

BRB No. 98-0158

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

Appeal of the Decision and Order and the Decision and Order on Remand - Denying Additional Compensation of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Gerard E. W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order on Remand - Denying Additional Compensation (95-LHC-248) of Administrative Law Judge Richard K. Malamphy 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).

This case is before the Board for the second time. To briefly recapitulate the facts in this case, claimant injured her left big toe on August 29, 1991, while working in a firewatch position for employer. After undergoing surgery twice, claimant returned to work as a driver for employer on March 11, 1994, with restrictions of no prolonged standing or walking. Thereafter, Dr. Tischler found that claimant reached maximum medical improvement on March 30, 1994, and claimant continued working until she was laid off in a reduction in force on May 31, 1994. Claimant was called back to work on August 1, 1994. Employer paid claimant permanent partial disability benefits for 19 weeks for a 50 percent impairment to the left big toe pursuant to Section 8(c)(8), 33 U.S.C. §908(c)(8), effective March 31, 1994, taking credit for its payments of compensation for temporary partial disability from March 31, 1994 through May 30, 1994, and for temporary total disability from May 31, 1994 through August 14, 1994.

In his Decision and Order issued January 31, 1996, the administrative law judge found claimant reached maximum medical improvement on March 30, 1994. The administrative law judge denied claimant temporary partial disability benefits from March 31, 1994 through May 30, 1994 and from August 1, 1994 to the present and continuing, denied claimant temporary total disability benefits from May 31, 1994 through July 31, 1994, and also denied a permanent impairment rating in excess of 50 percent under Section 8(c)(8). Lastly, the administrative law judge found that employer was entitled to a credit for excess compensation previously paid to claimant.

Claimant then appealed the administrative law judge's decision to the Board. In its Decision and Order issued January 28, 1997, the Board remanded the case for the administrative law judge to reconsider the extent of claimant's impairment under the schedule, affirmed the administrative law judge's finding that claimant reached maximum medical improvement on March 30, 1994, and held that the driver position for employer constitutes suitable alternate employment. The Board also held that, as maximum medical improvement and suitable alternate employment had been established, further benefits for temporary partial disability were precluded, as claimant's injury was to a scheduled member. In addressing this issue, the Board rejected claimant's contention that she was entitled to temporary total disability compensation during her period of layoff from May 31, 1994 through July 31, 1994, reasoning that once entitlement to a scheduled award is established, the fact that suitable alternate employment subsequently became temporarily unavailable to claimant cannot be the basis for an award of temporary total disability. Finally, the Board rejected claimant's contention that employer was not entitled to a credit for its payments of compensation during the periods from March 31, 1994 through May 30, 1994 and May 31, 1994 through August 14, 1994. See *Clegg v. Norfolk Shipbuilding and Dry Dock Co.*, BRB No. 96-0672 (Jan. 28, 1997)(unpublished).

In his Decision and Order on Remand issued September 11, 1997, the administrative law judge reaffirmed his previous finding that claimant's impairment rating for her left big toe is 50 percent. See 33 U.S.C. §908(c)(8), (14). On September 22, 1997, claimant petitioned the United States Court of Appeals for the Fourth Circuit for review of the Board's ruling that she was not entitled to temporary total disability for the period of her layoff from May 31, 1994 through July 31, 1994. Thereafter, on October 9, 1997, claimant timely filed the instant protective appeal with the Board in the event the issue submitted to the Fourth Circuit was deemed to be interlocutory. On December 11, 1997, the Fourth Circuit dismissed claimant's appeal as interlocutory, and by Order of March 23, 1998, the Board ruled that claimant's appeal is now properly before the Board.

Claimant's sole contention on appeal is that she was entitled to temporary total disability compensation while laid off from her light duty position from May 31, 1994 through July 31, 1994, and, thus, that the administrative law judge erred in determining that employer is entitled to credit benefits paid to her during this period against claimant's scheduled award. In support of her argument, claimant avers that employer provided no evidence of suitable alternate employment during the layoff period and that without evidence of suitable alternate employment, the ruling in *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980), mandating that compensation for partial disability due to a scheduled injury is to be calculated based solely on the employee's physical impairment, is inapplicable. Employer responds that the law of the case doctrine precludes the Board from again considering the issue of employer's entitlement to a credit for its payments of compensation during the period of claimant's layoff. Employer argues, in the alternative, that the administrative law judge correctly found employer entitled to a credit as claimant was not entitled to temporary total disability benefits during her layoff.

As an initial matter, we hold that under the circumstances in the instant case, the law of the case doctrine does not bar further consideration by the Board of the issue of claimant's entitlement to total disability benefits during the period of her layoff and employer's entitlement to a credit for the temporary total disability payments it made for this period. The Board has held that it will adhere to its initial decision when a case is before it for a second time unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. See *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). At the time that the Board's previous decision in this case was issued, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, had not specifically addressed the issue of an employee's entitlement to total disability benefits after being laid off for economic reasons from a light duty job at employer's facility. Subsequent to the issuance of the Board's decision, however, the Fourth Circuit considered this issue in *Newport News Shipbuilding & Dry Dock Co. v. Cole*, 120 F.3d 262 (Table), No. 96-2535 (4th Cir. Aug.

12, 1997).¹ As the law of the case doctrine is not a rule of law but, rather, a discretionary rule of practice used to promote finality in the adjudication process, *see Williams*, 22 BRBS at 237, we are not compelled to apply it where, as in the instant case, intervening controlling law now exists; accordingly, we will address claimant's assertion of error and reexamine our previous decision regarding this issue.

It is well-established that in order to establish a *prima facie* case of total disability, claimant need only establish that she cannot perform her usual employment; claimant's usual employment is that which she was performing at the time of the injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). Where, as in the instant case, claimant has established that she is unable to perform her usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet this burden by offering claimant a light-duty position in its facility so long as the position is tailored to claimant's physical restrictions, and the job is necessary and profitable to employer's business. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). In order for such a job to constitute suitable alternate employment, however, the job must be actually available to

¹Pursuant to Local Rule 36(c) of the United States Court of Appeals for the Fourth Circuit, the citation of an unpublished decision "is disfavored...." Nevertheless, Local Rule 36(c) provides that an unpublished decision with precedential value may be cited in relation to a material issue in a case if there is no published opinion that would serve as well (if all other parties are served with a copy of the decision). The Fourth Circuit's unpublished decision in *Cole* was attached to claimant's brief and served on employer. Inasmuch as *Cole* is factually indistinguishable from this case, and there is no published Fourth Circuit decision specifically addressing the issue in question, it is consistent with the court's rule to cite it in this case.

claimant. *See Wilson v. Dravo Corp.*, 22 BRBS 463 (1989).

Upon further consideration of claimant's contention that she is entitled to total disability compensation during the period in which she was laid off from her light-duty driver position with employer, we agree with claimant that the administrative law judge's denial of her claim for total disability compensation during the period of the layoff cannot be affirmed in light of the Fourth Circuit's decision in *Cole*. In *Cole*, an administrative law judge, citing *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988), awarded claimant benefits during a period when her light-duty position with employer was unavailable due to an economic layoff.² In affirming the award of benefits to claimant, the Fourth Circuit specifically discussed the Board's decision in *Mendez* and thereafter held in accordance with that decision that, in order for employer to carry its burden of establishing that suitable alternate employment exists for a claimant, employer must demonstrate that a suitable alternate job exists. Thus, in a situation where a light duty job given to claimant is no longer available due to an economic layoff, employer has made that job unavailable and thus may not rely on that position to demonstrate that a suitable alternate job exists. *See Cole*, slip op. at 7.

²In *Mendez*, 21 BRBS at 22, the Board held that where an employer provides claimant with a light duty job at its facility but then lays him off for economic reasons, it cannot rely on this job to meet its burden of establishing suitable alternate employment because it has made the alternate work unavailable. *See also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994).

In the instant case, as in *Cole*, light-duty suitable alternate employment at employer's facility became unavailable to claimant due an economic layoff and employer did not attempt to demonstrate the availability of additional suitable alternate employment opportunities to claimant during the period of time that claimant's position was unavailable.³ Inasmuch as the Board is bound by the controlling law in the Fourth Circuit, within whose jurisdiction this claim arises, see *Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997), we hold that, as it is uncontroverted that employer failed to establish the availability of suitable alternate employment during the period of claimant's economic layoff, claimant is entitled to permanent total disability compensation during the period of that layoff.⁴ See *Cole*, 120 F.3d at 262 (Table); *Mendez*, 21 BRBS at 22. The administrative law judge's denial of the claim for compensation during the period of claimant's layoff is therefore reversed, and his Decision and Order is modified to reflect claimant's entitlement to permanent total disability compensation during the period of May 31, 1994 through July 31, 1994. The administrative law judge's Decision and Order is further modified to reflect that the credit for overpayment of compensation granted to employer shall not include payments made to claimant during the period of her total disability from May 31, 1994 through July 31, 1994.

Accordingly, the administrative law judge's denial of compensation during the period claimant was laid off at employer's facility and his award of a credit to employer for total disability payments made for this period are reversed, and his Decision and Order is modified to reflect that claimant is entitled to permanent total disability benefits during this period; thus, employer is not entitled to a credit for the total disability benefits it paid for this period. In all other respects, the administrative law judge's Decision and Order and Decision and

³The initial decision in this case suggests that claimant could not receive total disability benefits because the layoff occurred after the commencement of a scheduled award for permanent partial disability. However, this fact is not a valid basis for distinguishing the applicable cases, as it is well-established that where the requirements for total disability under Section 8(a) or (b) are satisfied, the schedule in Section 8(c)(1)-(19) does not apply. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366 n.17 (1980). The same standards for demonstrating a *prima facie* case and suitable alternate employment apply regardless of whether the schedule or Section 8(c)(21) applies should claimant be found permanently partially disabled.

⁴We note that although claimant seeks temporary total disability benefits for the period of her layoff, she is entitled to permanent, rather than temporary, total disability compensation for this period inasmuch as she reached maximum medical improvement on March 30, 1994, prior to the time of her layoff. See *Clegg v. Norfolk Shipbuilding and Dry Dock Co.*, BRB No. 96-0672 (Jan. 28, 1997)(unpublished), slip op. at 3. The date of maximum medical improvement separates temporary from permanent disability. See, e.g., *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990).

Order on Remand - Denying Additional Compensation are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge