

BRB No. 13-0573

RICKY N. EASON)
)
 Claimant-Respondent)
)
 v.)
)
 NORTHROP GRUMMAN SHIPBUILDING,) DATE ISSUED: May 16, 2014
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel A. Sarno, Jr.,
Administrative Law Judge, United States Department of Labor.

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

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport
News, Virginia, for self-insured employer.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

Employer appeals the Decision and Order on Remand (2011-LHC-00441) of
Administrative Law Judge Daniel A. Sarno, Jr., 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'Keefe v. Smith, Hinchman &
Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. To recapitulate,
claimant, a pipefitter for employer, injured his knees at work on September 28, 2008.
Following surgery on his right knee in January 2009, claimant returned to full-duty work
in June 2009. In October 2009, Dr. Hoang, claimant's treating orthopedic surgeon, gave

claimant a permanent impairment rating of 14 percent of the lower extremity.¹ Emp. Ex. 11 at 10-12. Claimant continued to work at his usual job until May 18, 2010, when he could no longer continue due to swelling and stiffness in both knees. Dr. Hoang took claimant out of work and began treatment. On August 10, 2010, claimant returned to his usual job without restrictions. Claimant filed a claim for temporary total or temporary partial disability benefits for the period between May 19 and August 20, 2010, and employer disputed the claim.

Administrative Law Judge Malamphy found that claimant's condition reached maximum medical improvement on October 26, 2009, when Dr. Hoang confirmed claimant's permanent impairment rating of 14 percent. Claimant's knees began to swell in May 2010 and he was off work for several months. Judge Malamphy found that claimant was not entitled to disability benefits for the flare-up of his knee condition, stating that, pursuant to *Potomac Electric Power Co. [PEPCO] v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), claimant's recovery for permanent partial disability for his knee is limited to the schedule award previously paid, and that claimant was precluded from obtaining additional compensation for any loss of wage-earning capacity.

Pursuant to claimant's appeal, the Board affirmed Judge Malamphy's finding that claimant's condition reached maximum medical improvement on October 26, 2009. However, the Board held that affirmance of the date of maximum medical improvement does not end the inquiry with regard to claimant's contention that he is entitled to additional benefits because payment of permanent partial disability benefits under the schedule is not determinative of a claimant's entitlement thereafter to permanent total, temporary total, or temporary partial disability benefits. *Eason v. Northrop Grumman Shipbuilding, Inc.*, BRB No. 12-0159, slip op. at 3-4 (Dec. 19, 2012) (unpub.). Accordingly, the Board remanded the case for further consideration of whether claimant is entitled to additional benefits between May and August 2010.

On remand, the case was assigned to Administrative Law Judge Sarno (the administrative law judge). The administrative law judge found that claimant's temporary restrictions from May 19 through August 20, 2010, due to the flare-up of the work injury, prevented claimant from performing his usual job as a pipefitter; that employer

¹Employer voluntarily paid claimant temporary total disability benefits between October 2, 2008, when claimant stopped working, and June 28, 2009, and from May 18 to 23, 2010, and permanent partial disability benefits pursuant to 33 U.S.C. §908(c)(2) for a 14 percent impairment to the lower extremity from October 16, 2009, through May 17, 2010. ALJ Ex. 1; Emp. Exs. 4, 10. Employer's notice of final payment also indicates it resumed payments of claimant's permanent partial disability benefits between May 19 and July 25, 2010, when it concluded claimant's total disability ceased. Emp. Ex. 4.

established the availability of suitable alternate employment during that period; and that claimant retained a residual wage-earning capacity of \$232 per week. Pursuant to 33 U.S.C. §908(e), (h), the administrative law judge determined that claimant is entitled to temporary partial disability benefits from May 19 to August 20, 2010, for his loss in wage-earning capacity. Decision on Remand at 10-11. Employer appeals, and claimant responds, urging affirmance. Employer filed a reply brief.

On appeal, employer challenges the administrative law judge's award of additional benefits, arguing that under *PEPCO*, claimant is precluded from obtaining additional compensation for any loss of wage-earning capacity because his knee disability had become both permanent and partial; therefore, claimant is limited to the scheduled award already paid. The Board addressed and rejected this argument in its prior decision in this case. *Eason*, slip op at 3-4. Specifically, the Board explained that *PEPCO* does not preclude an award for additional temporary partial disability benefits due to a worsening of a claimant's work injury, despite employer's having paid in full permanent partial disability benefits under the schedule.² *Id.* (citing *PEPCO*, 449 U.S. at 277, 14 BRBS at 366 and *Pacific Ship Repair & Fabrication, Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012)); *see also Walker v. Todd Pacific Shipyards*, 46 BRBS 57 (2012), *vacated on other grounds on recon.*, 47 BRBS 11 (2013); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). For the reasons set forth in *Eason*, we reject employer's legal challenge to the administrative law judge's decision. The administrative law judge properly applied the law. *Benge*, 687 F.3d 1182, 46 BRBS 35(CRT). Moreover, we affirm, as unchallenged, the administrative law judge's findings that claimant was unable to perform his usual work from May 19 to August 20, 2010; that employer established the availability of suitable alternate employment during this period; and that claimant is entitled to temporary partial disability benefits pursuant to Section 8(e) for this period. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

² A claim for such benefits, however, must be made within the time limitations of Act. *See* 33 U.S.C. §§913, 922; *see also Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge