

RICKY N. EASON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTHROP GRUMMAN)	DATE ISSUED: 12/19/2012
SHIPBUILDING, INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-00441) of Administrative Law Judge Richard K. Malamphy 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 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).

Claimant, a pipefitter for employer, injured his knees at work on September 28, 2008. ALJ Ex. 1. Following surgery on his right knee in January 2009, claimant returned to full-duty work in June 2009. In October 2009, Dr. Hoang, claimant's treating orthopedic surgeon, gave claimant a permanent impairment rating of 14 percent of the

lower extremity.¹ Emp. Ex. 11 at 10-12. Claimant continued to work at his usual job until May 18, 2010, when he could no longer continue working due to swelling and stiffness in both knees. Claimant saw Dr. Hoang, who took him out of work and began treating him. On August 10, 2010, claimant returned to his usual job without restrictions. Claimant sought temporary total or temporary partial disability benefits for the period between May 19 and August 20, 2010, and employer disputed the claim.

The administrative law judge found that claimant's condition reached maximum medical improvement on October 26, 2009, when Dr. Hoang confirmed claimant's permanent impairment rating of 14 percent. Decision and Order at 7-8. Although claimant's knees began swelling in May 2010 and claimant was off work for several months, the administrative law judge found that claimant was not entitled to total disability benefits for the flare-up of his knee condition. The administrative law judge found that claimant's condition previously had become permanent and he had been compensated for his right knee injury under the schedule. The administrative law judge also stated summarily that employer's vocational counselor identified jobs within claimant's restrictions available during the period claimant was restricted from working. Emp. Ex. 2. Thus, apparently finding that claimant's disability from May 19 to August 20, 2010, remained both permanent and partial, the administrative law judge denied claimant's claim for temporary total or temporary partial disability benefits, stating that, pursuant to *Potomac Electric Power Co. [PEPCO] v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), claimant's recovery for permanent partial disability is limited to the schedule award previously paid and he is precluded from obtaining additional compensation for any loss of wage-earning capacity. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

Claimant challenges the finding that his knee condition reached maximum medical improvement in October 2009, contending his condition was still temporary and, thus, he should have been paid temporary total or temporary partial disability benefits between May and August 2010 when he was out of work. A condition may be found permanent on the date a doctor gives claimant a permanent impairment rating. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1998), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). A physical therapist evaluated claimant's capabilities on September 23, 2009, and rated claimant's impairment at 14 percent. Dr. Hoang confirmed this rating to claimant's

¹Employer voluntarily paid claimant temporary total disability benefits between October 2, 2008, when claimant stopped working, and June 28, 2009, and from May 18 to 23, 2010, and permanent partial disability benefits pursuant to 33 U.S.C. §908(c)(2) for a 14 percent impairment to the lower extremity from October 16, 2009, through May 17, 2010. ALJ Ex. 1; Emp. Exs. 4, 10. Employer's notice of final payment also indicates it resumed payments of claimant's permanent partial disability benefits between May 19 and July 25, 2010, when it concluded claimant's total disability ceased. Emp. Ex. 4.

lower extremity on October 26, 2009. *See* Emp. Ex. 11 at 10-12. Claimant was not undergoing any additional treatment for his injury at this time. Thus, the administrative law judge rationally found that claimant's condition reached maximum medical improvement on October 26, 2009. Therefore, we affirm his finding as it is supported by substantial evidence. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

Nevertheless, affirmance of the date of maximum medical improvement does not end the inquiry with regard to claimant's contention that the administrative law judge erred in denying additional benefits in this case. The administrative law judge found that, in light of the permanency of claimant's condition, employer's liability for benefits is limited to the amount provided by the schedule at 33 U.S.C. §908(c)(2); therefore, claimant is not entitled to additional benefits for a subsequent period when he was unable to work. Decision and Order at 8-9. The administrative law judge's finding does not comport with law. Therefore, we vacate the administrative law judge's finding that claimant is not entitled to disability benefits for the period between May 19 and August 20, 2010, and remand the case for additional findings.

The Supreme Court's decision in *PEPCO* holds that the schedule is the exclusive remedy for compensating a claimant for permanent partial disability to parts of the body enumerated therein. *PEPCO*, 449 U.S. at 272, 14 BRBS at 365. Such a claimant may not receive an award under Section 8(c)(21), (h), 33 U.S.C. §908(c)(21), (h), for a loss of wage-earning capacity. *See Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). However, it is well established that a claimant is not limited to an award under the schedule when an injury to a scheduled member results in total disability. *Id.*, 449 U.S. at 277 n.17, 14 BRBS at 366 n.17; *see DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998). Moreover, although we have affirmed the finding that claimant's knee condition became permanent on October 26, 2009, recent law holds that such a conclusion does not preclude a finding that a claimant is entitled to additional temporary benefits as a result of a work-related injury. *Pacific Ship Repair & Fabrication, Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012);² *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). Thus, the fact that permanent partial disability benefits were fully paid under the schedule is not determinative of a claimant's entitlement thereafter to permanent total, temporary total, or temporary partial disability

²In *Benge*, the United States Court of Appeals for the Ninth Circuit held that an employee with a permanent partial disability could be "reclassified" as temporarily totally disabled during a period of recovery following surgery. *Benge*, 687 F.3d 1182, 46 BRBS 35(CRT). While *Benge* is not controlling law in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, it is instructive in situations involving a temporary exacerbation of a "permanent" condition. *See also Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

benefits. *PEPCO*, 449 U.S. at 277, 14 BRBS at 366; *Benge*, 687 F.3d 1182, 46 BRBS 35(CRT); *Walker v. Todd Pacific Shipyards*, __ BRBS __, BRB Nos. 12-0180, 12-0315 (Nov. 29, 2012); *see also Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Leech*, 15 BRBS 18.

Therefore, we remand this case to the administrative law judge for further consideration. To establish a prima facie case of total disability, a claimant must show that he cannot return to his usual employment due to his work-related injury. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). Once he establishes a prima facie case, the burden shifts to his employer to establish the availability of suitable work that the claimant could perform if he diligently tried. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). If the claimant is unable to perform any work due to his work-related injury, his disability is total. *See Macklin v. Huntington Ingalls, Inc.*, 46 BRBS 31 (2012). In this case, there is evidence in the record indicating that claimant was put on temporary work restrictions between May and August 2010. Cl. Ex. 3. The administrative law judge did not address whether these restrictions precluded claimant from performing his usual work during this period. Employer offered into evidence a labor market survey covering this period. Emp. Ex. 2. The administrative law judge did not address this evidence with any specificity, stating summarily that employer's vocational expert identified jobs within claimant's restrictions. Decision and Order at 8. The administrative law judge must compare the duties and requirements of the identified jobs with claimant's physical restrictions and other vocational factors in order to determine if employer identified the availability of suitable alternate employment. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Therefore, on remand the administrative law judge must make finding of fact on these issues consistent with law, and determine if claimant is entitled to additional disability benefits. *PEPCO*, 449 U.S. at 277 n.17, 14 BRBS at 366 n. 17; *Benge*, 687 F.3d 1182, 46 BRBS 35(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

Accordingly, the administrative law judge's denial of benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge