BRB No. 09-0773

EDWARD M. BOGDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 06/14/2010
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for claimant.

Jean E. Novak (Strassburger McKenna Gutnick & Gefsky), Pittsburgh, Pennsylvania, for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (2008-LHC-01403) of Administrative Law Judge Daniel L. Leland 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related back injury on February 24, 2002. He continued working for employer until May 8, 2002, and has not returned to gainful employment since that time. The parties stipulated that claimant has received the following benefits under the Act for this back injury: temporary total disability benefits from May 9, 2002 through March 18, 2003, 33 U.S.C. §908(b), permanent total disability benefits from March 19, 2003 through October 26, 2004, 33 U.S.C. §908(a), and permanent partial disability benefits from October 27, 2004, and continuing. 33 U.S.C. §908(c)(21).[1] Claimant additionally sought benefits under the Act for a 30.938 percent binaural hearing loss, based on a May 3, 2002 audiogram. 33 U.S.C. §908(c)(13). The parties stipulated that claimant sustained a work-related hearing loss on or about May 3, 2002, but disagreed as to the extent of that loss and the effect of claimant's receipt of compensation for his back injury on the amount of benefits due for any work-related hearing loss.[2]

In his Decision and Order, the administrative law judge found the May 3, 2002 audiogram, which demonstrated a 30.938 percent binaural impairment, to be the most reliable audiogram of record, and he accordingly found claimant entitled to 61.876 weeks of permanent partial disability benefits for his hearing loss commencing on May 3, 2002. The administrative law judge determined, however, that with the exception of the period from May 3 through May 8, 2002, the scheduled award for claimant's work-related hearing loss is subsumed in the total disability award for claimant's back injury and, thus, is not payable. The administrative law judge therefore awarded claimant six days of

[1] Previous proceedings regarding claimant's claim for benefits under the Act for his back injury were finally resolved by the Board's decision in *Bogden v. Consolidation Coal Co.*, BRB No. 06-0193 (Nov. 9, 2006) (unpub.).

[2] Employer conceded that claimant was entitled to hearing loss benefits from May 3 to May 8, 2002, when it commenced payment of total disability benefits to claimant for his work-related back injury. *See* Decision and Order at 10-11; Emp. Resp. Br. at 3.

benefits for his hearing loss subject to the statutory maximum compensation rate in effect at the time his disability commenced in 2002. 33 U.S.C. §§908(c)(13), 906(b)(1).

On appeal, claimant contends that the administrative law judge erred as a matter of law in finding that claimant's entitlement to a scheduled award for his hearing loss was terminated by his receipt of total disability benefits for a different injury.[3] Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging that the administrative law judge's decision be modified to reflect claimant's entitlement to the remainder of the permanent partial disability benefits due under the Act as a result of his hearing loss once his period of total disability ceased.

Claimant first contends that the subsequent onset of total disability resulting from a different injury, in this case an injury to his back, should have no effect on his entitlement to ongoing permanent partial disability benefits for his work-related loss of hearing. Acknowledging contrary Board precedent, *see B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007), claimant urges the Board to reconsider its holding in

[3] Claimant makes two additional arguments on appeal. First, claimant challenges the administrative law judge's application of the statutory maximum rate in effect at the time his disability commenced in 2002 rather than the maximum rate in effect at the time compensation was first awarded in 2009. Recognizing that the administrative law judge's application of the 2002 maximum rate is consistent with the Board's construction of Section 6(b), (c) of the Act, 33 U.S.C. §906(b), (c), *see Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006), claimant notes his disagreement with *Reposky* in order to preserve this issue for judicial review. Pursuant to the decision in *Reposky*, we affirm the administrative law judge's application of the 2002 maximum compensation rate under Section 6(b)(1). *See also J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 99-100 (2009); *C.H. [Heavin] v. Chevron U.S.A., Inc.*, 43 BRBS 9, 15-17 (2009).

Claimant also contends that the administrative law judge abused his discretion in denying claimant's motion for leave to file an additional post-hearing brief responding to arguments presented in employer's post-hearing brief regarding the issue of claimant's entitlement to concurrent benefits for his back injury and hearing loss. We disagree. The administrative law judge did not abuse his discretion in adhering to the simultaneous post-hearing briefing schedule agreed to by both claimant's and employer's counsel at the hearing. *See* Tr. at 39. Claimant's counsel was aware of the concurrent benefits issue to be briefed, *see id* at 6-7, and presented argument discussing the relevant precedents in his post-hearing brief; thus, claimant was not prejudiced by the administrative law judge's denial of his request to present additional argument on the concurrent benefits issue. *See generally Touro v. Brown & Root Marine Operators*, 43 BRBS 148 (2009).

that case and hold that claimant's scheduled hearing loss award may be paid concurrently with his award of total disability benefits for his back injury.[4] We need not address this contention, however, as we agree with claimant's alternative argument, in which the Director concurs, that the administrative law judge's finding that claimant's entitlement to benefits for his hearing loss terminated permanently once he became totally disabled by his back injury rests on a misinterpretation of the Board's decision in *Stinson.*

Claimant argued unsuccessfully before the administrative law judge that, pursuant to *Stinson,* 41 BRBS 97, the scheduled award for his hearing loss lapsed during his period of total disability and then resumed once his back condition was no longer totally disabling. *See* Decision and Order at 12. The administrative law judge found that *Stinson* does not support claimant's position, relying on language in that case that "[c]laimant may receive a scheduled award for hearing loss for the appropriate number of weeks up to the point he became totally disabled, at which point any scheduled hearing loss would terminate." *Stinson,* 41 BRBS at 100; *see* Decision and Order at 12. As claimant correctly contends, however, the use of the word "terminate" in the preceding sentence must be viewed in the context of that case which, in contrast to the present case, did not involve a change in the extent of claimant's disability from total to partial. Specifically, the Board in *Stinson* discussed prior caselaw regarding awards of concurrent benefits, stating that a claimant cannot receive permanent partial disability benefits for a loss of hearing concurrently with total disability benefits for a different injury. *Id.* at 98. Relevant to the present case, as noted by both claimant and the Director, the Board went on to state that "[i]f the total disability lapses, however, the scheduled award can be paid." *Id., citing Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 235 and n.4 (1985). Although the administrative law judge cited this statement, *see* Decision and Order at 11, he did not recognize that it is directly applicable here, as claimant's permanent total

[4] In *Stinson,* 41 BRBS 97, the Board held that the administrative law judge erred in finding that the claimant was entitled to receive concurrent hearing loss benefits and total disability benefits for a back injury where the hearing loss claim was based on an audiogram which postdated the onset of permanent total disability. *Id.* at 98-99. The Board remanded the case, however, for the administrative law judge to consider the claimant's entitlement to a hearing loss award based on audiograms in the record which predated the onset of total disability. The Board stated in this regard that the claimant could receive hearing loss benefits for the appropriate number of weeks up to the point he became totally disabled. *Id.* at 99-100.

disability award ended as of October 27, 2004, and was replaced by an award of permanent partial disability benefits based on claimant's loss in wage-earning capacity.[5]

As the Board explicitly recognized in *Stinson* that where a claimant's total disability award lapses, a claimant's scheduled hearing loss award can be paid in full, 41 BRBS at 98, the administrative law judge's determination in this case that upon the commencement of the total disability award, claimant permanently lost his entitlement to his hearing loss award cannot stand. We therefore hold that claimant is entitled to the resumption of his scheduled permanent partial disability award for his work-related loss of hearing as of October 27, 2004, the date on which his permanent total disability award for his back injury converted to a permanent partial disability award for that injury. *Id.; see also Turney,* 17 BRBS at 235 and n.4. As of that date, October 27, 2004, claimant is entitled to receive his Section 8(c)(13) hearing loss award concurrently with his Section 8(c)(21) award of permanent partial disability benefits for his back injury. *See I.T.O Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Padilla v. Pedro Boat Works,* 34 BRBS 49 (2000); *Turney*, 17 BRBS at 235.

With regard to the calculation of these concurrent awards, the United States Court of Appeals for the Fourth Circuit's decision in *Green* is instructive. In *Green,* the claimant injured his left ankle and left shoulder in a work accident. Both injuries independently foreclosed the claimant from performing his pre-injury job. The claimant sustained a 25 percent impairment to his foot, entitling him to scheduled benefits of two-thirds of his average weekly wage of $599, or about $400 per week, for 51.25 weeks. *See* 33 U.S.C. §908(c)(4), (19). He was also entitled to benefits under Section 8(c)(21) for his disabling shoulder injury, and this award at two-thirds of the difference between the his average weekly wage and his post-injury wage-earning capacity was $200 per week. *See* 33 U.S.C. §908(c)(21), (h).

The Fourth Circuit first held that the claimant cannot receive compensation for the combination of his disabilities in an amount that exceeds the rate for permanent total disability. *See* 33 U.S.C. §908(a)(compensation for permanent total disability is two-

[5] Thus, the Board's decisions in *Rathke v. Lockheed Shipbuilding & Constr. Co.,* 16 BRBS 77 (1984); *Bouchard v. General Dynamics Corp.,* 14 BRBS 839 (1982); *Mahar v. Todd Shipyards Corp.,* 13 BRBS 603 (1981); and *Tisdale v. Owens-Corning Fiber Glass Co.,* 13 BRBS 167 (1981), *aff'd mem sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied,* 462 U.S. 1106 (1983), are not dispositive of the issue presented in this case, as those cases did not involve the situation where the claimant's entitlement to total disability benefits ceased and he became only partially disabled.

thirds of average weekly wage). *Green*, 185 F.3d at 243, 33 BRBS at 142(CRT). The court also held, however, that a claimant cannot be deprived of full compensation for each of the permanent partial disabilities. *Id.* The court therefore held that the claimant was entitled to his full Section 8(c)(21) ongoing award of $200 per week, as well as scheduled benefits for the ankle injury up to the total disability rate of $400 per week. In order to fully compensate the ankle injury, the court extended the number of weeks over which the employer was to pay the scheduled award.[6] *Id.* The Board followed *Green* in *Padilla*, 34 BRBS 49, in affirming the administrative law judge's concurrent award of benefits pursuant to Section 8(c)(21) and Section 8(c)(2), with the number of weeks for the scheduled award extended so that claimant would not receive benefits greater than those for permanent total disability.

Applying *Green* in this case, as it provides the only relevant precedent, we modify the administrative law judge's decision to award claimant concurrent permanent partial disability benefits pursuant to Section 8(c)(21) and Section 8(c)(13). The maximum payable for claimant's combined disabilities is $1,011.67,[7] two-thirds of his average weekly wage of $1,517.50. Claimant is entitled to receive ongoing permanent partial disability benefits, at the stipulated weekly compensation rate of $894.96, payable during the continuation of his permanent partial disability due to his back injury pursuant to Section 8(c)(21) of the Act. Claimant also is entitled to scheduled benefits for his hearing loss commencing on October 27, 2004, for the difference between claimant's unscheduled permanent partial disability of $894.96 and the total disability rate of

[6] The claimant's total disability rate was $400 per week. Claimant was awarded $200 per week in ongoing benefits for the loss in wage-earning capacity due to the shoulder injury and $200 per week for the ankle impairment concurrently. The payment period for the scheduled award was doubled to 102.5 weeks to permit full payment of the scheduled award. *Green*, 185 F.3d at 243, 33 BRBS 142(CRT); *see* 33 U.S.C. §908(c)(4), (19) (25 percent of foot award runs for 51.25 weeks at two-thirds of average weekly wage).

[7] This figure represents the maximum benefit for total disability and not the maximum compensation rate under Section 6(b)(1), which is $966.08. 33 U.S.C. §906(b)(1); *see* n.2 *supra.* However, Section 6(b)(1) applies in determining the maximum amount of each of the two awards individually, not the total amount of the two awards combined. *Stevedoring Services of America v. Price*, 382 F.3d 878, 889-892, 38 BRBS 51, 57-59(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). Thus, claimant may receive concurrent awards up to a maximum of $1,011.67 for the combined award. *Id.*

$1,011.67.[8] This award is payable weekly until the entire amount due for claimant's scheduled 30.938 percent hearing loss is paid in full.[9] *Green*, 185 F.3d at 242-243, 33 BRBS at 142(CRT); *Padilla*, 34 BRBS at 52-53.

Accordingly, the administrative law judge's Decision and Order is modified to award compensation as stated herein. In all other respects, 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

_____
BETTY JEAN HALL
Administrative Appeals Judge

[8] Claimant's Section 8(c)(21), 33 U.S.C. §908(c)(21), award at a $894.96 weekly compensation rate plus a hearing loss award at a compensation rate of $116.71 equals $1,011.67, the maximum compensation payable pursuant to Section 8(a), 33 U.S.C. §908(a).

[9] Pursuant to the statutory formula and the administrative law judge's findings, claimant is entitled to a total award equal to $966.08 per week for 61.876 weeks, or $59,777.17, payable in weekly installments as stated above until the total amount is paid. Employer is entitled to a credit for the scheduled benefits paid prior to the onset of claimant's permanent total disability.