



BRB No. 15-0199

JOHN SCARBROUGH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHANNON WAGNER dba SEATTLE	)	DATE ISSUED: <u>Feb. 23, 2016</u>
MARINE CONSTRUCTION	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Nina M. Mitchell (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Compensation and Benefits (2013-LHC-00937) of Administrative Law Judge Richard M. Clark 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 rational, supported by substantial evidence, rational, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 10, 2012, claimant was hired by employer to perform tile work on bathrooms aboard the vessel *Ocean Peace*, which was under construction. At the time of his hiring, it was understood that, as claimant was to be employed only for this specific project, his employment with employer would be temporary in nature. On January 18, 2012, claimant slipped and fell while entering the vessel. Claimant proceeded to work for four hours, after which his tile work was completed. Although the specific project for which employer hired claimant was finished, employer retained claimant's services as a carpenter and painter until February 13, 2012. Claimant testified that, between the date of the work incident, January 18, and the date of his termination, February 13, 2012, he sought medical care for back and knee pain. All of employer's work on the *Ocean Peace* was completed on February 19, 2012.

Claimant subsequently commenced working for Crestline Trucking (Crestline) as a truck broker on March 1, 2012. Claimant continued to seek medical treatment for his knee complaints and, on May 7, 2012, he underwent surgery on his right knee. Claimant's employment with Crestline ended on May 14, 2012. On May 18, 2012, claimant filed a claim for benefits under the Act seeking temporary total disability benefits from February 14 to March 1, 2012, temporary partial disability compensation from March 1 to May 14, 2012, and ongoing temporary total disability compensation commencing May 14, 2012.

In his Decision and Order, the administrative law judge found that, following surgery, claimant's knee condition reached maximum medical improvement on July 26, 2012, with a 12 percent impairment, but that claimant's back condition remained temporary in nature. The administrative law judge further found that claimant did not establish that he could not return to his usual employment duties; specifically, the administrative law judge concluded that employer released claimant on February 13, 2012, because claimant's project for employer had been completed and that claimant voluntarily left his later position with Crestline. The administrative law judge awarded claimant permanent partial disability benefits under the schedule for a 12 percent impairment to claimant's right knee, as well as continuing medical benefits for claimant's work-related back condition. 33 U.S.C. §§907, 908(c)(2).

On appeal, claimant challenges the administrative law judge's denial of temporary total disability benefits. Employer responds, urging affirmance of the administrative law judge's decision in its entirety. Claimant has filed a reply brief.<sup>1</sup>

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<sup>1</sup> In his reply brief, claimant withdrew his claim for temporary partial disability benefits during the period of March 1 to May 14, 2012. *See* Cl. Reply Br. at 5.

Claimant first contends the administrative law judge erred in failing to award him temporary total disability benefits from February 14 to March 1, 2012, the day he commenced employment with Crestline. In order to make out a prima facie case of total disability, claimant must establish that he is unable to perform his usual work due to the work injury. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9<sup>th</sup> Cir. 2010); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9<sup>th</sup> Cir. 1988).

We affirm the administrative law judge's finding that claimant was released from his employment on February 13, 2012, because his project was completed and employer no longer required claimant's services, and not as a result of his work injury or an inability to perform his employment duties. *See* Decision and Order at 33-34, 40. In this regard, Mr. Wagner, employer's owner, testified that claimant was hired to perform tile work in three bathrooms onboard the *Ocean Peace*, and that after claimant completed his tile project he was kept on employer's payroll to assist with carpentry and painting work because employer was behind on its deadline for completing its work on the vessel. *See* Tr. at 338, 344, 347-348.<sup>2</sup> Mr. Wagner additionally testified that other employees had been released before February 13, 2012, and that claimant was released when his painting duties were completed. *Id.* at 357-358. Claimant similarly testified that he was hired to perform a specific tile project, that his tile work was completed on January 19, 2012, and that employer extended his employment by allowing him to perform carpentry and painting work. *See* Tr. at 125-126. Claimant further testified, with regard to his last day of employment with employer, that "[t]he job ended" on or about February 13 or 14. *Id.* at 131. In support of his appeal, claimant cites his February 14, 2012 diary entry, which states that he was "let go after boss learned of extent of injury." *See* CX 7 at 15.

The administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. The Board is not empowered to reweigh the evidence, but must affirm the administrative law judge's findings that are rational and supported by substantial evidence. *See generally* *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge extensively reviewed the evidence of record, and his finding that claimant was released by employer on February 13, 2012 due to the completion of his employment duties is rational and within his authority as factfinder. The administrative law judge noted the

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<sup>2</sup> Mr. Wagner testified that he kept claimant employed after the completion date of the bathroom tile project for two reasons: 1) he realized that claimant needed employment for personal reasons; and 2) from a business standpoint, it was more efficient to keep claimant to perform tasks necessary for the completion of employer's work on the *Ocean Peace* than to hire new employees. *See* Tr. at 347-349.

absence of contemporaneous medical evidence supporting claimant's contention that his injury prevented him from performing his usual work. Decision and Order at 36-37; *see* CXs 19, 20, 23, 69. Moreover, the testimony of Mr. Wagner and claimant support the finding that claimant was released by employer upon the natural conclusion of his job and not because of his injury. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant did not establish an inability to perform his usual work due to his injury from February 14 to March 1, 2012.

Claimant also contends the administrative law judge erred in denying his claim for continuing temporary total disability benefits after he left his job with Crestline. Claimant challenges the administrative law judge's findings as to claimant's reason for leaving Crestline, and contends, moreover, that the administrative law judge erred in finding that the medical evidence does not support claimant's disability claim.

We reject claimant's contention that the administrative law judge erroneously found that claimant voluntarily left his position with Crestline. The administrative law judge rationally found that claimant gave conflicting reasons for leaving this job, and that, moreover, claimant did not testify that his injury prevented him from working there. *See* Decision and Order at 5, 37, 40; Tr. at 138, 181. The administrative law judge acted within his discretion in crediting the deposition testimony of Ms. Broten, employer's vocational expert, who reported that claimant told her he left Crestline due to the firm's "family dynamics," *see* EX 38 at 658, and documentation from Crestline indicating claimant voluntarily left his position with that company. *See* EX 46 at 849. Thus, as it is supported by substantial evidence, we reject claimant's contention that he established entitlement to total disability benefits based on a physical inability to continue to work at Crestline.

Nonetheless, we agree with claimant that the administrative law judge's limiting claimant to a schedule award cannot be affirmed. If claimant is totally disabled by an injury to a scheduled member, he is not limited to an award under the schedule. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). The administrative law judge denied total disability benefits because claimant failed to establish his prima facie case at the time he was released from his employment by employer. The administrative law judge found that it was only in hindsight that claimant's physicians "thought it was not a good idea for Claimant to have worked in construction." Decision and Order at 34-35. The administrative law judge thus concluded that as none of claimant's physicians opined contemporaneously with the end of claimant's work for employer that claimant should not work in construction, and in fact claimant continued to perform his duties with employer through his date of release, claimant "failed to establish that he could not return to his usual employment in construction work, which he was doing when he was injured." *Id.* at 40.

This analysis reflects an erroneous application of law. The fact that claimant was not immediately disabled by his work injury does not preclude him from establishing that, at a later date, his injury precluded his return to the work he was performing at the time of his injury (his “usual work”). See generally *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986). In this regard, the administrative law judge did not address the effects of claimant’s right knee treatment and surgery on his ability to perform his usual work as of the date of the surgery, May 7, 2012. Claimant initially consulted with Dr. Pennington on March 20, 2012 regarding the possibility of right knee surgery. See CX 24 at 62. On May 7, 2012, Dr. Pennington performed an arthroscopy with partial medial meniscectomy and chondroplasty patellofemoral articulation on claimant’s right knee. See CX 26. Following this procedure, Dr. Pennington opined that claimant could not have returned to general or shipyard construction work until July 26, 2012, the date on which claimant’s right knee became medically stationary. See CXs 67 at 237; 40 at 110. This evidence could establish that claimant was totally disabled for at least several months after his surgery. See, e.g., *J.R. [Rodriguez] v. Bollinger Shipyards, Inc.*, 42 BRBS 95 (2008), *aff’d sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5<sup>th</sup> Cir. 2010) (claimant is totally disabled if he is unable to work at all due to his injury). Dr. Evans, who commenced treating claimant in July 2013, placed physical restrictions on claimant and opined that claimant should not return to shipyard or manually laborious work due at least in part to his work injuries. See CXs 61 at 188; 62 at 189. This evidence could establish that claimant again made out a prima facie case of total disability in July 2013. See generally *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

The administrative law judge did not discuss whether claimant established his prima facie case of total disability as of his May 7, 2012, surgery, or for any periods thereafter. See *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). Therefore, we must vacate the denial of total disability benefits and remand the case for the administrative law judge to address all the relevant evidence under the appropriate legal standards.<sup>3</sup> *Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). If claimant established his inability to perform his usual work due to his work injury for any period, he has made out a prima facie case of total disability and is entitled to total disability benefits unless employer established the availability of suitable alternate employment during any period in which claimant was unable to work. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9<sup>th</sup> Cir. 1980).

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<sup>3</sup> In this regard, we do not intend to proscribe the administrative law judge’s consideration of evidence not cited in this decision. On remand, the administrative law judge is to address all evidence relevant to the issue of whether claimant made out his prima facie case of total disability for given periods or on a continuing basis.

On remand, the administrative law judge must address the evidence to determine if claimant and employer met their respective burdens on this issue.<sup>4</sup> *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9<sup>th</sup> Cir. 2010); *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4<sup>th</sup> Cir. 2000).

Accordingly, the administrative law judge's denial of total disability benefits after May 7, 2012, is vacated, and the case remanded for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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<sup>4</sup> If claimant was physically capable of returning to his usual work after reaching maximum medical improvement or if employer established the availability of suitable alternate employment, claimant is limited to the scheduled award already entered. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).