

BRB No. 93-1333

JOAN TUTHILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	
ELECTRIC BOAT DIVISION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge,  
United States Department of Labor.

James P. Berryman (Suisman, Shapiro, Wool, Brennan & Gray), New London, Connecticut,  
for claimant.

Edward J. Murphy (Murphy & Beane), Boston, Massachusetts, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-1622) of Administrative Law Judge Ainsworth H. Brown awarding benefits 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 law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured her head and neck on December 27, 1985, while working in the shipyard.

Claimant was paid temporary total disability benefits from January 3, 1986 to March 16, 1986, and from May 1, 1986 to June 7, 1991. Claimant was paid temporary partial disability compensation from June 8, 1991 to August 3, 1991, and from December 7, 1991 through the date of the hearing.

In his Decision and Order awarding benefits, the administrative law judge found that claimant's condition reached maximum medical improvement on November 20, 1986 and he awarded claimant permanent partial disability benefits from November 20, 1986.<sup>1</sup> The administrative law judge also found that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

On appeal, claimant contends that she is entitled to total disability benefits through July 31, 1991, as she returned to gainful employment on August 1, 1991. Claimant argues that the administrative law judge erred in finding that November 20, 1986, the date of maximum medical improvement, is the date claimant's disability became partial, citing *Palombo v. Director, OWCP and General Dynamics Corp.*, 937 F.3d 70, 25 BRBS 1 (CRT) (2nd Cir. 1991). Employer responds, agreeing that *Palombo* applies, but contending that claimant's entitlement to total disability benefits ended on May 1, 1991, the date she received her associates degree in computer science and became capable of re-entering the job market.

We agree with claimant's contention that the administrative law judge applied the incorrect standard in concluding that claimant's partial disability began on the date of maximum medical improvement. The date of maximum medical improvement separates temporary from permanent disability, not total from partial disability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990). Further, the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, has held that total disability does not become partial until the date on which suitable alternate employment is shown to be available. *Palombo*, 937 F.3d at 70, 25 BRBS at 1 (CRT); *See also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Employer's contention that claimant is entitled to total disability benefits only through May 1, 1991, when she received her degree, lacks merit as there is no evidence of alternate employment until August 1, 1991, the date claimant began working as a production assistant for an advertising company.<sup>2</sup> Thus, claimant is entitled to receive permanent total disability benefits from November 20, 1986 to July 31, 1991, and permanent partial disability benefits thereafter. We therefore modify the administrative law judge's decision to provide that claimant is entitled to permanent total disability benefits from November 20, 1986 to July 31, 1991, and to permanent partial disability benefits thereafter.

Accordingly, the administrative law judge's Decision and Order awarding benefits is

---

<sup>1</sup>The parties stipulated that claimant's average weekly wage is \$526.47 and the administrative law judge found that claimant's post-injury wage-earning capacity is \$198.80.

<sup>2</sup>The labor market survey of record is not useful in determining the date claimant's total disability ended, as the survey is dated March 2, 1992, and claimant began working on August 1, 1991. Claimant's Ex. 1. Moreover, the survey was performed solely to ascertain the wages claimant's post-injury job paid at the time of injury. *Id.*

modified to reflect claimant's entitlement to permanent total disability benefits from November 20, 1986 through July 31, 1991. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge