

BRB No. 03-0515

RUTHIE BARTLING)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: <u>MAR 22, 2004</u>
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Granting Reimbursement and Order Granting Motion for Reconsideration of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Granting Reimbursement and Order Granting Motion for Reconsideration (1997-LHC-1942) of Administrative Law Judge Richard E. Huddleston 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 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).

Claimant sustained a work-related back injury on March 24, 1980, and as a result was unable to return to her usual employment with employer. Claimant returned to regular full-time employment in March 1985, as a civilian employee of the Federal Government with the United States Air Force at Randolph Air Force Base, in Texas. Claimant, initially hired at a GS-04, step 1, pay rate, progressed through a series of successive positions and upgrades such that as of June 8, 1997, she received pay at a GS-05, step 8 rate.

Employer voluntarily paid benefits for periods of temporary total disability up to November 25, 1984, and claimant thereafter sought, and employer ultimately agreed to pay permanent partial disability benefits based on the difference between the rate of pay for her government position, reduced to its 1980 level, and her average weekly wage at the time of her injury. Employer thus paid claimant permanent partial disability benefits from November 26, 1984, until October 27, 1996, at which time it ceased payments, alleging that claimant no longer had any loss in wage-earning capacity as a result of her work-related injury. Claimant then filed the instant claim seeking additional benefits. In response, employer requested Section 8(f) relief, 33 U.S.C. §908(f).

In his decision, the administrative law judge initially determined that claimant’s actual earnings from her federal government jobs “fairly and reasonably” represent her post-injury wage-earning capacity. The administrative law judge then converted those earnings to their equivalent at the time of the work-related injury in 1980, and calculated claimant’s loss in wage-earning capacity and entitlement to benefits from November 26, 1984. Specifically, the administrative law judge concluded that claimant established a loss in wage-earning capacity from November 26, 1984, until June 8, 1997, and therefore awarded claimant permanent partial disability benefits at varying rates throughout that time period. The administrative law judge concluded that claimant did not establish any loss in wage-earning capacity thereafter and therefore is not entitled to any disability benefits from June 8, 1997. Moreover, the administrative law judge determined that employer is entitled to Section 8(f) relief in this case.

On appeal, claimant contends that the administrative law judge erred in relying on her actual post-injury wages to calculate her loss in wage-earning capacity without any consideration of her continuing physical impairment due to her work-related injury. Employer responds, urging affirmance.

Section 8(c)(21) of the Act, 33 U.S.C. '908(c)(21), provides for an award of permanent partial disability benefits based on the difference between a claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. Section 8(h), 33 U.S.C. '908(h), provides that a claimant's wage-earning capacity shall be her actual post-injury earnings if they fairly and reasonably represent her wage-earning capacity. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). The party contending that the employee's actual earnings are not representative of her wage-earning capacity bears the burden of establishing an alternative, reasonable wage-earning capacity. *Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT); *see also Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 23 BRBS 127(CRT) (9th Cir. 1990); *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188, 190 (1985).

We affirm the administrative law judge's decision, as it is supported by substantial evidence and accords with applicable law. The administrative law judge herein reviewed claimant's post-injury employment history and determined that the wages earned in that employment fairly and reasonably represent her post-injury wage-earning capacity. In making this determination, the administrative law judge relied on the fact that claimant has worked steadily as a government employee for 13 years, and has, over that time, obtained grade and step increases. In addition, the administrative law judge found that the record is devoid of any evidence that due to her work-related injury claimant is restricted in the duties of her current job, that she has been unable to obtain either new positions or pay increases, or that she will be hampered professionally in the future. Thus, after consideration of a number of relevant factors regarding claimant's post-injury employment, the administrative law judge concluded that claimant has not shown that her post-injury wages do not fairly and reasonably represent her post-injury ability to earn wages. Moreover, claimant has not established an alternative reasonable wage-earning capacity. The administrative law judge's finding that claimant's actual earnings fairly and reasonably represent her post-injury wage-earning capacity is therefore affirmed as it is supported by substantial evidence. *Hundley*, 32 BRBS 254; *See Ward v. Cascade General Inc.*, 31 BRBS 65 (1995).

Sections 8(c)(21) and 8(h) of the Act further require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of the claimant's injury and then compared with her average weekly wage to compensate for inflationary effects. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 7; *see also Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995) (*Rambo I*) (Supreme Court noted the administrative law judge's wage-earning capacity analysis in which he properly accounted for inflation). In the instant case, the administrative law judge applied a rational method for converting claimant's post-injury

wages back to the time of her work injury. In this regard, the administrative law judge rationally relied on the General Schedule Salary Table, published by the Office of Personnel Management, as of October 1980, to determine the wages claimant's post-injury jobs paid at the time of her injury. The administrative law judge then compared claimant's post-injury wages and her pre-injury average weekly wage to determine the extent of her loss in wage-earning capacity and thus, entitlement to permanent partial disability benefits. 33 U.S.C. § 908(c)(21). He found that claimant's post-injury wage-earning capacity gradually increased over the years and that her corresponding loss in wage-earning capacity conversely diminished to the point that as of June 8, 1997, claimant's post-injury wage-earning capacity exceeded her pre-injury average weekly wage. The administrative law judge therefore concluded that claimant is no longer entitled to an award of permanent partial disability benefits from June 8, 1997. As the administrative law judge's calculation of claimant's post-injury wage-earning capacity, his factoring of that figure to account for inflation, and subsequent comparison to claimant's pre-injury average weekly wage are rational, in accordance with law, and supported by substantial evidence, they are affirmed. *See DeWeert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002); *Hundley*, 32 BRBS 254. Consequently, the administrative law judge's denial of permanent partial disability benefits after June 8, 1997, is affirmed.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Granting Reimbursement is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge