BRB No. 00-1095

KEVIN KEENAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES	)	DATE ISSUED: Dec. 4, 2002
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Benefits Review Board Remand of Ellin M. O=Shea, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry & Moorhead, LLP), Wilmington, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela, Brown & Mann), San Pedro, 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 Benefits Review Board Remand (92-LHC-0235) of Administrative Law Judge Ellin M. O=Shea 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).[1] 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). This is the second time this case is before the Board.

[1]By Order dated September 26, 2001, the Board dismissed and remanded this case to the district director for reconstruction of the record or, alternatively, to the Office of Administrative Law Judges for a new hearing. Following receipt of the original case record on July 29, 2002, the Board reinstated the appeal on its docket. Order of August 29, 2002.

Claimant, a longshoreman, suffered an injury to his right shoulder on January 21, 1988, and subsequently underwent two surgeries, reaching maximum medical improvement on November 28, 1990. Claimant filed a claim for continuing disability benefits. In her first decision, the administrative law judge found that claimant=s shoulder injury was an unscheduled injury compensable under Section 8(c)(21) of the Act, 33 U.S.C. '908(c)(21). Having further concluded that although claimant suffers no current loss in wage-earning capacity but that the residuals of his injury may cause claimant to experience job limitations in the future, the administrative law judge awarded claimant a *de minimis* award of $1 per week, as well as medical benefits. Decision and Order - Award of Benefits (Feb. 22, 1993). The administrative law judge also awarded claimant=s counsel an attorney=s fee of $5,700, plus $791 in expenses. Supp. Decision and Order (Oct. 22, 1993). Both parties appealed to the Board.

In its decision, *Keenan v. Eagle Marine Services*, BRB Nos. 93-1234/A (Aug. 14, 1996)(unpublished), the Board affirmed the administrative law judge=s finding that claimant=s shoulder injury is an unscheduled injury which would be compensable under Section 8(c)(21). *Id.* at 2. On employer=s appeal of the *de minimis* award, the Board remanded the case for reconsideration of the award in light of the then-recent holding of the United States Court of Appeals for the Ninth Circuit in *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996) [subsequently *aff=d and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997)]. *Keenan*, slip op. at 2-3. Further, in light of its decision to remand the case, the Board vacated the attorney=s fee award and remanded for the administrative law judge to reconsider the fee in light of her decision on remand as well as employer=s objections that it was not liable for any fee under Section 28(b), 33 U.S.C. '928(b), as it had proffered two settlement offers to claimant which the administrative law judge had not considered. *Keenan*, slip op. at 4.

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[2]In its decision, the Ninth Circuit held that in a situation where there is a significant physical impairment but no present loss of earnings, claimant may be entitled to a nominal or *de minimis* award in order to incorporate Athe possible future effects of a disability in an award determination.@ *Rambo*, 81 F.3d at 844, 30 BRBS at 31(CRT). The Supreme Court agreed with the holding of the Ninth Circuit, but vacated the Ninth Circuit=s award of nominal benefits, as findings of fact by the administrative law judge were necessary. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT)(2d Cir. 1989); *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).

On remand, the administrative law judge found that, after consideration of the additional evidence submitted by the parties as well as claimant=s work history since the accident, claimant=s post-injury earnings fairly and reasonably represent his wage-earning capacity and that there is no significant chance that his injury will cause a diminution in his wage-earning capacity in the future. Accordingly, as she determined that claimant=s post-injury wage-earning capacity exceeded his pre-injury average weekly wage, the administrative law judge denied claimant=s claim for permanent partial disability benefits, including a *de minimis* award and found that reconsideration of the attorney=s fee award therefore was rendered moot.

Claimant appeals, contending that the administrative law judge erred in concluding that his shoulder injury is a non-scheduled injury, in failing to award compensation based on his loss of earning capacity resulting from his inability to perform the foreman position or a *de minimis* award, and in failing to find employer liable for an attorney=s fee. Employer responds, urging affirmance of the administrative law judge=s decision on remand.

Claimant initially contends that the administrative law judge erred in finding that he suffered a non-scheduled injury potentially compensable under Section 8(c)(21), alleging he should be compensated under Section 8(c)(1), 33 U.S.C. '908(c)(1), for loss of use of his arm. This issue was fully considered and resolved by the Board in its prior decision. *Keenan*, slip op. at 2. Thus, the Board=s decision on this issue constitutes the law of the case and we decline to consider the issue again. *Ion v. Duluth, Missabe & Iron Range Ry. Co.,* 32 BRBS 268 (1998); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

Claimant next argues that the administrative law judge erred in failing to award him compensation for permanent partial disability based upon his inability to accept and perform the higher paying position of foreman. It is claimant=s contention that, but for the residual effects and physical limitations arising out of his work injury, he would be a foreman, earning significantly higher wages. The administrative law judge rejected this argument for two reasons. First, the administrative law judge stated that such a comparison is not supported by the Act which contemplates a comparison between an employee=s pre- injury average weekly wage and post-injury wage-earning capacity, 33 U.S.C.'908(c)(21), (h), and not by comparing post-injury earnings to those claimant could have earned Abut for@ his injury. Decision on Remand at 10-11. Second, the administrative law judge found unpersuasive claimant=s testimony that his injury precluded him from obtaining the foreman position, as she found the physical requirements of that position are within claimant=s medical restrictions. *Id.*

Claimant, who currently works as a marine clerk, does not contest the administrative law judge=s finding that his actual post-injury wages in the years since the award was entered, adjusted for inflation, exceed his average weekly wage at the time of injury. He does, however, contend that he continues to have a loss in wage-earning capacity because his injury prevents him from being promoted to foreman and that Abut for@ his injury he would have the potential to earn more than he is currently earning thus demonstrating a loss in wage-earning capacity. We need not address claimant=s contention that the administrative law judge erred in finding unpersuasive his testimony concerning the wages he would be earning if he were able to hold the foreman position, as the administrative law judge=s finding that this consideration is not relevant comports with law. As the administrative law judge correctly stated, the Act requires that a claimant=s permanent partial disability award under Section 8(c)(21) be based on a comparison between the claimant=s average weekly wage at the time of injury, and his post-injury wage-earning capacity. 33 U.S.C. '908(c)(21), (h); *see Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986). The inquiry into a claimant=s post-injury wage-earning capacity concerns his ability to earn wages in his injured condition, and not what he could be earning absent injury. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th

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[3]It is claimant=s contention that but for the residuals of his work injury he could have obtained the position of foreman earning significantly greater wages. HT II at 61. He was offered an opportunity to become a foreman in October 1997 when he received a letter from the Foreman=s Labor Relations Committee stating he had been selected for promotion consideration. 2CX 4. However, based upon his perception that he was physically incapable of performing the job claimant did not take the required physical examination and therefore was not promoted to foreman. On appeal, claimant contends that the administrative law judge erred in relying upon the testimony of Captain Lombard that the actual activities of a foreman were well within claimant=s physical abilities. HT II at 74-77, 99-101.

[4]Section 8(c)(21) states:

> In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

Cir. 1985)*; see also Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984)*; Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1978) (1st Cir. 1978). The United States Court of Appeals for the Ninth Circuit recently addressed the issue raised by claimant in *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). Therein, the court stated that Adisability is not defined, as it would be under the tort system, as the inability to earn hypothetical future wages that the worker could have earned if he had not been injured. Rather, disability is defined under the Act as the difference between the employee=s pre-injury >average weekly wages= and his post-injury >wage-earning capacity.=@ *Id.,* 289 F.3d at 160, 36 BRBS at 17-18(CRT); *see also Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 692 (1980). As the administrative law judge properly determined that the wages claimant could be earning but for his injury are not relevant to a determination of any loss in wage-earning capacity, we affirm the denial of permanent partial disability benefits. *Id.*

Finally, claimant contends that the administrative law judge erred in failing to award him nominal benefits based upon the significant possibility that he could suffer a loss of wage- earning capacity in the future as a result of his work injury. In her initial decision, the administrative law judge granted a *de minimis* award based upon what she considered an Aunknown element...which prevents an unreserved finding that future economic harm is not a significant possibility.@ Decision at 16 (Feb. 22, 1993). The administrative law judge, upon reviewing the additional evidence submitted on remand in light of the Supreme Court=s decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), concluded that, based upon claimant=s work history in the 14 years following the injury and especially in the nine years since he reached maximum medical improvement, there is no significant possibility that claimant=s injury will cause a diminished earning capacity in the future. Decision on Remand at 10.

In *Rambo II*, 521 U.S. at 138, 31 BRBS at 61(CRT), the Supreme Court held that Aa worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions.@ In denying a nominal award, the administrative law judge relied on claimant=s higher wages as a marine clerk in the years since the accident, the stability of the marine clerk position given claimant=s seniority, the suitability of the position given claimant=s experience and his physical restrictions, and the facts that

[5]Claimant earned $102,070 in 1997 and $140,316 in 1998.

claimant=s current physical restrictions are only prophylactic in nature and that he has not seen a doctor for his shoulder injury since 1990. Decision on Remand at 10. Thus, the administrative law judge found that notwithstanding any limitations due to the shoulder injury, claimant has not established the significant possibility of a future diminished earning capacity due to the work injury. On appeal, claimant points to no evidence of record suggesting that the administrative law judge=s findings are in error. Claimant contends only that his work restrictions are permanent and that he lost the opportunity to become a foreman because of these restrictions. Assuming, *arguendo*, the veracity of claimant=s contentions, they do not lead to the conclusion that he has established the significant possibility of future economic harm due to his work injury. As discussed, *supra*, the wages claimant could have earned Abut for@ his injury are not a relevant consideration in determining whether claimant is likely to sustain a loss of wage-earning capacity in the future. Consequently, as the administrative law judge=s finding is rational and supported by substantial evidence, we affirm the administrative law judge=s denial of a *de minimis* award. *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002); *Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997).

Accordingly, the administrative law judge=s Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]Because we have affirmed the administrative law judge=s denial on remand of all disability compensation, claimant=s contention that the administrative law judge should have awarded him an attorney=s fee, based on the prior award of nominal benefits, is without merit.

BETTY JEAN HALL
Administrative Appeals Judge