BRB No. 92-0570

DOROTHY WALKER Claimant-Petitioner v. ARMY & AIR FORCE EXCHANGE SERVICE and EMPLOYER'S SELF INSURANCE SERVICES Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Kenneth J. Shakeshaft (Shakeshaft & Chernushin, P.C.), Colorado Springs, Colorado, for claimant.

Thomas Owen McElmeel (McElmeel & Schultz), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-2392) of Administrative Law Judge Thomas Schneider awarding benefits 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered two back injuries, which together are covered by a single claim for benefits under the Act.[1] On September 8, 1978, while working as a sales clerk at Fort Carson, Colorado, claimant suffered a lower back injury attempting to lift boxes. She returned to work on a light duty basis as an I.D. checker until June 8, 1979, when she reinjured her back. Employer voluntarily paid temporary total and temporary partial disability benefits from June 12, 1979 through January 30, 1988. Er. Ex. 10. The parties stipulated that claimant's average weekly wage was $125 as of June 1979. Decision and Order at 5.

Claimant was treated by Dr. Abbott Kagan, who diagnosed a chronic back strain and assessed a five percent permanent impairment on September 9, 1982. Er. Ex. 15. Dr. Mary Shahzadi also treated claimant. On October 11, 1985 and June 19, 1987, Dr. Shahzadi updated claimant's work restrictions, reporting on the latter date that claimant "has reached maximum medical improvement." In this report Dr. Shahzadi assessed claimant as suffering from a ten percent impairment based on the combined effects of the 1978 and 1979 back injuries. Er. Ex. 17.

After a formal hearing, the administrative law judge issued his Decision and Order awarding benefits for a permanent partial disability pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).[2] The administrative law judge initially determined that claimant was unable to

[1]Claimant also suffered a knee injury on July 3, 1983. This injury was not before the administrative law judge, who remanded the claim based on it to the district director. The administrative law judge, in making his findings with respect to the nature and extent of claimant's disability, focussed exclusively on claimant's back injuries.

[2]The administrative law judge also granted employer relief from continued compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), Decision and Order at 6, and denied claimant benefits for disfigurement, Decision and Order at 5-6. These findings are not challenged on appeal.

return to her pre-injury employment as a sales clerk. Decision and Order at 3. He then discussed claimant's post-injury employment as a cashier, and found that the earnings from this employment fairly represent claimant's post-injury wage-earning capacity. Decision and Order at 4. The administrative law judge computed claimant's loss in wage-earning capacity to be $39.49, resulting in a compensation rate of $26.33. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330-31 (1990).

On appeal, claimant contests the administrative law judge's finding that her current post-injury earnings fairly and reasonably represent her wage-earning capacity. Claimant asserts that she works in pain and that her current duties are "clearly outside" the restrictions imposed by Dr. Shahzadi. Cl. Br. at 7. She also avers that she is a "temporary, intermittent" employee and that the record can only support the inference that she is capable of earning the wages of a "part-time, unskilled worker." Cl. Br. at 9. In response to claimant's appeal, employer contends that claimant's post-injury employment has been continuous, and that her post-injury wages have been consistent and exceed her pre-injury earnings. Employer also urges the Board to award it costs pursuant to Section 26, 33 U.S.C. §926.

Section 8(c)(21) of the Act provides for an award of permanent partial disability benefits based on the difference between claimant's pre-injury average weekly wage and post-injury wage-earning capacity. Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which dictates that a claimant's wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, BRBS , BRB No. 92-2308, slip op. 4-5 (Feb. 15, 1996). If the post-injury work is continuous and stable, the post-injury earnings are more likely to reasonably and fairly represent a claimant's wage-earning capacity. *See Long v. Director, OWCP*, 767 F.2d 1578, 1582-83, 17 BRBS 149, 153 (CRT) (9th Cir. 1985). Determinations of wage-earning capacity under Section 8(h), however, require a comprehensive review of all relevant factors, such as claimant's physical condition, age, education, work experience and any other reasonable variable that would form a rational basis for the decision, including, where appropriate, claimant's earning power on the open labor market. *See Id.*; *Mangaliman*, slip op. at 7.

We agree with claimant that the administrative law judge's determination of wage-earning capacity in this instance cannot be affirmed. One factor in determining whether claimant's post-injury wages fairly and reasonably represent her wage-earning capacity is whether she works in pain, *see Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 1551, 24 BRBS 213, 220 (CRT) (9th Cir. 1991), or whether the work is within her restrictions. *Id.*; *Mason v. Bender Welding and Machine Co.*, 16 BRBS 307, 309 (1984). The administrative law judge considered claimant to be a credible witness, and accepted her testimony that she worked in pain, *see* H.T. at 74, although she also testified that she is comfortable with four to six hours per day because her "back is not as painful." H.T. at 75; Decision and Order at 3. The administrative law judge found that claimant's complaints of pain were not dispositive, however, because she was also limited in her hours "partly" due to lack of work. Decision and Order at 5. The administrative law judge also stated,

however, that "[i]t is not clear that all of the foregoing limitations are respected in claimant's current job," Decision and Order at 3, and that claimant "should perhaps be working less than she actually is to comply with her restrictions."[3] Decision and Order at 5.

Because of the administrative law judge's speculation on whether claimant's post-injury work meets her restrictions, it is not clear that this claimant is performing suitable alternate employment, and whether her wages derived therefrom accurately demonstrate her residual wage-earning capacity. Because we cannot render more specific findings to supplement the administrative law judge's Decision and Order, *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 543 (2d Cir. 1982), we must vacate the administrative law judge's findings under Section 8(h), and remand this case to the administrative law judge to evaluate anew the question of claimant's residual wage-earning capacity, addressing all relevant factors in making these findings. The administrative law judge on remand must specifically determine whether claimant's current work falls within her restrictions, so that the actual earnings of this light duty work can establish her wage-earning capacity under the relevant factors. *See generally Mangaliman*, slip op. at 8.

Claimant next asserts that the administrative law judge erred in setting the date of maximum medical improvement at September 9, 1982. Claimant urges that the correct date of her maximum medical improvement should instead be set in June 1987, because Dr. Shahzadi concluded in 1987 that claimant had "reached maximum medical improvement." Er. Exs. 16, 17.

Claimant's argument is without merit. The administrative law judge's finding of the date of claimant's maximum medical improvement is supported by substantial evidence. While the administrative law judge did not discuss any evidence other than the medical report of Dr. Kagan, Er. Ex. 15, who rated claimant as suffering from a five percent permanent partial disability as of September 9, 1982, to determine that claimant reached maximum medical improvement on that date, Dr. Shahzadi's opinion does not conflict with Dr. Kagan's assessment. Dr. Shahzadi upgraded the disability assessment from Dr. Kagan's five percent impairment to a ten percent permanent partial disability. Er. Ex. 17. Also, her statement in 1987 that claimant "has reached maximum medical improvement" does not contradict Dr. Kagan's diagnosis, almost five years previous, that claimant suffered from a permanent disability. *See* Er. Exs. 15-17. Because the administrative law judge rationally relied on Dr. Kagan's report to establish claimant's date of maximum

[3]Dr. Shahzadi restricted claimant to "not lifting in excess of 10 lbs., not standing for extended periods of time nor prolonged sitting without breaks 15 minutes out of every two hours," and further directed that claimant "should avoid stooping and crawling and should avoid excessive pushing and pulling." Er. Ex. 17.

medical improvement because he assigned claimant a permanent disability rating, *see Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988), we affirm the administrative law judge's finding that the date of claimant's maximum medical improvement is September 9, 1982.

Finally, employer seeks Section 26 costs against claimant for bringing an unreasonable appeal. Employer's complaint is without merit. The Board is not empowered to assess costs pursuant to this section. *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 633, 27 BRBS 132 (CRT)(9th Cir. 1994); *see Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995), *aff'g on other grounds* 24 BRBS 84 (1990); *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

Accordingly, the Decision and Order awarding benefits is vacated with respect to the finding regarding claimant's post-injury wage-earning capacity and this case is remanded to the administrative law judge for proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge