BRB No. 97-889

CHARLES L. NORFLEET	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	
	)	
	)	
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.

Ralph Rabinowitz (Rabinowitz, Rafal, Swartz, Taliaferro & Gilbert, P.C.), Norfolk, Virginia, for claimant.

Gerard E.W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2324, 95-LHC-2325) 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 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).

On September 9, 1984, claimant, a marine painter, injured his back while working for employer. Claimant had back surgery on December 28, 1984, and subsequently returned to work for employer as a painter with the restriction of no overtime work. In a Compensation Order dated May 23, 1990, the district director awarded claimant temporary partial disability benefits to compensate him for his lost overtime for the periods from December 3 to 23, 1984, March 4 to June 2, 1985, and from June 2, 1985 to June 1, 1989, in the amount of $79.55 per week. After temporary partial disability benefits were paid for the maximum five year period prescribed in Section 8(e) of the Act, 33 U.S.C. §908(e),

employer voluntarily paid claimant permanent partial disability benefits of $79.55 per week until April 23, 1995. Thereafter, it asserted a credit for an overpayment of benefits. *See* 33 U.S.C. §914(j). Claimant suffered his second back injury while working for employer on November 7, 1991. Subsequent to his back surgery on December 16, 1991, claimant returned to light duty work until May 20, 1994, as a janitor and telemarketer for employer with permanent restrictions. Claimant never returned to his usual work as a shipyard painter, and was automatically terminated on August 14, 1995, because he had not worked at the shipyard for more than one year. On January 9, 1997, claimant had his third back surgery, for which employer voluntarily paid claimant temporary total disability and medical benefits.

In his decision, the administrative law judge denied claimant's claim for continuing permanent partial disability benefits from April 23, 1995, in the amount of $79.55 per week for lost overtime as a result of the 1984 injury. With regard to claimant's claim for permanent partial disability benefits from February 26, 1995, and continuing, for the 1991 injury, the administrative law judge found that claimant did not establish his *prima facie* case of total disability and denied benefits. Assuming, *arguendo*, that claimant established his *prima facie* case of total disability, the administrative law judge found that employer established suitable alternate employment and that claimant's loss in wage-earning capacity is $28.23 per week.

On appeal, claimant challenges the administrative law judge's denial of benefits for his 1984 and 1991 injuries. Employer responds in support of the administrative law judge's decision to which claimant replied. In addition, claimant filed supplemental authorities on August 29, 1997, and February 13, 1998, which the Board accepts as part of the record. 20 C.F.R. §802.215.

We first address claimant's challenge to the administrative law judge's denial of permanent partial disability benefits from April 23, 1995, and continuing, for lost overtime as a result of the 1984 injury. The administrative law judge denied claimant's claim for lost overtime after finding that claimant did not present evidence establishing either the amount of overtime he worked post-injury in comparison to his co-workers or the amount of overtime available to him before and after his injury. *See Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987); Decision and Order at 17. Contrary to claimant's contention, the administrative law judge was not bound to accept the district director's compensation order awarding claimant temporary partial disability benefits for lost overtime in the amount of $79.55 as evidence that claimant continued to have a loss of overtime earnings. *See generally Raimer v. Willamette Iron & Steel Co*., 21 BRBS 98 (1988); Cl. Ex. 2; Emp. Ex. 5. Moreover, employer's voluntary payments to claimant of permanent partial disability benefits for a period after it paid claimant temporary partial disability benefits for the statutory maximum five year period does not establish claimant's entitlement to those benefits. *See generally Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997). Finally, although two-thirds of the difference between claimant's stipulated average weekly wage in 1984 and 1991 equals an amount close to the district director's award of temporary partial disability benefits and employer's voluntary payment

of permanent partial disability benefits, the administrative law judge was not required to infer that claimant's lost overtime is $79.55 per week based on that fact.[1] Consequently, as the administrative law judge rationally determined that claimant did not present any evidence to support his claim of lost overtime, we affirm the administrative law judge's denial of permanent partial disability benefits from April 23, 1995, and continuing, for the 1984 injury. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989)(claimant bears the burden of establishing the extent of his disability).

We next address claimant's challenge to the administrative law judge's denial of permanent partial disability benefits from February 26, 1995, and continuing, for the 1991 injury. Claimant contends that the administrative law judge erred in finding that he did not establish his *prima facie* case of total disability. Initially, we note that this is not a claim for total disability benefits; rather, claimant seeks permanent partial disability benefits. However, a finding that claimant can perform his usual work full-time, without restrictions can support a conclusion that he has no loss in wage-earning capacity. A conclusion that claimant is able to return to his usual work requires a determination as to the job duties performed prior to his injury and a finding that these duties are within claimant's post-injury medical restrictions. *See, e.g.*, *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). On the other hand, a claimant working post-injury in his former job but with pain and restrictions nevertheless can establish a loss in wage-earning capacity, *see, e.g., Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991), or alternatively, entitlement to a nominal award if he establishes that, despite the absence of a present loss in wage-earning capacity, there is a significant possibility of future economic harm as a result of his injury. *Metropolitan Stevedore Co. v. Rambo*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997).

[1]In his brief, claimant asserts that two-thirds of the difference between his stipulated average weekly wage in 1984 ($557.58) and 1991 ($442.35) is approximately $77 (2/3 [557.58-442.35]). Our computation yields $76.82.

The administrative law judge's denial of permanent partial disability benefits cannot be affirmed. Although the administrative law judge noted employer's agreement that claimant's restrictions appear to prevent him from working in his old job as a painter based on the position description and Dr. Neal's opinion that claimant is unable to return to his old job without light duty restrictions, the administrative law judge concluded that there is "no very good evidence" that claimant is unable to perform his old job. Decision and Order at 17-18; Cl. Exs. 10, 15; Emp. Exs. 48, 62; Emp. Post-Hearing Br. at 40. In so concluding, the administrative law judge did not make a comparison between claimant's job duties as a shipyard painter and the restrictions imposed on claimant post-injury by Dr. Neal. Although the administrative law judge relied on evidence establishing that claimant is working post-injury for painting companies, that claimant's shipyard painting job did not require him to lift weights he was not capable of lifting, and that if claimant could work post-injury as a commercial and residential painter, he could work post-injury as a shipyard painter, we hold that his reliance on this evidence is flawed. The fact that claimant worked for four different companies as a painter since his injury and was working as a painter at the time of the hearing is not substantial evidence in support of the administrative law judge's finding that claimant can return to work as a shipyard painter, as the administrative law judge did not determine whether the job duties of the pre-injury and post-injury positions are the same.[2] Tr. at 55-60, 66; Emp. Exs. 56-58, 63. Additionally, the fact elicited from Ms. Davis, employer's consultant who drafted the job description for shipyard painter, that employer did not require employees to lift anything more than they were capable of lifting is insufficient to support the administrative law judge's finding, since this lifting restriction is only one of claimant's seven restrictions, which include, *inter alia*, no working in awkward positions, bending, or squatting.[3] Cl. Exs. 10, 15; Emp. Exs. 48, 62; Tr. at 331-332. Lastly, the opinion of Mr. Ambrose, one of employer's supervisors, that since claimant is now working as a residential and commercial painter, he could work as a shipyard painter is not substantial evidence in support of the administrative law judge's finding as the record does not establish that Mr. Ambrose was aware of the physical requirements of claimant's current work as a commercial and residential painter. Emp. Ex. 67 at 18-20.

We, therefore, vacate the administrative law judge's finding that claimant is able to return to his usual work and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must determine whether

[2]Although the administrative law judge noted that claimant applied to a painting company under contract with area shipyards, claimant testified that he informed that prospective employer that he could not accept the job as he was not physically able to do it. Tr. at 78.

[3]Claimant's restrictions imposed after the 1991 injury include no lifting over 25 pounds, no heavy physical work, no working in awkward positions, and no climbing, bending, squatting, or overtime. Cl. Exs. 9, 10; Emp. Exs. 48, 60 at 56; Tr. at 45-46. His shipyard painting job required him to frequently reach above shoulder height, work with arms extended at shoulder level, bend, stoop, and work overtime. Emp. Ex. 62.

claimant is capable of returning to his usual work without restrictions by comparing claimant's job duties as a shipyard painter to the physical restrictions imposed on claimant post-injury. *Manigault*, 22 BRBS at 332; *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). If, on remand, the administrative law judge determines that claimant is capable of returning to his shipyard painter position without restrictions, he may again deny claimant disability benefits. If, however, claimant is able to return to his usual work because he works outside his restrictions or in pain, the administrative law judge must determine whether claimant nonetheless has a loss in wage-earning capacity consistent with the discussion below, *see Gross*, 935 F.2d at 1544, 24 BRBS at 213 (CRT), or alternatively whether he is entitled to a nominal award. *Rambo*, 117 S.Ct. at 1953, 31 BRBS at 54 (CRT).

If claimant is unable to return to his shipyard position, we agree with claimant that the administrative law judge must reconsider his findings regarding claimant's post-injury wage-earning capacity. Claimant contends that the administrative law judge erred in determining that his post-injury wage-earning capacity is $10 per hour. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984). If they do not, the administrative law judge must determine a reasonable dollar amount that does. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). In either case, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can perform post-injury. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co*., 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall*, 725 F.2d at 791, 16 BRBS at 56 (CRT). Claimant's pain and limitations are relevant in determining his post-injury wage-earning capacity and may reflect a greater loss in earning capacity than that demonstrated by claimant's actual post-injury earnings alone. *See, e.g., Gross*, 935 F.2d at 1544, 24 BRBS at 213 (CRT). The party seeking to prove that claimant's actual post-injury wages do not fairly and reasonably represent his post-injury wage-earning capacity bears the burden of proof. *See, e.g., Guidry*, 967 F.2d at 1039, 26 BRBS at 30 (CRT).

After alternatively finding that employer established suitable alternate employment, the administrative law judge found that claimant's post-injury wage-earning capacity is $10 per hour or $400 per week based on a 40-hour work week, since he concluded claimant is now successfully performing his job at that wage. Decision and Order at 19-20. Consequently, the administrative law judge concluded that claimant suffered a loss in wage-earning capacity, if any, in the amount of $28.23 per week (two-thirds of the difference between claimant's 1991 stipulated average weekly wage of $442.35 and his post-injury wage-earning capacity of $400). The administrative law judge discredited claimant's allegation that he is performing his present job by working outside his restrictions and in pain, in part, because claimant had not been to visit a doctor.

The administrative law judge acted within his discretion in crediting the opinion of Ms. Yonke that claimant has the capacity to earn $7-14 per hour as a painter over that of Ms. Edwards that claimant has the capacity to earn $4.25-4.50 per hour, as he provided rational reasons for doing so. *See* Decision and Order at 19; Cl. Ex. 8; Emp. Ex. 54. His crediting of Ms. Yonke's report over that of Ms. Edwards thus supports his finding that claimant has the capacity to earn $10 per hour. However, we cannot affirm the administrative law judge's remaining findings regarding claimant's post-injury wage-earning capacity as the administrative law judge erred in not considering Dr. Neal's admitted post-hearing reports, found at Claimant's Exhibits 19-23, which support claimant's allegation that he works outside his restrictions and in pain.[4] *See McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). If claimant works in pain and outside his restrictions, claimant's actual earnings in his post-injury job may not fairly and reasonably represent his wage-earning capacity. *Gross*, 935 F.2d at 1544, 24 BRBS at 213 (CRT). Although the administrative law judge noted Dr. Neal's concern that claimant might reinjure his back if he works outside his restrictions, the administrative law judge did not discuss and weigh Dr. Neal's subsequent reports which document claimant's post-hearing recurrent disc lesion as a direct result of his 1991 work injury and state that claimant is in constant and severe pain, particularly after a day's work as a painter. Decision and Order at 19 n. 3; Dr. Neal's deposition at 45-46; Cl. Exs. 19-23.

Moreover, claimant's contention that the administrative law judge erred in finding that he can work 40 hours per week or earn an average of $400 per week post-injury has merit. Although Ms. Yonke's report identifies several painting companies where claimant could work 40 hours per week, the administrative law judge did not take into account claimant's complaints of pain while working and the fact that claimant alleged he did not regularly work 40 hours per week as a painter post-injury.[5] *See* Emp. Exs. 54, 56-58, 63; Tr. at 61. Consequently, we vacate the administrative law judge's findings regarding claimant's post-injury wage-earning capacity and remand this case to the administrative law judge for reconsideration. Regardless of the figure the administrative law judge finds is

[4]Additionally, the administrative law judge did not consider Dr. Neal's reports dated December 10, 1996, and January 11, 1997, as well as Dr. Foer's report dated December 4, 1996, which were submitted post-hearing after the administrative law judge formally admitted Claimant's Exhibits 19-23 into the record. It is unclear whether these medical reports were admitted into the record.

[5]At Gerloff Painting, Incorporated, claimant worked from 24 hours per week to 40 hours per week but averaged approximately 35 hours per week. Emp. Ex. 56. Claimant left Polston Painting Company because a 40-hour work week could not be guaranteed. Emp. Ex. 57. At Haynes Furniture Company, claimant worked anywhere from 12 to 40 hours per week but averaged 32 hours per week. Emp. Ex. 58. At E.M. Raines Painting Company, Incorporated, claimant worked 395.5 hours for 13 weeks for an average per week of approximately 30 hours. Emp. Ex. 63. At the time of the hearing, claimant was working for E.M. Raines. Claimant did not tell E.M. Raines that he has permanent work restrictions for fear of not being hired. Tr. at 59-60.

claimant's wage-earning capacity, he must adjust these wages to the wages paid at the time of the 1991 injury. If the actual wages his post-injury employment paid at the time of injury are not established in the record, the administrative law judge should adjust the wages downward based on the percentage increase in the national average weekly wage from 1991 to the time of the hearing in 1996 to eliminate the effect of inflation. *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

Accordingly, the administrative law judge's Decision and Order is vacated with respect to the denial of benefits for the 1991 injury, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.[6] In all other respects, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[6]We note that if, on remand, the administrative law judge awards claimant benefits, relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), was awarded employer in the administrative law judge's Order on Motion for Reconsideration.