

QUENTIN A. LASSITER)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>Dec. 6, 2000</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

Christopher R. Hedrick (Mason, Cowardin & Mason, P.C.), Newport News,
Virginia, for employer.

Kristin M. Dadey (Henry L. Solano, Solicitor of Labor; Carol DeDeo,
Associate Solicitor; Mark Reinhalter, Senior Attorney), Washington, D.C.,
for the Director, Office of Workers' Compensation Programs, United States
Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals
the Decision and Order (98-LHC-0876) of Administrative Law Judge Fletcher E.
Campbell, Jr., 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. *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his back at work in 1973, for which he was hospitalized and missed about four months of work. He eventually returned to his usual job with restrictions. He was injured again at work on May 27, 1984, and underwent surgery on his back. He again returned to work with permanent restrictions. In a Decision and Order dated February 21, 1989, Administrative Law Judge Daniel Sarno, Jr., found claimant entitled to permanent partial disability benefits, 33 U.S.C. §908(c)(21), and he granted employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In 1993, claimant underwent surgery to trim the scar tissue left from the 1985 surgery. He needed another operation in 1997 as a result of the previous operations, and was out of work from August 4, 1997 until January 4, 1998. Claimant filed a claim for temporary total disability benefits for the period during which he was out of work due to the 1997 surgery, which was later amended to a claim for permanent total disability compensation. Employer sought to shift liability for these benefits to the Special Fund pursuant to the previous grant of Section 8(f) relief. The Director maintained that claimant’s disability during this period was temporary, such that employer is liable for claimant’s benefits.

Claimant and employer stipulated before the administrative law judge that claimant is entitled to permanent total disability benefits for the period following the 1997 surgery, from August 4, 1997 to January 4, 1998, and the administrative law judge awarded claimant benefits consistent with this stipulation. Thus, the sole issue before the administrative law judge was whether employer or the Special Fund is liable for these benefits. In his decision, the administrative law judge found that claimant’s disability did not change from permanent to temporary during the recovery period following the 1997 surgery. Thus, as he found that claimant’s condition has remained permanent at all times since 1985, he found that employer’s entitlement to Section 8(f) relief remained in effect for the disability benefits due claimant during his recovery period.

On appeal, the Director contends that an employer remains fully liable to pay compensation benefits for any subsequent periods of temporary disability arising from the

¹The Decision and Order issued on August 27, 1999, did not include an order granting employer relief from continuing compensation liability pursuant to Section 8(f). However, in an Errata Order dated November 4, 1999, the administrative law judge amended his decision to include an order granting employer’s relief pursuant to Section 8(f) at the expiration of 104 weeks after May 30, 1985. *See* Errata Order at 2.

same injury for which it was awarded Section 8(f) relief, in addition to its liability for the first 104 weeks of permanent disability compensation. In this case, the Director contends the administrative law judge erred in finding that claimant was permanently totally disabled following the 1997 surgery, and he therefore urges the Board to hold that employer is liable for temporary total disability benefits for the period from August 4, 1997, to January 4, 1998. Employer responds, urging affirmance of the administrative law judge's decision.

As the Director correctly asserts, the Board has held that Section 8(f) specifically and unequivocally states that employer is liable for 104 weeks of permanent disability, in addition to compensation payments for any temporary disability arising from the same injury for which employer was awarded Section 8(f) relief, *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRB 96 (1989), and that 20 C.F.R. §702.145(b) does not exempt employer from paying temporary total disability benefits following its payment of permanent disability benefits for 104 weeks. *Sizemore v. Seal & Co.*, 23 BRBS 101 (1989). Employer must pay all compensation due for temporary disability whenever it occurs. *Id.*

In the instant case, the administrative law judge found that claimant's condition has remained permanent since 1985, and that the surgery in 1997 did not change the nature of claimant's underlying condition, as it was not undertaken in order to improve claimant's condition. He also noted that claimant's pre-operative and post-operative restrictions did not change, and thus there is no evidence that claimant's overall condition has improved beyond its 1985 point of maximum medical improvement. The administrative law judge did agree that claimant's temporary restrictions following the 1997 surgery were more stringent, but concluded that this supports his finding that claimant's condition has not improved.

The Director does not contest the finding that claimant has an underlying permanent partial disability, but instead contends that for the period from August 1997 to January 1998, claimant's disability temporarily increased, resulting in a period of temporary total disability. We agree that the case must be remanded for reconsideration of this issue. The administrative law judge focused on the overall nature of claimant's disability from the date of the original permanent disability, 1985, concluding that it was permanent and has continued to be so, as it is has not improved and is not expected to improve beyond where it was in 1985. Although this finding is supported by substantial

²The administrative law judge relied upon the Board's holding in *Leech v. Service Engineering Co*, 15 BRBS 18 (1982), to find that "a temporary deterioration of a permanently disabled worker does not render him temporarily disabled." Decision and Order at 7. That case addressed whether an employee's survivors were entitled to death benefits under Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3), and the Board held that a temporary total disability award subsumed the permanent partial award for the same injury, but that the

evidence, the relevant inquiry in this case is much narrower and concerns the nature of claimant's condition following the 1997 surgery itself, *i.e.*, whether claimant's total disability following surgery was expected to improve. As the administrative law judge correctly stated, a permanent disability is one that has continued for a lengthy time and appears to be of lasting or indefinite duration, as opposed to one that merely awaits a normal healing period. *See Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Claimant was assigned increased restrictions during this recovery period, but eventually returned to work with the same restrictions he had before the surgery. As the administrative law judge did not consider all relevant evidence concerning the nature of claimant's condition for the period from August 4, 1997 to January 4, 1998, we vacate the administrative law judge's finding that claimant's condition was permanent during this period, and we remand the case for further consideration.

underlying permanent partial disability did not disappear during the temporary exacerbation. Thus, the survivors were entitled to death benefits pursuant to Section 8(d)(3). The Board has held that this rationale does not apply when determining the applicability of Section 8(f) inasmuch as Section 8(f)(1) specifically provides for employer to pay 104 weeks of permanent disability benefits **in addition** to any periods of temporary benefits, whenever they may arise. 33 U.S.C. §908(f)(1); *Shaw*, 23 BRBS at 99.

³The stipulation of employer and claimant that claimant is entitled to permanent total disability benefits for this time period does not bind the Director, as he was not a party to the stipulation. *See generally Byrd v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 253 (1993).

Accordingly, the administrative law judge's finding that claimant's disability from August 4, 1997 to January 4, 1998, was permanent is vacated, as is his consequent finding that the Special Fund is liable for the permanent total disability benefits due claimant for this period. The case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge