

BRB No. 04-0912

QUENTIN L. JONES)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 08/30/2005
 NEWPORT NEWS SHIPBUILDING AND)
 DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (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 on Remand (2003-LHC-0988) of Administrative Law Judge Larry W. Price 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'Keefe 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. Claimant, a shipfitter, injured his left elbow and knee when he fell from a ladder during the course of his employment on August 11, 1997. Employer voluntarily paid medical benefits and

compensation, making its last payment on October 26, 1998.¹ Subsequently, claimant developed hip complications arising from his work-related knee injury. On August 11, 1999, within one year of the last payment of benefits, claimant sought a nominal award for his hip condition pursuant to *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Claimant's attorney thereafter sent letters to the Office of Workers' Compensation Programs on October 13 and November 2, 2000, alleging claimant's entitlement to total disability benefits following employer's decision to pass claimant out of work in October 2000 due to a lack of work within his restrictions.

Administrative Law Judge Campbell found that claimant filed a timely and valid motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. He awarded claimant temporary total and partial disability benefits for his hip injury beginning on October 9, 2000, and continuing until April 29, 2001, the date claimant returned to work. Employer appealed the administrative law judge's decision to the Board.

In its Decision and Order, *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002), the Board held that Judge Campbell properly determined that claimant's request for a nominal award was a timely and valid request for modification. The Board also affirmed the award of temporary total and partial disability benefits. However, because claimant's claim for a nominal award had never been adjudicated or withdrawn, it remained open and, in January 2003, the parties filed pre-hearing statements regarding claimant's claim for a nominal award commencing April 29, 2001.

The case was reassigned to Administrative Law Judge Price (the administrative law judge),² and he found that claimant failed to establish that his work-related injury will have an economic impact in the future. Accordingly, he denied claimant's claim for a nominal award.

Claimant appeals, contending that the administrative law judge erred in finding he is not entitled to a nominal award. Employer responds, urging affirmance.

¹ Employer paid temporary total disability benefits from November 13, 1997, through March 2, 1998, 33 U.S.C. §908(b), and permanent partial disability benefits for a 20 percent impairment to the left knee, 33 U.S.C. §908(c)(2), and for a three percent impairment to the left elbow, 33 U.S.C. §908(c)(1). The district director issued a compensation order to this effect, based on the parties' stipulations.

² Claimant filed a motion for summary decision on July 29, 2003, arguing that the Board's decision compelled the conclusion that he is entitled to a nominal award. Judge Campbell denied claimant's motion on November 5, 2003, and a hearing date was set for May 3, 2004. The case was reassigned to Judge Price on March 1, 2004.

The Supreme Court has held that a nominal award is appropriate where claimant has not established a present loss in wage-earning capacity due to his injury, but has established that there is a significant possibility that his injury will result in future economic harm. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *see also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984). The administrative law judge found that claimant failed to demonstrate that there is a significant possibility that his physical condition will deteriorate resulting in a diminished wage-earning capacity in the future. Decision and Order at 3. The administrative law judge relied on claimant's present employment as a bench welder with employer, a position he has held for over three years, and his significant seniority of over 25 years. Tr. at 10, 13-14. The administrative law judge noted that claimant did not allege that he is physically incapable of performing his present job, which was approved by Dr. Stiles. Claimant contended that because he has previously been laid off from suitable work, his continued employment must be deemed uncertain and a future loss of wage-earning capacity anticipated. The administrative law judge relied on the testimony of claimant's general foreman, Warren Doyle, who stated that claimant's current position is one which is constant and necessary to employer's operations. Tr. at 11-14.

The administrative law judge also observed that claimant's medical condition does not establish a probable future loss in wage-earning capacity. He found that claimant's continued aches and pains do not prevent the performance of his current position, which is within the restrictions approved by Dr. Stiles. Dr. Stiles expressed his opinion that claimant's condition could deteriorate in the future, CX 5, but the administrative law judge noted that he did not address the nature and extent of such deterioration. The administrative law judge therefore found that he could not infer from this statement that claimant would sustain a future deterioration in his wage-earning capacity.

The administrative law judge's finding that the evidence of record does not support a finding that there is a significant possibility that claimant will sustain future economic harm as a result of his injury is rational, supported by substantial evidence, and in accordance with law. *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997); *cf. Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004) (majority holds that administrative law judge erred in denying nominal award because claimant had worked in suitable alternate employment for some time; court held that work restrictions due to injury justify nominal award because claimant would be at disadvantage on the open market should he lose his job). Contrary to claimant's contention, the administrative law judge was not required to infer that he likely would suffer a future loss in wage-earning capacity because he previously had been passed out of work in view of the evidence that his current work was suitable and a necessary element of employer's

business without regard to particular contracts. Tr. at 21. We, therefore, affirm the administrative law judge's denial of a nominal award.

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

REGINA C. McGRANERY
Administrative Appeals Judge