

BRB Nos. 09-0216
and 09-0216A

D.O.)
)
Claimant-Respondent)
Cross-Respondent)
)
v.)
)
McDONNELL DOUGLAS SERVICES)
)
and)
)
AIG CLAIMS SERVICES) DATE ISSUED: 08/27/2009
)
Employer/Carrier-)
Respondents)
)
ALSALAM AIRCRAFT COMPANY,)
LIMITED)
)
and)
)
INSURANCE COMPANY OF THE)
STATE OF PENNSYLVANIA)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Cross-Petitioner) DECISION and ORDER

Appeals of the Decision and Order on Second Remand and the Order Granting Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Scott C. Sands (Sands & Associates), Chicago, Illinois, for claimant.

Matthew H. Ammerman and Ryan M. Perdue (Fitzhugh, Elliott & Ammerman, P.C.), Houston, Texas, for McDonnell Douglas Services and AIG Claims Services.

Richard L. Garelick (Flicker, Garelick & Associates, LLP), New York, New York, for Alsalam Aircraft Company, Limited, and Insurance Company of the State of Pennsylvania.

Kathleen H. Kim (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Alsalam Aircraft Company, Limited (Alsalam) appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Decision and Order on Second Remand and the Order Granting Motion for Reconsideration (2003-LHC-2109, 2003-LHC-2125, 2004-LHC-1655) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the third time that this case is before the Board. To reiterate the facts, claimant initially injured his back and neck on October 28, 1997, during the course of his employment as a crew chief with McDonnell Douglas Services (MDS) in Saudi Arabia. Tr. at 71-74. As a result of this work incident, MDS paid compensation to claimant from October 28 through November 3, 1997. Although claimant remained symptomatic, he then returned to his usual work. Tr. at 87-89.

On January 13, 1998, claimant's employer, but not his job, changed when Alsalam bought MDS's operations. Claimant, who continued to work but sometimes missed days due to symptom flare-ups caused by the previous day's work activities, was subsequently diagnosed with disc herniations at C5-6 and C6-7 from the 1997 injury. On May 18, 1999, claimant injured his shoulder at work. He underwent surgery on his right shoulder on August 17, 1999, and by September 7, 1999, he was released to return to light duty.

In March 2000, claimant returned to his usual employment after being released from care for his shoulder injury; claimant testified that he suffered pain in his neck when he performed certain aspects of his job. In April 2000, claimant learned that he needed surgery on his neck. On August 18, 2000, claimant arrived in the United States whereupon he underwent a second surgical procedure on his right shoulder on January 30, 2001, and on July 3, 2001, he underwent neck surgery at MDS's expense. Because claimant failed to return to work in Saudia Arabia, Alsalam ceased paying claimant's salary in February 2001, and terminated his employment on May 22, 2001. Claimant filed a claim for benefits under the Act for his 1999 shoulder injury, and Administrative Law Judge Roketenetz found Alsalam liable for temporary total disability benefits from February 8 through May 9, 2001, and permanent total disability benefits from May 10 through July 2, 2001, for claimant's shoulder injury, based upon an average weekly wage of \$1,195.46.¹ Cl. Exs.(ii) 5, 47. Following claimant's July 3, 2001 neck surgery, MDS paid claimant disability compensation from July 3, 2001, through May 4, 2004, at varying rates. MDS Ex. 62. According to claimant, he experienced additional neck and back symptoms in the summer of 2003, and on September 29, 2003, he learned that his first neck surgery had been unsuccessful and that he needed revision surgery. After MDS denied authorization for this second neck surgery, claimant sought benefits against both MDS and Alsalam.

In his initial Decision and Order, Administrative Law Judge Mills found that claimant's current neck disability is due solely to the natural progression of his October 28, 1997, work injury because MDS failed to show that there was a new injury or aggravation of this condition while claimant worked for Alsalam. Accordingly, Judge Mills held MDS liable for temporary total disability benefits, beginning on July 3, 2001, and continuing, as a result of claimant's neck condition, as well as future medical expenses. Judge Mills found claimant's average weekly wage to be \$1,235.50, pursuant to Section 10(c), 33 U.S.C. §910(c).

On MDS's appeal, the Board determined that the administrative law judge misapplied the aggravation rule when considering the issue of which employer is responsible for the payment of claimant's benefits. The Board therefore vacated the administrative law judge's finding that MDS is the responsible employer and remanded the case for reconsideration of this issue. The administrative law judge's average weekly wage calculation and his award of an attorney's fee payable to claimant's counsel also were vacated by the Board. [*D.O.*] v. *McDonnell Douglas Services*, BRB Nos. 05-0445/A (Feb. 15, 2006) (unpub.) (*D.O. I*).

¹ According to Judge Roketenetz's decision claimant sought permanent total disability benefits for the shoulder injury only through July 2, 2001, because of a previous agreement with MDS under which it would pay him compensation for his neck injury beginning on July 3, 2001, the date of the neck surgery. Cl. Ex.(ii) 47 at 3, 14.

On remand, Judge Mills found that claimant's continuing employment with Alsalam aggravated his underlying neck condition, resulting in claimant's disabling symptoms and pain, and that this condition thereafter reached a point where claimant could not continue gainful employment with Alsalam. Accordingly, pursuant to the aggravation rule, the administrative law judge concluded that Alsalam is the employer responsible for the payment of benefits due claimant as a result of his neck condition. The administrative law judge determined claimant's average weekly wage was \$931.93 and approved claimant's counsel's request for an attorney's fee and costs in the amount of \$33,114.59. Alsalam appealed this decision to the Board, contending that the administrative law judge erred in holding it liable for the payment of claimant's benefits. On cross-appeal, claimant asserted that the administrative law judge erred in calculating his average weekly wage and in failing to award him permanent total disability benefits as a consequence of his prior shoulder injury. In its second decision, the Board rejected Alsalam's contention that Judge Mills employed an improper standard on remand in addressing the issue of which employer is responsible for the payment of claimant's benefits under the Act, and concluded that substantial evidence supports Judge Mills's finding that claimant's neck surgeries and disability are related to his employment activities with Alsalam. Accordingly, the Board affirmed the finding that Alsalam is liable for the benefits due claimant as of July 3, 2001. The Board vacated Judge Mills's calculation of claimant's average weekly wage and remanded the case for further consideration of that issue. The Board also directed the administrative law judge on remand to fully address claimant's claim for benefits arising post-July 2, 2001, as a result of his work-related shoulder condition should claimant pursue that claim on remand. *D.O. v. McDonnell Douglas Services*, BRB Nos. 07-0341/A (Dec. 21, 2007) (unpub.) (*D.O. II*).

The case on remand was reassigned to Administrative Law Judge Price (the administrative law judge). In his Decision and Order on Second Remand, the administrative law judge found that claimant's average weekly wage for his neck injury is \$1,235.50, and that this wage is greater than the average weekly wage, \$1,195.46, found by Judge Roketenetz to be applicable to claimant's shoulder injury. The administrative law judge awarded Alsalam relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In his Order Granting Motion for Reconsideration, the administrative law judge clarified his award of benefits to claimant to reflect the following: claimant is entitled to permanent total disability benefits as a result of his right shoulder injury from May 10, 2001, and continuing, based on an average weekly wage of \$1,195.46, subject to annual increases pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f); claimant is entitled to temporary total disability benefits as a result of his neck and back conditions from July 3, 2001, and continuing, based on an average weekly wage of \$1,235.50; Alsalam is entitled to offset its payment of permanent total disability benefits against its liability for temporary total disability benefits; Alsalam is entitled to relief from the Special Fund for any permanent total disability benefits which it paid to claimant subsequent to May 10, 2003.

On appeal, Alsalam challenges the administrative law judge's finding that it is the employer responsible for the payment of benefits to claimant. Claimant and MDS respond, urging affirmance. In his cross-appeal, the Director asserts that the administrative law judge erred in awarding claimant permanent total disability benefits subsequent to July 2, 2001, and in determining that Alsalam is entitled to relief pursuant to Section 8(f) of the Act. Claimant and Alsalam have filed briefs in response to the Director's cross-appeal.

Responsible Employer

Alsalam contends that the Board erred in affirming in its second decision the finding that Alsalam is the responsible employer. The issue of the appropriate legal standards to be used in addressing the issue of which employer is responsible for the payment of claimant's benefits under the Act was thoroughly considered and addressed by the Board in its prior decisions, *see D.O. I*, slip op. at 4 – 7; *D.O. II*, slip op. at 4 – 7, and those determinations on this issue constitute the law of the case.² *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Alsalam has raised no basis for the Board to depart from this doctrine. *See Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). Accordingly, Alsalam's contention of error is rejected.

Concurrent Awards

In his cross-appeal, the Director challenges the administrative law judge's award of ongoing permanent total disability benefits to claimant for his right shoulder injury. The Director contends that no factual basis exists for concurrent awards for claimant's shoulder and neck injuries and that, moreover, claimant did not experience a loss of wage-earning capacity from his 1999 shoulder injury when he ceased working for Alsalam in August 2000. For the reasons that follow, we reject the Director's contentions of error and affirm the administrative law judge's award of permanent total disability benefits to claimant.

In this case, claimant filed three claims for benefits under the Act. Initially, claimant filed a claim against MDS for his 1997 neck and back injury. Alsalam bought MDS's operations in January 1998. Claimant thereafter filed two additional claims, one for his 1999 shoulder injury and one for the subsequent aggravation of his neck/back condition in 2000. In his Decision and Order dated November 5, 2002, Judge Roketenetz found that claimant's shoulder injury reached maximum medical improvement on May 9, 2001, and that claimant had restrictions placed by Dr. Rogalsky as a result of his shoulder

² In its brief, Alsalam acknowledges that the Board, in *D.O. II*, addressed the issue it again raises on appeal. Alsalam consequently seeks to have Judge Price's decision, which did not address this issue, summarily affirmed so that it may appeal the Board's prior decision to the circuit court of appeals. *See* Alsalam Br. at 2 – 3; *see also* 33 U.S.C. §921(c); 20 C.F.R. §802.410.

condition that prohibited his return to work as a crew chief for Alsalam.³ He found that claimant established his *prima facie* case of total disability and that Alsalam offered no evidence of suitable alternate employment.⁴ Cl. Ex.(ii) 47 at 16 – 47. Consequently, Judge Roketenetz awarded claimant temporary total disability benefits from February 7 through May 9, 2001, and permanent total disability benefits from May 10 through July 2, 2001, based on an average weekly wage of \$1,195.46. No party appealed this decision.

Claimant subsequently sought ongoing total disability benefits as a result of his work-related back, neck, and shoulder conditions. In a Decision and Order dated January 18, 2005, Judge Mills concluded that claimant has been temporarily totally disabled as a result of his neck condition since February 7, 2001; as claimant had previously received total disability benefits through July 2, 2001, for the shoulder injury pursuant to Judge Roketenetz's November 5, 2002 decision, Judge Mills awarded claimant temporary total disability benefits for his neck condition commencing July 3, 2001.⁵ [*D.O.*] v. *McDonnell Douglas Services/Boeing*, 2003-LHC-2109; 2003-LHC-2125; 2004-LHC-1655 (Jan. 18, 2005). After the Board remanded the case for reconsideration of the calculation of claimant's average weekly wage, Judge Mills declined claimant's request that he consider the extent of claimant's disability resulting from his shoulder injury and award benefits at the average weekly wage at the time of the shoulder injury, stating that this issue was not within the scope of the Board's remand. *D.O. v. McDonnell Douglas Services*, 2003-LHC-2109; 2003-LHC-2125; 2004-LHC-1655 (Aug. 10, 2006)(Decision and Order on Remand Awarding Benefits) and (Dec. 5, 2006) (Order Denying Claimant's Petition for Reconsideration). Claimant and Alsalam appealed this decision and the Board, in remanding the case for further consideration of the average weekly wage issue, specifically stated that, as claimant's claim for compensation post-July 2, 2001 for his shoulder injury was before Judge Mills initially, the administrative law judge must fully address this claim should claimant pursue it on remand. *D.O. II*, slip op. at 10 – 11.

³ Claimant's shoulder restrictions included a ten-pound limit on lifting and no repetitive overhead reaching or lifting. Cl. Ex.(ii) 14.

⁴ In addressing the extent of claimant's disability, Judge Roketenetz stated that Alsalam did not dispute claimant's status as disabled during the period for which he sought benefits; rather, Alsalam took the position that claimant's disability during this period was due to a pre-existing neck condition related to claimant's employment in 1997 with another employer. Cl. Ex.(ii) 47 at 15.

⁵ As a result of the award of total disability benefits for claimant's neck condition, Judge Mills concluded that the nature and extent of claimant's post-July 2, 2001, work-related shoulder condition is irrelevant since claimant could not receive compensation greater than that for his total disability. January 18, 2005, Decision and Order at 29, n. 8.

In his Decision and Order on Second Remand, the administrative law judge found that claimant's average weekly wage for total disability compensation purposes relating to claimant's neck condition is \$1,235.50; as this average weekly wage is greater than the average weekly wage found to be applicable for claimant's shoulder injury by Judge Roketenetz, the administrative law judge found the issue of the extent of disability due to claimant's shoulder injury to be moot. Decision and Order on Second Remand at 3. On reconsideration, the administrative law judge found claimant to be permanently totally disabled by his right shoulder condition as of May 10, 2001, and, consequently, he concluded that claimant is entitled to permanent total disability benefits from May 10, 2001, and continuing based on an average weekly wage of \$1,195.46 with increases pursuant to Section 10(f) of the Act. Order Granting Motion for Reconsideration at 1. Alsalam was granted an offset of the permanent total disability benefits against its liability for the temporary total disability benefits, which award is based on an average weekly wage of \$1,235.50.⁶

We affirm the administrative law judge's determination that claimant is entitled to permanent total disability compensation for his work-related right shoulder condition commencing May 10, 2001, the date on which claimant's shoulder condition reached maximum medical improvement. The extent of disability sustained by claimant as a result of his work-related right shoulder condition was addressed by Judge Roketenetz in his November 5, 2002, decision. He found that substantial medical evidence supported a finding that claimant was unable to return to his usual work due to the shoulder injury. Alsalam did not establish suitable alternate employment at that time. The resultant finding of permanent total disability as a result of the shoulder injury was not appealed. Alsalam subsequently acknowledged before Judge Mills that claimant was unable to resume his usual employment duties as a crew chief due to his shoulder condition.⁷ See May 13, 2004 Transcript at 46 – 47. In his present appeal, the Director does not address Judge Roketenetz's reliance on the medical restrictions placed on claimant by Dr. Rogalsky, which constitute substantial evidence in support of his finding that claimant was permanently totally disabled as a result of his shoulder condition as of May 10, 2001,

⁶ The result of the concurrent awards is that, ultimately, the rate for the permanent total disability award will exceed that for temporary total disability, assuming that the disability resulting from the neck injury remains temporary. See 33 U.S.C. §906(b), (c).

⁷ While Alsalam presented labor market surveys in support of its attempt to establish the availability of suitable alternate employment, Judge Mills found that claimant was entitled to ongoing temporary total disability compensation as a result of his neck condition since claimant was participating in a state-sponsored vocational rehabilitation program and because claimant diligently sought work. These findings were not appealed by Alsalam which, moreover, has not asserted error in the administrative law judge's decision to award claimant continuing permanent total disability benefits for his shoulder condition.

see n.3, *supra*, nor does he cite to any evidence of record which would support a finding that claimant is not totally disabled as a result of that work-related condition.

We reject the Director's contention that the administrative law judge's conclusion that claimant was permanently totally disabled as of May 2001 is "totally inconsistent with his contradictory finding that Claimant subsequently became temporary totally disabled" on July 3, 2001, as a result of his neck condition. Claimant sustained distinct work-related injuries to his neck and shoulder, which resulted in separate physical restrictions. While, as the Director asserts, an employee cannot receive benefits for more than total disability, *see, e.g., Korineck v. General Dynamics Corp.*, 835 F.2d 42, 20 BRBS 63(CRT) (2^d Cir. 1987), an employee may be unable to resume his usual employment duties with employer due to distinct and unrelated injuries. *See generally I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999)(where knee and shoulder injuries from same accident each resulted in claimant's inability to perform his usual work, claimant is entitled to a full partial award for each condition). In this case, substantial evidence of record supports the administrative law judge's determination that claimant is precluded from resuming his usual employment duties with Alsalam as a crew chief due to both his neck and shoulder conditions.

We also reject the Director's contention that the permanent total disability award is erroneous because claimant failed to establish a loss in wage-earning capacity due to the shoulder injury prior to the occurrence of the August 2000 neck injury. The cases cited by the Director for this proposition concern instances of concurrent permanent partial and permanent total disability awards. *See, e.g., Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). In such cases, claimant must establish that the first, partially disabling injury continued to cause a loss in wage-earning capacity at the time of the second, totally disabling injury in order to be entitled to a continuing partial award concurrent with a total disability award for the second injury. *See, e.g., Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). In this case, this analysis is simply inapposite. Claimant was not claiming a continuing award for a loss of wage-earning capacity for his shoulder injury concurrent with a total disability award for the neck injury, but was seeking total disability benefits as of the date of his second shoulder operation in 2001, which caused his inability to perform his usual work. As explained above, the administrative law judge's finding in this regard is supported by substantial evidence. Therefore, we affirm the finding that claimant is permanently totally disabled as of May 10, 2001, due to his shoulder injury. Moreover, there is no danger of claimant receiving a double recovery or more than two-thirds of his average weekly wage, as the administrative law judge properly offset the permanent total disability award against the temporary total disability award. *See generally Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985)(schedule award lapses during period of temporary total disability). As ordered by the administrative law judge, the permanent total disability award is to be fully credited against employer's liability for the temporary total disability award for the neck injury. *See* n.6, *supra*.

Section 8(f)

We now address the Director's appeal of the administrative law judge's award of Section 8(f) relief to Alsalam.⁸ Section 8(f) shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes: (1) that the employee had a pre-existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that his permanent total disability is not due solely to the second injury. *See* 33 U.S.C. §908(f)(1); *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

In this case, Alsalam sought Section 8(f) relief based on its liability for permanent total disability benefits for claimant's right shoulder injury. In his decision, the administrative law judge found that claimant's neck condition constituted a manifest pre-existing partial disability, and that claimant's current permanent disability is not due solely to his right shoulder condition but, rather, is due to both his right shoulder condition and his pre-existing neck condition. Thus, the administrative law judge awarded Alsalam relief pursuant to Section 8(f).

The Director contends that the award of Section 8(f) relief is improper because claimant's compensable disability is for temporary total benefits and Section 8(f) applies only to awards of permanent disability of more than 104 weeks.⁹ *See* 33 U.S.C. §908(f)(1); *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985). We have affirmed the award of permanent total disability for claimant's shoulder injury, rejecting the Director's contention that such an award is improper. However, as of July 3, 2001, the compensable disability has been that for the neck injury. The award of

⁸ Alsalam's contention that a letter dated July 12, 2004, from the Director to Judge Mills precludes the Director from challenging Judge Price's award of Section 8(f) relief is without merit. Before Judge Mills, Alsalam sought Section 8(f) relief based upon claimant's neck injury and the Director informed Judge Mills that he would not oppose such an award if claimant's condition was found to be permanent. Judge Mills denied Alsalam's claims based on his determination that claimant's cervical spinal injury had not yet reached maximum medical improvement. In contrast, before Judge Price, Alsalam sought Section 8(f) relief based upon claimant's back injury, and the Director at all times argued against such an award.

⁹ The Director does not contest that the substantive elements for Section 8(f) relief are met in this case.

temporary total disability for the neck injury is predominant due to claimant's higher average weekly wage for this injury. Until such time as the permanent total disability award for the shoulder injury becomes the compensable disability, due to increases in the compensation rate applicable to the permanent total disability award, Section 8(f) is inapplicable. Employer is fully liable for all temporary total disability benefits due claimant for his neck disability. *See generally Sizemore v. Seal & Co.*, 23 BRBS 101 (1989); *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96 (1989). When employer's aggregate permanent total disability payments reach 104 weeks, then the award of Section 8(f) relief will become effective.¹⁰ *See Hansen v. Container Stevedoring*, 31 BRBS (1997). The administrative law judge's decisions are modified to reflect employer's full liability for the temporary total disability award for claimant's neck injury and for the Special Fund's liability for permanent total disability for claimant's shoulder injury after employer has paid 104 weeks of actual permanent total disability benefits for this condition.

Accordingly, the award of Section 8(f) relief is modified as stated herein. In all other respects, the administrative law judge's Decision and Order on Second Remand and the Order Granting Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹⁰ Claimant was awarded permanent total disability for the shoulder injury from May 10 to July 2, 2001. When these 7 and 4/7 weeks plus additional weeks of permanent total disability payments for the shoulder injury reach 104 weeks, the award of Section 8(f) relief will commence. The district director may make the necessary calculations as these calculations involve a ministerial act.