



BRB No. 21-0404

ROBERT L. BROWN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
HUNTINGTON INGALLS,)	
INCORPORATED)	
)	DATE ISSUED: 5/16/2022
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting Partial Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz, Norfolk, Virginia, for Claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.) Newport News, Virginia, for self-insured Employer.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits and Order Granting Partial Reconsideration (2019-LHC-00280) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On June 9, 2017, Claimant injured his left calf while working as a chipper for Employer. He reported the injury and was sent to Employer's shipyard clinic for evaluation where he was initially diagnosed with a left calf strain. He continued to work until August 17, 2017,¹ when he first received treatment from Dr. Arthur W. Wardell, who diagnosed a left calf strain and plantaris rupture, and removed Claimant from work. CX 2. Dr. Wardell cleared Claimant to return to work with restrictions on March 5, 2018, CX 2 at 48, and afterward opined Claimant's calf injury reached maximum medical improvement at some point during the summer of 2018. *Id.*; EX 13, Dep. at 13. Meanwhile, in April 2018, Employer obtained a labor market survey identifying several jobs which Dr. Wardell approved as suitable for Claimant. Claimant, however, has not returned to work.²

On June 4, 2018, Claimant visited Dr. Wardell with complaints of left knee pain. Dr. Wardell diagnosed Claimant with a medial and complex lateral meniscus tear of his left knee, which he opined is "a consequence of the mechanical abnormalities [Claimant] placed on his left leg due to his left calf weakness and resulting limp" after Claimant's June 9, 2017 work accident. EX 13, Dep. at 9, 11. He performed an arthroscopy on Claimant's left knee on February 26, 2019, and removed Claimant from all work. CX 2 at 127, 128. In September 2019, Dr. Wardell stated he anticipated Claimant would reach maximum medical improvement following his February 26, 2019 left knee surgery, most likely in late November or early December 2019. EX 13, Dep. at 13-14. However, he also opined Claimant would need a total left knee replacement, after which "he will be at maximum

¹ The shipyard clinic sent Claimant back to work with restrictions of no climbing, no ladders, and no steps. HT 30. Claimant, however, stated he continued to climb ladders and steps while he was being treated by the clinic. *Id.* at 31.

² Claimant voluntarily retired on September 30, 2018. HT at 18.

medical improvement for both surgical and non-surgical care” of his left knee. *Id.*, Dep. at 14, 22. The record indicates Employer authorized the left knee replacement surgery in January 2020, Decision and Order at 2, and Dr. Wardell performed the procedure on Claimant on August 27, 2020. Cl’s Br. at 2. Claimant states Dr. Wardell has not yet determined whether his left knee has reached maximum medical improvement following his total knee replacement procedure. *Id.*

Employer voluntarily paid Claimant temporary total disability benefits from August 18, 2017, through June 10, 2018. Claimant thereafter sought ongoing temporary total disability benefits from June 11, 2018, as well as additional medical benefits, for his left calf injury and alleged consequential work-related left knee injury. Employer authorized payment of additional medical benefits for Dr. Wardell’s treatment through September 11, 2018, but contested Claimant’s request for additional disability benefits. The case was transferred to the Office of Administrative Law Judges and a formal hearing was held on October 21, 2019, in Newport News, Virginia.

In his decision, the ALJ found Claimant sustained work-related injuries to his left calf and left knee. In terms of Claimant’s left calf injury, he found Claimant entitled to, and Employer liable for, temporary total disability benefits from August 18, 2017, through March 4, 2018, and permanent partial disability benefits thereafter pursuant to 33 U.S.C. §908(c)(21) of the Act. As for Claimant’s left knee injury, the ALJ found Claimant entitled to, and Employer liable for, an ongoing award of temporary total disability benefits from February 26, 2019. On reconsideration, the ALJ amended his award of benefits to reflect “the award of permanent partial disability compensation shall be suspended for the period during which Claimant is entitled to temporary total disability compensation.” Order on Recon. at 3.

On appeal, Employer challenges aspects of the ALJ’s award. Claimant and the Director, Office of Workers’ Compensation Programs (Director), also respond. Claimant urges affirmance. The Director agrees with Employer regarding benefits improperly awarded under Section 8(c)(21) and urges the Board to vacate the award and remand the case for further consideration. Claimant filed a reply to the Director’s brief.

Employer contends that because Claimant sustained work-related injuries to his left calf and left knee arising out of the same June 9, 2017 incident, his recovery for permanent partial disability benefits relating to both injuries should be limited to the schedule at Section 8(c)(2). Citing *Potomac Elec. Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268 (1980), it maintains the Act’s schedule is the exclusive remedy for permanent partial disability sustained to body parts listed there, because benefits paid pursuant to the schedule fully compensate claimants for their permanent partial disabilities. Employer therefore contends the ALJ erred by awarding Claimant permanent partial disability

benefits for his left calf injury under Section 8(c)(21), rather than Section 8(c)(2). Employer further contends the ALJ improperly separated Claimant's left lower extremity injury into two aspects and erroneously awarded permanent partial disability for one of them but then temporary total disability for the other. Moreover, Employer asserts that because Claimant retired from employment in September 2018, case law establishes he is no longer entitled to disability benefits once he is found capable of returning to light duty work. In his response brief, Claimant states the ALJ's Order Granting Partial Reconsideration is in accordance with the law and should therefore be affirmed.

The Director asserts the ALJ applied an incorrect statutory provision when determining Claimant's permanent partial disability award for his left calf. Because of this error, he urges the Board to vacate the award of unscheduled benefits and remand the case for further consideration. He states the Board should instruct the ALJ to reopen the record on remand to allow the parties to submit additional evidence on Claimant's permanent impairment relating to his left calf injury, and then calculate his award in accordance with Sections 8(c)(2) and (19) of the Act. In reply to the Director's brief, Claimant states Employer's appeal solely pertained to the ALJ's Order Granting Partial Reconsideration and did not challenge the ALJ's award of permanent partial disability benefits for his left calf injury under Section 8(c)(21). He therefore states it is inappropriate for the Board to address this issue on appeal.

The ALJ found Claimant's left calf injury became permanent on March 5, 2018, but his left knee injury, which he found is awaiting a normal healing period, remained temporary. He next found: Claimant's left calf injury rendered him incapable of returning to his usual work as of August 18, 2017; Employer established the availability of suitable alternate employment as of March 5, 2018; and Claimant did not undertake a diligent job search, thereby entitling Claimant to temporary total disability benefits for this injury from August 18, 2017, through March 4, 2018. Decision and Order at 6-9. Addressing Claimant's entitlement to an ongoing award of permanent partial disability benefits for his left calf injury, the ALJ rejected Employer's position that Claimant should be limited to a scheduled award for loss of use of his left leg because "Employer has not provided any evidence, such as a permanent partial disability rating" from which to fashion such an award. Instead finding Section 8(c)(21) "is the appropriate provision to apply," the ALJ calculated the permanent partial disability award for Claimant's left calf injury by subtracting his residual wage-earning capacity of \$456.70³ from his stipulated average weekly wage of \$1,526.09. He next found Claimant incapable of performing any work

³ The ALJ arrived at this figure by averaging the weekly wages of those jobs he concluded constituted suitable alternate employment.

from February 26, 2019, because of his work-related left knee injury, thereby entitling Claimant to ongoing temporary total disability benefits from that date.

On reconsideration, the ALJ denied Employer's motion to alter Claimant's permanent partial disability benefits for his left calf injury to reflect a scheduled award under Section 8(c)(2) and again found Claimant entitled to benefits under Section 8(c)(21). In reaching this conclusion, he rejected Employer's contention that *PEPCO*, 449 U.S. 268, foreclosed the possibility of a permanent partial disability award in this case under Section 8(c)(21). He found *PEPCO* narrowly addressed whether a claimant may choose a larger recovery under Section 8(c)(21), as measured by his actual post-injury impairment in his wage-earning capacity, over what the schedule allows, and therefore "does not speak to the present situation, where the record is insufficient to calculate" a scheduled award. Order on Recon. at 2. He therefore distinguished *PEPCO* because "there was sufficient evidence to calculate benefits both under §§8(c)(19) and 8(c)(21)," while in this case "I could not locate any evidence in the record necessary to calculate" a scheduled award and "Employer has not directed me to such evidence in its closing brief or motion for reconsideration." *Id.* Nevertheless, the ALJ modified his decision "to reflect the award of permanent partial disability compensation shall be suspended during the period Claimant is entitled to temporary total disability compensation benefits." *Id.*

In the event of an injury to a scheduled member, recovery for a claimant's permanent partial disability is confined to what the schedule in Section 8(c)(1)-(19) of the Act provides, 33 U.S.C. §908(c)(1)-(19). *PEPCO*, 449 U.S. 268. An award of permanent partial disability benefits for a scheduled disability is predicated solely on the existence of a permanent anatomical impairment to a member listed in the schedule, and economic loss is not considered in determining an impairment rating under the schedule. *See, e.g., Soliman v. Global Terminal & Container Service, Inc.*, 47 BRBS 1, 2 (2013); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011); *see also Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915 (4th Cir. 1998).

In this case, it is undisputed, and the ALJ accordingly found, Claimant sustained a work-related left calf injury in June 2017 which culminated with his entitlement to permanent partial disability benefits as of March 5, 2018. Claimant's left calf injury necessarily constitutes an injury to a "scheduled member." *PEPCO*, 449 U.S. 268, 14 BRBS 363. Thus, Claimant's recovery is restricted to a scheduled award for a partial loss of use of his left leg under Section 8(c)(2), (19), 33 U.S.C. §908(2), (19).⁴ *Id.* Employer

⁴ Although Employer did not challenge the ALJ's finding that Claimant is entitled to permanent partial disability benefits for his left calf injury, it did explicitly challenge the

and the Director properly argue the ALJ inappropriately fashioned Claimant's permanent partial disability award using his loss of wage-earning capacity and Section 8(c)(21). Therefore, contrary to the ALJ's finding, the Supreme Court's decision in *PEPCO* conclusively holds the schedule is the exclusive remedy for compensating a claimant for permanent partial disability to listed parts of the body. *PEPCO*, 449 U.S. at 272. Such a claimant therefore may not receive an award under Section 8(c)(21), (h), 33 U.S.C. §908(c)(21), (h), for a loss of wage-earning capacity. See *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836 (4th Cir. 1999); *Gilchrist*, 135 F.3d 915. Wage-earning capacity is already factored into a scheduled award. *Gilchrist*, 135 F.3d 915.

Additionally, the ALJ's finding that Claimant's compensation should be calculated under Section 8(c)(21), because Employer did not proffer evidence of Claimant's impairment, mischaracterizes the burden on this issue. The claimant bears the burden of establishing the extent of his disability. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In this case, if the evidence regarding Claimant's impairment is non-existent or in equipoise, Claimant cannot satisfy his burden of proof on this issue and therefore has not established his entitlement to any permanent partial disability benefits. *Green*, 656 F.3d 235; *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

Consequently, because the ALJ applied an incorrect statutory provision and burden of proof, we vacate his award of permanent partial disability benefits for Claimant's left calf injury under Section 8(c)(21) and remand the case for further consideration. On remand, the ALJ may reopen the record to provide the parties the opportunity to submit evidence establishing an impairment rating for purposes of calculating Claimant's permanent partial disability award for his work-related left leg injuries in accordance with Section 8(c)(2) of the Act.⁵

ALJ's decision to award such benefits under Section 8(c)(21) rather than Section 8(c)(2). Emp's Br. at 1, 16-20.

⁵ As Claimant's left calf and left knee injuries resulted from the same work incident and involve the same scheduled member, a "leg lost" under Section 8(c)(2), the ALJ may, on remand, request the parties submit evidence regarding an impairment rating for Claimant's left leg which incorporates the effects of both injuries. If, however, Claimant's left knee injury has not yet reached maximum medical improvement, the ALJ may calculate Claimant's scheduled permanent partial disability award based on an impairment rating associated only with his left calf injury. Employer must then pay benefits for Claimant's left calf injury in accordance with the schedule for the corresponding number of weeks from March 5, 2018, until Claimant became totally disabled due to his left knee

Employer's remaining contentions, however, lack merit. First, consequential injuries are compensable under the Act. 33 U.S.C. §902(2); *Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680 (4th Cir. 2017). In this case, Employer does not dispute that Claimant's left knee injury is work-related or Dr. Wardell's assessment that Claimant became incapable of performing any work as of February 26, 2019, due to this work-related injury. We therefore affirm those findings, as well as the ALJ's award of temporary total disability benefits from February 26, 2019.⁶ *Huntington Ingalls Indus., Inc. v. Eason*, 788 F.3d 118 (4th Cir. 2015), *cert. denied*, 136 S.Ct. 1376 (2016). Second, it is well established that a claimant is not limited to an award under the schedule when an injury to a scheduled member results in temporary total disability. *PEPCO*, 449 U.S. at 277 n.17; *Eason*, 788 F.3d 118; *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120 (8th Cir. 1998). Nevertheless, as the ALJ appropriately determined on reconsideration, the schedule award is suspended during temporary total disability and resumes when total disability terminates. *See ITO Corp. of Baltimore v. Green*, 185 F.3d 239 (4th Cir. 1999); *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011); *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.4 (1985). Consequently, in this case, the payment of any scheduled award would be suspended during the period that Claimant remains totally disabled. *Id.*

Accordingly, we affirm the ALJ's award of temporary total disability benefits from August 18, 2017, through March 4, 2018, and ongoing from February 26, 2019. We also affirm his finding that Claimant is entitled to permanent partial disability benefits, which are suspended during Claimant's period of total disability. We vacate the permanent partial disability award under Section 8(c)(21) of the Act and remand the case for further

injury on February 26, 2019. At this juncture, any remaining scheduled award for Claimant's left calf injury would be suspended and would resume only if, and when, his total disability ends. Once Claimant's left knee condition becomes permanent, he may be entitled to additional scheduled benefits under Section 8(c)(2), instead of temporary total disability benefits, if such impairment increases the total impairment of the loss of use of his leg. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Any additional scheduled award would be limited to that additional impairment and subject to an Employer credit for any overpayment of temporary total disability benefits. *See generally Davenport v. Apex Decorating Co.*, 13 BRBS 1029 (1979).

⁶ We also reject Employer's contention that Claimant's retirement precludes any award of disability benefits after he is found capable of returning to light duty work. *See generally Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96 (4th Cir. 2018). Moreover, compensation for permanent partial disability in this case is calculated under the schedule and is based on a permanent impairment for loss of use of a member, rather than any loss in actual wage-earning capacity. *See generally Soliman*, 47 BRBS at 2.

consideration. On remand, the ALJ must consider Claimant's entitlement to a scheduled award of permanent partial disability benefits under Section 8(c)(2) consistent with our decision. We affirm the ALJ's decisions in all other respects.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge