

BRB No. 13-0432

RICKEY O. NELSON)
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 Claimant-Respondent)
)
 v.)
)
 CASCADE GENERAL,)
 INCORPORATED) DATE ISSUED: Apr. 21, 2014
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION, LIMITED)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Robert E. Babcock and James R. Babcock (Holmes, Weddle & Barcott, P.C.), for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2010-LHC-00782, 2010-LHC-00783) of Administrative Law Judge Steven B. Berlin 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On July 27, 2009, claimant experienced chest pains and shortness of breath while walking up a flight of stairs at work.¹ On July 29, 2009, Dr. Dyehouse saw claimant for his chest pain and referred him to Dr. Peizner for testing. Dr. Peizner performed an angiogram on August 6, 2009, which revealed coronary artery disease. That same day, Dr. Peizner placed a stent in claimant's anterior descending artery. Dr. Peizner discharged claimant on August 7, 2009, and removed him from work for the week of August 10-15, 2009, stating he could return thereafter. EX 6 at 39, 67, 71-73. On August 18, 2009, based on Dr. Dyehouse's referral, claimant saw Dr. Proano, an occupational medicine specialist, for a determination of his work capacity. Dr. Proano opined that claimant was permanently precluded from performing his work as a marine electrician as of August 6, 2009.² Claimant informed employer on or after August 18, 2009, that he was "quitting because the doctor told me I'm retiring." EX 9 at 261; EX 7 at 143.

Claimant alleged that the July 27, 2009, work injury caused or contributed to a worsening of his coronary artery disease, rendering him permanently and totally disabled. Employer responded that claimant was totally disabled by an October 2008 stroke that resulted in cognitive and neurological deficiencies. Although claimant continued to work for employer after his stroke, employer argued that claimant was working only because of its beneficence, and that his wages vastly exceeded his true earning capacity. Tr. at 8. Employer also contended that the events of July 27, 2009, had no effect on claimant's underlying coronary artery disease and contributed to no residual limitations that affected claimant's ability to work.

¹ Claimant worked for employer as a marine electrician and was tasked with keeping the electrical ventilation equipment within OSHA requirements. EX 9 at 235-236. A typical day's work required him to climb ladders and maneuver into confined spaces. *Id.* at 236.

² Dr. Proano stated that claimant's 2008 cerebrovascular accident, persistent neurological deficit, and acute coronary syndrome prevent claimant from permanently performing his work as a marine electrician. EX 7 at 98-99, 141.

Weighing the evidence as a whole, the administrative law judge found, based on the opinions of Drs. Dyehouse, Peizner, and Proano, that conditions at work caused symptoms of claimant's underlying cardiovascular disease to become manifest on July 27, 2009, and that these symptoms were debilitating while they lasted. Thus, the administrative law judge found that claimant suffered a work-related aggravation of his underlying cardiac condition on this date. As Dr. Peizner placed a stent in claimant's artery to alleviate his coronary symptoms and removed him from work from August 10-15, 2009, to recover, the administrative law judge found claimant entitled to temporary total disability benefits due to his injury during this period. Decision and Order at 16. The administrative law judge found that claimant's condition reached maximum medical improvement at the end of this recovery period based on the parties' stipulation. Further finding that employer stipulated to total disability and failed to offer evidence of suitable alternate employment, the administrative law judge found claimant entitled to continuing permanent total disability benefits from August 16, 2009.³ The administrative law judge awarded employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's award of permanent total disability benefits, arguing that he erroneously considered only the economic, and not also the medical, component of claimant's disability.⁴ Employer asserts that the administrative law judge credited Dr. Peizner's opinion that claimant could return to work after August 15, 2009; therefore, claimant had no residual disability and is not entitled to an ongoing award of permanent total disability benefits. Claimant responds, urging affirmance of the award.

Disability under the Act is an economic concept based on a medical foundation. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978); *Owens v. Traynor*, 274 F.Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir.), *cert. denied*, 393 U.S. 962 (1968). Disability is defined under the Act as the "incapacity *because of injury* to earn wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. §902(10) (emphasis added); *see* 33 U.S.C. §902(2). To establish a prima facie case of total disability, a claimant must demonstrate that he cannot

³ The administrative law judge also found that claimant has a 3.8 percent work-related binaural hearing loss and that claimant is entitled to a schedule award for this loss in the event that claimant is no longer totally disabled.

⁴ We affirm as unchallenged the administrative law judge's award of temporary total disability benefits from August 10-15, 2009; the contingent award of permanent partial disability benefits for claimant's hearing loss; and the award of medical benefits. *Scalio v. Ceres Terminals, Inc.*, 41 BRBS 57 (2007).

return to his usual employment due to his work-related injury. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). Thus, there must be at least a partial causal relationship between a claimant's work injury and his disability in order for an injury to be compensable. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). Once the claimant establishes his prima facie case, the employer bears the burden of establishing the availability of suitable alternate employment to show that the claimant's disability is, at most, partial. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

In this case, claimant and employer stipulated that claimant's work-related coronary aggravation reached maximum medical improvement on August 15, 2009, and that claimant is unable to return to his usual employment and is totally disabled. Tr. at 6-7. They disagreed, however, on the cause of this total disability. Although the administrative law judge addressed employer's assertion that claimant is totally disabled by the residuals of the non-work-related stroke he suffered in 2008, and found he was not, the administrative law judge did not specifically address whether claimant met his burden of establishing that he is precluded from returning to work at least in part due to his work-related heart condition. The administrative law judge appears to have presumed that, because the parties stipulated to total disability, and, as claimant is not disabled due to his stroke, he must, therefore, be totally disabled due to his work-related heart condition. Absent evidence of the availability of suitable alternate employment, the administrative law judge found claimant entitled to total disability benefits. Decision and Order at 18.

We cannot affirm the award of ongoing permanent total disability benefits. *See Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). The administrative law judge did not address the dispositive issue presented by the claim and he made inconsistent findings within in his decision. The dispositive issue is whether claimant established that his work-related coronary injury, at least in part, renders him unable to perform his usual work. *See Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon.* 45 BRBS 73 (2011) (holding that the administrative law judge must determine if the claimant is disabled by the work-related aggravation or the non-work-related progression of the underlying pulmonary disease). Whether employer established that the residuals from claimant's 2008 stroke disabled claimant is not dispositive. The issue is whether claimant's work injury had a permanent effect on his coronary condition so as to contribute to his total disability. It is claimant's burden to make out his prima facie case of total disability due to the work injury, not employer's burden to show that some other condition disables claimant. *Id.*

Moreover, the administrative law judge seemingly credited Dr. Peizner's opinion that claimant can perform his usual work from the standpoint of his work-related coronary incident. *See* Decision and Order at 11. Drs. Bietz and Proano opined that claimant's stent may occlude and cause a return of his coronary symptoms with stress at work and that, therefore, claimant should not return to work. Tr. at 35; EX 7 at 110-111. Dr. Peizner opined that claimant's condition was significantly improved following the stent insertion and that claimant could return to his prior work. EX 6 at 45-46, 72-73. In his summary of this evidence, the administrative law judge found that the possibility of future occlusion warrants a finding that claimant's medical condition needs monitoring, but does not warrant a finding that claimant could not return to work. Decision and Order at 11. This finding contradicts the administrative law judge's later award of ongoing benefits on the apparent basis that claimant is totally disabled by his coronary condition. *Id.* at 18. In addition, the administrative law judge found that the work-related cardiac episode did not aggravate claimant's underlying coronary artery disease. *Id.* at 10.⁵ This finding also undermines the award of permanent total disability benefits.

Therefore, we must vacate the award of permanent total disability benefits and remand this case for further findings. On remand, the administrative law judge must resolve the inconsistencies between his findings of fact and his legal conclusions; he must specifically address whether claimant established that he was precluded from returning to his usual work due at least in part to his work-related cardiac condition after his work injury reached maximum medical improvement on August 16, 2009.⁶ *See* 33 U.S.C. §902(10); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

⁵ The administrative law judge's specific finding is: "I cannot accept the theory that conditions at work . . . thus aggravated the underlying coronary artery disease. All of the other medical experts opined that Claimant's activity did not aggravate Claimant's underlying coronary artery disease, but only brought on symptoms that alerted medical doctors to the disease sooner than they otherwise might have discovered it." Decision and Order at 10.

⁶ If the administrative law judge finds that claimant cannot return to his usual work due to his work-related heart condition, then, in the undisputed absence of evidence establishing the availability of suitable alternate employment, claimant is entitled to permanent total disability benefits. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). If claimant is not totally disabled, he is entitled to the scheduled award for his work-related hearing loss. *See Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011).

Accordingly, the administrative law judge's award of permanent total disability benefits commencing August 16, 2009, is vacated, and the case is remanded for further findings consistent with this decision. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge