BRB No. 97-335

RICHARD WAGNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Decision and Order Denying Petition for Reconsideration of Joel F. Gardiner, Administrative Law Judge, United States Department of Labor.

Janmarie Toker (McTeague, Higbee, MacAdam, Case, Watson & Cohen), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy), Portland, Maine, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits and Decision and Order Denying Petition for Reconsideration (95-LHC-2107, 95-LHC-2108) of Administrative Law Judge Joel F. Gardiner 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 began working for employer as a welder trainee on May 1, 1972. On September 30, 1976, claimant fell approximately 50 feet, sustaining injuries to his feet, ankles, left knee, pelvis, spine, and skull. He underwent several surgical procedures, and remained out of work for approximately three years. Claimant received total disability benefits during this period. Dr. Southall, claimant's orthopedic surgeon, released claimant for work, with restrictions on heavy lifting and prolonged standing or walking, in the fall of 1978. According to Dr. Southall, claimant reached maximum medical improvement on September 7, 1978, and he assigned him a ten percent whole person impairment as a result of a compression fracture of the lumbar spine, a ten percent impairment of the left leg as a result of the knee injury, and a twenty-five percent impairment to each foot. Taking into consideration claimant's walking and standing restrictions, employer provided claimant with a job in 1980 as a courier between its Hardings facility in East Brunswick and its main plant in Bath, and later as a posting clerk for blueprints, in which he worked for approximately one year. Tr. at 27-28.[1]

Claimant was then transferred to the company store as a counter clerk. This work involved selling tools, work clothing, and other shipyard materials to employees. He was appointed supervisor in 1986, and initially his duties remained the same. Cl. Ex.12; Tr. at 36-37. Claimant testified that he had no problems performing the work until 1990 or 1991, when his duties changed and he had to attend meetings more frequently at employer's main yard and make off-site visits to different facilities. Claimant testified that although he previously had spent about 10 percent of his time on his feet, following the change in his job, the time he spent standing or walking increased to 30 or 40 percent. Tr. at 44. Claimant was laid off by employer on October 30, 1992, allegedly as a result of a reduction in force.

In March 1993 claimant and his wife started a business called MRS Supply, selling work tools, footwear and clothing items similar to those sold at employer's store. Tr. at 43-44, 46. Claimant stated that he used two Individual Retirement Accounts (IRAs) worth $10,000, as capital to start the business, but that he had not yet recouped his investment, and that he soon expected a profit. Claimant sought permanent total disability

[1]The hearing in this case took place on December 12, 1995. On December 27, 1995, employer informed the administrative law judge that it would raise the issue of status under Section 2(3), 33 U.S.C. §902(3), post-hearing. The administrative law judge held a second hearing on this issue on February 23, 1996. The issue of jurisdiction is not, however, before the Board in the present appeal, and references to the transcript are to that from the first hearing.

compensation or alternatively permanent partial disability compensation under the Act commencing as of the date of his October 30, 1992, layoff based on the natural progression of the September 1976 injury, or alternatively a gradual aggravating injury based on the increased amount of standing and walking he did during the last several years he worked.

After initially finding that claimant's current condition is the result of the natural progression of his severe injuries from the 1976 incident, the administrative law judge denied the claim for permanent total disability compensation, crediting claimant's testimony that he was able to perform the work as a counter clerk at employer's facility and could have continued to do so but for the fact that he had been laid off. The administrative law judge further stated that he was not addressing claimant's entitlement to permanent partial disability compensation because the parties did not address the issue of claimant's present earning capacity either at the hearing or in post-hearing briefs. In addition, the administrative law judge noted that even if he were to have found that claimant had a gradual injury in 1992, he would have found that this injury was not disabling because claimant's business earnings, as reflected on his 1995 income tax return, did not truly reflect claimant's wage-earning capacity due to the inherent costs in starting up a business. *See* Decision and Order at 14-15, n.3. He did, however, hold employer and Commercial Union, the carrier on the risk in 1976, liable for claimant's ongoing medical expenses.[2]

Claimant thereafter filed a Petition for Reconsideration, asserting that while he accepted the administrative law judge's finding that his current problems are the result of

[2]At the formal hearing employer was represented in its current capacity as self-insured and by its carrier at the time of the 1976 accident, Commercial Union, which was the carrier on the risk from January 1, 1963 through February 28, 1981. Employer became self-insured on September 1, 1988. Decision and Order at 3.

the 1976 incident rather than a new injury, he was entitled to permanent partial disability compensation based on the difference between his stipulated average weekly wage in 1976 of $216.40 and his current earnings in self-employment adjusted to 1976 levels to account for inflation, asserting that the necessary figures were in evidence. The administrative law judge denied claimant's motion for reconsideration, and this appeal followed.[3]

On appeal, claimant contends that the administrative law judge abused his discretion in failing to resolve the issue of his entitlement to permanent disability compensation, asserting that he raised alternative entitlement to either permanent total disability or permanent partial disability benefits. Claimant avers that he is entitled to permanent total disability benefits because he carried his burden of establishing that he is incapable of performing his usual welding work for employer and employer did not meet its burden of establishing the availability of suitable alternate employment. While recognizing that employer provided claimant with alternate work within its facility, claimant argues that such work was no longer available to him after he was laid off and that employer did not introduce other evidence of suitable alternate work. In the alternative, claimant argues that he is entitled to permanent partial disability benefits based on the difference between his

[3]The administrative law judge initially found the motion was untimely, reasoning that his Decision and Order was filed by the district director on July 12, 1996, and claimant's letter requesting reconsideration was received on July 26, 1996, which would place it within the 15-day limit allowed for reconsideration (10 days plus 5 for mailing) under 20 C.F.R. §802.206(b)(1) and 29 C.F.R. §18.4(c), but the grounds supporting the motion were not filed until August 12, 1996, thus rendering the reconsideration request untimely. Decision and Order Denying Petition for Reconsideration at 2. The administrative law judge then addressed the merits of claimant's motion. Claimant timely appealed this decision. On appeal, claimant does not address the administrative law judge's findings regarding the timeliness of his motion for reconsideration, and the merits of the initial decision are properly appealed only if the motion was timely. 20 C.F.R. §802.206. As claimant's initial request for reconsideration was timely filed on July 26, 1996, we conclude that the requirements of Section 802.206 have been satisfied.

stipulated 1976 average weekly wage and his earnings in self-employment. Claimant argues that although his ownership of a business is not necessarily indicative of his ability to work, income derived from his services in that business can serve as a basis for establishing his wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's denial of claimant's disability claim but asserting that, if the Board remands the case, the administrative law judge should be allowed to reopen the record to obtain whatever additional evidence he finds necessary to adequately address the issue of claimant's post-injury wage-earning capacity.

We initially reject claimant's argument that he is entitled to permanent total disability compensation. Based on his consideration of the record evidence, the administrative law judge found that the facts establish that claimant sustained a work-related injury on September 30, 1976, which prevented him from performing his prior work duties for employer as a welder. Inasmuch as claimant established a *prima facie* case of total disability, *see Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993), the burden shifted to employer to demonstrate the availability of suitable alternate employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

Employer met its burden by providing claimant with a light duty job within his restrictions at its facility from September 1980 to October 1992; however, when employer laid claimant off, it made this alternate job unavailable. *See Mendez v. National Steel and Shipbuilding Co.*, 21 BRBS 22 (1988). Employer conceded that claimant's former position was filled by another employee, and there were no other positions open in the yard within claimant's restrictions. Tr. at 39. Thus, suitable alternate employment is no longer available at employer's facility. Inasmuch, however, as claimant was actually performing similar work in self-employment, and claimant does not assert that his self-employment was not suitable or that his earnings in this work are not representative of his wage-earning capacity, claimant is at most partially disabled. Therefore, the denial of permanent total disability benefits is affirmed.

We agree with claimant however, that the administrative law judge erred in failing to determine the extent of his permanent partial disability, if any, and accordingly conclude that the case must be remanded for additional consideration. Under 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) 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. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988).

Our review of the record establishes that, contrary to the administrative law judge's determination, the issue of claimant's entitlement to permanent partial disability was both adequately briefed and developed while the case was before the administrative law judge.[4] Prior to the December 12, 1995, hearing, claimant submitted a letter dated November 3, 1995, to which he attached a list of exhibits, stating that the "issues for hearing are entitlement to permanent total and permanent partial disability for various periods from October 30, 1992, to the present and continuing, and entitlement to medical services and supplies." In addition, the parties mentioned the issue of permanent partial disability compensation in their opening statements at the hearing, *see, e.g.*, Tr. at 19, 21, and claimant reiterated this argument in his post-hearing brief. Cl. Ex. 31. Further, a May 6, 1996, position letter written to the administrative law judge by Bath Iron Works and Commercial Union urges the administrative law judge to order an appropriate level of permanent partial disability compensation.

In addition, while the administrative law judge stated that claimant's tax returns from self-employment were not truly reflective of claimant's post-injury wage-earning capacity because claimant has costs and overhead that he must pay before taking home a salary, this fact does not affect the administrative law judge's obligation to determine claimant's post-injury wage-earning capacity. Claimant correctly avers that income from self-employment may indicate a claimant's post-injury wage-earning capacity provided that the income results from claimant's personal services. *Sledge v. Sealand Terminal, Inc.*, 14 BRBS 334, 337 (1981), *after remand*, 16 BRBS 178 (1984). *See also Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). In the present case, claimant introduced tax returns from 1993 until 1995 into evidence, and these returns appear to separate claimant's business expenses from his salary. Cl. Exs. 23, 32. Moreover, while the administrative law judge stated in his Decision and Order Denying Petition for Reconsideration that there was no evidence as to how many hours claimant worked in his business, we note that claimant testified that he works four or five hours a day in his business versus the eight to nine hours he worked in the shipyard. Tr. at 44. In addition, where the administrative law judge finds that claimant's actual earnings do not reasonably represent his residual wage-earning capacity, Section 8(h) requires that he calculate a precise dollar figure which reasonably and fairly represents claimant's post-injury wage-earning capacity*. See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Claimant correctly avers that as the party contending that claimant's actual wages are not representative of his post-injury wage-earning capacity bears the burden of establishing an alternative reasonable

[4]Moreover, even if claimant had only asserted entitlement to permanent total disability compensation, it is well established that a claim for permanent total disability includes lesser claims, such as one for partial disability. *See Young v. Todd Pacific Shipyards Corp.,* 17 BRBS 201, 204 n.2 (1985).

wage earning capacity, the administrative law judge erred in requiring claimant to establish that his actual wages are representative of his residual earning capacity. *See Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). Inasmuch as the issue of claimant's entitlement to permanent partial disability compensation was raised below but was not resolved by the administrative law judge, we vacate his denial of benefits and remand for him to decide this claim. *See generally Mitchell v. Bath Iron Works Corp.,* 11 BRBS 770, 780 (1980).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge