



BRB No. 15-0314

RUSSELL L. MOODY)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: <u>Mar. 10, 2016</u>
HUNTINGTON INGALLS,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-LHC-00702, 00703) of Administrative Law Judge Kenneth A. Krantz 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 if they are rational, supported by substantial evidence and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer for approximately 45 years. He suffered a back injury in July 2001 while working for employer as a welder, which required three surgeries. Claimant returned to suitable work for employer as a driver in 2011. Claimant notified employer on August 1, 2011, that he intended to retire and, pursuant to company

policy, claimant's last day of work was three months later on October 31, 2011. During the interim, claimant injured his right shoulder during the course of his employment for employer; however, he was able to continue working as a driver. Claimant first received medical treatment for his injury on November 2, 2011, and he underwent shoulder surgery on December 13, 2011.¹ CX 4 at A, B, D. Claimant's treating physician, Dr. Coleman, released claimant to work on February 17, 2012, with restrictions of no overhead reaching, lifting or carrying over 10 pounds. *Id.* at W. Employer declined to pay claimant compensation for temporary total disability, 33 U.S.C. §908(b), for the period claimant was unable to work while he was recuperating from shoulder surgery from December 13, 2011 to February 16, 2012.

In his decision, the administrative law judge found that claimant is entitled to temporary total disability compensation for his recuperative period. The administrative law judge rejected claimant's contention that his retirement was "involuntary," i.e., due to his work-related injuries. Decision and Order at 9. The administrative law judge attributed claimant's retirement to his displeasure at having to work the second shift from 3:30 p.m. to 12:00 a.m. However, the administrative law judge found that, pursuant to *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997), claimant's retirement prior to the time of his surgery was irrelevant; claimant need show only that his physical disability is due to the work injury and need not also establish a loss of wage-earning capacity due to the injury. *Id.* at 7. Because there was no dispute between the parties that claimant could not perform his usual work while he was recuperating from shoulder surgery, the administrative law judge awarded claimant compensation for temporary total disability from December 13, 2011 to February 16, 2012. *Id.* at 9-10.

On appeal, employer challenges the award of disability benefits, contending the administrative law judge erred by applying *Harmon*. Employer asserts that, pursuant to *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993) and *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001), claimant is not entitled to disability compensation because he voluntarily retired prior to undergoing surgery. Employer contends it does not have to pay compensation when there is no economic loss due to the work injury because claimant no longer had any wage-earning capacity at the time of the physical incapacitation. Claimant urges affirmance of the

¹ Employer accepted the shoulder injury as work-related and paid claimant medical benefits, including those fees associated with the December 13, 2011 surgery. See 33 U.S.C. §907(a). There is no basis in the record for claimant's testimony or the administrative law judge's statement that the surgery was "postponed" until after claimant retired. Tr. at 21; Decision and Order at 8. Claimant first saw Dr. Coleman on November 2, 2011, after claimant retired, and on that date Dr. Coleman scheduled surgery for December 13. CX 4 at A, C.

administrative law judge's compensation award. We agree with employer, and therefore, we reverse the award of benefits.

Section 2(10) of the Act provides that: "'Disability' means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]" 33 U.S.C. §902(10) (emphasis added). Thus, contrary to the administrative law judge's statement, the disability inquiry encompasses both physical and economic considerations. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979). Claimant bears the burden of establishing that his loss of wage-earning capacity is due to his work injury. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989); *see also McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988). For example, where a claimant is performing suitable alternate work post-injury, and his inability to continue to do so is not due to the work injury, the employer is not liable for total disability benefits. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Similarly, when a claimant leaves or is discharged from his usual work for reasons unrelated to his work-related injury, he does not have a "disability" within the meaning of the Act because his loss of earning capacity is not "because of injury." *Hoffman*, 35 BRBS 148; *Burson*, 22 BRBS 124.

In *Harmon*, 31 BRBS 45, the Board held that a claimant who suffered a work-related traumatic injury and became unable to perform his usual work prior to his longevity retirement remained "disabled" following his retirement. That is, because the claimant's work injury precluded his return to his usual work prior to or at the time of retirement, it was immaterial that claimant retired due to eligibility based on his longevity. *Id.* at 47-48. In contrast, in *Hoffman*, a claimant suffered a traumatic knee injury, returned to light-duty work with his employer which was deemed suitable, and retired three years later by accepting the employer's early retirement package. After claimant's retirement, his knee condition worsened and his physician increased his permanent impairment rating and later performed both arthroscopy and total knee-replacement surgeries, rendering the claimant unable to work. The Board affirmed the administrative law judge's finding that the claimant's retirement was not due to his injury. Thus, his loss of wage-earning capacity was not caused by his injury but was due to his retirement and, although he was entitled to increased benefits under the schedule as a showing of lost wage-earning capacity is not required for such benefits, he was not entitled to permanent total disability benefits. *Hoffman*, 35 BRBS at 149-150;² *see also*

² In his response brief, claimant asserts it is significant that the claimant in *Hoffman* was denied permanent total disability benefits, whereas he seeks temporary total disability benefits, which the employer in *Hoffman* had paid to the claimant in that case for one period of post-retirement recuperation. *See Hoffman*, 35 BRBS at 150 n.1. We

Burson, 22 BRBS 124. Accordingly, in a traumatic injury claim for post-retirement disability compensation, the only relevant inquiry is whether claimant's work injury precluded his return to his usual work at the time of his retirement such that the loss of earning capacity was "because of injury." *Harmon*, 31 BRBS 45.

Contrary to the administrative law judge's statement, the issue concerning the reason for claimant's retirement is central to this case because resolution of that issue determines whether claimant's disability is "because of injury" pursuant to Section 2(10). In finding that claimant's retirement was "voluntary," the administrative law judge found that claimant retired due to his displeasure at being assigned to work the second shift, and he rejected as not credible claimant's contention that driving aggravated his 2001 work-related back injury and caused his retirement.³ Decision and Order at 9; *see* Tr. at 16-17, 24-26, 32; EX 2 at 8. This finding is within the administrative law judge's discretion and it is supported by substantial evidence of record. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Moreover, claimant did not contend that his shoulder injury precluded his continued work for employer. *See* Tr. at 7-9; Cl. Post-Hearing Br. at 9.⁴ Thus, in this case, claimant continued working in a suitable position until he voluntarily retired. Accordingly, as claimant did not establish that either his work-related back or shoulder injury prevented him from working as a driver at the time of his retirement on October 31, 2011, claimant did not establish that he lost any wage-earning capacity "because of" his work injuries. Claimant's retirement had already resulted in his complete loss of earning capacity at the time of his shoulder surgery. Therefore, we reverse the administrative law judge's award of post-retirement temporary total disability compensation. 33 U.S.C. §902(10); *Hoffman*, 35 BRBS 148.

do not view this as significant, in that the employer's liability for the temporary total disability benefits it had voluntarily paid was not challenged on appeal.

³ The administrative law judge found that when claimant complained that the truck seat aggravated his back, employer placed him in another truck. Decision and Order at 9; *see* Tr. at 19-20, 24, 34.

⁴ Claimant's contention regarding his shoulder is limited to contending that he is entitled to benefits because his shoulder surgery was rescheduled to a date after his retirement. As discussed in n. 1, *supra*, there is no foundation in the record for the assertion that the surgery was postponed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits for temporary total disability from December 13, 2011 to February 16, 2012, is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge