BRB No. 92-0968

PAUL B. WHALEN, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of George G. Pierce, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Michelle Jodoin LaFond and Patricia A. Lerwick (Norman, Hanson & DeTroy), Portland, Maine, for self-insured employer.

Mark Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (91-LHC-0629) of Administrative Law Judge George G. Pierce 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 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured on February 10, 1955, in the course of his employment with employer when he stepped on cardboard covering a hole through which he fell eighty feet. Claimant suffered internal injuries, including damage to his urethra. Following his injury, claimant underwent surgery to repair his urethra and was hospitalized for approximately three to four weeks. Thereafter, claimant returned to his usual employment with employer, but continued to miss work occasionally for treatment necessitated by the urethral injury. Employer, under the state act, voluntarily paid claimant compensation for temporary total disability from February 18, 1995 to March 5, 1955, and medical benefits until February 10, 1965.[1]

The administrative law judge found that claimant's claim, filed thirty-five years after the injury, is not barred either by Section 13 of the Act, 33 U.S.C. §913, or by the doctrine of laches. The administrative law judge found further that inasmuch as claimant testified that his condition had worsened in recent years, requiring more frequent treatments, claimant has not yet reached maximum medical improvement and therefore his disability is temporary in nature. Thus, the administrative law judge denied claimant cost-of-living adjustments because claimant's condition is not permanent. The administrative law judge found that because of the treatment and surgery claimant periodically requires, he misses work and is unable to earn the wages he did prior to the injury, and he awarded claimant temporary total disability benefits for the dates that claimant has missed work in order to receive treatment, as well as medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.[2]

[1]The Maine act provides such benefits for a maximum of ten years. Decision and Order at 3.

[2]The parties stipulated that claimant was temporarily totally disabled during the following periods: December 29, 1969 to January 26, 1970; December 11, 1989 to January 15, 1990; and April 27, 1990 to June 24, 1990. The administrative law judge accepted these stipulations. Decision and Order at 2. In addition to these dates, the administrative law judge awarded claimant temporary total disability for the following periods: December 23, 1969; September 30, 1986 to October 1, 1986; July 21, 1987; February 11, 1988 to February 29, 1988; November 13, 1989 to December 10, 1989; February 5, 6 and 14, 1990; and March 11 and 19, 1990. Decision and Order at 6-7.

On appeal, claimant contends that the administrative law judge erred in finding that his condition is not permanent. Claimant contends he is entitled to permanent total disability benefits on the days he missed work, and that his compensation should be based on his average weekly wage adjusted to include statutory cost-of-living adjustments. The Director, Office of Workers' Compensation Programs (the Director), responds in support of claimant's contention that his condition is permanent. She argues, however, that claimant is not entitled to permanent total disability benefits and the associated cost-of-living adjustments, but contends that claimant should be compensated for a permanent partial disability. Thus, the Director contends that the case must be remanded for the administrative law judge to determine claimant's loss in wage-earning capacity resulting from the work he misses due to periodic medical treatment. Employer responds, urging affirmance of the administrative law judge's decision.

We agree that the administrative law judge erred in finding that claimant's condition is still temporary thirty-five years after the accident. A permanent disability is one that has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649, *petition for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Permanent does not mean unchanging. Where an employee's condition only deteriorates after the condition became stable, permanency may be found. *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986).

Following the initial period of recovery, claimant was required to undergo urethral dilations to prevent formation of a stricture. The frequency of the dilations decreased from daily at their inception in 1955 to weekly and then monthly. In a report dated March 7, 1961, Dr. Anderson stated that claimant should have a dilation every six months, and claimant has subsequently undergone dilations at least every three to six months. Claimant also had various surgical procedures during 1987 through 1990. Claimant testified that in the last five years his condition is worsening, requiring more treatment.

It is clear from the record that claimant's condition is chronic as it has lasted for thirty-five years, and although it may periodically vary and become worse, the condition is not merely awaiting a normal healing period. *See Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979). Claimant's condition, therefore, is permanent within the meaning of the Act. *See Davenport*, 18 BRBS at 196-197. That claimant continues to undergo procedures does not militate against such a holding, as there is no doctor's opinion of record stating that his underlying condition will improve as a result. *See Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*). Rather, the procedures are undertaken to prevent claimant's condition from worsening. *See* Cl. Ex. 17. Consequently, we reverse the administrative law judge's finding, and hold, as a matter of law, that claimant's condition is permanent. We must remand the case for the administrative law judge to determine the onset of claimant's permanent

disability, based on the medical evidence of record.[3] *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Nonetheless, we cannot agree that claimant is entitled to permanent total disability benefits for the days he missed work to undergo medical treatment. In order to be entitled to total disability benefits, claimant must establish he is unable to return to his usual work. *See generally CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). Although claimant is unable to work when he is undergoing treatment or surgery, his ability to perform the duties of his job is unimpaired by the residuals of the work injury. Thus, on the facts presented herein, the appropriate method of compensating claimant is an award of permanent partial disability benefits under Section 8(c)(21), 33 U.S.C. §908(c)(21), as the Director suggests, and we must remand the case to the administrative law judge for further findings.[4]

Under Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post wage-earning capacity. Because claimant periodically misses work for treatment, the administrative law judge correctly found that claimant has a loss in wage-earning capacity. *See* Decision and Order at 6. Generally, in order to neutralize the effects of inflation, the administrative law judge must adjust post-injury wage levels to the level paid pre-injury so they may be compared with the pre-injury average weekly wage, which in this case is $70. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986). In this case as claimant is employed in the same job as he had at the time of injury, this adjustment could result in a finding that claimant has no loss in actual wages. The proper inquiry, however, is whether claimant's injury results in a loss in his wage-earning *capacity*, and not a loss in his actual wages. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 575, 8 BRBS 818, 823 (1st Cir. 1975); *see also Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 714, 21 BRBS 51 (CRT) (11th Cir. 1988).

[3]Although claimant suggests two possible dates of permanency, March 7, 1955, the date claimant returned to work after the initial injury, or March 7, 1961, the date a doctor reduced his need for treatment to every six months, the Board is not empowered to make factual determinations. 33 U.S.C. §921(c)(3); 20 C.F.R. §802.301. Moreover, the date a claimant returns to work is not determinative of the date a condition becomes permanent. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988).

[4]The administrative law judge noted in the Decision and Order that claimant sought either permanent total disability or permanent partial disability benefits. Although, on appeal, claimant seeks permanent total disability benefits, we note that a claim for total disability benefits implicitly includes a claim for permanent partial disability. *See Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985).

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury wages if these earnings fairly and reasonably represent his wage-earning capacity. If they do not, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity, taking into account such factors as his physical condition, age, education, industrial history, earning power on the open market, and any other reasonable variable that can form a factual basis for the decision. *See, e.g., Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). On remand, therefore, the administrative law judge should consider relevant factors and fashion an award for permanent partial disability under Section 8(c)(21) consistent with law.[5]

Given our holding that claimant is entitled to an award for permanent partial disability benefits, we must reject claimant's contention that he is entitled to cost-of-living adjustments. Under Section 10(h) of the Act, 33 U.S.C. §910(h), compensation for permanent total disability or death which commenced or occurred prior to the October 27, 1972, enactment date of the 1972 Amendments is upgraded beyond the pre-amendment maximum. *See generally Director, OWCP v. Bath Iron Works Corp.*, 885 F.2d 983, 22 BRBS 131 (CRT) (1st Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). As claimant is not entitled to permanent total disability benefits, he is not entitled to adjustments under Section 10(h). Similarly, adjustments under Section 10(f), 33 U.S.C. §910(f), are unavailable as Section 10(f) applies to permanent total disability or death benefits resulting from injuries occurring after the effective date of the 1972 Amendments.

Accordingly, the Decision and Order-Awarding Benefits is reversed insofar as it finds that claimant's condition is not permanent. The case is remanded to the administrative law judge for findings regarding the onset of claimant's permanent disability and for consideration of an award for permanent partial disability. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

[5]For example, if the administrative law judge finds that claimant is absent from work ten percent of the time because of his treatment, he may find that claimant has a ten percent loss in wage-earning capacity.