

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0180

KEVIN MILLER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
GLOBAL LINGUIST SOLUTIONS, LLC)	
)	DATE ISSUED: 11/05/2020
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter (Law Office of Jeffrey M. Winter), San Diego, California, for Claimant.

Maryann C. Shirvell and Karen Beeman (Laughlin, Falbo, Levy & Moresi LLP), Sacramento, California, for Employer/Carrier.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier appeal Administrative Law Judge Richard M. Clark's Decision and Order Awarding Compensation and Benefits (2017-LDA-00232) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as

amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant grew up in Turkey and immigrated to the United States when he was 19. Tr. at 108. When he was young, he was diagnosed with osteomyelitis in his right knee and underwent surgery, which left him with a misaligned knee. JX 8 at 103-104.

Claimant started working for employer as a linguist in early 2007 and was stationed in Iraq, first at a Marine camp near Baghdad and then at Mosul. Tr. at 109-112. He underwent a pre-employment physical examination and was given a clean bill of health. JX 8 at 68-69. Mosul was subject to constant mortar attacks and Claimant stated he felt his life was in danger "all the time." Tr. at 113-114, 119. He later was assigned to al Asad where he witnessed violence from attacks on convoys and improvised explosive devices. JX 8 at 76, 79-81.

Claimant started experiencing pain in his right knee in late 2008, at first treating it only with over-the-counter medications before he went to see a doctor in February 2009. JX 8 at 48-49. Dr. Odeh stated there were signs of a recurrence of Claimant's previous osteomyelitis and he might have a knee strain. *Id.* at 48-51. Claimant remained able to perform all his work duties, although he was more careful when he needed to climb onto or jump off a Humvee. *Id.* at 116. He stopped working in July 2009, when he returned to the United States for medical treatment on his right knee. *Id.* at 51-52, 116-117.

Claimant was treated in September 2009 and was diagnosed with noted valgus deformity of his right knee and patellofemoral pain. JX 9 at 142. An X-ray of his right hip showed "very minimal narrowing" relative to the left. *Id.* at 149-150. Dr. Sim opined Claimant's work aggravated his pre-existing valgus deformity misalignment and recommended a realignment osteotomy. *Id.* at 141. Claimant stated, at this point, his hip hurt more than his knee. JX 8 at 94-97.

On December 2, 2009, Dr. Harpley evaluated Claimant for psychiatric complaints, including constant fear, paranoia, and nightmares; he diagnosed chronic post-traumatic stress disorder (PTSD) and a major depressive disorder and recommended various forms of psychological treatment as well as medication. JX 11 at 201-202. In April 2010, Dr. Harpley recommended against proceeding with knee surgery because "psychotic depression can adversely impact a patient's surgical prognosis." *Id.* at 211. Claimant attempted suicide on April 29, 2010 and was hospitalized. JX 7 at 29-31; JX 11 at 214. Dr. Moyer diagnosed severe PTSD and major depressive disorder of moderate severity.

JX 19 at 350. Claimant was discharged on May 3, 2010. *Id.* 19 at 368-372. He continued to receive outpatient treatment for his psychiatric conditions, including therapy and medication. JX 8 at 90.

Dr. Levine, an orthopedic surgeon and Claimant's primary treating physician, concluded Claimant had severe instability of the right knee and a straining injury and his work activities had hastened the need for future knee surgery. JX 12 at 246, 253. On September 17, 2010, Dr. Levine diagnosed trochanteric bursitis of the right hip and found Claimant to be permanent and stationary and suffering from a 50 percent impairment of the lower extremity. *Id.* at 262-263. He stated Claimant was no longer able to work for Employer or in a war zone. *Id.* at 263. He further recommended a knee arthroscopy in April 2011. *Id.* at 264A.

Claimant was psychologically cleared for surgery by Dr. Harpley as of May 24, 2012. JX 12 at 264F. He underwent arthroscopic knee surgery on January 14, 2014. Dr. Levine examined Claimant again on June 3, 2014 and opined his knee was at maximum medical improvement as of that date. *Id.* at 264Q. He stated Claimant's knee condition would prevent him from performing his usual work for Employer. *Id.* at 264AA-264BB. Claimant filed a claim for benefits for the injuries to his right knee and right hip, and for his psychiatric conditions.

The parties stipulated claimant's right knee injury is work-related. The administrative law judge concluded Claimant also established his right hip injury and psychological injuries are work-related.¹ *See* Decision and Order at 90-94. The administrative law judge found Claimant's right knee reached maximum medical improvement on September 17, 2010 when Dr. Levine found it permanent and stationary, although noting surgery would be necessary in the future,² and that after the surgery on January 14, 2014, Claimant's knee disability became temporary until it again reached maximum medical improvement on June 3, 2014. *See id.* at 96-97. The administrative law judge concluded Claimant's psychological injuries reached maximum medical improvement on March 26, 2014, but that Claimant's right hip injury has not yet reached maximum medical improvement.³ *See id.* at 97 (citing JX 11 at 245V).

¹ Causation is not at issue on appeal.

² Dr. Levine's notes regarding surgery did not reference Claimant's psychological injuries or any effect Claimant's psychological condition could have on his surgery.

³ The administrative law judge found Claimant's lack of credibility as to his allegedly worsening psychological symptoms after mid-2015 supports a finding that

The parties stipulated Claimant was totally disabled by his right knee injury from July 8, 2009 through August 16, 2011. *See* Decision and Order at 99. The administrative law judge found Claimant established a prima facie case of total disability through the date of the hearing on August 2, 2017, because Drs. Levine and Muldoon issued work restrictions both before and after Claimant’s knee surgery that prohibited him from returning to his usual work. *See id.* He also concluded Claimant established a prima facie case of total disability due to his hip injury as of September 2, 2016, and his psychological injuries until at least March 26, 2014, due to Dr. Harpley’s restricting Claimant from work in combat zones or high-stress work environments. *See id.* at 99-101.

The administrative law judge found Employer established suitable alternate employment with a December 19, 2014, labor market survey. *See* Decision and Order at 102-104. He thus awarded temporary total disability benefits for both the right knee and psychological injuries from July 8, 2009 at the 2009 maximum compensation rate; and (although his psychological injury remained temporary) permanent total disability benefits due to the knee injury from September 17, 2010 to January 14, 2014, at the maximum compensation rate in effect each year for 2010, 2011, 2012, 2013 and 2014, as he was “currently receiving permanent total disability benefits.” *See id.* at 107. He found Claimant’s knee returned to temporary total disability status on January 14, 2014, when Claimant underwent surgery. This award was based on the 2009 maximum compensation rate. *See id.* The administrative law judge awarded permanent total disability benefits commencing March 26, 2014, when claimant’s psychological condition became permanent; these benefits were paid at the 2014 maximum compensation rate and continued when Claimant’s knee injury reached maximum medical improvement again on June 3, 2014. The administrative law judge concluded Claimant became permanently partially disabled as of December 19, 2014 when Employer established suitable alternate employment. *See id.* at 105-106. The administrative law judge awarded Claimant permanent partial disability benefits due to his psychological injuries based on a post-injury wage earning capacity of \$480 per week. *See id.* at 107. He awarded a concurrent scheduled award for Claimant’s 31 percent impairment to his right lower extremity, pursuant to *I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th

Claimant’s psychological injuries remain at maximum medical improvement and have not, in fact, worsened. *See* Decision and Order at 98.

Cir. 1999).⁴ The administrative law judge did not state at what maximum compensation rate the permanent partial disability awards are to be paid.⁵

On appeal, Employer contends the administrative law judge erred in awarding permanent total disability benefits as of September 18, 2010 for Claimant's right knee injury and in awarding permanent partial disability benefits based on the maximum compensation rate in effect in 2014 rather than 2009, when Claimant first became disabled. Claimant filed a response brief, urging affirmance. Employer filed a reply brief.

Employer first assigns error to the administrative law judge's finding that Claimant's right knee injury reached maximum medical improvement on September 17, 2010 and that he, therefore, was permanently totally disabled from September 18, 2010 through January 13, 2014, even though his knee required future surgery. Citing *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014), Employer further contends that because the combination of Claimant's psychological impairment and his knee injury rendered him totally disabled and the psychological impairment was temporary at the time, Claimant should have been found to be temporarily totally disabled through March 26, 2014, when his psychological condition reached maximum medical improvement.

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement, *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996), or "when the injury has healed to the full extent possible." *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126, 29 BRBS 22, 25(CRT) (5th Cir. 1994). A claimant's condition may also be considered permanent if it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The prognosis of future improvement does not preclude a finding of permanency. *See Misho*, 48 BRBS 13.

⁴ Where a claimant is entitled to concurrent awards for permanent partial disability for both a scheduled and unscheduled injury, claimant's unscheduled award is paid in full and the scheduled award is paid on a pro-rated basis until paid out, with total weekly compensation limited by the maximum compensation rate for permanent total disability. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

⁵ The parties stipulated Claimant's average weekly wage at the time of injury was \$2,529.46, high enough for partial disability awards to be subject to the maximum compensation rate in Section 6(b)(1), 33 U.S.C. §906(b)(1).

The administrative law judge cited *Carrion v. SSA Marine Terminals, LLC*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016), for the proposition that a previously-permanent disability can be rendered temporary again by a surgery that creates a new healing period; the potential for future surgery does not render an injury temporary if it has reached its normal healing period. *See* Decision and Order at 96 (citing *Carrion*, 821 F.3d at 1173-74, 50 BRBS at 64(CRT)). The *Carrion* court stated that if a claimant undergoes the anticipated surgery, the nature of the disability “should be assessed after the surgery, not in anticipation of such a contingency.” *Carrion*, 821 F.3d at 1174, 50 BRBS at 64(CRT). The administrative law judge relied on Dr. Levine’s opinion that, as of September 17, 2010, Claimant’s knee injury was at maximum medical improvement and then became temporary again on January 14, 2014, when Claimant underwent knee surgery. *See* Decision and Order at 97. He concluded Claimant’s right knee again reached maximum medical improvement on June 3, 2014 after the surgery. *See id.*

We affirm the administrative law judge’s conclusion that Claimant’s knee injury reached maximum medical improvement on September 17, 2010, in spite of Claimant’s need for future surgery. The administrative law judge reasonably relied on Dr. Levine’s opinion that Claimant’s right knee injury was permanent and stationary as of September 17, 2010 to find his right knee reached maximum medical improvement on that date. Furthermore, Claimant’s medical records support a finding that as of September 17, 2010, his right knee injury had reached a point where “normal and natural healing” was no longer likely, *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), and he was “no longer undergoing treatment with a view towards improving his condition.” *Abbott*, 40 F.3d at 126, 29 BRBS at 25(CRT).⁶ As it is supported by substantial evidence and is in accordance with the law, we affirm the administrative law judge’s finding that Claimant’s right knee reached maximum medical improvement on September 17, 2010.

We also reject Employer’s contention that the temporary nature of Claimant’s psychological condition controls the award prior to March 26, 2014. In *Misho*, the Benefits Review Board held that where a claimant establishes an inability to perform his usual work due to only one work-related condition, rather than a combination of work-related injuries, the nature of that disabling condition governs the award of benefits. *Misho*, 48 BRBS at

⁶ At the time Dr. Levine stated Claimant’s knee condition was permanent and stationary, Claimant’s knee surgery was not scheduled or imminent. *See McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000) (holding that a claimant was permanently totally disabled where his condition was not improving and surgery was not anticipated); *see also Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

15.⁷ Employer's contention that Claimant was not totally disabled by his knee injury, because Dr. Levine stated Claimant could continue to work as an interpreter in an office setting, is not supported by law. Dr. Levine stated in 2010 that Claimant's knee injury precluded him from performing his usual work duties. Moreover, Employer did not establish suitable alternate employment was available to Claimant at this time. Without a showing of suitable alternate employment, Claimant's hypothetical ability to work in an office setting is insufficient to establish he was not totally disabled. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660(CRT) (9th Cir. 1980); *LaRosa v. King & Co.*, 40 BRBS 29 (2006). Therefore, the administrative law judge correctly concluded the nature of Claimant's disabling knee injury governed his award of benefits. *Misho*, 48 BRBS at 16. Thus, we affirm his finding that Claimant was permanently totally disabled from September 18, 2010 through January 3, 2014. *See Carrion*, 821 F.3d at 1174, 50 BRBS at 64(CRT); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

We next address Employer's challenge to the maximum compensation rate applicable to the award of permanent partial disability benefits. Section 6(b)(1) of the Act sets the maximum compensation rate at 200 percent of the applicable national average weekly wage. 33 U.S.C. §906(b)(1); *see also* 20 C.F.R. §§702.801-806. The applicable initial maximum compensation rate is that in effect when a claimant first becomes disabled and thereby entitled to compensation, regardless of when the award is entered. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012); *see* 20 C.F.R. §§702.805(a), 702.806(a). Thereafter, a claimant is entitled to the subsequent increased maximum rates only if he is "currently receiving" permanent total disability benefits. *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010); *see* 20 C.F.R. §702.806(b). A claimant's benefits for any temporary disability or for permanent partial disability remain subject to the maximum rate in effect when the claimant first became disabled. *Id.*, 625 F.3d at 1207-1208, 44 BRBS at 78(CRT); 20 C.F.R. §802.805.⁸ The administrative law

⁷ In *Misho*, the claimant sustained work-related physical and psychological injuries and her psychological injury alone rendered her incapable of returning to her former work. *Misho*, 48 BRBS at 15. The Board held the claimant was entitled to permanent total disability benefits as of the date her totally disabling psychological injury became permanent, even though her physical injuries had not yet reached permanence. *See id.* at 16.

⁸ In *Roberts*, the claimant was injured in 2002 and the administrative law judge awarded him temporary total disability benefits from the date he ceased working after his injury in March 2002, permanent total disability benefits from July 2005 when he reached maximum medical improvement, and permanent partial disability benefits from October 2005 when his employer established suitable alternate employment. *Roberts*, 625 F.3d at 1205, 44 BRBS at 76(CRT). The Ninth Circuit held that a claimant is "newly awarded

judge's Order does not indicate the maximum compensation rate for Claimant's concurrent permanent partial disability awards, but his recitation of *Roberts* demonstrates a proper understanding of the law. *See* Decision and Order at 106.⁹

Employer correctly contends Claimant's permanent partial disability awards are to be based on the maximum compensation rate applicable in fiscal year 2009, when he first became disabled by his knee and psychological conditions. *Roberts*, 625 F.3d at 1208, 44 BRBS at 47(CRT) (9th Cir. 2010); 20 C.F.R. §702.805. Because the administrative law judge's decision does not so explicitly state, we modify it to hold that Claimant's permanent partial disability benefits for his scheduled and unscheduled injuries should be paid based on the maximum compensation rate in effect in July 2009, or \$1,200.62.

Accordingly, we modify the administrative law judge's award to reflect Claimant's entitlement to permanent partial disability benefits from December 19, 2014 is to be based on the fiscal year 2009 maximum compensation rate of \$1,200.62. In all other respects,

compensation" for the purposes of determining the applicable maximum compensation rate when a claimant first becomes entitled to compensation, i.e., when a claimant first becomes disabled, a conclusion affirmed by the Supreme Court. The 2002 maximum compensation rate remained in effect for subsequent periods of temporary total and permanent partial disability because the claimant was not "currently receiving" permanent total disability benefits. The Ninth Circuit therefore affirmed the award of permanent partial disability benefits based on the maximum compensation rate for 2002, when the claimant first became disabled. *See Roberts*, 625 F.3d at 1208, 44 BRBS at 77(CRT).

⁹ The administrative law judge stated:

The applicable initial maximum compensation rate is that in effect when the claimant first becomes disabled and thereby becomes entitled to compensation, regardless of when a compensation order is issued. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100, 112 (2012). This rate also applies to subsequent permanent partial disability compensation. *Roberts v. Dir., OWCP*, 625 F.3d 1204 (9th Cir. 2010).

Decision and Order at 106.

we affirm the administrative law judge's Decision and Order Awarding Compensation and Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge