BRB No. 92-1678

FRANK SOOM	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams, Frederickson, Stark & Weisensee, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-1980, 1981) of Administrative Law Judge Alexander Karst 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, while acting in the course and scope of his maritime employment with employer, injured his left knee on May 5, 1986. In a subsequent accident on December 29, 1988, claimant purportedly reinjured his left knee and injured his lower back which claimant alleges eventually led to his permanent total disability. The parties are in agreement that claimant was injured on the dates alleged, that he injured his left knee in the first incident in 1986 and that he injured his lower back in the second incident in 1988. Additionally, employer concedes that claimant is permanently partially disabled.

As a result of prior injuries to his left ankle in 1978 and to his left knee in 1981, claimant received a consolidated stipulated scheduled disability award in 1984, which, in effect, awarded claimant 21 percent loss of the leg due to the ankle injury and 15 percent loss of the leg due to the knee injury. Claimant reinjured his left knee again on May 5, 1986, was off work for about a month, and received temporary total disability. Dr. Vessely returned him to work and commented that surgery might be needed. Employer's Exhibit 18. Subsequently, in May 1987, Dr. Baldwin, a knee specialist, recommended surgery to remove some loose crystals in claimant's left knee, however, claimant elected to put the surgery off until after he had unrelated sinus surgery, which occurred in September 1988.

On December 29, 1988, claimant, as a result of a slip and fall accident at work, injured his lower back and allegedly aggravated his left knee condition, making Dr. Baldwin's recommended surgery imperative. Claimant continued to work until his knee surgery was performed on April 25, 1989. Dr. Baldwin released claimant for work effective July 8, 1989, and subsequently reported that claimant's knee had reached maximum medical improvement as of September 6, 1989. Dr. Baldwin opined that the accident in 1988 resulted in an additional five percent impairment of the knee and thus, having taken Dr. Vessely's 1983 rating of fifteen percent impairment into account, evaluated claimant's knee-related leg impairment at twenty percent. Claimant's Exhibit 47. He expressed no opinion as to the limitations, if any, imposed by claimant's back condition. *Id.*

Claimant first visited a physician with regard to his back injury, on August 15, 1989.[1] Claimant's Exhibit 29. At that time, Dr. Vessely noted that an examination showed acute spasm, limitation of motion of the back, with marked muscle tenderness and advised claimant that he should have a CT scan to see if he has any significant nerve root damage. *Id.* Claimant then went to Dr. Flemming on August 17, 1989, whose assessment was lumbar syndrome associated with an on-the-job injury. Claimant's Exhibit 32. Dr. Flemming recommended physical therapy and authorized claimant to return to full work activity as of September 15, 1989. Claimant's Exhibits 32, 33.

Claimant continued to work as a longshoreman until July 25, 1990. In September 1990, Dr. Flemming signed claimant's disability retirement form and fixed the onset of disability as July 25, 1990, claimant's last day of work. Claimant's Exhibit 32. Claimant last saw Dr. Flemming on November 6, 1990. *Id.*

[1]The record contains letters from Clinton Van Fleet, a chiropractor, which state that claimant saw him for a back problem on January 20 and July 3, 1989. Claimant's Exhibit 46.

The administrative law judge determined that claimant was not permanently and totally disabled from doing his work as a result of his knee and back injuries, and thus, concluded that claimant had voluntarily retired at the age of 62. The administrative law judge, however, found that as a result of his injuries on December 29, 1988, claimant's wage-earning capacity was diminished by twenty percent. With regard to claimant's knee impairment, the administrative law judge determined that claimant was entitled to a scheduled award for twenty percent of loss of the leg, under Section 8(c)(2), 33 U.S.C. §908(c)(2). Consequently, the administrative law judge determined that claimant was entitled to compensation at the maximum legal rate of $636.24 for 56.31 weeks beginning on September 15, 1989.[2] The administrative law judge further found that employer is entitled to a credit of $13,830.34, which claimant had received in a scheduled award for his previous knee injury.

As for claimant's back injury, the administrative law judge accepted employer's concessions that claimant was permanently partially disabled due to the slip and fall on December 29, 1988, and that claimant worked twenty percent fewer hours after this injury. Based on claimant's average weekly wage of $1,125.47, the administrative law judge determined that claimant had a remaining wage-earning capacity of $900.38 per week. The administrative law judge then found that half of the twenty percent loss of wage-earning capacity is due to the left leg impairment and upon factoring out the scheduled leg award, determined that claimant is entitled to a permanent partial disability award under Section 8(c)(21), 33 U.S.C. §908(c)(21), in the amount of $75.03 per week,[3] beginning on July 26, 1990. The administrative law judge further determined, pursuant to Section 8(f), 33 U.S.C. §908(f), that employer is liable for 104 weeks of compensation for the Section 8(c)(21) injury and that thereafter, liability for said compensation would fall to the Special Fund. The administrative law judge also found that claimant was temporarily totally disabled from August 17, 1989 to September 15, 1989 due to his 1988 back injury. Lastly, the administrative law judge held employer liable for claimant's work-related medical expenses, as well as past medical transportation costs in the sum of $522.50.

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[2]The administrative law judge found that claimant's average weekly wage of $1,125.47 converted to a compensation rate of $750.31, which exceeded the then maximum compensation rate of $636.24. In calculating the number of weeks of compensation, the administrative law judge noted that twenty percent of 288 weeks is 57.6 weeks. The administrative law judge, however, reduced this figure by 1.29 weeks, which represents the period during which the scheduled award overlapped a period of temporary total disability from September 6, 1989 to September 15, 1989. We note that in his discussion of claimant's knee injury, the administrative law judge inadvertently referred to the period of temporary total disability as extending from August 9, 1989, to September 15, 1989, which falls contrary to his subsequent finding, which is supported by substantial evidence, Claimant's Exhibits 32, 33, that claimant was temporarily totally disabled due to his back condition from August 17, 1989 to September 15, 1989.

[3]This figure was arrived at by taking two-thirds of claimant's loss in wage-earning capacity, *i.e.*, two-thirds of $225.09, and then dividing that figure ($150.06) in half.

On appeal, claimant challenges the administrative law judge's Decision and Order regarding: the administrative law judge's reduction of the scheduled award for his leg injury by 1.29 weeks; the administrative law judge's denial of temporary total disability benefits for the period of December 4 to December 11, 1989; the administrative law judge's determination that one-half of claimant's twenty percent loss of wage-earning capacity is due to his left knee injury; the administrative law judge's failure to give him one award under Section 8(c)(21) for both his back and leg injuries as of July 25, 1990, when claimant reached maximum medical improvement with regard to his back; and the administrative law judge's determination that claimant was physically able to continue his employment after July 25, 1990. Employer responds, in agreement with claimant's argument that the administrative law judge incorrectly reduced the length of the scheduled award by 1.29 weeks. In all other respects, employer urges affirmance. Claimant has also filed a reply brief, reasserting his positions on appeal.

Claimant initially contends that the administrative law judge erred in reducing claimant's scheduled permanent partial disability award for the left knee by the 1.29 weeks that that award overlapped the temporary total disability award for his low back injury. Claimant specifically maintains that the administrative law judge should have determined that the 57.6 weeks of compensation for claimant's knee impairment began on September 15, 1989, when claimant's temporary total disability for his back injury ended. Claimant further argues that the administrative law judge incorrectly interpreted *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985), in rendering his finding on this issue. Consequently, claimant requests the Board to modify the administrative law judge's Decision and Order to reflect that the scheduled permanent partial disability award begins on September 15, 1989. Employer, in its response brief, agrees with claimant's contention, noting that it had stipulated that temporary total disability compensation should run through September 15, 1989.

It is inconsistent with the wage-earning capacity principle to allow an award for scheduled permanent partial disability to coincide with temporary total disability. *See generally Turney*, 17 BRBS at 235. In order to avoid double recovery, schedule awards lapse during periods of temporary total disability; once the claimant reaches maximum medical improvement and the temporary total disability award is terminated, the scheduled award resumes. *Id.* at n. 4. In the instant case, Dr. Baldwin opined that claimant's left knee had reached maximum medical improvement as of September 6, 1989. The administrative law judge, however, determined that claimant was temporarily totally disabled due to his back injury from August 17, 1989 to September 15, 1989. Consequently, the schedule award for claimant's leg impairment lapses until the end of the temporary total disability period, which in this case is September 15, 1989, and is then fully payable. *Id.* We therefore hold that the administrative law judge improperly reduced the compensation due on the schedule award by 1.29 weeks, and accordingly, modify the administrative law judge's Decision and Order to reflect that claimant is entitled to the full 57.6 weeks of compensation for said injury, commencing September 15, 1989.

Claimant next asserts that there is nothing in the record to support the administrative law

judge's denial of temporary total disability from December 4, 1989 to December 11, 1989. Claimant argues that contrary to the administrative law judge's determination, the record contains evidence that claimant sought treatment for his back and obtained a no-work authorization from a treating physician. Specifically, claimant maintains that Dr. Van Fleet, a chiropractor who had been treating claimant since January 20, 1989, documented a re-aggravation of claimant's low back on December 4, 1989, and commented that temporary disability was necessary from December 4, 1989, through December 11, 1989. Claimant asserts that the administrative law judge improperly inferred that since claimant did not consult Dr. Flemming, he was not entitled to disability benefits. Moreover, claimant maintains that it is not proper for the administrative law judge to summarily discredit Dr. Van Fleet's opinion simply because of his training and profession, particularly since the administrative law judge had no way of judging Dr. Van Fleet's credibility.

While Dr. Van Fleet, in a letter dated December 18, 1989, noted that temporary disability was necessary from December 4, 1989 through December 11, 1989, the administrative law judge correctly found that Dr. Van Fleet did not tie this loss of work time to the 1988 work incident. Claimant's Exhibit 46. In fact, the only reference to that accident was a notation by Dr. Van Fleet that "[a]ccording to the patient he was injured at work on 12-29-88." *Id.* In addition, the administrative law judge permissibly accorded little weight to Dr. Van Fleet's letter because it was not specific as to the cause of the flare ups of pain and because Dr. Van Fleet is a chiropractor, and not a physician. *See generally Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993). Consequently, the administrative law judge's determination that claimant was not temporarily totally disabled from December 4, 1989 to December 11, 1989 is affirmed as it is supported by substantial evidence.[4]

Claimant also avers since the record contains ample evidence to establish that he retired due to his back condition, the administrative law judge improperly determined that claimant is a voluntary retiree. In support of his contention, claimant forwards the medical opinion of Dr. Flemming, who opined that claimant could not return to longshore work because of his low back problem, and notes that the record contains no medical evidence which conflicts with that opinion. Claimant, therefore, seeks an award of permanent total disability benefits for his back injury.

In determining whether claimant retired due to his back injury, the administrative law judge considered the entirety of the relevant evidence of record, which includes the medical opinions of Drs. Flemming and Baldwin, as well as evidence indicative of claimant's intent to voluntarily retire. Initially, the administrative law judge rejected Dr. Flemming's opinion, that claimant was totally and permanently disabled due to his back injury as of July 25, 1990, because it was based to a great extent on claimant's subjective complaints, which the administrative law judge found were

[4]Claimant also argues that the Section 20(a), 33 U.S.C. §920(a), presumption applies in this instance and that since there is no evidence to establish rebuttal, claimant has clearly established his entitlement to benefits for temporary total disability during this period of time. It was conceded that claimant injured his back in the December 29, 1988 employment-related accident. Thus, the issue here concerns the nature and extent of claimant's disability, and consequently, Section 20(a) does not apply. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

exaggerated, and on the notion that claimant was doing "heavy" labor in the shipyards, which is contrary to claimant's own concession that his work on the waterfront area in recent years had been quite light. Hearing Transcript at 40-42, 54, 73, 76-78, 90, 102. The administrative law judge further found that Dr. Flemming's opinion is not entitled to dispositive weight on the issue of the extent of claimant's disability due to his back injury, because at the time he rendered his opinions, he was rather inexperienced[5] and not yet board-certified as an orthopedist. *See generally Pimpinella*, 27 BRBS at 154.

The administrative law judge's determination that claimant voluntarily retired is also supported by several facts in the record. Decision and Order at 5-6. Initially, as the administrative law judge correctly noted, although claimant fell on December 29, 1988, he worked steadily and regularly up to and following his knee operation and waited until August 15, 1989, before he felt it necessary to see an orthopedist for his back. Additionally, in September 1989, claimant told his knee doctor, Dr. Baldwin, that he intended to retire the next year once he had enough hours to get another year's credit for retirement. The administrative law judge stated that there is evidence to indicate that claimant started working significantly fewer hours only after he accumulated the 800 hours necessary for a year's retirement credit and four weeks vacation pay in early June 1990, Hearing Transcript at 80-88, 90, and that claimant did not see his back physician, Dr. Flemming, between March 1 and August 1, 1990, *i.e.*, from about four months before he quit until about a week after he quit working on July 25. Moreover, the administrative law judge accurately noted that claimant told his allergist, unconnected with this litigation, that he is able to do anything he wants to do. Employer's Exhibit 34. Accordingly, we affirm the administrative law judge's finding that claimant's back injury did not force him into retirement, but rather that claimant voluntarily retired from his employment as a longshoreman, as that finding is supported by substantial evidence. *See generally* 20 C.F.R. 702.601(c); *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989). Claimant, thus, is not entitled to a permanent total disability award for his back injury.

Claimant further contends that the administrative law judge had no basis to find that claimant's knee contributed to one-half of his twenty percent loss in wage-earning capacity, since the undisputed medical evidence is that Dr. Baldwin released claimant to full work with no restrictions due to his left knee on September 6, 1989. Moreover, claimant maintains that Dr. Baldwin noted that claimant's knee had worsened only slightly due to his injury on December 29, 1988, and the record indicates that claimant had not returned to Dr. Baldwin for his left knee since his release on September 6, 1989. Lastly, citing *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), claimant asserts that in addition to the scheduled knee award, the administrative law judge should have awarded claimant one unscheduled award for a twenty percent loss in wage-earning capacity based on both the knee and the back injuries as of July 25, 1990.

When claimant suffers two distinct injuries, a scheduled injury and a non-scheduled injury,

[5]In fact, as the administrative law judge notes, the record indicates that Dr. Flemming joined the clinic after he completed his training in August of 1989, which was around the time he first saw claimant on August 17, 1989.

arising either from a single accident or multiple accidents, he may be entitled to receive compensation under both, the scheduled at Section 8(c)(1)-(20) and the non-scheduled at Section 8(c)(21). *See Frye*, 21 BRBS at 194; *Turney*, 17 BRBS at 232. However, since the scheduled injury is being compensated separately, any loss in wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. *Id.*

In the instant case, the administrative law judge found that the scheduled injury for loss of use of the leg and the non-scheduled back injury arose from a single incident, *i.e.*, the employment-related accident which occurred on December 29, 1988.[6] Therefore, while claimant is entitled to be separately compensated for his leg and back injuries, any loss in claimant's wage-earning capacity due to his scheduled leg injury must be factored out of his unscheduled back injury award. There is no physician of record who evaluated claimant with regard to both his left knee and back injuries, and the administrative law judge specifically noted that claimant was not asked to, nor did he, assign relative weight to these two factors. Thus, in making his determination, the administrative law judge reasonably concluded from claimant's testimony[7] that claimant's leg and back injuries equally contributed to his loss in wage-earning capacity.[8] Inasmuch as the administrative law judge's

[6]Claimant's reliance on *Frye* to support his contention that he is entitled to a twenty percent permanent partial disability award in addition to the scheduled leg award is misplaced. The language cited by claimant from *Frye* pertains to a situation wherein a harm to a part of the body not covered under the schedule *results from the natural progression of an injury to a scheduled member*, which is not analogous to the facts, and subsequently, the administrative law judge's findings, in this case. This aspect of the Board's decision in *Frye*, that claimant is entitled to only an award under Section 8(c)(21) where the harm to a part of the body not covered by the schedule is the natural sequela of a schedule injury, was overruled in *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). However, given the different fact pattern, *Bass* has no bearing on the instant case.

[7]In particular, the administrative law judge relied on claimant's testimony that he quit working because, number one, "I was in too bad a shape to work," and "[n]umber two, I was afraid I was going to fall and hurt myself." Hearing Transcript at 42-43. Given the evidence in this case, notably claimant's testimony, the medical opinions of Drs. Flemming and Baldwin, as well as claimant's medical history of extensive knee problems, the administrative law judge could rationally infer that claimant was in "too bad a shape" due to his back injury and that claimant's fear of falling was primarily due to his ankle instability and related knee problems, *i.e.*, the scheduled injury.

[8]Claimant's contention that Dr. Baldwin's release of claimant to full work with no restrictions due to his left knee on September 6, 1989, directly conflicts with the administrative law judge's finding that claimant's left knee partially contributed to his loss of wage-earning capacity is without merit. Despite returning him to work without restrictions, Dr. Baldwin noted that claimant would have some difficulty in lifting, pushing, climbing and carrying due to his knee and Dr. Baldwin testified that claimant's knee "condition is a slowly progressive problem," that can be made worse if he were to twist his leg or fall on it. Claimant's Exhibit 47, Deposition at 32. Overall, Dr. Baldwin assessed claimant's knee-related impairment, even after maximum medical improvement, at twenty percent. Claimant's Exhibit 47, Deposition at 12-13. In light of this, we hold that Dr. Baldwin's opinion,

determination is rational and supported by substantial evidence, we affirm the administrative law judge's finding that half of claimant's twenty percent loss of his wage-earning capacity was due to the scheduled loss of use of the left leg. Consequently, we affirm the administrative law judge's determination that claimant is entitled to a permanent partial disability award under Section 8(c)(21) in an amount equal to one half of $150.06, or $75.03 per week, beginning on July 26, 1990.

Accordingly, the administrative law judge's decision is modified to reflect that claimant is entitled to 57.6 weeks of compensation for his scheduled award for loss of the leg, commencing September 15, 1989. In all other respects the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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when taken in its entirety, does not preclude an inference that claimant's left knee partially contributed to his loss of wage-earning capacity, and thus, Dr. Baldwin's opinion does not directly conflict with the administrative law judge's finding.