BRB No. 98-0726

LEE F. ANTHONY	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Claimant's Motion for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Claimant's Motion for Reconsideration (96-LHC-1464) of Administrative Law Judge Fletcher E. Campbell, Jr., awarding benefits 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, while working as a structural welder for employer, sustained an injury to his right knee on October 18, 1988, as a result of his tripping over some trash and having his right knee hit the head of a bolt. Dr. Shall opined that claimant initially reached maximum medical improvement with regard to the knee injury as of July 31, 1990, with a 15 percent permanent partial impairment to his right leg, which subsequently increased to a 20 percent impairment as of November 15, 1995. Claimant's Exhibit (CX) 1-1, 1-9. Claimant also has received treatment for his knee injury from Dr. Trengove-Jones, and over the course of time has undergone six surgeries to his right knee.

On August 30, 1991, claimant began working for Alpha Omega Security (Alpha) as an armed guard, walking patrols at various locations; he continued to work in this capacity up to the time of the hearing.[1] Meanwhile, claimant stated that he first noticed sharp pains running through his lower and middle back sometime after his third knee surgery on March 16, 1990, but prior to the time he began working for Alpha. Hearing Transcript (HT) at 46-51. Claimant stated that his back problems increased as he became more active at Alpha, HT at 23-24, 51, and he estimated that he has had to leave his work assignment with Alpha due to back pain on fewer than ten occasions. HT at 42-43. During the course of treatment for claimant's knee injury, Dr. Shall also provided treatment for claimant's back pain. Specifically, Dr. Shall prescribed physical therapy, performed an MRI on claimant's back and referred him to Dr. Lewis for a neurological evaluation in June, 1993.[2] In addition, Dr. Shall opined, by letter dated December 20, 1995, that claimant's injury of October 18, 1988, and subsequent treatment of his right knee injury possibly contributed to his back problems, stating that "the use of crutches and canes and prolonged limping over the years due to his right knee injury may, in fact, have exacerbated [his] back pain." CX 1-1. Additionally, Dr. Peach, whom claimant engaged for evaluation of his back pain in June 1994, ultimately agreed that claimant's "difficulty with ambulation secondary to his knee problems is the probable cause of his chronic musculoligamentous low back pain." CX-5-2.

[1]Employer terminated claimant on November 7, 1992, after he had been absent from work for 30 continuous months. Claimant has worked regularly as a security guard since August 30, 1991, with the exception of time off for surgery and the requisite recovery periods.

[2]Dr. Lewis initially opined that claimant's low back appears to be soft tissue pain and probably is a strain, and suspected that it occurred as a result of his use of crutches and canes. CX 6. Dr. Lewis however subsequently noted that he did not understand claimant's pain disorder as he found no evidence of radiculopathy and the MRI on his lumbar spine performed in 1991 was normal. Dr. Lewis did though prescribe medication for claimant's soft tissue back pain.

Claimant filed the instant claim for compensation based on his alleged work-related back injury.

In his decision, the administrative law judge initially determined that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his back condition and that employer could not establish rebuttal thereof. Accordingly, the administrative law judge concluded that claimant's back pain is causally related to his on-the-job accident on October 18, 1988. The administrative law judge then determined that while claimant suffers from a temporary partial impairment from his back injury, he has failed to show any loss of wage-earning capacity and is not entitled to any additional compensation for his back injury since his restrictions have not limited his employment in any way not already limited by his scheduled knee injury.[3] The administrative law judge, however, determined that claimant is entitled to all reasonable and necessary medical benefits associated with his back injury. With regard to claimant's knee injury, the administrative law judge found that claimant's condition reached permanency as of August 6, 1990, when Dr. Shall assigned a 15 percent impairment rating, which was increased to a 20 percent impairment rating on November 15, 1995, and accordingly, awarded claimant permanent partial disability benefits for his knee condition pursuant to the schedule based upon the 20 percent disability to claimant's right lower extremity. The administrative law judge subsequently issued an Order Denying Claimant's Motion for Reconsideration.

On appeal, claimant challenges the administrative law judge's findings that he reached maximum medical improvement from his right knee injury as of August 6, 1990, that he has not as yet reached maximum medical improvement with regard to his back condition, and that he is limited to his recovery under the schedule where he has suffered an additional disability due to his back injury. Employer responds, urging affirmance.

Claimant initially argues that the administrative law judge erred in finding that he reached maximum medical improvement with regard to his knee injury as of August 6, 1990, as Dr. Shall's deposition testimony establishes that claimant did not reach maximum medical improvement with regard to his knee condition until May 1997. Claimant also argues that the administrative law judge erred in ruling that his

[3]The administrative law judge specifically noted that since claimant has been compensated for his initial knee injury under the schedule, 33 U.S.C. §908(c)(2), any loss of wage-earning capacity due to this scheduled injury must be factored out before an award for his unscheduled back injury may be ordered. *See* Decision and Order at 9.

back condition had not yet reached a state of permanency.

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. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). While an administrative law judge may rely on a physician's opinion to establish the date of maximum medical improvement, he need not look only for a statement regarding maximum improvement, but he may use the date the doctor assessed the claimant with an impairment rating, as that may be sufficient evidence of permanency. *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994) (Smith, J., dissenting on other grounds).

In the instant case, the administrative law judge determined that claimant's right knee condition reached maximum medical improvement as of August 6, 1990, when Dr. Shall first assigned a 15 percent impairment rating. As claimant notes, Dr. Shall did opine in his deposition that claimant reached maximum medical improvement with regard to his right knee in May 1997, following his most recent surgery on January 21, 1997. Joint Exhibit (JX) 2 at 6-7. However, Dr. Shall also noted that "there were other dates of what you would call maximum medical improvement and then recurrence," as "the nature of [claimant's] knee is that he would do well for a while and then return." JX 2 at 7. Dr. Shall further opined that after his recovery from the January 21, 1997, surgery claimant's work restrictions reverted back to those set out in May 1995. JX 2 at 11. While claimant experienced periodic bouts of pain which were relieved by surgery, the condition of his knee, after recovery from surgery, remained relatively the same with the exception that claimant's impairment rating was increased by Dr. Shall to 20 percent on November 15, 1995, demonstrating deterioration rather than improvement in claimant's condition. Consequently, we affirm the administrative law judge's finding that claimant reached maximum medical improvement for his right knee as of August 6, 1990, as the evidence of record shows that the condition of claimant's right knee has essentially remained unchanged since that date. *See Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *see generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998).

With regard to claimant's back condition, there is no medical evidence to support claimant's contention that his back condition reached maximum medical improvement as of May 5, 1995. First, while Dr. Shall acknowledged that claimant did not have any physical restrictions as a result of his back injury until May 5, 1995, his opinion is insufficient to establish that claimant's back injury has reached the point of maximum medical improvement. As the administrative law judge found, Dr. Shall explicitly testified that because of insufficient testing he was unable to

determine whether or not claimant had reached maximum medical improvement with regard to his back. In addition, the administrative law judge found that Dr. Trengove-Jones continued to treat claimant's back condition subsequent to May 5, 1995, and the record establishes that Dr. Trengove-Jones noted, as of February 9, 1996, that claimant's "back is giving him considerable problems and this may require surgical attention in the future." CX 4-3. We therefore affirm the administrative law judge's determination that claimant's disability resulting from his back injury remains temporary in nature. *See generally Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993).

Claimant lastly asserts that the administrative law judge erred in ruling that *Potomac Electric Power Co. v. Director, OWCP* [*PEPCO*], 449 U.S. 268, 14 BRBS 363 (1980), applies in the instant case to limit claimant's recovery to the scheduled compensation award for his knee injury. Claimant argues that the *PEPCO* decision did not reach cases, like the instant one, involving a claimant who suffers a scheduled injury and a non-scheduled injury and asserts that the Board's decision in *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994), which is more on point, dictates that claimant is entitled to an award of temporary partial disability benefits as he has clearly established a causal relationship between his back injury and the October 18, 1988, accident and has demonstrated the requisite loss in wage-earning capacity as a result of his back injury.

The Supreme Court held in *PEPCO* that a permanent partial disability resulting from an injury to a member listed under the schedule requires an award of benefits pursuant to the schedule. It rejected the notion that Section 8(c)(21), 33 U.S.C. §908(c)(21), offers a claimant an alternative measure of compensating an injury covered by the schedule. *PEPCO*, 449 U.S. at 268, 14 BRBS at 363; *see also Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 234 (1985). In *Bass*, the Board held that if a claimant sustains a harm to a body part not specified in the schedule as a result of an injury to a scheduled member, he may also receive benefits under Section 8(c)(21) for the consequential injury in addition to the benefits under the schedule for the initial injury. *Bass*, 28 BRBS at 17-18. Pursuant to *Frye*, if two injuries are then being compensated separately, any loss of wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988).

We agree that the administrative law judge must reconsider claimant's entitlement to disability benefits pursuant to *Bass.* In order to be entitled to an award of partial disability benefits under the Act, 33 U.S.C. §§908(c)(21), (e), claimant must first establish that he cannot return to his regular or usual employment due to his

work-related injury. *See generally Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67, 69 (1998). It is undisputed in this case that claimant is unable to perform his usual job as a structural welder, Decision and Order at 3, and the administrative law judge found that claimant does have restrictions due to his back injury. Decision and Order at 9. If the restrictions due to his back injury preclude his return to his former employment and impede his ability to perform alternate work, then claimant is entitled to partial disability benefits for any loss in wage-earning capacity due to his restricted ability to perform other jobs. The case must be remanded for the administrative law judge to determine whether claimant's back injury limited his ability to work and, if so, to determine the extent of claimant's loss in wage-earning capacity due to his back. *Green*, 32 BRBS at 67; *Frye*, 21 BRBS at 197. If claimant has a loss in wage-earning capacity, he is entitled to concurrent awards of compensation under both Section 8(e) and the schedule at Section 8(c)(2).[4] *Id.*

Accordingly, the administrative law judge's denial of disability compensation for claimant's back injury is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[4]The purpose of the Board's holding in *Frye,* regarding "factoring out" the effect of a scheduled injury is to avoid double recovery and requires simply that restrictions due to the knee not be considered in addressing any limitations on claimant's employability. For example, if a claimant has limitations due to a back injury which preclude some types of jobs and restrictions due to a knee which eliminate others, the job limitations due to the knee should not be considered. There is no danger of double recovery, however, if claimant's back injury alone could cause the entire loss in wage-earning capacity; claimant is entitled to benefits for the full loss in wage-earning capacity due to his back condition even if his right knee injury alone also resulted in restrictions, *Green*, 32 BRBS at 69. A schedule award for the knee alone cannot fully compensate claimant for the loss in earning capacity due to his back.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge