BRB No. 98-634

RONALD JONES	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:_____
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-1162) of Administrative Law Judge Robert D. Kaplan 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 was injured on April 27, 1989, during the course of his employment.

Employer voluntarily paid temporary total disability benefits at a rate of $159 per week for a total of $21,195.65, and claimant filed a claim for continuing benefits.

The administrative law judge denied claimant continuing benefits. He found that claimant's average weekly wage is $221.69, as proposed by employer. Specifically, the administrative law judge noted the parties' agreement that claimant earned $19 per hour at the time of injury; however, he rejected claimant's contention that average weekly wage should be based on a 40-hour week when the evidence establishes that, during the 10 years preceding the injury, claimant only once worked over 1,000 hours per year, and more frequently averaged around 370 hours per year.[1] Cl. Ex. 6. Consequently, the administrative law judge used claimant's actual hours of work in 1988 and determined his average weekly wage is $138 (378 hours x $19 divided by 52 weeks). Because this number is lower than employer's calculation, he gave claimant the benefit of employer's calculation. Decision and Order at 4-6. Next, the administrative law judge determined that claimant is permanently disabled and that maximum medical improvement occurred on July 23, 1990. Decision and Order at 7. However, he found that claimant is not totally disabled. He concluded that only claimant's knee injury prevents him from returning to his usual work and that there are suitable alternate jobs available for claimant. Decision and Order at 7-9. In particular, the administrative law judge relied on a December 22, 1992, letter from a vocational expert which contained the results of a data base search and stated that, as of September 1990, there was suitable alternate employment available to claimant within his physical restrictions. Decision and Order at 9. The administrative law judge also relied on a doctor's report which stated that claimant has a 25 percent impairment to his right leg, but the administrative law judge agreed with employer that it is entitled to a credit for benefits it paid for the 10.5 percent of the impairment that was due to a prior work injury. Decision and Order at 9-10. As employer paid more voluntarily than that to which claimant is entitled, the administrative law judge denied additional benefits. Decision and Order at 10-11.

On appeal, claimant generally contends the administrative law judge did not completely review the evidence, did not address all the relevant facts, and did not provide an adequate rationale for his decision; claimant thus asserts that his decision does not conform to the Administrative Procedure Act and is not supported by substantial evidence. These contentions are stated without reference to legal

[1]The low hours are due to claimant's previous work injuries and to his low seniority. Decision and Order at 5.

authority or to specific error on behalf of the administrative law judge. The circumscribed scope of the Board's review authority necessarily requires the party challenging the administrative law judge's decision to address that decision and demonstrate why substantial evidence does not support the result reached. A decision contrary to the party's expectations, or contrary to some aspect of the record, is not necessarily an erroneous decision. When a party is represented by counsel, mere assignment of error is not sufficient to invoke Board review. *Collins v. Oceanic Butler, Inc.,* 23 BRBS 227 (1990); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986). The Board's Rules of Practice and Procedure provide that a Petition for Review "shall contain a statement indicating the *specific* contentions and describing with *particularity* the substantial questions of law or fact to be raised by the appeal." 20 C.F.R. §802.210 (emphasis added). The party's brief in support of its Petition for Review must contain a discussion of the relevant law and evidence.

In the instant case, claimant has failed to meet these threshold requirements. Contrary to claimant's brief, the administrative law judge fully considered the record and the relevant facts in determining the nature and extent of claimant's disability and his decision is rational and it conforms with the Administrative Procedure Act.[2] Further, counsel's summation of a favorable piece of evidence is not, of itself, an indictment of the administrative law judge's decision. Counsel neither cites any relevant law nor identifies any error in the administrative law judge's consideration of the evidence. Therefore, we affirm the administrative law judge's denial of additional disability compensation.

Moreover, we also reject claimant's summary challenge to the administrative law judge's average weekly wage determination on the grounds that such determination is supported by substantial evidence. An administrative law judge has considerable latitude in calculating a claimant's average weekly wage pursuant to Section 10(c). 33 U.S.C. §910(c); *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). In this case, the administrative law judge rationally decided to use the actual number of hours claimant worked in 1988 as a basis for calculating average weekly wage in view of the fact that claimant has not established a history of regularly working 40 hours per week. *See New Thoughts Finishing Co. v. Chilton,* 118 F.3d 1028, 31 BRBS 51

[2]For example, claimant's assertion that he cannot return to his usual work is not disputed by employer and, in fact, was stipulated by the parties; therefore, his assertion does not raise an issue of disability before the Board.

(CRT)(5th Cir. 1997). Thus, the administrative law judge rationally rejected claimant's contention that his average weekly wage should be his hourly rate, $19, multiplied by 40 hours per week. Therefore, the administrative law judge's computation of claimant's average weekly wage and his subsequent deferral to employer's higher figure are rational, and, indeed, are beneficial to claimant. As the administrative law judge's average weekly wage calculation is rational, we conclude that claimant has established no error on this issue, and we affirm the administrative law judge's finding that claimant's average weekly wage is $221.69. *Bonner*, 600 F.2d at 1288; *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Richardson v. Safeway Stores, Inc.,* 14 BRBS 855 (1982); *see generally Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge