BRB No. 01-0356

RONALD GUTHRIE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLMES & NARVER, INCORPORATED	)	DATE ISSUED: Dec. 19, 2001
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order On Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Pfeifer, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order on Remand (91-LHC-1730) of Administrative Law Judge Alexander Karst 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. Claimant sustained a work-related injury to his lower back on April 27, 1989, and subsequently underwent a lumbar laminectomy. As a result of his injury, claimant has a left foot drop, wears a foot brace and has chronic leg pain. At the time of his injury, claimant worked as a plumber and general repairman for employer on the Johnston

Atoll, a United States nuclear and chemical warfare waste storage facility in the South Pacific about 800 miles southwest of Hawaii.

Unable to work within his medical restrictions on the Johnson Atoll, claimant began work with Fujitsu on April 23, 1990, a computer chip manufacturer, in Gresham, Oregon. Initially, claimant began work as a heating, ventilation, and air conditioning technician level 3, but was later shifted to work closer to his plumbing background. Claimant subsequently was promoted to level 4, and, at the time of the hearing, was "lead man" of his work group. Claimant's position, which is not physically demanding and is within his medical restrictions, entails the supervision of others, paper work, timekeeping, and monitoring of equipment. His shifts begin at 6:00 p.m., and claimant works four 12-hour shifts one week and three 12-hour shifts the next week. In 1990, claimant earned $36,312.28 in 35 weeks and in 1991 he earned $65,067.17.

In his initial Decision and Order, the administrative law judge denied the claim for permanent partial disability compensation, finding that claimant failed to establish a loss of wage-earning capacity. *See* 33 U.S.C. §908(h). The administrative law judge found that claimant's post-injury weekly wage-earning capacity of $925.93 exceeded claimant's average weekly wage, which the administrative law judge calculated, under 33 U.S.C. §910(c), as $857.06. The administrative law judge excluded from the calculation of claimant's average weekly wage the "subsistence and quarters" allowance claimant received, which consisted of employer-provided meals and lodging for employees working on the Atoll.

On claimant's appeal, the Board reversed the administrative law judge's finding that the "subsistence and quarters" allowance should not be included in claimant's average weekly wage. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48, 49-52 (1996). The Board, however, affirmed the administrative law judge's finding that claimant's actual wages with Fujitsu represented his post-injury wage-earning capacity. *Id.* at 52-53. Accordingly, the Board held that claimant was entitled to permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), based on the difference between claimant's higher average weekly wage and his post-injury wage-earning capacity.

Employer appealed to the United States Court of Appeals for the Ninth Circuit the Board's holding that the "subsistence and quarters" should be included in claimant's average weekly wage. The court reversed the Board's holding and excluded the "subsistence and quarters" allowance from the calculation of claimant's average weekly wage. *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT) (9th Cir. 1997). Thus, the award of benefits also was reversed.

Claimant, who had not filed a cross-appeal, filed a motion for reconsideration, contending that the court should have remanded the case for a determination of whether claimant is entitled to a nominal award of benefits. Claimant requested that his motion be held in abeyance pending the Supreme Court's decision following its grant of *certiorari* in *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996). Claimant

acknowledged that he had not raised the issue of his entitlement to a nominal award below, but argued that doing so was unnecessary because a claim for benefits includes a claim for any lesser degree of disability, pursuant to the Ninth Circuit's decision in *Rambo.* After the Supreme Court issued its decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), the Ninth Circuit granted claimant's motion for reconsideration, and remanded the case for consideration of claimant's entitlement to a nominal award. *Wausau Ins. Cos. v. Director, OWCP*, 136 F.3d 586 (9th Cir. 1998).

On remand, the administrative law judge first rejected employer's contention that because claimant had not filed a cross-appeal with the Ninth Circuit, the administrative law judge was without jurisdiction to decide the claim on remand. The administrative law judge stated that it was not within his province to determine that the court of appeals was without authority to remand the case. The administrative law judge also denied claimant a nominal award, finding that claimant failed to establish the likelihood of future economic harm as a result of his injury.

On appeal, claimant contends that the administrative law judge erred in denying him a nominal award. Employer responds, urging affirmance of the administrative law judge's denial of a nominal award.

Claimant contends he has established a significant possibility of future economic harm, as his higher wages are due to his working the night shift and to overtime work. Claimant contends that if he were to lose the overtime or to work on the day shift, his wages would fall below his pre-injury level. In *Rambo II*, the Supreme Court held that a nominal award is appropriate when the claimant's work-related injury has not diminished his present wage-earning capacity, but claimant establishes there is a significant potential that the injury will cause diminished wage-earning capacity in the future. The purpose of such awards is to account for Section 8(h)'s mandate that future effects of an injury be considered in calculating an injured employee's post-injury wage-earning capacity. *Rambo II*, 521 U.S. at 138, 31 BRBS at 61(CRT); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

The administrative law judge found that claimant did not establish the significant possibility that his wage-earning capacity will decrease in the future due to his injury. The administrative law judge stated that the record lacks any evidence that Fujitsu, claimant's post-injury employer, or the computer chip industry in general, may suffer a downturn. The administrative law judge noted his original findings that claimant had been promoted within a relatively short period of time and was apparently well thought of at Fujitsu. Order on Remand at 2; *see also Guthrie*, 30 BRBS at 52-53. The administrative law judge also inferred, in the absence of any evidence to the contrary, that claimant's position with Fujitsu is even more secure than it was at the time of the hearing in 1992, based on claimant's

seniority, if nothing else. The administrative law judge noted that claimant did not submit any new evidence on remand, although the administrative law judge provided claimant the opportunity to do so. *See generally Denton v. Northrop Corp.*, 21 BRBS 37 (1988). The administrative law judge therefore concluded that claimant's argument for a nominal award was too speculative as it rests on the supposition that the economy "might" change and adversely affect him. Indeed, claimant offered no evidence that his position is insecure or that he will lose overtime or his night shift position. *See Guthrie*, 30 BRBS at 52 & n.8. Inasmuch as the administrative law judge's findings are rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's denial of a nominal award.[1] *See generally Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001); *Buckland v. Dep't of Army*, 32 BRBS 99 (1997).

Accordingly, the administrative law judge's Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[1]We decline to address employer's argument that the Ninth Circuit erroneously assumed jurisdiction when claimant had not filed a cross-appeal and, therefore, that the administrative law judge lacked jurisdiction to decide the matter on remand.