BRB No. 93-1613

WALTER GREENE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHARLESTON AIR FORCE CENTRAL BASE FUND	)	
	)	
and	)	
	)	
AIR FORCE CENTRAL WELFARE FUND	)	DATE ISSUED:
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Jennings McKelvey, Charleston, South Carolina, and John Hughes Cooper, Sullivan's Island, South Carolina, for claimant.

Roy H. Leonard, San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification (85-LHC-1347) of Administrative Law Judge John C. Holmes 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 injured his back while working for employer as a tractor operator on October 3, 1983. Claimant returned to light duty work for employer on September 13, 1989, although his job title was the same as before his injury. Employer terminated claimant on June 8, 1990 for failure to report that he had earnings from an outside business, Greene's Janitorial Service, while he was on disability.

In the first decision issued in this case, Administrative Law Judge Stuart Levin found that claimant was temporarily totally disabled from October 6, 1983 and continuing. On September 26, 1989, employer filed a Motion for Modification on the ground that claimant was no longer temporarily totally disabled. In the Decision and Order Granting Modification, Administrative Law Judge John C. Holmes found that claimant reached maximum medical improvement on March 3, 1987. The administrative law judge further found that employer established suitable alternate employment by virtue of the light duty job it provided claimant at its facility. The administrative law judge concluded that the light duty work employer gave claimant was tailored to fit claimant's physical and mental limitations, but did not constitute sheltered employment. The administrative law judge found that claimant suffered no loss in wage-earning capacity, as claimant was paid the same wage scale as he was earning at the time of the injury, and found that because claimant was terminated for a reason unrelated to his disability, claimant is not entitled to benefits following his discharge on June 8, 1990. The administrative law judge declined to issue a *de minimis* award. The administrative law judge therefore modified the prior decision by awarding claimant temporary total disability benefits from October 3, 1983, until March 3, 1987, and permanent total disability benefits from March 3, 1987 to September 13, 1989.

On appeal, claimant contends that the administrative law judge erred in determining that claimant's light duty job with employer constituted suitable alternate employment, that the administrative law judge erred in failing to consider claimant's earning-capacity in the open market, and, in the alternative, that the administrative law judge erred in failing to issue a *de minimis* award. Claimant also contends that the administrative law judge erred in determining that employer had a legitimate reason for terminating claimant, and therefore had no further obligation to demonstrate suitable alternate employment. Employer responds, urging affirmance.

Claimant contends that his light duty work was sheltered in that it varied from day to day, and that it was not within his restrictions because Dr. Kidd stated claimant should not work on flower beds or install wall boards. Claimant also contends the administrative law judge should have considered his earning power on the open labor market, as claimant cannot read and has a limited education. Claimant avers that the administrative law judge's analysis of whether the light duty job was within claimant's restrictions does not comply with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(a).

To meet its burden of establishing suitable alternate employment, employer may offer claimant a job within its facility which is tailored to claimant's medical restrictions as long as it is necessary and profitable to employer's business. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). If the job is regular, continuous, and not sheltered, claimant's earning power in the open market need not be considered in determining claimant's post-injury wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, BRBS , BRB No. 92-2308 (Feb. 15, 1996); *Peele*, 20 BRBS at 136; *Darden*, 18 BRBS at 226.

In the instant case, we hold that the administrative law judge rationally determined that the light duty job employer offered claimant within its facility constituted suitable alternate employment. The administrative law judge considered claimant's responsibilities on the job, and found they were within the light duty work restrictions of the doctors who treated claimant. Although claimant's job duties encompassed some gardening and installing sound boards, and Dr. Kidd opined claimant should not perform those activities, claimant's supervisors, Nancy Corbin and Wayne Crockett, stated that claimant did not complain to them about the job's physical requirements although he was instructed to do so if he had a problem. Ms. Corbin also testified that she formulated claimant's work activities based on the doctors' restrictions. Mr. Crockett stated they gave claimant "productive" work, and not just any work to have claimant do something. No evidence indicates that claimant did not have the mental capacity or educational background to perform the work. While the administrative law judge could have been more detailed in his analysis, substantial evidence consisting of the doctors' medical opinions that claimant can perform light work and claimant's supervisors' testimony that claimant was performing the light work without significant difficulty supports the administrative law judge's finding that claimant's light duty work was within his restrictions. *See Peele*, 20 BRBS at 136.

Moreover, where, as here, employer has established suitable alternate employment by providing claimant a light duty job claimant can successfully perform at its facility, claimant's subsequent discharge for reasons unrelated to his disability does not affect his disability status.[1] *Mangaliman*, slip op. at 5; *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993). In such a case, the job provided by employer should be considered by the administrative law judge in determining claimant's wage-earning capacity. As the administrative law judge in the present case rationally found that claimant could successfully perform the light duty job, we hold that the administrative law judge rationally determined that claimant's actual wages on the job represented his post-injury wage-earning capacity. *See Guthrie v. Holmes & Narver, Inc.*, BRBS , BRB No. 93-0624 (Feb. 27, 1996). As claimant was receiving the same wage scale as he did at the time of his injury, claimant sustained no loss in wage-earning capacity. We therefore affirm the administrative law

judge's finding that claimant suffered no loss of wage-earning capacity following his return to work as of September 13, 1989.

[1]Once it is established that claimant was not discharged for reasons related to his disability, the validity of the discharge is not relevant if Section 49 of the Act, 33 U.S.C. §948a, is not implicated. Nevertheless, contrary to claimant's contention, the administrative law judge's finding that claimant was discharged for violating a rule for not reporting outside earnings while on disability is supported by the evidence of record. *See* Emp. Ex. 6, 17; Decision and Order at 5.

We hold, however, that the administrative law judge erred in evaluating claimant's entitlement to a *de minimis* award. In denying claimant a *de minimis* award, the administrative law judge merely noted the Board's "strong opposition" to the issuance of *de minimis* awards and his finding that claimant could perform other suitable alternate employment.[2] The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, has stated that a *de minimis* award may be appropriate in some cases to protect a worker whose economic loss cannot presently be ascertained. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1227 n.9, 18 BRBS 12, 32 n.9 (CRT)(4th Cir. 1985). The standard for determining the applicability of a *de minimis* award is whether the claimant has established that he has a medical disability which presently causes no loss in earning capacity, but there is a reasonable expectation of significant economic harm in the future. *See LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984); *Hole v. Miami Shipyard Corp*., 640 F.2d 769, 13 BRBS 398.1 (5th Cir. 1981). As the administrative law judge did not consider claimant's entitlement to a *de minimis* award under the proper legal standard, we vacate the administrative law judge's denial of a *de minimis* award, and remand the case for consideration of this issue.

Accordingly, the administrative law judge's Decision and Order Granting Modification is vacated with regard to the denial of a *de minimis* award, and the case is remanded for further consideration in accordance with this decision. In all other respects, the decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]The administrative law judge refers to his earlier finding that claimant was capable of fulfilling several jobs listed in employer's labor market survey dated March 3, 1987. The administrative law judge found, however, that employer did not demonstrate suitable alternate employment prior to the actual hiring of claimant because employer did not follow-up the job listings or provide wages for the jobs. Decision and Order at 6.