

DONNA SIDEBOTTOM)
)
 Claimant-Petitioner)
)
 v.)
)
 ARMY AND AIR FORCE EXCHANGE) DATE ISSUED: June 10, 2002
 SERVICE)
)
 and)
)
 GAY AND TAYLOR, THOMAS)
 HOWELL GROUP)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits and the Order Denying Claimant's Motion for Clarification and Reconsideration and Denying Employer's Motion for Reconsideration of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Roger R. Kline (Mancini, Schreuder, Kline & Conrad, P.C.), Warren, Michigan, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Awarding Benefits and the Order Denying Claimant's Motion for Clarification and Reconsideration and Denying Employer's Motion for Reconsideration (95-LHC-916, 95-LHC-917, 93-LHC-2179, 93-LHC-2180) of Administrative Law Judge Mollie W. Neal rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5

U.S.C. §8171 *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).

This case is before the Board for the second time. To recapitulate the facts, claimant sustained work-related injuries to her right shoulder and arm on September 2, 1991, October 27, 1992, October 8, 1993, and January 8, 1994. Employer voluntarily paid claimant temporary total disability benefits for the time claimant was off work, and claimant returned to work in a light duty capacity after each incident. After the last injury, claimant returned to light duty work as a store associate with employer in April 1995, but could no longer perform the job as of May 1995. Employer voluntarily paid claimant temporary total disability benefits from May 1, 1995, and continuing.¹

In her initial decision, the administrative law judge found that the three injuries claimant sustained in 1992-1994 were not “new” injuries but were “aggravations” of the prior, 1991 injury, and that therefore claimant’s average weekly wage should be calculated based on the average weekly wage at the time of the initial 1991 injury. Consequently, the administrative law judge ordered employer to pay claimant temporary total disability benefits at the stipulated minimum compensation rate of \$170.54 per week based on claimant’s 1991 average weekly wage of \$188.51 for the periods claimant was unable to work because of her injuries, and temporary partial disability benefits for the periods claimant returned to her light duty sales clerk job after each exacerbation. On reconsideration, the administrative law judge found claimant temporarily totally disabled. The administrative law judge authorized the district director to recalculate the temporary total and partial disability benefits awarded because of certain errors she had made in her initial decision. Employer appealed the administrative law judge’s average weekly wage determination on various grounds and her finding that claimant is totally disabled. The parties had stipulated that claimant’s average weekly wage was \$104.87 in 1992, \$121.04 in 1993, and \$94.51 in 1994.

The Board vacated the administrative law judge’s finding that the 1991 average

¹Claimant has been diagnosed with deQuervain’s disease of the right wrist, carpal tunnel syndrome of the right hand, reflex sympathy disorder, tendinitis, chronic pain syndrome, and chronic sympathetic dystrophy of the right upper extremity. Cl. Ex. 4; Emp. Ex. 3.

weekly wage is to be used for all awards and remanded the case, holding that the administrative law judge's finding that the three subsequent injuries were "aggravations" or "exacerbations" of the 1991 injuries to her right wrist, hand, and shoulder but were not new and distinct injuries, cannot be reconciled with the legal principle that an "aggravation" is a "new injury" under the Act, and that the medical evidence supports the conclusion that claimant suffered from an exacerbation or an aggravation of her initial injury as a result of the subsequent incidents. *Sidebottom v. Army & Air Force Exch. Serv.*, No. 98-1465 (Aug. 4, 1999) (unpub.). The Board also vacated the administrative law judge's determination that claimant's average weekly wage for the 1992-1994 injuries is the same as her 1991 average weekly wage, and noted that in order to fully compensate claimant for all her injuries, claimant may be entitled to concurrent awards for partial and total disability to the maximum statutory extent allowable in order to fully compensate her for the loss of earning capacity resulting from these injuries. The Board directed that in her decision on remand, the administrative law judge should specify the dates she awards claimant temporary total, temporary partial, permanent partial, and permanent total disability benefits as the exact awards made are not clear from her decision on reconsideration. The Board affirmed the ongoing award of total disability benefits.

In her Decision and Order on Remand - Awarding Benefits, the administrative law judge found that claimant sustained four new and discrete injuries, and found claimant entitled to compensation benefits for various periods of time at various rates, as follows:

- temporary total disability from September 3, 1991 to September 27, 1992, at the weekly rate of \$170.54;

- permanent partial disability from September 28, 1992 to October 27, 1992, based on the difference between an average weekly wage of \$188.51 and wage-earning capacity of \$104.87;

- temporary total disability from October 28, 1992 to February 7, 1993, and March 22, 1993, to September 21, 1993, based on an average weekly wage of \$104.87;

- permanent partial disability from February 8, 1993 to March 21, 1993, and September 22, 1993 to October 7, 1993, based on the difference between the average weekly wage of \$188.51, and post-injury wage-earning capacity of \$104.87;

- temporary total disability from October 9, 1993 to November 16, 1993, based on an average weekly wage of \$121.04;

-permanent partial disability from November 17, 1993 to January 7, 1994, based on the difference between an average weekly wage of \$121.04, and post-injury wage-earning capacity of \$94.51;

-temporary total disability from January 9, 1994, through April 2, 1995, based on an average weekly wage of \$94.51;

-permanent partial disability from April 3, 1995 to April 28, 1995, based on the difference between her average weekly wage of \$121.04, and wage-earning capacity of \$94.51;

-and starting on April 29, 1995, continuing permanent total disability compensation based on an average weekly wage of \$94.51, plus applicable annual adjustments under Section 10(f), 33 U.S.C. §910(f).

Decision and Order on Remand at 21-22. The administrative law judge then stated that “[c]laimant is entitled to these concurrent awards of permanent partial and permanent total disability benefits provided that her total weekly benefits do not exceed the statutory maximum compensation benefits allowable for permanent total disability, pursuant to section 6(b)(1) of the Act. . . .” Decision and Order on Remand at 22.

Claimant filed a motion for reconsideration, requesting that the administrative law judge’s Decision and Order be amended to specify the particular concurrent awards which should be paid and the time frames for these concurrent payments. Employer filed a motion for reconsideration, requesting that the administrative law judge compensate claimant’s hand and arm symptoms under the schedule, 33 U.S.C. §908(c)(1), (3), rather than under Section 8(c)(21), 33 U.S.C. §908(c)(21). In an Order Denying Claimant’s Motion for Clarification and Reconsideration and Denying Employer’s Motion for Reconsideration, the administrative law judge declined to amend her order on remand and denied the relief requested by both parties.

On appeal, claimant requests the relief which was the subject of her motion for reconsideration before the administrative law judge, *i.e.*, that the administrative law judge specify how the concurrent payments should be paid in order to make claimant whole. Employer responds, urging that the administrative law judge’s Decision and Order on Remand be affirmed.

We agree with claimant that the administrative law judge did not structure concurrent awards which fully compensate claimant for her loss in wage-earning capacity. No party disputes the proposition that claimant may receive concurrent permanent partial disability awards, or concurrent permanent partial disability and permanent total disability awards,

provided that the total award is not in excess of the statutory maximum compensation allowable for permanent total disability.² See *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); see also *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139 (CRT) (4th Cir. 1999). The administrative law judge acknowledged this legal principle and apparently intended to apply it in the instant case, stating: “I find and conclude that Claimant, in addition to the award of permanent and total disability benefits, pursuant to Section 6(b)(2), at the weekly rate of \$94.51, and commencing on April 29, 1995, is also entitled to receive concurrent awards of permanent partial disability benefits, as found above, and these awards shall continue as long as Claimant’s weekly benefits do not exceed the statutory maximum allowable under Section 6(b)(1) of the Act” Decision and Order on Remand at 18. See also Order denying Claimant’s Motion for Clarification and Reconsideration at 4. The administrative law judge, in denying claimant’s motion for reconsideration, states that her Order awarding benefits is specific in terms of the amounts of disability compensation and the dates for which they are awarded. We agree with claimant, however, that the administrative law judge did not structure concurrent awards, but rather awarded only consecutive awards for specific injuries based on claimant’s residual wage-earning capacity at the time of each successive injury.

²Under Section 8(a), the amount of concurrent awards combined is limited by the 66 2/3 percent rate for permanent total disability. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). Claimant’s combined awards cannot exceed the amount prescribed for total disability under Section 8(a), plus Section 10(f) adjustments, nor can they exceed the statutory maximum compensation rate under Section 6(b). See *Price v. Stevedoring Services of America*, 36 BRBS , BRB Nos. 01-0632/A, slip op. at 13 n.12 (April 30, 2002). The statutory maximums are not at issue in the present case.

The administrative law judge correctly stated that claimant's compensation benefits for each period of total disability should be calculated based on her average weekly wage at the time of each injury, which, in this case, is equal to claimant's lower, residual wage-earning capacity. *See Hastings*, 628 F.2d 85, 14 BRBS 345. However, where, as here, the preceding injuries result in a loss of wage-earning capacity such that claimant's later average weekly wage, based on the residual wage-earning capacity, at the time of the subsequent aggravations is lower than at the time of previous injuries, claimant is entitled to concurrent awards in order to be fully compensated for the full loss in wage-earning capacity due to her injuries.³ *See Brady-Hamilton*, 58 F.3d 419, 29 BRBS 101(CRT); *Hastings*, 628 F.2d 85, 14 BRBS 345; *Lopez*, 23 BRBS 295. It is undisputed that claimant returned to light duty work after her initial 1991 injury with a loss in wage-earning capacity. Thereafter, she sustained periods of temporary total disability due to aggravating injuries, an additional loss in wage-earning capacity resulting in permanent partial disability and, ultimately, permanent total disability. In order to fashion concurrent awards, the permanent partial disability awards should not terminate. Rather, these awards continue and run concurrently with the total disability awards for the second, third and fourth injuries. During claimant's later periods of partial disability, claimant is entitled to receive the first permanent partial disability award with the second, so that the partial loss of wage-earning capacity claimant sustained due to the combination of her injuries is fully compensated. *See Hastings*, 628 F.2d 85, 14 BRBS 345; *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1984), *aff'd in part and rev'd on other grounds*, 738 F.2d 474, 16 BRBS 115(CRT)(D.C. Cir. 1984). Thus, as the administrative law judge's order does not enter concurrent awards, we modify her order to remove the termination dates on the awards of permanent partial disability. The award of permanent partial disability commencing September 28, 1992, is modified to provide an award of permanent partial disability based on the stated amounts commencing on that date and continuing for so long as claimant remains disabled. Similarly, the award of permanent partial disability commencing November 17, 1993, is modified to commence on that date and

³Claimant correctly states that the district director's June 12, 2001 Benefit Payment BreakDown Report reflects that the execution of the administrative law judge's compensation order does not provide for concurrent benefits. *See* Attachment to Claimant's Brief.

continue throughout claimant's disability.⁴

Moreover, structuring concurrent awards so that permanent partial disability continues should, when combined with a permanent total disability award based on claimant's remaining wage-earning capacity, fully compensate claimant for her loss in wage-earning capacity from the time of the first injury. *See Hastings*, 628 F.2d at 91, 14 BRBS at 350; *Crum*, 16 BRBS at 108. Since *Hastings*, many cases have presented facts involving a claimant whose wages have risen during the period of permanent partial disability, so that combined permanent total disability and permanent partial disability awards actually exceed claimant's statutory recovery under Section 8(a) based on the higher average weekly wage. *See, e.g., Price v. Stevedoring Services of America*, 36 BRBS , BRB Nos. 01-0632/A (April 30, 2002). *Brady Hamilton* was such a case, and the Ninth Circuit imposed a remedy limiting recovery to the 66 2/3 percent of average weekly wage mandated by Section 8(a). This case, however, presents the situation first discussed in *Hastings* - claimant sustained an initial injury and subsequent aggravations have only further reduced her earning capacity. Under *Hastings*, the combination of awards should make her whole, but, because her highest average weekly wage is below the statutory minimum of 50 percent of the national average weekly wage, 33 U.S.C. §906(b)(2), it does not do so. This results because claimant's compensation rate for total disability is her average weekly wage; thus, she is entitled to 100 percent of her average weekly wage for total disability. 33 U.S.C. §906(b)(2). The concurrent permanent partial disability award, however, is limited to the two-thirds rate, *see* 33 U.S.C. §908(c)(21), so that the combined awards cannot, mathematically, add up to the 100 percent claimant is entitled to receive. In order to make claimant whole and award total disability benefits at the statutory minimum rate she is entitled to receive, claimant is entitled to combined payments of the ongoing permanent partial and total disability benefits equal to the minimum compensation rate of \$188.51, the amount of her average weekly wage at the time of the first injury, during all periods of total disability. Moreover, Section 10(f) adjustments for permanent total disability must also be based on the full rate for the combined awards. *Price*, slip op. at 12-13.

⁴Claimant does not contend that the distinct awards are not based on correct monetary figures, but only that the administrative law judge did not enter concurrent awards.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits and the Order Denying Claimant's Motion for Clarification and Reconsideration and Denying Employer's Motion for Reconsideration are modified to reflect claimant's entitlement to concurrent awards, in accordance with this opinion.⁵

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵Claimant's counsel requests an attorney's fee for services rendered in connection with this appeal. Counsel must file a fee petition which conforms to the requirements of 20 C.F.R. §802.203.