

BRB Nos. 00-0149
and 01-0363

BRUCE A. HOLTE)
)
Claimant-Petitioner)
)
v.)
)
HALL-BUCK MARINE,) DATE ISSUED: Dec. 11, 2001
INCORPORATED)
)
and)
)
F.A. RICHARD & ASSOCIATES)
)
Employer/Carrier-)
Respondents) DECISION and ORDER

Appeal of the Decision and Order on Benefits Review Board Remand of Ellin O'Shea, Administrative Appeals Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Christopher M. Galichon (Depree Galichon & Associates), San Diego, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Benefits Review Board Remand (99-LHC-0349) of Administrative Law Judge Ellin O'Shea 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).

This is the second time this case is before the Board. To summarize the facts, claimant, a longshoreman working as a switchman, injured his left foot and knee, right ankle, left wrist and neck when he fell from a moving train on January 27, 1995. Except for the injury to his left foot, all of claimant's injuries have fully resolved. It was agreed by the parties that claimant became medically

stationary as of May 27, 1997. In her initial Decision and Order, the administrative law judge found that in addition to the periods of temporary total disability for which employer had already compensated claimant, claimant was entitled to temporary partial disability compensation from February 12 to April 26, 1995, and from May 1 to September 27, 1995.¹ See 33 U.S.C. §908(e). The administrative law judge further awarded claimant permanent partial disability compensation under the schedule for the disability sustained to his left foot. See 33 U.S.C. §908(c)(4), (19).

On appeal, the Board vacated the administrative law judge's findings regarding claimant's loss of wage-earning capacity from February 12 to April 26, 1995, and from May 1 to September 27, 1995, and remanded the case for the administrative law judge to fully consider the impact of claimant's medical condition on his ability to earn wages during these periods and to recalculate, if necessary, any loss in wage-earning capacity he may have suffered. In all other respects, the Board affirmed the administrative law judge's decision. *Holte v. Hall-Buck Marine, Inc.*, BRB No. 00-0149 (Oct. 5, 2000)(unpublished).

Subsequent to the issuance of the Board's Decision and Order, claimant filed a timely motion for reconsideration of the Board's decision. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Thereafter, the administrative law judge issued her Decision and Order on Benefits Review Board Remand in which she expanded on her prior analysis and reinstated her original findings. Claimant subsequently filed an appeal of this decision with the Board. BRB No. 01-0363. By Order dated January 18, 2001, the Board consolidated claimant's motion for reconsideration in BRB No. 00-0149, with his appeal of the administrative law judge's decision on remand, BRB No. 01-0363.

We first address the arguments raised by claimant in his motion for reconsideration of the Board's initial decision. BRB No. 00-0149. On reconsideration, claimant argues that the Board erred in affirming the administrative law judge's rejection of claimant's allegation regarding an additional lost fifty days of employment and the administrative law judge's determination that claimant suffered no loss in wage-earning capacity from August 29, 1996, to May 27, 1997, particularly from August 29, to September 29, 1996.

¹In her initial decision, the administrative law judge found that claimant suffered a loss in wage-earning capacity of \$93.97 during the subject 31.75 weeks.

Claimant's motion for reconsideration is denied. Contrary to claimant's initial assertion, the administrative law judge's determination that claimant was fully capable of performing his usual job duties during the relevant periods of time is supported by the record, including a lack of any medical restrictions placed upon claimant by his treating physicians, *see* EXS 7, 20, as well as the failure by claimant to present any evidence, testimonial or otherwise, that he required assistance to perform his job duties upon his return to work. It is well-established that the party seeking to establish that claimant's actual post-injury earnings are not representative of his post-injury wage-earning capacity bears the burden of proof on the issue. *Ward v. Cascade General Inc.*, 31 BRBS 65 (1995). In the instant case, the record supports the administrative law judge's conclusions, and claimant's contentions do not counter the fact that he, as the party bearing the burden, failed to prove that his actual wages are not reflective of his wage earning capacity during the period of August 29, 1996, through May 27, 1997. *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990).²

Claimant additionally alleges that it was illegal for the administrative law judge to discredit his testimonial summary of a log allegedly listing an additional 50 days of work time that he lost because of his injury. An administrative law judge is entitled to evaluate the credibility of all witnesses, is not bound to accept the opinion or theory of any particular one, and may draw her own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). While the administrative law judge acknowledged claimant's testimony regarding the allegedly lost 50 days, she noted that it was not persuasive in light of the Pacific Maritime Association records submitted into evidence by both parties, claimant's own explanation of how union job assignments were made, and her calculations of missed days based upon that explanation. *See* Decision and Order at 11. Based on the record before us, we find no reason to disturb the administrative law judge's credibility determinations or our previous decision. Accordingly, we reaffirm our previous decision on the issues raised by claimant on reconsideration. 20 C.F.R. §802.409.

²Contrary to claimant's contention, the mere fact that claimant continues to take medication to alleviate his pain does not entitle claimant to compensation as a matter of law.

We now consider the issues raised in claimant's appeal of the administrative law judge's decision on remand. BRB No. 01-0363. On appeal, claimant contends that the administrative law judge committed error by reversing her prior findings concerning whether his actual 1995 earnings, received between February 12 and April 26, 1995 and May 1, 1995, and September 27, 1995, properly reflected his wage-earning capacity during those periods of time. Contrary to claimant's assertions, however, the administrative law judge did not reverse her prior findings and conclusions regarding these periods of time but, rather, reinstated them with a lengthy analysis.³ Specifically, the administrative law judge stated in her decision on remand that it was her intention to clarify and reinstate her prior statements and award of compensation "without confusion and the conflict" of her initial decision. *See* Decision on Remand at 2.

In her initial decision, the administrative law judge had separated the contested periods of claimant's partial disability from the remaining periods of partial disability within the 1995 to May 30, 1997 time frame because she considered this period significantly different since claimant had not yet received an accurate diagnosis and treatment of his injury. As the administrative law judge noted on remand, her statements regarding the circumstances under which claimant worked during these periods, although confusing, did not support a conclusion that the actual wages earned during these periods of time were *not* reflective of his wage earning capacity but rather that that particular period should not be combined with the other periods of alleged disability. *See* Decision on Remand at 2. Furthermore, the administrative law judge noted that had she considered all periods of claimant's alleged partial disability as a single entity, claimant would have suffered no loss in wage-earning capacity throughout the entire period from the date of injury until May 27, 1997, because his post-injury wages, *en toto*, even adjusted for inflation, exceeded his pre-injury weekly wages. *See* Decision on Remand at 4-5. In segregating the periods of time noted by claimant, the administrative law judge found that although claimant's actual wages were reflective of his wage earning capacity, claimant had indeed suffered a loss and therefore was entitled to temporary partial disability compensation for these periods of time. *Id.*

Claimant bears the burden of proof in establishing the nature and extent of any disability sustained as a result of a work-related injury, *see Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRB 56 (1985), and must establish any loss in wage-earning capacity. *Long v. Director, OWCP*, 767

³Contrary to claimant's contention, there is no requirement that the administrative law judge reopen the record on remand.

F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). In reaching her decision on this issue, the administrative law judge gave full consideration to claimant's symptomology and pain, occasional loss of work, and limitations in his work abilities. In so doing she concluded that claimant failed to establish that any of these alleged limitations affected job opportunities or his performance to such an extent that the wages earned during these periods were not a fair and reasonable reflection of claimant's wage-earning capacity. Claimant presented no evidence other than his own testimony that his actual wages were not a true reflection of his wage-earning capacity. Decision on Remand at 3-5. Therefore, after expanding upon her original analysis, the administrative law judge determined that claimant was entitled to the same awards of compensation to which she found claimant to have been entitled in her initial Decision and Order.

Accordingly, the administrative law judge did not reverse her prior findings on remand. Rather, she reiterated her reasoning for separating the periods of alleged disability and reinstated her conclusion that claimant suffered a loss in wage-earning capacity during these periods of time. Claimant, without establishing reversible error, is essentially asking the Board to reverse the administrative law judge's weighing of the evidence; we decline to do so. *See Marinelli v. American Stevedoring Ltd.*, 34 BRBS 112 (2000). Therefore, the administrative law judge's determination on remand that claimant is entitled to temporary partial disability compensation from February 12, 1995 to April 26, 1995 and from May 1, 1995 to September 27, 1995, is affirmed.

Accordingly, claimant's motion for reconsideration is denied. The administrative law judge's Decision and Order on Benefits Review Board Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge