BRB No. 98-1184

ARMANDO V. RAMIREZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED	)	DATE ISSUED: April 20, 1999
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order Granting in Part and Denying in Part Claimant's, Employer's and the District Director's Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Arturo V. Ramirez, Houston, Texas, for claimant.

W. Robins Brice (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Order Granting in Part and Denying in Part Claimant's, Employer's and the District Director's Motion for Reconsideration (97-LHC-0162) 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). 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, a checker who began his longshore employment in 1970, sustained a head injury on April 11, 1978, for which he underwent surgery to repair a ruptured blood vessel. Following the surgery, claimant experienced vision problems, memory loss and emotional problems for which he received psychiatric counseling from Dr. Brinsmade. Claimant eventually returned to work as a longshore clerk and/or checker sometime in 1981, but continued to see Dr. Brinsmade on a regular basis. Claimant received a settlement under the Longshore Act as a result of his 1978 accident and resulting injuries.

In 1988, claimant began working full-time out of the hiring hall as a checker for various employers on a day-to-day or week-to-week basis. On April 3, 1989, claimant, while working for employer, was run over by a chassis which was being used to load and unload cargo. As a result of this accident, claimant sustained a fracture of the fifth right rib, a pelvic injury, contusions to the low back and left hip area, and extensive ligament damage to his right knee which subsequently required surgery on April 27, 1989. Additionally, claimant testified that as a result of his being run over by the chassis, he has a fear of being re-injured while at work on the docks because the area where the chassis load and unload the cargo and the checkers work is "a madhouse" and unorganized. Hearing Transcript (HT) at 75. Employer voluntarily paid periods of temporary total disability and temporary partial disability benefits, as well as a scheduled award for claimant's right knee injury.[1]

[1]Employer paid temporary total disability benefits from April 4, 1989, through July 11, 1991, at a weekly rate of $564.40. Employer paid temporary partial disability benefits from July 12, 1991, through December 31, 1991, at a weekly rate of $76.09; from January 1, 1992, through December 31, 1992, at a weekly rate of $65.71; from January 1, 1995, through December 31, 1995, at a weekly rate of $62.57; and from January 1, 1996, through December 31, 1996, at a weekly rate of

Claimant returned to work on July 12, 1991, accepting checking positions which involved automobiles or work in the warehouse because this work was not hazardous or stressful. Claimant initially worked every other day to build up his strength and eventually in 1992, worked full-time continuously for the next two years at the Port of Houston Authority (PHA) in the chassis yard. In 1995, claimant lost his position in the PHA chassis yard, and has attempted to work in other positions since then to determine the type of jobs he could perform without physical or emotional problems. At the time of the hearing, claimant continued to be hired out of the hiring hall to work in checker/clerk positions at the PHA. Claimant testified that he usually takes three to four days off from work per week because he cannot physically perform the work that he is assigned. He further stated that he continues to work because "he need[s] to work." HT at 147.

$7.51. Moreover, employer paid claimant compensation for 72 weeks at a rate of $564.40 based on a 25 percent loss of use to his right leg. Employer also has paid all medical benefits as a result of the 1989 accident pursuant to Section 7 of the Act. 33 U.S.C. §907.

In his decision, the administrative law judge found that as a result of the injuries sustained in his April 3, 1989, work-related accident, claimant was temporarily totally disabled from April 3, 1989, through April 7, 1991,[2] and permanently totally disabled from April 8, 1991, through April 30, 1992. The administrative law judge next determined that claimant sustained no loss of wage-earning capacity in calendar years 1993 and 1994, and thus, found employer liable only for permanent partial disability benefits for the periods of May 1, 1992, through December 31, 1992, and January 1, 1995, through January 31, 1995, and that claimant returned to being permanently totally disabled from February 1, 1995, and continuing thereafter. Specifically, the administrative law judge determined that claimant could not return to his usual employment as a checker/clerk because the physical requirements of those positions were beyond the scope of the physical limitations resulting from his work injuries. Additionally, the administrative law judge found that claimant's job with PHA from May 1, 1992, through January 31, 1995, represented suitable alternate employment, as that work was predominantly sedentary in nature. The administrative law judge, however, determined that in February 1995, claimant was no longer hired by PHA to work in the sedentary position but instead began accepting checker/clerk positions out of the hiring hall which exceeded his work restrictions and thus did not constitute suitable alternate employment. The administrative law judge found that claimant continued to work in these checker/clerk positions only due to extraordinary effort on his part, thereby entitling him to total disability benefits despite his continued employment. The administrative law judge also awarded claimant medical benefits, interest and a Section 14(e), 33 U.S.C. §914(e), assessment. Moreover, the administrative law judge determined that employer is entitled to Section 8(f) relief, 33 U.S.C. §908(f), and to a credit for all wages earned and compensation paid to claimant.

Claimant, employer and the Director each filed motions for reconsideration with the administrative law judge. Addressing employer's arguments, the administrative law judge first altered his original decision to reflect that employer's liability for a Section 14(e) assessment ends on October 11, 1996, rather than November 14, 1997. The administrative law judge then rejected employer's

[2]The administrative law judge also determined that claimant reached psychological maximum medical improvement on February 22, 1991, and physiological maximum medical improvement on April 8, 1991, as to the injuries sustained as a result of the April 3, 1989, work accident.

contention that he improperly addressed the extent of claimant's injury in concluding that claimant was permanently totally disabled, and denied employer's request to reopen the record to submit additional evidence of suitable alternate employment as untimely. In response to the contentions put forth by claimant and the Director, the administrative law judge amended his decision to reflect that employer, although entitled to a credit for all compensation previously paid to claimant, is not entitled to offset its liability for disability compensation with any wages earned during periods where claimant exerted extraordinary effort in the performance of work. Additionally, the administrative law judge amended his decision by adding that employer is liable for the previously paid scheduled award.

On appeal, employer challenges the administrative law judge's award of permanent total disability benefits from February 1995 and continuing. Claimant responds, urging affirmance. The Board heard oral argument in this case on February 11, 1999, in Houston, Texas.

Employer argues that the administrative law judge erroneously awarded permanent total disability benefits in this case, as the issue of total disability was not raised at the pre-trial and hearing stages of the instant case, and thus employer lacked any notice regarding the viability of this issue. In addition, employer argues that as it has undisputedly met its burden of showing suitable alternate employment by offering evidence of a job that claimant has actually performed for a substantial period of time after his injury, *i.e.*, the sedentary position with PHA, and as the record establishes that claimant has had substantial post-injury earnings, it had no reason to believe that permanent total disability would be at issue in the case.

The administrative law judge rejected employer's contention that he improperly addressed the issue of total disability. In his Order on Reconsideration, the administrative law judge determined that, based on the parties' stipulations, Joint Exhibit (JX) 1, employer's opening remarks during the formal hearing and the Rules of Practice and Procedure for Administrative Hearings, 29 C.F.R. Part 18, he had the authority to address the entire nature and extent of claimant's work-related injury and ultimately to conclude that claimant was, during various times, permanently totally disabled.

We hold that the administrative law judge erred in awarding claimant total disability benefits on the present record, as the record is replete with indications that claimant, at no point prior to the time of issuance of the administrative law judge's decision, sought a determination regarding his entitlement to any total disability benefits beyond what had already been paid by employer. *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); *Collins v. Todd Shipyards Corp.*, 5

BRBS 334 (1977). First, as employer suggests, the parties' Pre-Hearing Statements give no indication that the issue of total disability resulting from claimant's work-related injury of April 3, 1989, was disputed. Specifically, claimant's form LS-18 includes as issues, "permanent partial disability [PPD], and loss of wage-earning capacity." Similarly, employer's form LS-18 lists as issues, "claimant's entitlement to PPD benefits based on his current wage-earning capacity and claimant's entitlement to PPD benefits for disability to his right leg." Although the parties stipulated that the issue of permanency was disputed, and that claimant's loss of wage-earning capacity and computation of average weekly wage and compensation rate remained unresolved issues, there is nothing in the stipulations which indicates that total disability was at issue. JX 1.

The hearing transcript lends further insight into this question. At the hearing, employer's counsel explicitly stated that the instant case "is a permanent partial disability case," HT at 19, to which the administrative law judge replied, "yes." *Id.* The administrative law judge subsequently noted that in addition to the issue regarding the extent of claimant's scheduled award for the loss of use of the right leg, "there's also an issue about a loss of wage-earning capacity upon his return to employment." HT at 24. In response to employer's statement, claimant's counsel stated that claimant suffered multiple injuries as a result of his accident and argues that "the loss of earning capacity, the permanent partial loss of earning capacity" is due to his nonscheduled back injury and his other general injuries which are independent of his scheduled injury for his leg. HT at 25. In his opening statement, claimant's counsel states that "I think the evidence would show that [claimant] has suffered permanent partial disability with respect to his injury, general injury." HT at 37. Claimant's counsel reiterates his position by later stating that claimant has "gone back to work, but he's not capable of earning the kind of income that he was earning before the [1989] injury," and resulting impairments. HT at 122; *see also* HT at 39.

It is further evident from the transcript that the administrative law judge has taken employer's counsel's opening statements out of context in finding that it is sufficient to include total disability as an issue. Specifically, while employer's counsel noted that she "want[ed] to clarify the employer's position with respect to the nature and extent of [claimant's] present disability," HT at 41, she at no time discusses the case in terms of total disability. Rather, her reference to the extent of injury is with regard to the assertion that claimant, either due to the fact that claimant's present disability is as a direct result of his continuing complaints involving his right knee which have been compensated under the schedule, *see* n. 1, *supra*, or due to the fact that claimant's current earning levels accurately reflect his wage-earning capacity, has no loss in wage-earning capacity. Thus, this statement more aptly refers to the "extent" in terms of claimant's loss in wage-earning capacity as a

result of his permanent partial disability. HT at 41. *See also* Employer's Post-Hearing Brief at 25. Lastly, in wrapping up the hearing, the administrative law judge explicitly stated that "the issues again, as I understand them, besides average weekly wage and loss of wage-earning capacity, is the permanent partial disability, which may or may not be up in the air,

given the change in status or condition, and then the fees and the 8(f) argument, attorney fees."[3] HT at 234.

The fact that total disability was not an issue at any time prior to the issuance of the administrative law judge's decision is further supported by the parties' post-hearing briefs. Claimant's Post-Hearing Brief mentions that "employer has paid for 119 weeks of temporary total disability," and notes that "this issue is only affected by the average weekly wage rate," which was still in dispute. Claimant's Post-Hearing Brief at 12. Moreover, while claimant lists in the "findings of fact" section of his brief that Dr. Kant opined that claimant "cannot return to his former employment," Claimant's Post-Hearing Brief at 4, he does explicitly state that "there is sufficient evidence to establish that the claimant sustained permanent disability that is partial in nature," *Id.* at 13, and although he again notes that "based on reasonable medical certainty, claimant cannot return to his former occupation of checker," claimant nevertheless states that "the issues here are: (a) whether [claimant's disability] is 'permanent' or 'temporary,' and (b) whether the actual earnings fairly and reasonably determine the wage-earning capacity." *Id.* In its brief, employer explicitly lists as Issues in Dispute, "the nature and extent of the claimant's permanent partial disability, if any." Employer's Post-Hearing Brief at 1. In fact, employer's only reference to total disability benefits comes in the form of its statement that all temporary total disability benefits have been paid. In light of this evidence, it is clear that claimant, at no time prior to the issuance of the administrative law judge's decision, stated an intent to seek total disability benefits beyond those employer had already voluntarily paid.

[3]The change in status to which the administrative law judge refers deals predominantly with the condition of claimant's knee, particularly the increase in the percentage of impairment from 12.5 percent to 25 percent.

In deciding to address the issue of total disability, the administrative law judge also relied on the Rules of Practice and Procedure for Administrative Hearings, specifically finding that pursuant to 29 C.F.R. §18.57(b),[4] he must decide the issues presented by the entire record, notwithstanding the parties' understanding of those issues. An administrative law judge's decision to raise an issue of his own accord is within his discretion as fact-finder. *See Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155 (CRT)(1st Cir. 1988). Claimant's entitlement to total disability compensation in the instant case can be considered a "new issue" which arose during the parties' presentation of the evidence. Section 702.336(b) of the longshore regulations, 20 C.F.R. §702.336(b), permits the administrative law judge to consider "[a]t any time prior to the filing of the compensation order in the case," any new issue upon his own motion, but requires that he give the parties "not less than 10 days' notice of the hearing on such new issue." Thus, inasmuch as the administrative law judge determined subsequent to the hearing that total disability is at issue in this case, the parties were entitled to reasonable notice and an opportunity to submit evidence on this issue. *See Velez*, 856 F.2d at 402, 21 BRBS at 155 (CRT)*; Klubnikin*, 16 BRBS at 182. We therefore hold that the administrative law judge erred, in his order on reconsideration, by denying employer's motion to submit

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[4]20 C.F.R. §18.57(b), in pertinent part, states:

> The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. Such decision shall be in accordance with the regulations and rulings of the statute or regulation conferring jurisdiction.

See also 5 U.S.C. §557(c)(3)(A); 20 C.F.R. §§702.338, 702.348.

additional evidence on the issue of total disability in this case. Consequently, the administrative law judge's finding of permanent total disability benefits is vacated and the case is remanded for reconsideration of this issue.

The administrative law judge, on remand, must allow the parties the opportunity to submit additional evidence and argument relevant to the issue of claimant's entitlement to total disability benefits. *Id.* Inasmuch as it is uncontested that claimant is unable to return to his usual work, the administrative law judge specifically must consider whether employer has met its burden of establishing the availability of suitable alternate employment. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing the issue of suitable alternate employment, the administrative law judge should determine whether the jobs which claimant performs out of the hiring hall meet employer's burden,[5] and if not, then determine whether employer can establish the availability of suitable alternate employment based on evidence, if any is entered into the record, of jobs on the open market which claimant is capable of performing given his physical and psychological limitations resulting

[5]We note that the administrative law judge found claimant to be totally disabled despite his continued employment, as he found that claimant returned to work out of financial necessity, despite physical pain and psychological fear. The administrative law judge also noted that claimant was working beyond the restrictions imposed by his doctors. Decision and Order at 25. An employee may be found to be totally disabled despite continued employment if he works only through extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Haughton Elevator Co. v. Lewis*, 572 F.2d 477, 7 BRBS 838 (4th Cir. 1978); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986); *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981); *Carter v. General Elevator Co.*, 14 BRBS 90 (1981). If the circumstances surrounding claimant's continued employment do not meet either of these criteria, factors such as claimant's pain and the physical or emotional limitations which cause him to avoid certain jobs offered by the hiring hall are relevant in determining post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21), based on reduced earning capacity, despite the fact that claimant's actual earnings may have increased. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo II],* 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997); *Container Stevedoring Co. v. Director, OWCP [Gross],* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981).

from the work-related injury. If, on remand, the administrative law judge determines that employer has established the availability of suitable alternate employment, he must then consider whether claimant has any loss in his wage-earning capacity and thus, is entitled to an award of permanent partial disability benefits under Section 8(c)(21), (h) of the Act, 33 U.S.C. §908(c)(21), (h). *See* n.5*, supra*; *see also Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Container Stevedoring Co. v. Director, OWCP*, 935 F.3d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981). Lastly, if on remand the administrative law judge determines that claimant has no present loss in wage-earning capacity he may then consider claimant's entitlement to a nominal award. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). Nominal awards are appropriate where claimant has not established a present loss in wage-earning capacity under Section 8(c)(21), but has established that there is a significant possibility of future economic harm as a result of the injury. *Id.*; *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989); *Hole*, 640 F.2d at 769, 13 BRBS at 237.

Accordingly, the administrative law judge's award of permanent total disability benefits commencing in 1995 is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge