BRB No. 03-0772

WILLIS BELVIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 29, 2004
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying *De Minimis* Award of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Breit 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 Denying *De Minimis* Award (2003-LHC-0162) of Administrative Law Judge Daniel A. Sarno, Jr., 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 injured his left knee on August 30, 1982, during the course of his employment for employer as a painter. Claimant underwent surgery to repair the medial collateral and anterior cruciate ligaments. Employer paid claimant compensation for periods

of temporary total and temporary partial disability from August 31, 1982, to December 13, 1984. 33 U.S.C. §908(b), (e). Claimant continued working for employer until he required further left knee surgery in April 1992 to repair a medial meniscus tear. 2003 EX 4. Employer paid claimant compensation for temporary total disability for approximately three months in 1992. At some point, employer also paid claimant permanent partial disability benefits for a 22.5 percent permanent impairment of the left leg, 33 U.S.C. §908(c)(2), although the record does not reveal when this payment was made. 2002 EX 1.

Following his surgery in 1992, claimant returned to work for employer with restrictions prohibiting kneeling, squatting, crawling, and climbing vertical ladders. 2002 EX 5, 6. Claimant subsequently claimed a period of temporary total disability from July 3, 2001, to April 11, 2003, due to his left knee injury; during at least part of this period suitable work for claimant was unavailable at employer's shipyard. At the hearing on this claim, the parties advised the administrative law judge that they wished to conclude the case by way of a stipulated compensation order. In a decision issued on June 28, 2002, the administrative law judge awarded benefits based on the parties' stipulations, *inter alia*, that employer would pay claimant temporary total disability compensation totaling $4,545.60, representing half of the disability claimed by claimant.

On September 11, 2002, claimant sought modification of the June 2002 compensation order, contending that he is entitled to a *de minimis* award based on *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). 33 U.S.C. §922; 2003 EX 2. In his Decision and Order Denying *De Minimis* Award, the administrative law judge found that claimant failed to establish the significant possibility that he will sustain a future wage loss due to his knee injury. The administrative law judge found that, in the absence of an affirmative or direct statement by Dr. Crawford attesting to a significant possibility of surgery or increased work restrictions in the future, or supporting testimony from claimant that his knee condition is worsening, the claim for a *de minimis* award must be denied.

On appeal, claimant challenges the administrative law judge=s denial of a *de minimis* award of benefits. Employer responds, urging affirmance.

Claimant argues that, contrary to the administrative law judge=s decision, he is entitled to a *de minimis* award as his treating physician has stated that he will need surgery in the future and that he will likely miss time from work. A *de minimis* award is appropriate when claimant's work-related injury has not diminished his present loss wage-earning capacity but there is a significant possibility of future economic harm as a result of the injury. *See Rambo II*, 521 U.S. at 138, 31 BRBS at 61(CRT).

In the instant case, the administrative law judge determined that claimant failed to demonstrate that there is a significant possibility that he will need surgery, and thus, a

significant possibility that he will miss work or suffer a diminished wage-earning capacity in the future. The administrative law judge found that claimant=s testimony provides no objective evidence that claimant faces a significant possibility of future economic harm. Specifically, the administrative law judge noted claimant's testimony that he is currently working for employer as a painter in the same department and doing the same kind of work as when he initially injured his knee in 1982. Tr. at 11. The administrative law judge credited claimant's testimony that his work is within his restrictions, he only occasionally sees Dr. Crawford, he is not on any pain medication, he experiences pain only "once in a while," and he has knee locking "maybe once a year." Tr. at 12-13. The administrative law judge also relied on claimant's request to Dr. Crawford in July 2001 to have his medical restrictions eliminated, which Dr. Crawford essentially granted in June 2002.[1] CX 1.

The administrative law judge then addressed Dr. Crawford's responses to claimant's counsel's January 23, 2003, letter. CX 1-d. Dr. Crawford checked the "yes" box to counsel's question asking whether claimant's knee condition was likely to deteriorate. Regarding future medical treatment, Dr. Crawford answered that claimant "will possibly go onto total knee arthroplasty." CXs 1-d; 2. Finally, Dr. Crawford addressed whether claimant may lose time from work in the future due to the deterioration of his knee condition and the need for future treatment by stating he "may although seems stable now." CX 1-d. The administrative law judge found that, given the format of the questions presented to Dr. Crawford and her responses, Dr. Crawford was unable to respond with any measure of certainty that claimant's knee condition will likely deteriorate in the future to the extent that he would sustain an economic loss. Decision and Order at 4.

The administrative law judge's findings and inferences are rational, and claimant has not raised any error in the administrative law judge's evaluation of the evidence. *See generally Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001). As the administrative law judge=s finding that claimant's testimony and Dr. Crawford's responses do not support a finding that there is a significant possibility that claimant will sustain future economic harm as a result of his knee injury is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *See Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001).

[1] On the other hand, the administrative law judge observed that claimant testified that he still is working in restricted duty. The administrative law judge stated that, as a result, he is uncertain whether claimant is currently working under light-duty restrictions. Decision and Order at 4, 4 n.4. This finding is not challenged on appeal.

Accordingly, the administrative law judge=s denial of a *de minimis* award is affirmed.[2] *See Buckland v. Dep't of the Army*, 32 BRBS 99 (1997).

Accordingly, the administrative law judge=s Decision and Order Denying *De Minimis* Award is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2] Employer contended before the administrative law judge and contends on appeal that claimant is legally precluded from obtaining a *de minimis* award because his injury is to a scheduled member and claimant is therefore precluded from receiving a partial disability premised on Section 8(h), 33 U.S.C. §908(h), pursuant to *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). The administrative law judge stated that he was unable to address this issue because the record is unclear as to when the schedule award was paid to claimant or whether claimant's condition had in fact reached maximum medical improvement. Decision and Order at 2 n.2, 3 n.3. Given our affirmance of the administrative law judge's finding that claimant, factually, failed to establish entitlement to a *de minimis* award, we need not address employer's contention regarding the legal issue presented. *Compare Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed.Appx. 333 (4th Cir. 2004) *with Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002). Should claimant again seek modification, the parties must put in sufficient evidence so that the administrative law judge may address their contentions.