

BRB No. 97-1095

HERMAN BURWELL)
)
 Claimant-Petitioner) DATE ISSUED: _____
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 v.)
)
 NEWPORT NEWS SHIPBUILDING)
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for
claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia,
for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-1247) of Administrative Law Judge Fletcher E. Campbell, 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 findings of fact and the 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, a pipefitter on the second shift at employer's facility, was injured at work on July 27, 1992, when a valve he was attempting to fix broke loose, hitting him in the back and throwing him onto his knees. Dr. Reid, the shipyard physician, referred claimant to Dr. McAdam for his back problems, who diagnosed musculoskeletal pain with some radicular pain in the lower right extremity. Claimant

was also seen by several other physicians, including Dr. Cook, a chiropractor, whose permanent restrictions regarding climbing vertical ladders, working in tunnels, lifting over twenty pounds, and limited bending, lifting and squatting were accepted and processed by employer. In addition to his night job with employer, claimant also worked for over 23 years during the day as a maintenance plumber with the Hampton City school system. Employer voluntarily paid claimant temporary total disability compensation from July 28, 1992 until October 6, 1992. Claimant, who returned to work in both of his jobs, sought permanent partial disability compensation under the Act commencing February 10, 1994. Claimant argued that although he has worked considerably more overtime post-injury than he did pre-injury due to increased availability, he nonetheless sustained a loss in his wage-earning capacity because he is unable to work as much overtime as comparable employees due to his injury.

In his Decision and Order, the administrative law judge found that although claimant established that he worked less overtime post-injury than comparable employees, he was not entitled to the compensation claimed because he failed to demonstrate that the difference in the overtime worked was attributable to his work injury. Claimant appeals, arguing that the administrative law judge's denial of the claim for lost overtime does not comport with applicable law and is not supported by substantial evidence. Employer responds, urging affirmance.

A loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity. See *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). In order to establish entitlement to disability compensation based on a loss of overtime hours, claimant must establish that he is unable to work available overtime because of his injury. See *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

Claimant specifically argues on appeal that because the administrative law judge found that he worked less overtime than comparable employees and noted that his supervisor testified that there were times when he withheld overtime from claimant because of his injury, he erred in denying his claim for permanent partial disability benefits of \$31.29 per week based on the difference between his post-injury overtime hours and the average overtime hours worked by comparable employees. In addition, he asserts that because he lacks the physical capacity to perform the same amount of overtime as his co-workers due to his restrictions from the work injury, this fact alone entitles him to compensation and the fact that he may have been unavailable to perform overtime work for reasons other than his work injury is irrelevant.

After review of the Decision and Order in light of the relevant evidence and claimant's arguments on appeal, we affirm the administrative law judge's denial of claimant's permanent partial disability claim based on a loss of overtime earnings because it is rational, supported by substantial evidence, and in accordance with law. See *O'Keeffe*, 380 U.S. at 359. Contrary to claimant's assertions on appeal, the administrative law judge rationally determined that inasmuch as claimant testified that there were times when he turned down the overtime offered by employer because he was "just tired" from working two jobs and did not introduce any evidence segregating the amount of overtime lost on that basis from that lost due to his injury, he is not entitled to the compensation claimed based on a comparison of his overtime hours with those of comparable employees because he did not meet his burden of establishing that the difference between the overtime hours worked was due to the injury.¹ Claimant's argument that he should have been awarded the compensation sought simply because he lacked the physical capacity to perform some of the overtime otherwise available to him similarly must fail. Disability under the Act is not premised solely on physical impairment but rather is defined under Section 2(10) of the Act, 33 U.S.C. §902(10), as the incapacity because of *injury* to earn the wages that claimant was receiving at time of injury. See generally *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). Inasmuch as claimant bears the burden of establishing the extent of his disability,

¹We note that the other reasons given by the administrative law judge for denying an award based on a comparison between the post-injury overtime worked by claimant and that worked by his co-workers over a three year period do not appear to be valid. The fact that the administrative law judge could not confirm the testimony of claimant's supervisor that he would try to make up for the times when he was forced to deny claimant an overtime opportunity because of his restrictions by offering claimant other overtime work does not establish that claimant does not have a loss in overtime due to his injury; any "made-up" overtime would be reflected in claimant's actual wages. Similarly, as Mr. Gianti also testified that in attempting to distribute the available overtime evenly among the members of the gang, he would "even things out" by providing claimant with work within his restrictions on Thursday or Friday night or on the weekends when claimant would be available to do it, Tr. at 46, the administrative law judge's rejection of claimant's method of calculation based on fact that it failed to account for the fact that claimant was unavailable to perform overtime work from Monday through Wednesday because of his other job arguably was improper. Moreover, claimant's employment records generally reflect that he refused to work available overtime on Saturdays, EX 3, and that he did not often decline offered overtime Mondays through Wednesdays. Any error he may have made in this regard is harmless, in any event, in light of our affirmance of the administrative law judge's determination that claimant failed to establish the amount of available overtime he lost due to the work-related injury.

see generally *Metropolitan Stevedore Co. v. Rambo*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989), and the administrative law judge rationally determined that on the facts presented claimant did not meet that burden, his denial of claimant's permanent partial disability claim based on a loss of overtime earnings is affirmed. *See generally* *Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge