BRB No. 03-0560

CHARLES REFFETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
R&D ASSOCIATES, INCORPORATED	)	DATE ISSUED: May 7, 2004
	)	
and	)	
	)	
AMERICAN INTERSTATE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Christopher D. Kuebler (O'Bryan Baun Cohen Kuebler), Birmingham, Michigan, for claimant.

Donald C. Adams, Jr. (Rendigs, Fry, Kiely & Dennis, L.L.P.), Cincinnati, Ohio, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-LHC-0735) of Administrative Law Judge Joseph E. Kane 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 welder, sustained an injury to his right knee on June 2, 1998, while repairing a barge for employer. This injury necessitated several operations. Employer paid claimant temporary total disability benefits from June 3, 1998, to April 9, 1999. Following an informal conference on January 29, 2001, employer paid claimant permanent partial disability benefits for a two percent impairment to the leg, pursuant to the schedule set forth at Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). At the time of the August 15, 2001 hearing, claimant worked for Greater Valley Fire Protection (Greater Valley) as a deliveryman making $12.50 an hour.[1]

At the hearing, claimant sought a permanent partial disability award under Section 8(c)(21), 33 U.S.C. §908(c)(21), for a loss of wage-earning capacity. In his Decision and Order, the administrative law judge first observed that claimant had not sought total disability benefits for any period. He found that claimant reached maximum medical improvement on April 19, 1999, as opined by Dr. Love, claimant's treating physician. As to the extent of claimant's disability, the administrative law judge credited the opinions of Drs. Love and Fisher that claimant suffers from a one percent whole person impairment. In so finding, the administrative law judge rejected that portion of Dr. Fisher's opinion which diagnosed claimant as having sustained an additional seven percent whole person impairment from laxity of the ligaments, because Dr. Fisher was the only physician to diagnose this condition. In determining whether claimant's post-injury wage-earning capacity was diminished by his work accident pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), the administrative law judge considered claimant's age, education, physical abilities, and the continuity of claimant's current employment and concluded that claimant had no post-injury loss of wage-earning capacity as his current position paying $12.50 per hour fairly and reasonably represents claimant's post-injury wage-earning capacity. The administrative law judge also denied claimant any future medical benefits because claimant had not prevailed on his allegation that he sustained a loss of wage-earning capacity. Finally, the administrative law judge found that claimant's counsel is not entitled to an employer-paid attorney's fee, as he had not successfully prosecuted the claim.

On appeal, claimant alleges that the administrative law judge erred in focusing only on whether he has a present loss of wage-earning capacity. Claimant contends that he is entitled to a nominal award pursuant to *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), because the evidence establishes the significant likelihood that his future wage-earning capacity will be diminished as his knee condition worsens. Claimant also contends that the administrative law judge erred in denying him future medical benefits. Claimant contends that if he establishes entitlement to a nominal award and/or future medical benefits, employer is liable for an

[1] Claimant obtained employment with Greater Valley on July 13, 2000.

attorney's fee. Employer responds, urging rejection of claimant's contentions and affirmance of the administrative law judge's decision.

In *Rambo II*, the Supreme Court stated that a claimant who has no current loss of wage-earning capacity due to his injury, but who has shown a significant possibility of a future wage loss, has a present disability, and that such a claimant is entitled to a nominal award. *Rambo II*, 521 U.S. at 135, 31 BRBS at 60(CRT). The Court's conclusion rests on the language of Section 8(h) of the Act, 33 U.S.C. §908(h), and the interplay between that subsection and Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). Since Section 8(h) includes "the effect of disability as it may naturally extend into the future," 33 U.S.C. §908(h), as a relevant factor for determining an injured employee's wage-earning capacity, the Court concluded there must be "a cognizable category of disability that is potentially substantial, but presently nominal in character" so as to account for the future effects of a disability. *Rambo II*, 521 U.S. at 131-132, 31 BRBS at 58(CRT). The Supreme Court, therefore, concluded that a nominal award is permitted under Section 8(c)(21) of the Act.

Claimant in this case, however, is precluded as a matter of law from receiving any award pursuant to Section 8(c)(21), including a nominal award. The Supreme Court held in *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980), that the schedule at Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), provides the *exclusive* recovery for permanent partial disability for body parts listed therein, and benefits paid pursuant to the schedule, based only on the percentage of permanent physical impairment, fully compensate claimant for his permanent partial disability, as those payments presume a loss in wage-earning capacity. A claimant 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, nor are economic considerations relevant in determining the degree of physical impairment.[2] *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). The Board has held that a claimant with a permanent partial disability to a scheduled member may not receive a nominal award pursuant to Section 8(c)(21). *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002); *cf. Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 Fed. Appx. 333 (4th Cir. 2004) (claimant may receive a temporary partial nominal award

[2] Thus, the administrative law judge erred in analyzing whether claimant had a present loss in wage-earning capacity as claimant's recovery for permanent partial disability is limited to that provided in the schedule. *See Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000).

pursuant to Section 8(e), (h), where claimant neither claimed nor was compensated for a permanent disability). As claimant claimed permanent partial disability benefits for an injury to his leg, the administrative law judge found that claimant's condition was permanent as of April 19, 1999, and employer paid claimant benefits under the schedule, we hold that claimant is precluded from receiving a nominal award pursuant to Section 8(c)(21) and (h).[3] *PEPCO*, 449 U.S. at 271, 14 BRBS at 365; *Porter*, 36 BRBS at 118.

Claimant next contends that the administrative law judge erred in denying him future medical benefits on the sole ground that claimant failed to establish he has a loss in wage-earning capacity. We agree that this finding is in error, as an injury need not be economically disabling in order for a claimant to be entitled to medical benefits pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a). *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); 20 C.F.R. §702.402 In order for medical care to be compensable, it must be appropriate for and related to the work injury. *See generally Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988).

We need not remand the case, however, because there is no indication in the record before us that claimant is currently claiming entitlement to any medical benefits which employer has declined to pay. Claimant has not alleged that he needs additional medical treatment for which he has sought authorization from employer and that it has been denied, or that he has incurred medical expenses which employer refused to reimburse. As a claim for medical benefits is never time-barred, claimant can file a claim for medical benefits if and when medical treatment becomes necessary, and employer refuses to authorize treatment or to reimburse claimant. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994).

Lastly, claimant contends that the administrative law judge erred in denying him an employer-paid attorney's fee. We reject this contention, as claimant has not established his entitlement to medical benefits at the present time or to additional disability benefits. *See* 33 U.S.C. §928; *Barker v. U.S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Baker*, 991 F.2d 163, 27 BRBS 14(CRT).

[3] Claimant's remedy for any change in his physical or economic condition is to petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, at any time within a year of the claim's rejection. *See generally Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

Accordingly, we vacate the administrative law judge's finding that claimant is not entitled to future medical benefits due to a lack of a disabling condition. In all other respects, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge