BRB No. 97-909

DAVID L. BRIGHT	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Susan B. Potter (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2050) of Administrative Law Judge Fletcher E. Campbell 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 which are rational, supported by substantial evidence, and 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 worked for employer as a rigger. He was injured on August 13, 1992, when he caught his thumb in a winch, causing his thumb to be severed. Claimant's left thumb was amputated and he sought treatment for the healing process with Dr. Aulicino, including surgery to release the tension of the scar tissue at the wound. Although unable to return to his former employment, claimant began working with Wayside Cleaners on September 30, 1995, through the Department of Labor's Vocational Rehabilitation Program. Emp. Ex. H. Claimant sought permanent partial disability benefits under the Act.

In his decision, the administrative law judge found that claimant reached maximum

medical improvement on July 30, 1993, when Dr. Aulicino declared he had reached maximum medical improvement, stated that his restrictions were permanent, and discharged claimant from further care. In addition, the administrative law judge found that claimant is entitled to benefits for a 33 percent impairment of his left hand. 33 U.S.C. §908(c)(3). Lastly, the administrative law judge found that employer is entitled to a credit pursuant to 33 U.S.C. §903(e)(1994) for disability benefits paid under the Virginia Workers' Compensation Act.

Claimant contends on appeal that the administrative law judge erred in finding his condition reached maximum medical improvement on July 30, 1993, rather than April 29, 1994, as claimant continued to be treated by his physician, his impairment rating was increased in September 1993, and the restrictions were increased on April 29, 1994. Claimant also contends that the administrative law judge erred in relying on claimant's medical impairment alone to award permanent partial disability benefits, and that the administrative law judge erred in awarding employer a credit for benefits paid under the Virginia act, as they compensate claimant for his wage loss, unlike the scheduled benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision.

Initially, claimant contends that the administrative law judge erred in finding that he was permanently disabled as of July 30, 1993, rather than April 29, 1994, the date claimant's treating physician added new restrictions. A permanent disability is a disability that has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore* Corp., 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined by medical evidence. *Jones v. Genco, Inc.,* 21 BRBS 12 (1988). The administrative law judge may rely on a physician's opinion that claimant's condition has reached maximum medical improvement to establish the date of permanency. *Mason v. Baltimore Stevedoring, Inc.*, 22 BRBS 413 (1989).

In the instant case, the administrative law judge based his finding on Dr. Aulicino's report of July 30, 1993, in which the physician declared claimant had reached maximum medical improvement, stated that claimant's restrictions were permanent, and discharged claimant from further care. Although claimant continued to see this physician after this date, it was for pain management and not for treatment towards recovery. In April 29, 1994, claimant complained that his hand hurt when he used it outside his restrictions, and the physician modified his restrictions to reflect that claimant should not work overtime, and reduced his lifting restriction to 20 pounds from 25 pounds. However, he did not change claimant's overall disability rating.[1] In addition, the record contains a report dated October

[1]Claimant also notes that the administrative law judge based his finding that claimant reached maximum medical improvement on Dr. Aulicino's opinion dated July 30, 1993, but used the impairment rating imposed as of September 15, 1993. However, the physician did not change claimant's impairment rating on September 15, 1993, to reflect an improvement

29, 1993, by Dr. Gwathmey, who also opined that claimant had reached maximum medical improvement with a permanent rating of 32 percent of the left hand. As the administrative law judge considered the relevant medical evidence of record, there is no evidence that claimant's condition has improved, or was expected to improve, since July 30, 1993, and claimant has raised no reversible error on appeal, we affirm the administrative law judge's finding that claimant's condition reached maximum medical improvement on July 30, 1993. *See generally Sinclair,* 23 BRBS at 156.

Claimant also contends that the administrative law judge erred in relying solely on the medical impairment rating given by Dr. Aucilino to award permanent partial disability benefits, as claimant contends that an impairment rating is not wholly dispositive of the disability inquiry. Section 8(c), 33 U.S.C. §908(c), provides for the payment of compensation for permanent partial disability. Section 8(c)(1)-(19) contains provisions for the loss or loss of use of particular body parts. 33 U.S.C. §908(c)(1)-(c)(19). Compensation for loss of or partial loss of use of a member is based on a medical evaluation of the degree of loss. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Since loss of wage-earning capacity is presumed in cases arising under the schedule, in determining the degree of loss under the schedule, economic factors are not taken into consideration. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, __ F.3d ___, 1998 WL 40474 (4th Cir. Feb. 4, 1998).[2]

In the present case, Dr. Aulicino rated claimant's hand disability as 33 percent taking into account the effect the thumb had on the operation of claimant's left hand. This rating is supported by the opinion of Dr. Gwathmey. Furthermore, it is undisputed that claimant is capable of performing his job at the cleaners, and that he, therefore, is only partially disabled. *See Dove v. Southwest Marine of San Francisco, Inc.,* 78 BRBS 139 (1986). As the administrative law judge's finding of the extent of claimant's impairment is supported by the medical evidence of record, and claimant's actual loss in wage-earning capacity is not to be considered in determining disability under the schedule, we affirm the administrative

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in claimant's condition on that date, but rather took into account the effect of the injury on the whole hand instead of just the thumb.

[2]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the present case arises, specifically rejected an employee's contention that in calculating a disability rating under the schedule, the administrative law judge can take into account the economic effects of claimant's loss. *Gilchrist*, 1998 WL 40474, *4.

law judge's finding that claimant is entitled to a scheduled award of 33 percent of the left hand. *See Gilchrist,* 1998 WL 40474, *4; *Pimpinella v. Universal Marine Service Inc.*, 27 BRBS 154 (1993).

Claimant's final contention on appeal is that the administrative law judge erred in awarding employer a credit for temporary disability payments made under the Virginia Workers' Compensation Act after claimant's date of maximum medical improvement. Section 3(e) provides a statutory credit for state workers' compensation benefits received by employees for the same injury or disability.[3] Although the benefits claimant received under a state's workers' compensation act may not compensate the same disability as those he receives under the Act, if all of the benefits are for the same injury, employer is entitled to a Section 3(e) credit for the full amount of the state award. *D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24 (CRT)(1st Cir. 1993); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990). In the instant case, claimant does not contend that the benefits he received under the Virginia Worker's Compensation Act were not for the same injury, only that they were not for the same disability. As the Act clearly provides for a credit for payments made under a state act for the same injury, we reject this contention. 33 U.S.C. §903(e).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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[3]Section 3(e) provides:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law... shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e).