

RODNEY F. BARNES, JR.)
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 Claimant-Respondent)
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 v.)
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 KINDER MORGAN, INCORPORATED) DATE ISSUED: 07/26/2012
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 and)
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 ACE U.S.A.)
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 Employer/Carrier-) ORDER on
 Petitioners) RECONSIDERATION

Claimant has filed a timely motion for reconsideration of the Board's Decision and Order in *Barnes v. Kinder Morgan, Inc.*, BRB No. 11-0339 (Jan. 27, 2012) (unpub.).¹ 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer has filed a response brief urging rejection of claimant's motion.² For the reasons set forth below, we deny claimant's motion and affirm the Board's decision.

To briefly recapitulate, claimant fell at work and sustained a torn left rotator cuff on January 6, 2004. Claimant underwent left shoulder surgery on July 6, 2004, and was released to return to work without restrictions on December 15, 2004. EX 5 at 145-147. Claimant worked 86 hours from December 15 to December 23, 2004. Claimant was off work on, and received holiday pay for, December 24 and 25, 2004; on December 26, 2004, claimant sustained a non-work-related stroke. Claimant sustained a larger and more disabling stroke on January 7, 2005. EX 7 at 169.

¹We accept claimant's Supplemental Memorandum of Recent Authority, which was filed on June 26, 2012.

²Employer also filed a timely a motion for reconsideration, but subsequently moved to withdraw its motion. We grant employer's request to withdraw its motion for reconsideration.

Relevant to claimant's motion for reconsideration, the administrative law judge found that claimant was entitled to temporary partial disability compensation from December 15, 2004 to February 1, 2005, when he reached maximum medical improvement. The administrative law judge found claimant entitled to continuing compensation for permanent partial disability from February 2, 2005, as, although claimant became unable to work due to the stroke, his post-injury wage-earning capacity, based on his actual wages in December 2004, due to the shoulder injury remained unchanged.

Employer challenged the administrative law judge's finding that claimant established a disability sufficient to support her compensation awards, as well as her average weekly wage and wage-earning capacity findings. Claimant responded, urging affirmance.

In its decision, the Board affirmed the administrative law judge's findings regarding claimant's post-injury wage-earning capacity and average weekly wage. The Board also affirmed the temporary partial disability award based on claimant's actual wages prior to his reaching maximum medical improvement. *Barnes*, slip op. at 3-10.

However, the Board reversed the permanent partial disability award. The administrative law judge had summarily found claimant entitled to a permanent partial disability award, stating, "[S]ince the claimant is no longer able to work at all due to his stroke, it is obvious that his wage-earning capacity from his covered injury remained unchanged after he reached maximum medical improvement." Decision and Order at 25. The Board stated that, "[W]hile it is true that any wage loss due to the work-related shoulder injury existing prior to the stroke continues, here claimant's shoulder injury had not reached maximum medical improvement before the stroke. Claimant bears the burden to show a permanent loss of wage-earning capacity due to the shoulder injury; the stroke is not relevant to this determination." *Barnes*, slip op. at 7 (citation omitted). With regard to whether claimant had met his burden of proof, the Board noted that on the stipulated date of maximum medical improvement, February 2, 2005, Dr. Brenneke did not list any permanent work restrictions on the form he completed for employer that day, JX 17 at 37, and that the administrative law judge rationally rejected the permanent restrictions retroactively imposed by Dr. Brenneke in 2006. The Board, therefore, stated that there is not substantial evidence in the record to support a finding that, after the date of maximum medical improvement, claimant continued to have a physical shoulder impairment due to the work injury.³ The Board also stated that there is not substantial

³In order to be compensable, claimant must establish that he has physical restrictions from his work injury that diminish his wage-earning capacity. See *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975).

evidence to support the finding that claimant would have continued to work fewer hours after his shoulder reached maximum medical improvement due to his self-limiting at work. The record supported the administrative law judge's finding that claimant had worked an increasing number of hours during his nine days of employment, and he had performed his usual longshore employment of a journeyman mechanic, for 14 hours, on his last work day before he suffered his first stroke on December 26, 2004. The Board, therefore, concluded that the record does not support the administrative law judge's inference that, absent his non-work-related strokes, claimant's self-limiting at work would have continued after claimant's shoulder condition reached maximum medical improvement on February 2, 2005, and that he would have sustained a permanent loss of wage-earning capacity due to the injury. *Barnes*, slip op. at 6.

On reconsideration, claimant contends that employer did not argue on appeal that claimant had no permanent disability after reaching maximum medical improvement on February 2, 2005. Claimant asserts that employer instead argued that claimant had no disability when he returned to work on December 15, 2004. Claimant also asserts that the Board ignored its scope of review in reversing the administrative law judge's rational inferences and findings.⁴

We reject claimant's contentions. Employer challenged the administrative law judge's temporary partial disability and permanent partial disability awards. *See* Employer's Petition for Review and Brief at 2-4. The Board rejected employer's contention that, legally, it cannot be held liable for any work-related disability following claimant's non-work-related stroke. Employer also contended that claimant did not establish a medical foundation for an ongoing disability award. *Id.* Employer averred that the case developed only because Dr. Brenneke retroactively gave claimant shoulder restrictions, which the administrative law judge rejected and that, therefore, there was no basis for an award after claimant's stroke. *Id.* at 3. Accordingly, as employer appealed the permanent partial disability award after claimant's stroke in view of the absence of credited work restrictions, the Board properly reviewed the administrative law judge's permanent partial disability award to determine if it was supported by substantial evidence, rational, and in accordance with law. *See generally Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *O'Keeffe*, 380 U.S. 359.

We also reject claimant's contention that the Board exceeded its scope of review in reversing the permanent partial disability award. The administrative law judge found that claimant's left shoulder condition reached maximum medical improvement on

⁴It is for this proposition that claimant has filed the supplemental authority of *Ceres Gulf, Inc. v. Director, OWCP*, 683 F.3d 225 (5th Cir. 2012).

February 2, 2005, that claimant had no permanent work restrictions, and that claimant worked an increasing number of hours after he was released to work before his stroke. Decision and Order at 2, 14, 24; CXs 11 at 44-45, 93, EX 2 at 36, 5 at 144-148, 10 at 244, JX 17 at 37. Based on these findings, the Board held that the administrative law judge's permanent partial disability award is not supported by substantial evidence, as claimant failed to establish that he had either a work-related physical impairment or economic disability after his shoulder condition reached maximum medical improvement. *Barnes*, slip op. at 6. Claimant has not demonstrated error in this holding and therefore we deny his motion for reconsideration.

Accordingly, claimant's motion for reconsideration is denied and the Board's decision is affirmed. 20 C.F.R. §802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge