BRB No. 98-0784

| | | |
|---|---|---|
| ALFORD SANBORN | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| HOLT CARGO SYSTEMS | ) | DATE ISSUED: |
| | ) | |
| Self-Insured | ) | |
| Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order-Denying Benefits and Decision and Order Granting Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

John K. McDonald (Cozen and O'Connor), Philadelphia, Pennsylvania, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits and Decision and Order Granting Reconsideration (97-LHC-0973) of Administrative Law Judge Paul H. Teitler 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 findings of fact and conclusions of law of the administrative law judge which 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 sustained a work-related, left ankle injury on April 9, 1996, when he stepped into a hole. He alleged that he aggravated a prior right hip injury in this incident. Although the administrative law judge found that claimant's ankle injury healed completely, he found that claimant established his inability to perform his usual employment, based solely on the work-related aggravation of the pre-existing hip injury. The administrative law judge found that employer established suitable alternate employment at its facility, and that claimant did not sustain a loss in wage-earning capacity as the alternative positions paid wages higher than claimant's average weekly wage. Thus, the administrative law judge denied claimant partial disability benefits under Section 8(c)(21) and (e) of the Act, 33 U.S.C. §908(c)(21), (e). On reconsideration, the administrative law judge awarded claimant medical benefits and an attorney's fee, but rejected his contention that he is entitled to a *de minimis* award.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment, and argues alternatively that the administrative law judge erred in failing to order a *de minimis* award. Employer responds in support of the administrative law judge's decision.

When, as here, a claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a suitable job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

We reject claimant's contention that the administrative law judge erred in assuming, without an evidentiary basis, that the four, light duty jobs employer offered claimant by letter in October 1996 were available to claimant 40 hours per week, and thus that claimant has not suffered a loss in wage-earning capacity.[1] The administrative law judge found that employer offered claimant the jobs of deckman-container operator, deckman-general cargo, forklift or chisel operator, and

[1]We affirm as unchallenged on appeal the administrative law judge's findings that claimant did not suffer a compensable injury to his ankle under the schedule as set forth in the Act, and that the four, light duty positions employer offered claimant were within his medical restrictions.

wharfman, and he noted that specifications of the hours for these jobs were contained in the job analysis completed by the vocational rehabilitation specialist. EX 2, 3. The administrative law judge found that the deckman positions required that two employees work as a pair, that each relieved the other after two hours, that the work day was eight hours, and that overtime was required. Similarly, the administrative law judge found that the wharfman job also specified that the job required eight hours a day with overtime. The administrative law judge then found that the job of forklift or chisel operator had the two hours on and two hours off structure, but did not require overtime. From this information, the administrative law judge rationally inferred that claimant would be working at least 40 hours per week in these positions. This determination is within the administrative law judge's discretion as the trier-of-fact. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); *John W. McGrath v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). The administrative law judge next determined that the positions identified by employer paid $20 per hour, and thus that claimant had a post-injury wage-earning capacity of $800 per week, which exceeds claimant's stipulated average weekly wage of $713.63. *See generally Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990). Inasmuch as the administrative law judge's findings are rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer established suitable alternate employment, and that claimant did not sustain a loss in wage-earning capacity. *Darby*, 99 F.3d at 685, 30 BRBS at 93 (CRT); *Ward v. Cascade General, Inc.*, 31 BRBS 65 (1996).

Claimant's alternative argument that he is entitled to a *de minimis* award also is without merit. *De minimis* awards are appropriate where claimant has not established a present loss in wage-earning capacity under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), but has established that there is a significant possibility of future economic harm as a result of the injury. *Metropolitan Stevedore Co. v. Rambo,* 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997). In his decision on reconsideration, the administrative law judge found that the record is devoid of evidence that claimant's hip injury will worsen or that claimant will have difficulty locating employment with his condition. Claimant's brief contains no discussion of the relevant evidence or allegation of specific error made by the administrative law judge. Consequently, we reject claimant's argument, as it is inadequately briefed. *See* 20 C.F.R. §802.211(b); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

Accordingly, the administrative law judge's denial of benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge