

EDWARD REDDEG	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING	)	DATE ISSUED: 08/23/2013
COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Stephen B. Berlin,  
Administrative Law Judge, United States Department of Labor.

Jeffrey Winter and Kim Ellis, San Diego, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England, Ponticello & St.  
Clair), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2009-LHC-00375, 2009-LHC-00376) of Administrative Law Judge Stephen B. Berlin rendered on claims 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).

This case is before the Board for a second time. On August 11, 2005, claimant injured his lower back while pushing an electrical panel during the course of his employment for employer. Dr. Raiszadeh opined, on February 23, 2006, that claimant's injury had reached maximum medical improvement and he imposed a permanent work restriction of no heavy lifting. At the request of the parties and based on their stipulations, the district director, on May 6, 2006, issued a compensation order awarding claimant permanent partial disability compensation for his August 2005 back injury.

In July 2006, claimant was assigned to perform electrical installation work onboard ships. Claimant's duties included working on the "big cable crew." Claimant returned to Dr. Raiszadeh complaining of worsening back symptoms, which claimant attributed to this work. Dr. Raiszadeh recommended that claimant return to modified work. Employer removed claimant from the "big cable crew" and provided him with lighter duty work, Tr. at 96-97, which claimant successfully performed until his discharge for cause by employer on December 14, 2006. *Id.* at 120-121. Claimant then obtained work with PacOrd that was less physically demanding; claimant worked for PacOrd from April through July 2007, when he was laid off due to lack of work. Claimant filed a claim under the Act alleging he sustained a cumulative back injury from July through December 2006 caused by his work duties for employer, particularly on the "big cable crew." ALJX 10; CX 1.

In his decision, Administrative Law Judge Etchingham found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his back condition to his employment after July 2006. Judge Etchingham found that employer produced substantial evidence to rebut the presumption and that, based on the record as a whole, claimant failed to establish he sustained a cumulative trauma injury from his work for employer. Judge Etchingham also addressed the extent of claimant's back disability from both the initial August 11, 2005 work injury and the alleged cumulative trauma injury, finding that claimant was not entitled to any additional disability benefits as employer provided suitable alternate employment to claimant. Specifically, Judge Etchingham found that employer provided claimant marine electrician work at its facility by adhering to Dr. Raiszadeh's September 2006 restriction against working on the "big cable crew" and that claimant lost this job due to his own misconduct.<sup>1</sup> Decision and Order at 23-25.

Claimant appealed Judge Etchingham's finding that he did not sustain a cumulative trauma back injury due to his work on the "big cable crew" for employer after July 2006. Claimant also asserted his entitlement to a nominal award. *Reddeg v. National Steel & Shipbuilding Co.*, BRB No. 10-0379 (Dec. 29, 2010) (unpub.). In its decision, the Board reversed Judge Etchingham's finding that employer rebutted the Section 20(a) presumption. The Board stated that employer did not present substantial evidence that claimant's pre-existing back condition was not aggravated by his subsequent employment on the "big cable crew," and it held that claimant sustained a work-related back injury as a matter of law. *Reddeg*, slip op. at 5. The Board remanded

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<sup>1</sup>Judge Etchingham also found that claimant is not entitled to *additional* benefits while he was in a vocational rehabilitation plan, but also that employer did not establish the basis for any credit for benefits it paid during such period. Decision and Order at 25.

the case for the administrative law judge to address claimant's contention that he is entitled to a nominal award.<sup>2</sup> *Id.* at 6-7.

On remand, the case was re-assigned to Administrative Law Judge Berlin (the administrative law judge) as Judge Etchingham had left the Department. In his decision, the administrative law judge stated that he would rely on Judge Etchingham's findings of fact and credibility determinations, as the Board did not disturb them on appeal. Decision and Order on Remand at 2 n.1, 6 n.7. The administrative law judge found that "the medical evidence that Judge Etchingham found credible" shows that claimant has a permanent restriction against performing "heavy work" but that he could otherwise return to work as a marine electrician, he could obtain such work with no loss of wage-earning capacity, and there is no evidence that claimant's condition is likely to worsen. *Id.* at 6-7. The administrative law judge thus concluded that claimant did not show a significant potential of a future loss in wage-earning capacity due to his work-related back injury, and he denied a nominal award. *Id.* Claimant appeals the administrative law judge's decision on remand. Employer responds, urging affirmance. Claimant filed a reply brief.

Initially, we reject claimant's contention that the administrative law judge erred in addressing on remand only his claim for a nominal award. Although Judge Etchingham found that claimant had not sustained a cumulative trauma injury, he addressed in the alternative claimant's entitlement to benefits for such an injury. *See* Decision and Order at 23-24. Specifically, he rejected as not credible claimant's testimony concerning his restrictions, as well as the opinion of Dr. Cleary. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Judge Etchingham found that employer accommodated Dr. Raiszadeh's September 2006 restriction against claimant's working on the "big cable crew" and that claimant lost this suitable alternate employment due to his own misconduct. Thus, employer was not required to identify other suitable alternate employment. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4<sup>th</sup> Cir. 1993). Claimant did not appeal these alternative findings and the Board affirmed them as unchallenged. *See* n. 2, *supra*. Similarly, claimant made no contention to the Board that Judge Etchingham erred in denying benefits while he was enrolled in a vocational rehabilitation program. *See generally General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000). Thus, the Board's remand was limited to claimant's entitlement to a nominal award, *see* 20 C.F.R. §802.405(a), and any other issues are

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<sup>2</sup>The Board affirmed as unchallenged the administrative law judge's finding that claimant was not entitled to disability benefits based on a present loss in wage-earning capacity. *Reddeg*, slip op. at 5 n.5.

waived due to claimant's failure to raise them in his initial appeal. *See generally Ravalli v. Pasha Maritime Services*, 36 BRBS 91, *denying recon. in* 36 BRBS 47 (2002).

With respect to the administrative law judge's denial of a nominal award, claimant contends he has had an increase in his physical limitations since August 2006 and that, therefore, he has demonstrated a significant possibility of a future loss of wage-earning capacity due to his back injury. Specifically, claimant observes that Dr. Raiszadeh restricted claimant only from heavy lifting when he released claimant to return to work in September 2006, whereas, in July 2009, Dr. Adsit increased claimant's work restrictions to also include those against repeated heavy lifting and carrying and repeated bending.

A nominal award under Section 8(h), 33 U.S.C. §908(h), is appropriate when an employee's work-related injury has not diminished his current wage-earning capacity but he establishes there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9<sup>th</sup> Cir. 2004). On remand, the administrative law judge discussed at length the decisions in *Rambo II* and *Keenan*. Decision and Order on Remand at 4-5. He found that claimant is permanently restricted from performing very heavy work. The administrative law judge also acknowledged that claimant has had flare-ups of back pain consistent with Dr. Adsit's opinion regarding the nature of claimant's condition. *See* Tr. at 476; *see also* EX 6 at 23, 29. The administrative law judge found, however, that there is no evidence that the flare-ups are likely to become more frequent or severe, or that claimant's underlying condition is likely to worsen or to require surgery. *See* CX 25 at 298. The administrative law judge additionally found that employer accommodated claimant's work restriction, that Drs. Raiszadeh and Adsit opined that claimant could work as a marine electrician within this restriction, and that claimant lost his suitable job with employer because of misconduct and not because of his inability to perform it. *Id.*; *see* Tr. at 479-481, 484-487; CX 25 at 298, 303. Moreover, claimant was able to obtain other marine electrician work within his capabilities, after claimant was terminated by employer for cause, that paid less only because it was part-time. Decision and Order on Remand at 6. The administrative law judge thus concluded that, since claimant could have worked for employer or other employers as a marine electrician without loss of earnings due to the injury and without exceeding his work restrictions, claimant failed to show the significant potential of a loss in future wage-earning capacity due to his injury.

We affirm the administrative law judge's finding that claimant is not entitled to a nominal award. The Supreme Court stated in *Rambo II* that "We emphasize that the probability of a future decline is a matter of proof; it is not to be assumed *pro forma* as an administrative convenience in the run of cases." *Rambo II*, 521 U.S. at 139, 31 BRBS at 62(CRT). In this case, the administrative law judge rationally found there is no creditable evidence of the significant likelihood that claimant's injury will deteriorate and cause a future diminution in his wage-earning capacity and claimant has not raised any reversible

error in the administrative law judge's consideration of the evidence or in his application of the law.<sup>3</sup> As the administrative law judge is entitled to weigh the evidence and to draw his own inferences therefrom, and as his findings of fact are rational and supported by substantial evidence, we affirm the denial of a nominal award.<sup>4</sup> *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *B.H. [Holloway] v. Northrop Grumman Shipbuilding Systems, Inc.*, 43 BRBS 129 (2009).

Accordingly, the administrative law judge's Decision and Order on Remand 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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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>3</sup>Both administrative law judges declined to rely on the opinion of Dr. Cleary, claimant's treating physician, because he relied heavily on claimant's subjective complaints, which Judge Etchingham discredited. Dr. Etchingham also noted that the factual foundation for some of Dr. Cleary's diagnoses appeared to be lacking. Decision and Order at 20-21. The fact that the district director relied on Dr. Cleary's opinion in finding claimant to be a candidate for vocational rehabilitation did not prevent the administrative law judges from reaching other conclusions based on the evidence presented. See *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988) (administrative law judge proceedings are de novo).

<sup>4</sup>The administrative law judge rationally found that Dr. Cleary's opinion is not entitled to any weight, for the reasons given by Judge Etchingham. Decision and Order on Remand at 2 n.1. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).