

BRB No. 92-258

JOHN H. LAMBETH)
)
 Claimant-Petitioner)
)
 v.)
)
 ALABAMA DRY DOCK AND)
 SHIPBUILDING CORPORATION) DATE ISSUED:
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

John R. Lockett (Cherry, Givens, Tarver, Peters, Lockett and Diaz, P.C.), Mobile, Alabama, for claimant.

Walter R. Meigs, Mobile, Alabama, for self-insured employer.

BEFORE: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-3185) of Administrative Law Judge James W. Kerr, 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 conclusions of law of the administrative law judge if they 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 injured his back while working for employer as a pipefitter on May 7, 1987. Dr. Rutledge diagnosed a lumbar sprain with lumbar radicular syndrome on the right side superimposed on pre-existing, lumbar degenerative disc disease. He opined that claimant

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

has a five percent permanent impairment, and that he reached maximum medical improvement on July 20, 1987. Claimant returned to work on August 23, 1987 with light duty restrictions, officially classified as Class III, with no loss of pay. Claimant's restrictions were no lifting over 35 to 40 pounds and no vertical climbing.¹ Cl. Ex. 11. Claimant testified he did little lifting but occasionally received help when he did, and sometimes he had nothing to do. Employer voluntarily paid claimant temporary total disability benefits from May 8, 1987 through August 22, 1987.

Claimant worked for employer until August 9, 1988, at which time employer granted him medical disability retirement. Marshall Philingin, who worked in employer's Industrial and Labor Relations Department, testified that claimant asked him for a personal leave of absence, or to be laid off due to seniority, which was refused, and that claimant became angry and stated he could make more money being laid off than he could working for employer. Claimant subsequently started working full-time running his own furniture refinishing business called "Blue Ribbon Antiques" with gross revenues of approximately \$750 in 1989. Tr. at 54. Claimant testified that he made enough money to pay his bills and his note on the building where his business was located. Claimant described this work as "easy to do" and "not strenuous," and testified that it involved lifting small weights and dragging any weights over 50 pounds; claimant also stated that occasionally he received help from his brother-in-law. Tr. at 51-53, 71. Claimant's pre-injury average weekly wage was \$299.93.

In the Decision and Order, the administrative law judge found that claimant did not suffer a loss in wage-earning capacity because he returned to work on August 23, 1987 with no reduction in pay, because he was not the only employee with Class III medical restrictions, and, relying on Mr. Philingin's testimony, the administrative law judge found that claimant stopped working for employer because he felt he could make more money if he were laid off. Decision and Order at 6. The administrative law judge concluded that claimant voluntarily retired from employer to work as a furniture refinisher, and was not entitled to permanent partial disability benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find that he has a loss in wage-earning capacity and is permanently partially disabled due to the work injury. Employer responds, urging affirmance of the denial of permanent partial disability benefits.

Specifically, claimant contends on appeal that the administrative law judge erred in failing to apply Section 8(h), 33 U.S.C. §908(h), and erred in failing to determine that he suffers a loss in wage-earning capacity. Claimant further contends that the administrative law judge erred in finding that he voluntarily retired as all the medical and vocational evidence establishes he is unable to perform his usual job as a pipefitter.² Claimant further contends that his post-injury employment

¹Claimant testified his usual job involved carrying or dragging weights from 90 to 150 pounds, and climbing ladders. Tr. at 35-36, 38, 40.

²Claimant cites the fact that he was on a Class III medical restriction when he returned to work, that Dr. Rutledge restricted him to a 45 pound intermittent lifting limit and a 30 pound frequent lifting limit, and Dr. Dyas opined that claimant is unable to perform his usual work as a pipefitter.

with employer was sheltered, and, regardless of whether he voluntarily left employer, the administrative law judge should have considered claimant's wage-earning capacity in the open market. Claimant cites the opinion of the rehabilitation counselor, Thomas Christiansen, that he could obtain security guard work at \$180 a week. Tr. at 88.

Pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(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. *Abbott v. Louisiana Insurance Guaranty Association*, BRBS , BRB No. 91-1991 (Sept. 28, 1993); *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds). 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 wage-earning capacity. Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, and claimant's earning power on the open market. *Sproull*, 25 BRBS at 109; *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979).

In the instant case, the administrative law judge's analysis of whether claimant suffered a loss in wage-earning capacity is insufficiently detailed, and we must vacate the denial of benefits. The administrative law judge erred in failing to determine whether claimant's actual post-injury wages in the light duty job provided by employer fairly and reasonably represent his wage-earning capacity given the relevant factors. See *Warren v. National Steel and Shipbuilding Co.*, 21 BRBS 149, 153 (1988). We note that if claimant's post-injury work is continuous and stable, if it is necessary and within claimant's physical restrictions, and claimant has the seniority to stay in the job, claimant may not be economically disabled even though he continues to suffer some physical impairment as a result of his injury. See *Cook*, 21 BRBS at 6; *Darcell v. FMC Corp., Marine and Rail Equipment Div.*, 14 BRBS 294 (1981). Under such circumstances, the fact-finder need not consider claimant's earning potential in the open market. *Cook*, 21 BRBS at 6. However, even if claimant's post-injury wages are equal to or higher than his pre-injury wages, he still may have suffered a loss in wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Frye v. Potomac Electric Power Co.*, 21 BRBS 194, 199 (1988).

The administrative law judge's finding that claimant voluntarily retired from employer does not end the inquiry in this case, as claimant may have suffered a loss in earning capacity prior to leaving this employment.³ Moreover, the evidence of record establishing that claimant has a

³Contrary to employer's contention, the administrative law judge need not find that claimant's self-employment earnings are representative of his post-injury wage-earning capacity. Claimant's actual post-injury earnings with employer may be representative of his wage-earning capacity, or his capacity may be demonstrated by other open market employment. See generally *Penrod Drilling*

permanent physical impairment preventing his return to his usual work and is subject to light duty work restrictions could establish that claimant has a loss in wage-earning capacity. Because the administrative law judge did not discuss the relevant factors or evidence of record regarding claimant's post-injury wage-earning capacity, we vacate the administrative law judge's denial of permanent partial disability benefits, and we remand the case for the administrative law judge to undertake the appropriate analysis pursuant to Section 8(h). *Warren*, 21 BRBS at 153.

Accordingly, the administrative law judge's denial of permanent partial disability benefits is vacated, and the case remanded for further consideration in a manner consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge