BRB Nos. 96-0514
and 96-0514A

WILLIE HOUCHENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

George E. Swegman (Ashcraft & Gerel), Washington, D.C., for claimant.

Alan D. Sundburg (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for the self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Awarding Benefits (93-DCW-13) of Administrative Law Judge Robert S. Amery rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (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).

The case before us has a long procedural history. Claimant injured his back on January 25, 1982, while working as a subway station attendant for employer. Employer voluntarily paid him temporary total disability benefits, pursuant to 33 U.S.C. §908(b), from January 26, 1982 through November 3, 1983. Claimant did not return to work and sought continuation of his benefits. In a Decision and Order dated October 22, 1984, Administrative Law Judge Victor J. Chao denied

further benefits, concluding that claimant was not disabled subsequent to November 3, 1983. Claimant appealed this denial to the Board, BRB No. 85-400, but before a decision was issued, the Board remanded the case at claimant's request to Judge Chao for consideration of modification pursuant to Section 22 of the Act, 33 U.S.C. §922.[1] In his Petition for Modification, claimant asserted that he returned to his prior employment as a station attendant from April 29, 1985 until October 7, 1985, but suffered constant pain and was removed from work by his physician, Dr. Azer. In addition, claimant submitted new evidence in support of his assertion that he was totally disabled as of October 7, 1985.

In a January 8, 1986, Supplemental Decision and Order, Judge Chao denied claimant's request for modification, stating that the new medical evidence did not persuade him to alter his original decision. On February 4, 1986, claimant underwent a lumbar laminectomy and on February 10, 1986, claimant filed a supplemental pleading in support of a motion for reconsideration of his modification petition, informing the administrative law judge of his recent surgery. In an April 24, 1986, Order, the administrative law judge denied reconsideration.

[1]By Order dated January 13, 1986, the Board dismissed claimant's appeal and instructed the parties that if the administrative law judge denied modification, claimant could request reinstatement of his appeal within 30 days of the date of denial. *See* Cl. Ex. 6.

Claimant then appealed Judge Chao's denial of his modification request to the Board.[2] On appeal, the Board affirmed the administrative law judge's denial of modification based on his finding that claimant failed to establish a change in condition. *Houchens v. Washington Metropolitan Area Transit Auth.*, BRB No. 86-1397 (October 3, 1989). On reconsideration, the Board affirmed its prior decision by Order issued July 24, 1990.

Claimant appealed the Board's decisions to the United States Court of Appeals for the District of Columbia Circuit. In its opinion, the court, *inter alia*, remanded the case to the Board for a more thorough explanation of its affirmance of Judge Chao's denial of modification. *Houchens v. Director, OWCP*, No. 90-1437 (D.C. Cir. December 10, 1991) (unpublished). By Order on Remand dated November 18, 1992, the Board provided the requested explanation and reinstated its initial Decision and Order, affirming the denial of claimant's application for modification. Claimant then appealed the Board's remand Order to the United States Court of Appeals for the District of Columbia Circuit, which affirmed the Board's decision on December 7, 1994. *Houchens v. Washington Metropolitan Area Transit Authority*, No. 92-1653 (D.C. Cir. Dec. 7, 1994).

Claimant thereafter filed another modification request by way of a pre-hearing statement dated January 28, 1993, seeking temporary total disability compensation following his February 4, 1986, surgery through April 28, 1986, when claimant returned to work as a station manager, and permanent partial disability benefits commencing March 23, 1988, based on a loss of overtime earnings in that position. After conducting a hearing, Administrative Law Judge Robert Amery rejected employer's argument that claimant's January 28, 1993, modification request was not timely and awarded claimant the temporary total disability compensation he claimed, but denied the claim for permanent partial disability compensation. In claimant's present appeal to the Board, claimant challenges Judge Amery's denial of his claim for permanent partial disability compensation. Employer responds, urging affirmance. In addition, employer cross-appeals the administrative law judge's finding that claimant's January 28, 1993, modification request was timely and asserts that if claimant is found entitled to permanent partial disability compensation, it is entitled to relief under Section 8(f) of the Act, 33 U.S.C. 908(f).

TIMELINESS OF SECOND MODIFICATION

Employer argues on cross-appeal that the administrative law judge erred in finding that claimant's January 28, 1993, modification request was timely. Employer asserts that when the Board remanded the case to the administrative law judge to consider modification in 1986, it stated that

[2]While this appeal was pending, claimant raised the issue of unpaid medical expenses with the deputy commissioner, because employer stopped paying his medical expenses. After an informal conference with the deputy commissioner, the issue was referred to Administrative Law Judge Joel Williams for a hearing. In a March 27, 1990, Decision and Order, the administrative law judge required employer to pay claimant's outstanding medical expenses, including the cost of the February 4, 1986, surgery and all medical expenses incurred after claimant left work in October 1985.

should Judge Chao deny modification, claimant could request reinstatement of his 1985 appeal. Employer maintains that as the administrative law judge declined to grant modification, and affirmed this decision on reconsideration on April 24, 1986, and claimant thereafter failed to request reinstatement of his initial appeal of Judge Chao's October 22, 1984, Decision and Order within 30 days of this date, Judge Chao's Decision became final on May 24, 1986. Employer alleges that as claimant's 1993 request for modification was not filed within a year of the May 24, 1986, denial, it was not timely.

We affirm the administrative law judge's determination that claimant's January 28, 1993, modification request was timely. The one-year time period within which modification of a denial of a claim must be sought pursuant to Section 22 begins to run on the date the decision denying the claim becomes final. Thus, modification may be requested within a year after the conclusion of the appellate process. *Black v. Bethlehem Steel Corp.*, 16 BRBS 138, 142-143 n.7 (1984), *appeal dismissed*, 760 F.2d 274 (9th Cir. 1985) (table); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977); 20 C.F.R. §702.373(b). *See also Director, OWCP v. Peabody Coal Co. [Sisk]*, 837 F.2d 295, 11 BLR 2-31 (7th Cir. 1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Moreover, as the administrative law judge stated, the benefits currently claimed on modification are for periods of disability post-dating the 1985 modification petition and initial 1984 proceeding. On the facts presented in this case, the administrative law judge rationally determined that because the denial of the claimant's initial modification request did not become final until the United States Court of Appeals for the District of Columbia Circuit issued its decision on December 7, 1994, claimant's January 28, 1993, request for modification was timely.[3]

EXTENT OF DISABILITY

Having determined that claimant's January 28, 1993, modification request was timely, we direct our attention to claimant's argument that the administrative law judge erred in denying his claim for permanent partial disability compensation based on a loss of overtime earnings. In his decision, Judge Amery denied claimant permanent partial disability compensation commencing March 23, 1988, finding that claimant failed to establish a loss in his wage-earning capacity based on his actual earnings. In so concluding, the administrative law judge noted that claimant's rate of pay had never been reduced, but had continually increased each year, and that his total annual wages had remained roughly about the same, with claimant's having actually earned more money in 1989 and 1990 than he earned at the time of his injury. Moreover, he rejected claimant's contention that he sustained a loss of wage-earning capacity because he has been unable to work the amount of overtime he had worked at the time of the injury; he concluded that no minimum overtime was

[3]In finding that claimant's modification request was timely, the administrative law judge was persuaded by claimant's argument that pursuant to *Intercountry Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 1 (1975), Section 22 of the Act, 33 U.S.C. §922, does not bar consideration of a claim timely filed under Section 13, which has not been the subject of a prior action by the deputy commissioner. He reasoned that as none of the issues in this claim could have been litigated at the time of Judge Chao's 1984 decision, claimant's 1985 application could be considered a new claim for a new period of disability which also would be subject to modification.

guaranteed and that based on the medical opinions of Drs. Azer, Marselas, and Gordon, it was discretionary on claimant's part as to whether he worked overtime.

On appeal, claimant asserts that because his actual post-injury wages must be adjusted to the wages paid at the time of his injury to account for the effects of inflation pursuant to *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980), the administrative law judge erred in relying on the fact that claimant's actual post-injury earnings were the same or more between 1988 and 1994 to conclude that claimant failed to establish a loss in his wage-earning capacity. Claimant asserts that since 1981 his hourly wage has nearly doubled, yet between 1988 and 1994 he earned, on average, almost $2,000 less than he earned in 1981, the year before his injury, due to his reduced ability to work overtime. Claimant alleges that in 1981 he worked 1,761.37 hours of overtime, an average of almost 34 hours per week, while during the period from 1988 through 1994 he averaged only 619 hours of overtime annually, or about 12 hours per week, and went down even further in 1993 and 1994, when he averaged 242.24 hours annually, or an average of 4.65 hours per week. Claimant maintains that his reduced ability to work overtime is related to his injury, as he has to use a back brace while at work and has to take pain medication and muscle relaxants on a long-term basis, which in turn has resulted in his having hernia and gastrointestinal problems. Claimant further argues that as the administrative law judge found that claimant's neurogenic bladder problems, reflux esophagitis, gastric ulcers, and multiple hernias were caused or aggravated by his use of a back brace due to the work injury, and that claimant accordingly was entitled to medical benefits for these conditions, he erred in failing to consider the effect of these work-related conditions on claimant's ability to work overtime.

An award for permanent partial disability for non-scheduled injuries is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). The party that contends that the employee's actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternative reasonable wage-earning capacity. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 n.3 (1987). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's post-injury wage-earning capacity. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). The administrative law judge must consider all relevant factors and evidence in making findings regarding claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). Loss of overtime earnings may provide a basis for determining that a claimant has demonstrated a loss in wage-earning capacity, where, as here, overtime was a normal and regular part of claimant's pre-injury employment and accordingly was included in determining claimant's average weekly wage. *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1990); *Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321 (1981).

Initially, we reject claimant's assertion that in denying his claim for permanent partial disability compensation based on a loss of overtime wages, the administrative law judge erred in neglecting to consider the medical opinions of Drs. Moshyedi, Daee, Werner and Singer regarding the impact of claimant's hernia and gastrointestinal problems resulting from his use of the back brace on his ability to work overtime. The administrative law judge considered these medical opinions in his Decision and Order at 11-14. Moreover, none of these doctors indicates that claimant cannot work overtime due to medical problems exacerbated by wearing the back brace.

Claimant's remaining arguments, however, have merit; specifically, we agree with claimant that the administrative law judge's denial of permanent partial disability benefits based on a loss of overtime earnings cannot be affirmed. In analyzing this issue, the administrative law judge erred in basing his conclusion that claimant failed to establish a loss of wage-earning capacity on the finding that no minimum overtime is guaranteed. The relevant inquiry where claimant is seeking to establish a loss of wage-earning capacity based on a loss of overtime earnings is whether overtime was available to claimant and claimant was unable to work those hours due to his injury. *See Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 113 (1989). The fact that no minimum overtime is guaranteed is irrelevant, if overtime is available to the injured employee, but he was unable to perform it. We note that the record in the present case reflects that claimant had a history of working overtime prior to his injury and that overtime was available to him after his injury based on his seniority.

Moreover, to the extent the administrative law judge relied on the fact that neither Dr. Azer nor Dr. Marselas specifically limited the hours of overtime that claimant could work to support his conclusion that any limitation on claimant's overtime income was discretionary and within claimant's control, he mischaracterizes their testimony. While Drs. Azer and Marselas did not specifically limit the hours of overtime which claimant could perform, they were of the opinion that claimant should not be working as a station attendant at all. Cl. Exs. 11, 12. Thus, their opinions cannot support the conclusion that claimant could perform overtime work as a station attendant.

Finally, in concluding that claimant failed to establish a loss of wage-earning capacity based on his actual post-injury wages because his annual wages had remained the same or increased since the time of his injury, the administrative law judge erred, as this fact is not dispositive of the wage-earning capacity issue. *Randall*, 725 F.2d at 795, 16 BRBS at 61 (CRT). Moreover, he failed to account for the fact that claimant's basic hourly rate had nearly doubled since the time of his injury. *See* Decision and Order at 5. Sections 8(c)(21) and 8(h) require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Given the intervening increase in claimant's basic hourly rate, comparison of his annual earnings in 1988 and thereafter with his pre-injury average weekly wage does not demonstrate that claimant had no loss in his wage-earning capacity. *See Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 18 BRBS 101 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986). *See also Container Stevedoring Co. v. Director, OWCP [Gross]*, 935

F.2d 1544, 1549, 24 BRBS 213, 220 (CRT) (9th Cir. 1991). In light of the aforementioned, and the administrative law judge's failure to explicitly consider claimant's testimony regarding the effect of his use of a back brace on his ability to perform overtime work post-injury,[4] we vacate the administrative law judge's denial of claimant's claim for

[4]We note that claimant's treating physicians, Drs. Azer and Marselas, indicated that from a medical standpoint claimant is not required to wear the brace. Cl. Ex. 12 at 20, Cl. Ex. 13 at 41.

permanent partial disability compensation, and remand for him to reconsider whether claimant has established a loss in his wage-earning capacity.[5]

Accordingly, the administrative law judge's denial of claimant's claim for permanent partial disability compensation is vacated and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order-Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[5]Employer argues in its brief on cross-appeal that if claimant is found entitled to permanent partial disability, it is entitled to Section 8(f) relief. In his Decision and Order at 16, the administrative law judge summarily concluded that it appeared that employer had presented sufficient evidence in Employer's Exs. 1 and 2 to justify Section 8(f) relief, but found Section 8(f) inapplicable in light of the fact that claimant had been awarded only temporary total disability compensation. On remand, if the administrative law judge finds that claimant is entitled to permanent partial disability compensation, he should reconsider employer's entitlement to Section 8(f) relief, analyzing and discussing the relevant evidence and should identify the evidentiary basis for any conclusion he reaches consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557. *See generally Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993) (Brown, J., dissenting).