BRB No. 99-1019

MARTIN J. NEELY	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Gary A. Gabree, Bath, Maine, for claimant.

Steven Hessert (Norman, Hanson & DeTroy), Portland, Maine, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (95-LHC-0879) of Administrative Law Judge David W. DiNardi 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*. 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 case is before us for the second time.

Claimant sustained a back injury on September 29-30, 1992. He was temporarily totally disabled from October 5 through October 11, 1992, and again from October 12 through October 18, 1992. Claimant notified employer of his injury and employer filed its First Report of Injury, Form LS-202, under the Longshore Act (the Act) on October 2, 1992. Cl. Ex. 14. Employer controverted the claim on October 6, 1992, on the ground that claimant was pursuing his benefits under state law. Claimant's Exhibit (CX) 15. Employer then paid

disability and medical benefits pursuant to the Maine Workers' Compensation Act (the Maine Act).

On May 4, 1994, claimant filed a claim for compensation under the Act in which he sought no additional benefits, but requested employer's acknowledgment of his "right to benefits" under the Act, specifically, by filing forms LS-206 (Payment of Compensation without an Award) and LS-208 (Notice of Final Payment), pursuant to Section 14(c), (g), 33 U.S.C. §914(c), (g). On June 9, 1994, employer filed a notice of controversion, disputing the fact of injury, the nature and extent of disability, the timeliness of the claim, and the responsible carrier. The case was subsequently transferred to the Office of Administrative Law Judges for a formal hearing.[1]

Administrative Law Judge Jeffrey Tureck denied both claimant's request that employer be required to file certain forms and his claim, finding that payments have been made under the Maine Act and no additional benefits have been sought under the Act. As no benefits were paid under the Act, he concluded that nothing in the Act compels employer to file these forms. Moreover, Judge Tureck noted that claimant did not identify how he is prejudiced by employer's failure to file the forms, as claimant's filing of his claim for compensation under the Maine Act tolls the statute of limitations and protects him indefinitely. Decision and Order at 2. Claimant appealed Judge Tureck's decision.

The Board held that the payments made to claimant under the Maine Act did not compel employer to file forms LS-206 or LS-208 in compliance with Section 14 of the Longshore Act, 33 U.S.C. §914. *Neely v. Bath Iron Works Corp.*, BRB No. 96-530 (Nov. 26, 1996)(unpub.). Additionally, because claimant stipulated that he is not seeking additional benefits under the Act and because all benefits to which he is entitled have been paid under the Maine Act, the Board held that Judge Tureck properly denied claimant an award of benefits under the Act. *Id*. Claimant thereafter appealed the Board's decision to the First Circuit.

[1]Prior to that, the district director rejected claimant's request for an informal conference, stating that claimant's claim under the Act was tolled by virtue of employer's payments under the Maine Act, and denying his request that employer be ordered to file an LS-208, as its payments were made under the state law.

The United States Court of Appeals for the First Circuit vacated the Board's decision and remanded the case for the administrative law judge to consider, in essence, claimant's entitlement to a nominal award of benefits in accordance with the decision by the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997).[2] *Neely v. Benefits Review Board*, 139 F.3d 276, 32 BRBS 73 (CRT) (1st Cir. 1998).

Meanwhile, claimant sustained an acute back strain as a result of a work-related accident on November 9, 1998. Claimant's treating physician, Dr. Raker, subsequently diagnosed minor degenerative joint disease with no significant findings at L3-4 and L4-5 based on the results of an x-ray and CT scan. Dr. Raker noted that claimant's back was "gradually improving," and advised that claimant could return to light duty work on December 2, 1998, and work in that capacity for about a month. Employer paid temporary total disability benefits between November 10, 1998, and December 2, 1998, and thereafter provided claimant with a light duty job within the limitations imposed by Dr. Raker.

In his Decision and Order on Remand, Administrative Law Judge David W. Di Nardi (the administrative law judge) determined that claimant did not establish the significant likelihood that his future wage-earning capacity will be diminished as a result of his 1992 work-related back injury, and accordingly denied his request for a nominal award of benefits. Additionally, the administrative law judge denied claimant's request for an attorney's fee.

On appeal, claimant challenges the administrative law judge's denial of a nominal award of benefits. Employer responds, urging affirmance.

Claimant contends that contrary to the administrative law judge's decision, the record conclusively establishes that he has an ongoing medical problem that stems from the work-related back injury he sustained in 1992, and that this condition has diminished his physical capacity to work and thus shows that there is a significant potential for future disability arising from the 1992 work-related back injury. As such, claimant argues that pursuant to *Rambo II* and the First Circuit's decision in this case, he is entitled to a nominal award of benefits based upon the 1992 back injury.

---

[2]The First Circuit discusses the relief sought as a declaratory ruling that claimant's accident was covered by the Act and states that the burden for establishing said relief is "sufficiently similar" to that required as a condition of nominal compensation under *Rambo II, i.e.*, that claimant show "a significant possibility" of future disability based on the subject injury, *Rambo II*, 117 S.Ct. at 1953, 31 BRBS at 54 (CRT). *Neely v. Benefits Review Board*, 139 F.3d 276, 32 BRBS 73 (CRT) (1st Cir. 1998). Moreover, the court was inclined to agree that form filing provisions are not designed to confer rights on an employee. *Id.*

After discussing the relevant evidence of record, the remand instructions of the First Circuit and the appropriate standard pursuant to *Rambo II*,[3] the administrative law judge concluded that claimant is not entitled to a nominal award of benefits related to the 1992 back injury as he did not establish that there is a "significant likelihood" that his future wage-earning capacity was or will be diminished as a result of said injury. Specifically, the administrative law judge found that between 1992 and 1998, claimant's average weekly wages increased from $531.07 to $673.25. Additionally, the administrative law judge found that during this six year span, claimant's medical and employment records reflect that he did not lose any time from work as a result of his back injury, nor did he seek any medical treatment for that injury. The administrative law judge therefore rejected claimant's testimony of subjective and ongoing complaints about his back problems between 1992 and 1998 as self-serving since they are unsupported by any objective evidence of record. Additionally, the administrative law judge found that Dr. Raker's opinion does not support a finding that the 1992 injury accelerated the degenerative process[4] and thus also does not establish a significant potential of a diminished future wage-earning capacity as a result of that injury. In this regard, the administrative law judge found persuasive Dr. Raker's testimony that claimant did not complain of or seek any treatment for his back problems between 1992 and 1998, Employer's Exhibit (EX) 44 at 12-13, 19, that claimant's other activities of daily living, such as playing football and doing martial arts, which claimant continued to perform between 1992-1998, similarly contributed to the degenerative process in the spine, EX 44 at 22, and that claimant's x-rays following the 1998 injury are what one would normally expect to see in a much younger person. EX 44 at 23. Lastly, although the administrative law judge noted the significance of the 1998 injury,[5] he nevertheless

[3]As claimant correctly contends, the administrative law judge improperly intimated that nominal awards are not appropriate for cases involving a traumatic injury. Decision and Order on Remand at 15. The administrative law judge's error is harmless as he nevertheless considered all of the relevant evidence pursuant to the appropriate standard in finding that claimant is not entitled to a nominal award in this case. *Rambo II*, 117 S.Ct. at 1953, 31 BRBS at 54 (CRT).

[4]Dr. Raker diagnosed claimant's condition as degenerative joint disease of the lumbar spine and opined that the 1992 injury contributed to the development of that disease, and that the 1998 injury, which was more severe, contributed to the ongoing process of that disease.

[5]The administrative law judge found that under the aggravation rule, any potential

concluded that the instant case does not involve the 1998 injury since the First Circuit remanded this case only for a determination as to whether claimant is entitled to a nominal award of compensation related to the 1992 injury. Moreover, employer voluntarily paid compensation for the 1998 injury and there is no evidence that a claim was filed with regard to that injury. As the administrative law judge's finding that claimant did not show a "significant possibility" of future disability based on the 1992 injury is supported by substantial evidence and is in accordance with the remand instructions set out by the First Circuit, it is affirmed. *Rambo II*, 117 S.Ct. at 1953, 31 BRBS at 54 (CRT); *Neely*, 139 F.3d at 276, 32 BRBS at 73 (CRT); *see also Buckland v. Department of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

---

future benefits would be paid on account of the 1998 date of injury. Thus, claimant does not need a nominal award of compensation because he could file a new claim for compensation for this injury at a higher average weekly wage. Decision and Order on Remand at 15.