BRB No. 99-0250

KENNETH M. STEPHENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, 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 (97-LHC-2758) of Administrative Law Judge Richard K. Malamphy 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Claimant, a pipefitter, was diagnosed with bilateral carpal tunnel syndrome in late 1994. Surgery was performed on each arm, and claimant returned to work in late October 1995. Employer paid temporary total disability compensation and permanent partial disability benefits under the schedule set forth in Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1). Claimant was laid off on November 17, 1995, during a general cutback by employer, and was recalled to work by employer on June 23, 1997. Claimant filed a claim seeking temporary partial disability benefits, as he alleged his condition had not reached permanency and as he earned lower wages in other positions during the lay-off. Employer contended claimant had reached maximum medical improvement before the layoff, and was, therefore, limited to an award under the schedule. The administrative law judge found that claimant's condition reached permanency on October 24, 1995, and that inasmuch as the parties stipulated that claimant had a wage-earning capacity of $170 per week during the layoff, claimant is limited to a scheduled award under the United States Supreme Court's holding in *Potomac Electric Power Co. (PEPCO) v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1983).

Claimant appeals the denial of temporary partial disability benefits, contending that his condition continued to improve until his recall to work in 1997, and thus, that the administrative law judge erred in finding claimant reached permanency in 1995. Employer responds, urging affirmance.

We reject claimant's contention, as the administrative law judge rationally found that claimant reached maximum medical improvement prior to the layoff. The record reflects an October 24, 1995, report from Dr. Lesnick, claimant's treating physician, in which the doctor states that claimant feels he has completely recovered, and is ready to work. The report further reflects that Dr. Lesnick's examination of claimant revealed that the incisions are completely healed, non-tender, and claimant has returned to regular duty. CX 1 at 4. Dr. Lesnick told claimant, however, that he does not assign disability ratings.[1] Thereafter claimant was seen on November 1, 1995, by Dr. Baddar, who performed an examination of claimant solely for the purpose of rating his disability. EX 5(a). He determined that claimant's condition had stabilized and he assigned claimant a ten percent impairment rating to each upper extremity, which employer paid. *Id.*; CX 4. Inasmuch as the record evidence supports the administrative law judge's determination that claimant's condition was permanent as of the date of Dr.

[1]The administrative law judge noted that several days after the lay-off, Dr. Lesnick recommended the use of gloves while grinding in response to claimant's complaints of tingling, but he did not recommend other restrictions. CX 1 at 3.

Lesnick's examination, that finding is affirmed. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 414, 417 (1989); *see also Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981). That claimant continued to complain of occasional pain and at the time of the recall, employer's clinic believed claimant to be under continuing restrictions, do not affect the finding that claimant reached maximum medical improvement at the earlier date. *See generally Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197 (1998).

Thus, as substantial evidence supports the administrative law judge's finding that claimant's condition was permanent at the time of the layoff, and as the parties stipulated to claimant's wage-earning capacity during the period of the layoff,[2] the administrative law judge properly limited claimant to an award under the schedule. *PEPCO*, 449 U.S. at 268, 14 BRBS at 363 (1983); *see generally Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

[2]Based on this, there is no claim for total disability during the layoff in this case. *See Norfolk Shipbuilding & Dry Dock Corp. v. Hord,* F.3d , 1999 WL 957694 (4th Cir. Oct. 19, 1999).

Administrative Appeals Judge