

BRB No. 91-1813

A. M. VONTHRONSOHNHAUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED: _____
INCORPORATED	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Joshua T. Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (87-LHC-0527) of Administrative Law Judge James W. Kerr, Jr., 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 findings of fact and conclusions of law of the administrative law judge 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).

This is the second time that this case has been appealed to the Board. On August 3, 1984, claimant injured his back while working as an inside machinist for employer. Employer voluntarily paid temporary total disability benefits based upon an average weekly wage of \$434.53 from August 9, 1984, until August 18, 1985, when claimant briefly returned to work, and then from August 26, 1985, until November 17, 1986. Thereafter, employer voluntarily paid claimant continuing permanent partial disability benefits at a rate of \$10.67 per week. At the hearing before the administrative law judge, claimant sought either permanent total or permanent partial disability benefits.

In a Decision and Order issued on October 30, 1987, the administrative law judge found that claimant reached maximum medical improvement on January 21, 1986, but was unable to return to his former employment as an inside machinist, and that employer established the availability of suitable alternate employment, specifically the position of machine shop foreman/quality assurance with Watler's Machine Shop. The administrative law judge determined that claimant had a post-injury wage earning capacity of \$350 per week, based upon the 1984 earnings of a machine shop foreman at Watler's, and awarded him permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), commencing January 22, 1986, the date of maximum medical improvement. The administrative law judge also awarded claimant medical benefits under 33 U.S.C. §907, and found that employer was entitled to Section 8(f), 33 U.S.C. §908(f), relief. In a Decision on Petition for Reconsideration, the administrative law judge reaffirmed his findings on permanency and suitable alternate employment.

On appeal, the Board rejected claimant's specific contentions regarding the suitability of the position at Watler's, but agreed with claimant that the administrative law judge's finding of suitable alternate employment based upon his analysis of a single job opening could not be upheld because it was inconsistent with *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), which the Board had held applicable to cases arising in the Fifth Circuit in *Green v. Suderman Stevedores*, 23 BRBS 322 (1990), *rev'd sub nom. P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). Consequently, the Board vacated the administrative law judge's suitable alternate employment finding and remanded the case for reconsideration of the issues of suitable alternate employment and claimant's post-injury wage-earning capacity consistent with *Lentz. Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

On remand, the administrative law judge again found that employer established the availability of suitable alternate employment, and that claimant's post-injury wage earning capacity

was \$350 per week, based upon the salaries of positions available to claimant at Watler's Machine Shop and Teumer Tool and Machine, Incorporated. While noting that the United States Court of Appeals for the Ninth Circuit held in *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), that total disability does not become partial until the date suitable alternate employment is shown to be available, the administrative law judge rejected claimant's assertion that *Stevens* should be applied in this case arising within the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit. Instead the administrative law judge followed the Board's decision in *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984), *rev'd sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990), which held that where suitable alternate employment is shown to be available, claimant's permanent total disability becomes a permanent partial disability as of the date of maximum medical improvement. Accordingly, he reinstated his prior finding that claimant was entitled to permanent partial disability compensation as of January 21, 1986, the date of maximum medical improvement.<sup>1</sup>

In the present appeal, claimant challenges the administrative law judge's finding regarding the commencement date for the award of permanent partial disability benefits. Employer responds, urging affirmance. Employer further contends that claimant is barred from raising this issue under the "law of the case" doctrine because he failed to raise it in the original appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, supporting claimant's position.

We initially reject employer's contention that claimant is precluded from raising the commencement date issue pursuant to the "law of the case" doctrine. There is no procedural rule barring consideration of the issue under these circumstances where the law has changed since the prior decisions were issued; intervening controlling authority is an exception to the "law of the case" doctrine. *See Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44, 47 (1995); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

The administrative law judge's finding that claimant's permanent partial disability award commenced as of the date of maximum medical improvement cannot be affirmed in light of the supervening change in law. The Board's holding in *Berkstresser*, which formed the basis for this finding, was subsequently rejected as contrary to the Act by the United States Court of Appeals for the District of Columbia Circuit. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990). Moreover, the Board ultimately abandoned its position in *Berkstresser* in *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on reconsideration) because of

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<sup>1</sup>On December 14, 1994, Administrative Law Judge Stuart Levin issued a Decision and Order which granted modification in part and which denied modification in part. The administrative law judge granted modification on the issue of a change in treating physician where claimant's prior treating physician had died and where claimant had since relocated. The administrative law judge, however, denied claimant's request to modify the award of permanent partial disability compensation based on a change in claimant's physical and economic conditions. This decision is not at issue on appeal.

the emerging body of contrary circuit case authority represented by *Stevens, Berkstresser* and the decision of the United States Court of Appeals for the Second Circuit decision in *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). Finally, and most importantly, we note that subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, specifically adopted the reasoning in *Stevens, Berkstresser*, and *Palumbo* that the capacity to do alternative work does not bring about a change in claimant's total permanent disability status until suitable alternative work is actually shown to be available. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991). As *Dollins* is controlling, we vacate the administrative law judge's finding that claimant's permanent total disability became partial as of the date of maximum medical improvement. The record indicates that of the jobs found suitable by the administrative law judge, the position at Watler's Machine Shop was identified the earliest.<sup>2</sup> As this job was first shown to be available by Tommy Sanders, employer's vocational rehabilitation specialist, on October 28, 1986, EX 18 at 19, we modify the administrative law judge's Decision and Order on Remand to reflect that claimant remains entitled to permanent total disability compensation from the date of maximum medical improvement, January 21, 1986 until October 28, 1986 consistent with *Dollins*. Claimant is entitled to permanent partial disability benefits pursuant to the administrative law judge's award thereafter.<sup>3</sup>

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<sup>2</sup>The record reflects that although claimant filed an application in July 1986 with Teumer Tool and Machine, Inc. for future job consideration, no position was actually available at that time. EX 18 at 10.

<sup>3</sup>Claimant also argues that the case should be remanded to the administrative law judge because he has been erroneously compensated at the rate of \$10.67 per week since November 1986 instead of at the \$56.35 weekly rate awarded by the administrative law judge. Although employer has submitted documentation from the district director which would suggest that claimant is in error, the Board may not consider these documents because they were not part of the record before the administrative law judge. *See Williams v. Hunt Shipyards Geosource, Inc*, 17 BRBS 32 (1985). In any event, we decline to remand the case to the administrative law judge on this basis; if claimant believes that he has not been properly compensated, his remedy would appear to lie with the district director, rather than with the administrative law judge. *See generally Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); 33 U.S.C. §918.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is modified to provide that claimant is entitled to permanent total disability benefits through October 28, 1986, and permanent partial disability benefits thereafter. In all other respects, the decision is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge