BRB No. 01-0586

ROBERT R. HAGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COOPER/T. SMITH STEVEDORING	)	DATE ISSUED: April 12, 2002
	)	
and	)	
	)	
I.T.O. CORPORATION	)	
	)	
Self-Insured	)	
Employers/Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Thomas R. Valkenet (Young & Valkenet, LLC), Baltimore, Maryland, for Cooper/T. Smith Stevedoring.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for I.T.O. Corporation.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-LHC-1492, 2000-LHC-1493) of Administrative Law Judge Linda S. Chapman 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 left knee on December 26, 1994, and his right knee on March 10, 1999, while employed as a heavy equipment operator by Cooper/T. Smith Stevedoring (Cooper) and I.T.O. Corporation (I.T.O.), respectively. The employers paid various periods of temporary total disability benefits. Although claimant was able to return to his usual work without restrictions after

surgeries for his left knee injuries, he was not able to return to longshore work after his 1999 right knee injury. On October 1, 1999, claimant elected a regular retirement. Claimant sought permanent total disability benefits for the cumulative effect of his knee injuries. For claimant's 1999 injury, the administrative law judge awarded claimant temporary total disability benefits from March 10 until August 24, 1999, his date of maximum medical improvement. Additionally, the administrative law judge awarded claimant scheduled permanent partial disability benefits for a 14 percent impairment to his left knee for the 1994 injury, to be paid by Cooper, and for a 20 percent impairment to the right knee for the 1999 injury, to be paid by I.T.O. *See* 33 U.S.C. §908(c)(2), (19).

On appeal, claimant challenges the administrative law judge's limiting him to two permanent partial disability awards under the schedule. Claimant maintains that the administrative law judge erroneously interpreted the Supreme Court's decision in *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980), in denying him permanent total disability benefits, or alternatively, permanent partial disability benefits for a loss of wage-earning capacity pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).

In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability is confined to the schedule at Section 8(c)(1)-(20) of the Act, *PEPCO*, 449 U.S. 268, 14 BRBS 363, and claimant is compensated based on the degree of his physical impairment. A claimant with a partial disability as a result of an injury to a scheduled member is not entitled to benefits for a loss of wage-earning capacity under Section 8(c)(21) of the Act. *Id.*; *see also Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). A claimant, however, who is permanently totally disabled by an injury to a scheduled member is not limited to a recovery under the schedule, but may receive permanent total disability benefits under Section 8(a), 33 U.S.C. §908(a). *PEPCO*, 449 U.S. at 278 n.17, 14 BRBS at 366 n.17. If claimant establishes that he cannot return to his former duties, and employer fails to establish suitable alternate employment, claimant is entitled to total disability benefits. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1982).

We reject claimant's contention that he is entitled to total disability benefits as a result of his two knee injuries merely because he is unable to return to his usual work due to his work injuries. Although claimant established his inability to perform his usual work, the parties also stipulated that claimant retains a residual wage-earning capacity of $300 per week. "Total disability" is defined as the "*complete incapacity* to earn wages in the same or any other employment." *Godfrey v. Henderson*, 222 F.2d 845, 849 (5th Cir. 1955) (emphasis added). The parties' stipulation that claimant retains a residual wage-earning capacity establishes as a matter of fact that claimant is not totally disabled.[1] *See Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). Thus, the administrative law judge did not err in awarding claimant partial disability benefits.

[1]Thus, the administrative law judge rationally stated that she need not reach the issue of whether I.T.O. established suitable alternate employment based on its labor market survey of May 1, 2000. Decision and Order at 18 n.10.

Moreover, the administrative law judge properly limited claimant to two recoveries under the schedule. Economic factors, *i.e.*, the loss of earning capacity a claimant sustains as a result of his injury, are not factored into a scheduled award, nor is claimant entitled to elect a higher recovery under Section 8(c)(21).[2] *PEPCO*, 449 U.S. at 274, 14 BRBS at 365; *Rowe*, 193 F.3d at 837, 33 BRBS at 162(CRT); *Gilchrist*, 135 F.3d at 919, 32 BRBS at 18-18(CRT). Under the schedule, claimant is entitled to receive benefits for a specific number of weeks, regardless of whether his earning capacity has actually been impaired. Conversely, as it appears in this case, a claimant can suffer an economic harm in excess of the compensation paid under the schedule. The *PEPCO* Court recognized this anomaly, but held that the plain language of the Act requires application of the schedule when an injury occurring to a member listed in the schedule results in partial disability. *PEPCO*, 449 U.S. at 283-284, 14 BRBS at 369. The Court stressed that only Congress has the authority to revisit this issue. *Id.* Consequently, as the administrative law judge's finding that claimant is limited to two permanent partial disability awards under the schedule is in accordance with law, is rational and is supported by substantial evidence, we affirm the administrative law judge's decision.

[2]The cases cited by claimant holding otherwise were decided prior to *PEPCO*, and therefore are of no precedential value on this point.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge