BRB No. 00-450

NILES WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

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

Robert J. Lynott (Thomas & Libowitz, P.A.), Baltimore, Maryland, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Granting Benefits (96-LHC-1604, 96-LHC-1605, 96-LHC-1606, 96-LHC-1607) of Administrative Law Judge John C. Holmes 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 case is on appeal to the Board for the third time. Claimant injured his right knee on April 4, 1992, and his left knee on January 19 and May 10, 1994, while working as a heavy equipment operator for employer. Claimant sought permanent total disability

[1]Claimant also alleged that he injured his back at work, but the Board previously affirmed

benefits for his knee injuries. The administrative law judge awarded claimant temporary total disability benefits from April 7 through September 30, 1992, for the right knee injury, and from May 10 through November 16, 1994, for the left knee injury. Additionally, the administrative law judge awarded claimant scheduled permanent partial disability benefits for a 40 percent impairment to the right leg for the 1992 injury, and for a five percent impairment to the left leg for the 1994 injury, 33 U.S.C. §908(c)(2), (19), and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

In *Williams v. I.T.O. Corp. of Baltimore, Inc.*, BRB Nos. 97-1217/A (June 4, 1998)(unpublished), the Board vacated the administrative law judge's finding that claimant did not establish his *prima facie* case of total disability and remanded the case to the administrative law judge for reconsideration of this issue. The administrative law judge was instructed to determine whether employer established the availability of suitable alternate employment if claimant's *prima facie* was established. The Board also vacated the administrative law judge's determination that claimant has a 40 percent impairment to the right leg and instructed the administrative law judge to discuss and weigh all relevant medical opinions with regard to this issue if he found that employer established the availability of suitable alternate employment. The Board affirmed the administrative law judge's award of permanent partial disability for a five percent impairment to the left leg conditioned upon whether employer established the availability of suitable alternate employment. In all other respects, the Board affirmed the administrative law judge's award of benefits, as well as his attorney's fee award.

In his decision on remand, the administrative law judge reinstated his initial decision, without following the Board's remand instructions. Thus, in *Williams v. I.T.O. Corp. of Baltimore, Inc.*, BRB No. 98-1646 (September 3, 1999)(unpublished), the Board again remanded the case to the administrative law judge and instructed him to follow the previous remand instructions.

In his second decision on remand, the administrative law judge found that claimant established his *prima facie* case of total disability and that employer established the availability of suitable alternate employment. Therefore, the administrative law judge again awarded claimant scheduled permanent partial disability benefits for a 40 percent impairment to his right leg and a five percent impairment to his left leg. Prior to the administrative law judge's issuance of his second decision on remand, claimant requested a new hearing. The administrative law judge did not address this request either by way of

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the administrative law judge's finding that claimant's back injury is not work-related. *Williams v. I.T.O. Corp. of Baltimore, Inc.*, BRB Nos. 97-1217/A (June 4, 1998)(unpublished), slip op. at 5-6.

[2]There was no time lost due to the January 19, 1994, left knee injury.

a separate order or in his second decision on remand.

In his present appeal, claimant challenges the administrative law judge's decision limiting him to two schedule awards. Claimant also contends that the administrative law judge erred in not addressing his request for a new hearing. Employer responds in support of the administrative law judge's decision.

We first address claimant's contention that the administrative law judge erred in not addressing his request for a new hearing. In cases that are remanded to an administrative law judge for reconsideration, the Board has held that if the credibility of a witness is at issue, and the presiding judge is unavailable to issue a decision, a party has the right to a *de novo* proceeding before the new administrative law judge if one is requested. *See Garmon v. Aluminum Co. of America, Mobile Works*, 29 BRBS 15 (1995)(decision on reconsideration); *Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981); *see also Pigrenet v. Boland Marine & Mfg. Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981); 5 U.S.C. §554(d); 20 C.F.R. §702.332. Thus, it follows that if a case is remanded for a decision on the existing record, and the presiding judge is available to issue a decision, a party does not have a right to a *de novo* proceeding.

In the instant case, claimant requested a new hearing in a letter dated October 25, 1999, addressed to employer's counsel and courtesy copied to the administrative law judge. The date stamped copy of the letter indicates it was received by the Office of Administrative Law Judges the next day. *See* October 25, 1999, letter to Attorney Robert Lynott. The administrative law judge issued his second decision on remand two months later on December 13, 1999, without addressing this letter. Under the circumstances, however, any error by the administrative law judge is harmless. In his letter claimant stated two reasons for his request. The first was simply the passage of time, as claimant alleged that after three years it would be difficult for the judge to remember the details of testimony, and that the issue involved credibility. However, as the administrative law judge who presided at the hearing was available to issue the decision on remand, a new hearing was not required. The passage of time does not, in and of itself, demonstrate the need for a new hearing, particularly since testimony was preserved through a written transcript and claimant's credibility was not at issue. In fact, the only issues on remand involved weighing the expert opinions of record, which was properly done on the existing record.

The second basis asserted in the letter alleged that claimant had undergone another knee surgery; thus, claimant stated it was only fair that both sides be allowed to submit updated medical evaluations. Claimant at no time alleged that he had new evidence to

[3]We note that the letter was neither addressed to the administrative law judge nor was it in the form of a motion to him.

submit which would affect the outcome of the case. If, as claimant alleges, he has undergone additional surgery and has new medical evidence to offer, he may request modification pursuant to Section 22 of the Act, 33 U.S.C. §922, within one year after the date of the last payment of benefits or the entry of a final decision on the claims. *See Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 30 BRBS 1 (CRT)(1995); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985).

We next address claimant's challenge to the administrative law judge's award of benefits. Claimant contends that the administrative law judge erred in failing to discuss and weigh the opinion of Dr. Anderson, claimant's vocational expert, in determining that employer established the availability of suitable alternate employment based on the opinion of Mr. Smolkin, employer's vocational expert. Once claimant establishes an inability to perform his usual employment because of a job-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). Where employer establishes the availability of suitable alternate employment in a case involving scheduled injuries, as here, claimant is not entitled to permanent total disability benefits but is limited to scheduled awards for his knee impairments. *See Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986); *Brandt v. Avondale Shipyards, Inc.*, 16 BRBS 120 (1984). An administrative law judge is not required to determine claimant's loss in wage-earning capacity in cases paid under the schedule, as claimant's post-injury wage-earning capacity is not relevant to claimant's entitlement to a schedule award. *See PEPCO*, 449 U.S. 268, 14 BRBS 363; *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT)(4th Cir. 1998); *see Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). In arriving at a decision regarding the extent of claimant's disability, the administrative law judge is entitled to weigh the evidence and to draw his own inferences from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

In the instant case, the administrative law judge found that employer established the availability of suitable alternate employment based on Mr. Smolkin's opinion that claimant could perform the jobs as a counselor with Harford County and a part-time van driver with Cecil County. Contrary to claimant's contention, the administrative law judge discussed and weighed Dr. Anderson's opinion but acted within his discretion in crediting the opinion of Mr. Smolkin, who testified that claimant could physically perform the position of counselor with Harford County, over the contrary opinion of Dr. Anderson, because Mr. Smolkin actually talked with the prospective employer about the physical requirements of the job while Dr. Anderson did not. *See Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988); Decision and Order on Remand Granting Benefits at 10-12; Emp. Ex. 5; Cl. Ex. 12B; Tr. at 137, 258-263. Moreover, the administrative law judge properly

relied on the part-time position as van driver with Cecil County as suitable for claimant as the fact that it is part-time employment does not preclude it from constituting suitable alternate employment. *See Royce v. Elrich Constr. Co.*, 17 BRBS 157 (1985); Decision and Order on Remand Granting Benefits at 12; Emp. Ex. 5; Tr. at 243. Thus, as the administrative law judge's finding that employer established the availability of suitable alternate employment is rational and supported by substantial evidence, it is affirmed. We therefore reject claimant's contention that the administrative law judge erred in limiting claimant to two scheduled awards based solely on the percentage of permanent impairment. *PEPCO*, 449 U.S. 268, 14 BRBS 363.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[4]Claimant does not challenge the finding that he has a 40 percent impairment to his right leg. Thus, this finding is affirmed. As noted *supra*, the Board affirmed the award based on a five percent impairment to claimant's left leg conditioned on the finding of suitable alternate employment.