

BRB No. 00-1118

SAMUEL RUSHING)
)
 Claimant-Petitioner)
)
 v.)
)
 EAGLE MARINE SERVICES) DATE ISSUED: July 27, 2001
)
 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 Awarding Benefits of Daniel L. Stewart,
Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry & Moorhead, L.L.P.), Wilmington, California,
for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela, Brown & Mann),
San Pedro, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (1999-LHC-1224,
1999-LHC-1225) of Administrative Law Judge Daniel L. Stewart 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'Keefe v. Smith, Hinchman*

& Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant, a holdman, sustained a work-related back injury on December 7, 1991. Employer voluntarily paid temporary total and partial disability benefits through June 6, 1993, when claimant returned to work in a light duty capacity. In August 1996, claimant began working as a marine clerk, a position he held at the time of the January 2000 hearing. Claimant sought permanent partial disability benefits from June 1993, and, alternatively, a nominal award for potential future losses in wage-earning capacity.

The administrative law judge found that claimant is entitled to permanent partial disability benefits of \$115.52 per week from June 7, 1993, through August 10, 1996.¹ 33 U.S.C. §908(c)(21), (h). The administrative law judge found that claimant did not have a loss in wage-earning capacity after August 10, 1996, and also denied claimant a nominal award, finding that claimant did not establish the significant possibility that his physical or economic condition would deteriorate in the future.

On appeal, claimant challenges the administrative law judge's denial of a nominal award. Employer responds, urging affirmance of the administrative law judge's decision.

The Supreme Court has held that a nominal award is appropriate when the claimant's work-related injury has not diminished his present wage-earning capacity, but there is a significant potential that the injury will cause diminished capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT)(1997). The purpose of such awards is to account for Section 8(h)'s mandate that future effects of an injury be considered in calculating an injured employee's post-injury wage-earning capacity. *See* 33 U.S.C. §908(h). In order to protect the employee's right to seek modification in the event that his physical or economic condition deteriorates, nominal awards are appropriate where a claimant has not established a present loss in wage-earning capacity under Section 8(c)(21), but has established a significant potential of future economic harm as a result of his injury. *Rambo II*, 521 U.S. at 138, 31 BRBS at 61(CRT); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001).

In the instant case, the administrative law judge found that both Dr. London,

¹The administrative law judge awarded employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), and thus the Special Fund assumed liability for benefits after 104 weeks from June 7, 1993.

employer's expert, and Dr. Marinow, claimant's treating physician, concluded that claimant's current work as a marine clerk is within his physical restrictions. Decision and Order at 19; EX 5; CX 25 at 28. Dr. Marinow also stated that there is a "moderate possibility" that claimant's back condition will deteriorate. CX 25 at 29-30. The administrative law judge found that this statement was insufficient to meet claimant's burden of establishing the "significant possibility" of future deterioration as required by *Rambo II*. Claimant challenges this conclusion on appeal.

Although we agree with claimant that the administrative law judge's statement of the legal standard misses the mark, we nonetheless affirm the administrative law judge's denial of a nominal award. Claimant is not required to establish the likelihood of a significant deterioration in his physical condition in order to be entitled to a nominal award. Claimant must establish the significant possibility of a deterioration in his wage-earning capacity. A minor deterioration in one's physical condition can cause a significant deterioration in wage-earning capacity. *See American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970) ("Even a relatively minor injury must lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified."); *see also Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975). In this case, however, the administrative law judge found that claimant did not establish that his physical condition was likely to deteriorate and result in a future loss of earning capacity. The administrative law judge properly reviewed the record as a whole, and in this context, found Dr. Marinow's statement regarding a "moderate" possibility of physical deterioration was not sufficient. As the judge noted, the doctor also stated that some patients' conditions tend to stabilize.

Moreover, the administrative law judge also found that claimant did not establish the significant possibility that his wage-earning capacity will decrease, and claimant does not challenge this finding on appeal. The administrative law judge relied on claimant's testimony that marine clerk jobs are plentiful, and the absence of evidence that such jobs would not continue to be plentiful. Decision and Order at 19. Claimant testified he plans to continue working in this capacity, that he is always able to obtain jobs which pay 25 percent more than the basic clerk jobs, and that he worked five to seven days per week during the last quarter. Tr. at 37-38, 40-42. The administrative law judge thus concluded that claimant failed to establish the significant possibility of future economic harm as a result of his injury. Inasmuch as claimant does not challenge this finding, and as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's denial of a nominal award. *See generally Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001); *Buckland v. Dep't of Army*, 32 BRBS 99 (1997).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is

affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge