge found, however, that claimant's claim in August 1999 for a *de minimis* award was timely filed pursuant to Section 22, that claimant is entitled to a *de minimis* award because her condition is likely to deteriorate, and that she is entitled to the temporary total disability benefits claimed in July 2000. In his Order Denying the Employer's Motion for Reconsideration, the administrative law judge rejected employer's contention that *Rambo II* precludes a claimant with a scheduled injury from seeking a *de minimis* award and that the decision in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), does not limit claimant to an award under the schedule based on the facts of this case. Accordingly, he affirmed his previous awards.

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[1]At the time of her injury, claimant worked as a shipbuilder; subsequently, claimant works for employer as a material checker in the same pay class.

[2]Employer conceded that claimant was totally disabled from work from July 20 to 24, 2000.

[3]Claimant does not contest this finding on appeal.

Employer appeals, contending that claimant's August 1999 modification claim for a *de minimis* award is invalid and that the modification claim for temporary total disability benefits was not timely pursuant to Section 22. Employer further contends that if the claim for a *de minimis* award is valid, the award is not supported by substantial evidence. Claimant responds, urging affirmance of the awards of *de minimis* benefits and temporary total disability benefits.

Section 22 of the Act, 33 U.S.C. §922, states in relevant part that a petition for modification may be filed "at any time prior to one year after the date of the last payment of compensation...." The administrative law judge found that claimant's letter of August 29, 1999, filed within one year of employer's final payment, stating, in relevant part, "[claimant] requests a minimal ongoing compensation award for purposes of keeping her claim open in the future...in accordance with the Unites [sic] States Supreme Court's Decision in *Rambo II*...", CX 3-32, was a timely modification claim for a *de minimis* award and that therefore claimant's claim for temporary total disability compensation for the period of July 20 to 24, 2000, also is timely, since the first modification claim had not been adjudicated. The administrative law judge awarded claimant ongoing *de minimis* benefits of one percent of her average weekly wage, as well as temporary total disability benefits for the specified period. The administrative law judge reiterated claimant's right to these benefits on reconsideration.

For the reasons stated in *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002), we reject employer's contention that a motion for modification seeking *de minimis* benefits is, *per se*, invalid as an "anticipatory" claim. *See also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-557 (4th Cir. 1999). We turn, then, to whether, in the context of this case, claimant's motion for a *de minimis* award constitutes a valid motion for modification. Claimant's claim for a *de minimis* award was filed after claimant's doctor noted claimant's increasing difficulty in performing her job and that she has progressive arthritis and probably will need knee replacement surgery in the future. CX 3-23. Thus, this claim was not anticipatory in nature. *Jones*, 36 BRBS at 110. Furthermore, the fact that no action was taken by OWCP on the claim does not negate its validity, as there is no evidence of claimant's lack of intent to pursue the claim for nominal benefits. *See id.*, 36 BRBS at 110-111; *see also Borda*, 171 F.3d 175, 21 BLR 2-557; *cf. Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113, 116-118 (2002) (request that informal conference not be scheduled indicates prematurity of modification claim); *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5 (2000), *aff'd mem.*, 238 F.3d 413 (4th Cir. 2000) (same).

Employer further contends, however, that because claimant's injury was to her leg, a body part covered by the schedule at Section 8(c)(1), she cannot receive a *de minimis* award because such awards are predicated on Section 8(h), 33 U.S.C. §908(h), which is inapplicable

to scheduled injury cases. The schedule at Section 8(c)(1)-(20) provides the exclusive recovery for permanent partial disability for body parts listed in the schedule. *Potomac Electric Power Co. v. Director, OWCP, [PEPCO],* 449 U.S. 268, 14 BRBS 363 (1980). Claimants with a permanent partial disability to a scheduled member cannot elect to receive benefits pursuant to Section 8(c)(21) based on a loss of wage-earning capacity as determined under Section 8(h). *Id.*, 449 U.S. at 271, 14 BRBS at 365. As the Board discussed in *Jones*, 36 BRBS at 108-109, the Supreme Court's decision in *Rambo II*, in approving nominal, or *de minimis*, awards in appropriate cases, relied on Section 8(h) which takes into account "the effect of disability as it may naturally extend into the future." *Rambo II*, 521 U.S. at 131-132 31 BRBS at 58(CRT). In *Porter*, 36 BRBS 113, the claimant sustained an injury to her arm, and received permanent partial disability benefits pursuant to a stipulated compensation order. Within one year of the last payment of benefits, the claimant filed a claim for a nominal award. The Board held, *inter alia*, that because the claimant was permanently partially disabled and her injury was to a scheduled member, she was precluded from receiving any benefits pursuant to Section 8(c)(21), including a nominal award. *Id.* at 118.

This case, however, is distinguishable from *Porter* in that claimant has not claimed or been compensated for any permanent disability to her leg, nor has her condition been termed "permanent" by her physicians. Thus, her modification claim for *de minimis* benefits is appropriately viewed as based upon an award for temporary partial disability benefits pursuant to Section 8(e), 33 U.S.C. §908(e).[4] A Section 8(e) award is not precluded to a claimant who sustains an injury to a member listed in the schedule at Section 8(c), but whose injury has not yet been found permanent. In *PEPCO*, the Supreme Court stated that "the character of the disability determines the method of compensation." *PEPCO*, 449 U.S. at 272, 14 BRBS at 365. The Court further described the four types of disability awards, *id.*, and stated that the Act separately prescribes the method of compensation for each type of disability. *Id.* Its holding limiting a claimant with a scheduled injury to an award under Sections 8(c)(1)-(20) applies only if the claimant is permanently partially disabled. *Id.*, 449

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[4]Section 8(e) states:

> In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. ' 908(e).

U.S. at 272 n.17, 14 BRBS at 366 n.17 ("the § 8(c) schedule applies only in cases of permanent partial disability. . ."); *see also Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 802 n.4, 33 BRBS 170, 173 n.4(CRT) (4th Cir. 1999); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Furthermore, an award pursuant to Section 8(e) is explicitly predicated on a loss of wage-earning capacity as determined under Section 8(h),[5] *see, e.g., Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992), and nothing in Section 8(h) or in *Rambo II* distinguishes between nominal awards entered pursuant to Section 8(c)(21) or those entered pursuant to Section 8(e). *See* 33 U.S.C. §908(e) (limiting award to five years). Thus, as claimant had evidence of a deteriorating condition and as she filed a claim for benefits to which she is potentially entitled, the context of this claim demonstrates that claimant had a "legitimate, non-frivolous claim" for a nominal award at the time the August 1999 letter was filed with the district director. *Jones*, 36 BRBS at 110. Having determined that claimant filed a timely, valid petition for modification in August 1999, we further hold, for the reasons stated in *Jones*, 36 BRBS at 111, that the subsequent modification claim for temporary total disability benefits was timely, as the earlier modification claim had not been adjudicated or withdrawn.[6] As claimant's entitlement to the five days of temporary total disability benefits is not otherwise contested, this award is affirmed.

We next address employer's contentions that claimant's entitlement to a *de minimis* award was not before the administrative law judge for adjudication, and that, moreover, the

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[5]Section 8(h) states:

> *The wage-earning capacity of an injured employee in cases of partial disability* under subdivision (c)(21) of this section or *under subdivision (e) of this section* shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. ' 908(h) (emphasis added).

[6]We note that it is the lack of adjudication of the modification claim for *de minimis* benefits, rather than its success on the merits, that renders timely the subsequent modification claim for temporary total disability benefits.

award is not supported by substantial evidence. We reject employer's contention that the administrative law judge erred in addressing claimant's entitlement to a nominal award. Claimant requested a hearing on the issue of her entitlement to five days' temporary total disability benefits. CX 3-9, 14. She averred that her claim for these benefits was timely based on her timely filed, yet unadjudicated claim for *de minimis* benefits. *See* Tr. at 7; Cl. post-hearing brief at 4-7. Employer countered that the claim was untimely under Section 22 because the *de minimis* claim was invalid. Tr. at 7-9. Under the circumstances, the administrative law judge properly addressed the pending *de minimis* claim, as it clearly was "part and parcel" of the parties' contentions regarding claimant's entitlement to the temporary total disability benefits claimed. *See generally Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999). Moreover, employer, in its motion for reconsideration to the administrative law judge, did not contend that the administrative law judge erred in addressing the issue, but asserted only that the *de minimis* award was not supported by the medical records claimant offered into evidence. Employer, therefore, cannot contend for the first time on appeal that it was deprived of the right to depose claimant's doctor or to schedule its own medical examination on the issue of the likelihood of the further deterioration of claimant's knee condition.[7]

Finally, we affirm the administrative law judge's *de minimis* award as it is rational, supported by substantial evidence, and in accordance with law. In *Rambo II*, the Supreme Court held that a nominal award is appropriate where the claimant does not have a present loss in wage-earning capacity, but demonstrates the significant potential that the injury will cause diminished capacity in the future. *Rambo II*, 521 U.S. at 126, 31 BRBS at 61(CRT); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). Dr. Siegel, claimant's treating physician, stated on June 4, 1999, that claimant has progressive arthritis of the left knee, and that she probably will need a total knee replacement in the future, "timing uncertain." CX 3-29, 33. On March 10, 2000, Dr. Siegel again noted that claimant will need a total knee replacement. CX 3-24. On June 26, 2000, Dr. Siegel wrote that claimant was not yet ready for the surgery, and he thought it advisable for her to wait. CX 1-1. He further wrote, however, that when the surgery occurs, she will be off work for eight weeks after which she will be able to return to her present bench work, although perhaps on a part-time basis at first. *Id.* This evidence supports the administrative law judge's *de minimis* award, as it demonstrates a deteriorating physical condition which is likely to impair claimant's earning

[7]Employer may seek modification of the administrative law judge's *de minimis* award, based on a mistake in fact. *See generally Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

capacity in the future. *Barbera,* 245 F.3d 282, 35 BRBS 27(CRT). Contrary to employer's contention, the fact that claimant will be able to return to her present job does not negate the likelihood that she will sustain a loss in wage-earning capacity, be it temporary total or partial, prior to that time. *See generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). Therefore, we affirm the administrative law judge's *de minimis* award.

Accordingly, the administrative law judge's Decision and Order Granting a De Minimis Award and Order Denying the Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge