

BRB No. 13-0559

JAMES E. FENSKE)
)
 Claimant-Petitioner)
)
 v.)
)
 SERVICE EMPLOYEES)
 INTERNATIONAL, INCORPORATED)
)
 and)
)
 INSURANCE COMPANY OF THE STATE) DATE ISSUED: Mar. 31, 2014
 OF PENNSYLVANIA)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Errata to Order and Decision Granting Benefits, and the Order Denying Motion for Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree, San Diego, California, for claimant.

Kenneth M. Simon (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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:

Claimant appeals the Decision and Order Awarding Benefits, the Errata to Order and Decision Granting Benefits, and the Order Denying Motion for Reconsideration (2011-LDA-00599, 00600) of Administrative Law Judge Russell D. Pulver 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act).¹ 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).

On October 9, 2005, claimant sustained a back injury while in the course of his employment as a truck driver for employer in Iraq. In an Order issued on May 6, 2009, the administrative law judge approved the parties' stipulations and, accordingly, awarded claimant temporary total disability benefits from October 9, 2005 through July 27, 2008, and permanent partial disability benefits from July 28, 2008, and continuing. Thereafter, on January 11, 2011, claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting that he is entitled to permanent total, rather than permanent partial, disability benefits. Claimant also asserted a claim for a work-related hearing loss. In his Decision and Order, the administrative law judge, having found there was a mistake of fact in the initial decision regarding the extent of claimant's disability, granted the modification sought by claimant. Specifically, pursuant to his determination that claimant has been unable to perform any work since July 25, 2008, when he reached maximum medical improvement, the administrative law judge awarded claimant

¹ Claimant has filed a Motion for Summary Reversal and Modification in Part, and Summary Affirmance in Part, of Award. We will consider the contentions made in claimant's motion as his brief in support of his appeal. 20 C.F.R. §802.211. In view of our disposition of this appeal, however, claimant's motion is moot. 20 C.F.R. §802.219(h). Employer's brief filed in response to claimant's motion will be considered as its response brief. 20 C.F.R. §802.212. We accept the Director's brief in response to claimant's motion, which is accompanied by a motion to accept it out of time; the Director's brief, and the subsequent correction thereto, will be considered as his response brief. 20 C.F.R. §§802.212, 802.217. We also accept claimant's and employer's respective briefs in reply to the Director's response brief, as well as claimant's additional brief replying to employer's reply brief. 20 C.F.R. §§802.213, 802.215. We further accept the Director's surreply brief, which is accompanied by a motion to permit the filing of a surreply to claimant's reply brief. 20 C.F.R. §§802.215, 802.219(h).

permanent total disability benefits from July 28, 2008, and continuing. 33 U.S.C. §908(a). With respect to the issue of the statutory maximum rates applicable to claimant's permanent total disability benefits pursuant to Section 6 of the Act, 33 U.S.C. §906, the administrative law judge rejected claimant's position that he became entitled to the fiscal year 2008 statutory maximum rate of \$1,160.36 as of July 28, 2008, when his entitlement to permanent total disability benefits commenced, finding instead that claimant was limited to the fiscal year 2006 maximum rate of \$1,073.64 that was in effect at the time of his injury, with Section 10(f), 33 U.S.C. §910(f), annual increases commencing on October 1, 2008, and thereafter.² Next, the administrative law judge found that claimant sustained a work-related 9.7 percent binaural hearing loss. However, citing the Board's holding in *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011), that a claimant may not receive concurrently a scheduled permanent partial disability award for one injury and a total disability award for a separate injury, the administrative law judge denied the claim for a scheduled award for claimant's work-related hearing loss. Subsequently, in an Errata to Order, the administrative law judge corrected the Decision and Order to reflect that employer is entitled to a credit for all disability benefit payments previously made to claimant. In a separate Order, the administrative law judge summarily denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's finding that claimant's permanent total disability benefits are limited to the fiscal year 2006 statutory maximum, subject to Section 10(f) annual adjustments thereafter. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in which he concurs with claimant's position on this issue, while employer, in response, urges affirmance of the administrative law judge's determination. Claimant additionally asserts that the Order section of the administrative law judge's decision should be modified to clarify that employer's credit for compensation paid encompasses the prior period of temporary total disability which was awarded pursuant to the parties' stipulations in the administrative law judge's May 6, 2009 Order and was paid by employer. The Director agrees that clarification is appropriate, while employer avers that no correction of the administrative law judge's order is necessary. Claimant also challenges the administrative law judge's denial of a scheduled award for claimant's hearing loss in order to preserve this issue for judicial review. Employer responds that the administrative law judge properly denied a scheduled hearing loss award.

We first consider claimant's challenge to the administrative law judge's finding that the fiscal year 2006 maximum compensation rate applies to his permanent total

² The administrative law judge accepted the parties' stipulation that claimant's average weekly wage at the time of his injury was \$1,850.

disability benefits, subject only to Section 10(f) annual adjustments.³ We agree with claimant and the Director that claimant became entitled to the fiscal year 2008 statutory maximum rate as of July 28, 2008, the date that he attained permanency and his entitlement to permanent total disability benefits commenced. The issue raised by claimant in this case regarding the applicable statutory maximum rate was recently addressed by the Board in *Lake v. L-3 Communications*, 47 BRBS 45 (2013). The Board held in *Lake* that, consistent with the decision of the United States Court of Appeals for the Ninth Circuit in *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012),⁴ in cases where the claimant's temporary total disability changes to permanent total disability during the fiscal year, the applicable maximum rate for the claimant's initial period of permanent total disability benefits is the rate in effect at the time the claimant's entitlement to those benefits commences. *Lake*, 47 BRBS at 48. The Board further held that in a permanent total disability case in which two-thirds of the claimant's actual average weekly wage exceeds the Section 6(b)(3) statutory maximum rate, he is entitled to the benefit of the new maximum rate each fiscal year. *Id.* at 49-50; *see also Marko v. Morris Boney Co.*, 23 BRBS 353 (1990). Such a claimant is entitled to receive the new Section 6(b)(3) maximum rate each fiscal year until such time as two-thirds of his actual average weekly wage falls below 200 percent of the applicable National Average Weekly Wage (NAWW), and then annual adjustments under Section 10(f) apply. *Lake*, 47 BRBS at 50; *see also Marko*, 23 BRBS at 361 n.6.

³ In addition to presenting argument in response to claimant's position regarding the applicable statutory maximum compensation rate, employer avers that the Board should reject claimant's argument on this issue as not having been properly raised before the administrative law judge. Claimant replies that the issue was properly raised before the administrative law judge. We reject employer's contention. Claimant's post-hearing brief filed with the administrative law judge presents argument, with citation to relevant authority, regarding the proper construction of the "currently receiving" clause of Section 6(c), 33 U.S.C. §906(c); claimant's brief, considered in its entirety, reflects that claimant's argument was premised on that clause, as opposed to the "newly awarded" clause of Section 6(c). Claimant's subsequent letter to the administrative law judge dated March 1, 2013 merely clarifies that the single reference in his brief to the "newly awarded" clause, *see* claimant's Post-Trial Brief at 28, line 22, represents an inadvertent error. We note, moreover, that claimant reiterated his argument regarding the "currently receiving" clause in his motion for reconsideration filed with the administrative law judge.

⁴ The decision of the United States Court of Appeals for the Ninth Circuit in *Roberts*, 625 F.3d 1204, 44 BRBS 73(CRT), is controlling in this case, which arises within the jurisdiction of that circuit. *See McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

For the reasons set forth in *Lake*, we hold that claimant became entitled to the fiscal year 2008 statutory maximum rate as of July 28, 2008, the date he became entitled to permanent total disability benefits. Thus, pursuant to *Lake*, the administrative law judge's Decision and Order is modified to award claimant permanent total disability benefits from July 28, 2008 through September 30, 2008 at the fiscal year 2008 maximum of \$1,160.36. The administrative law judge's Decision and Order is further modified to provide that claimant became entitled to the new fiscal year 2009 statutory maximum of \$1,200.62 as of October 1, 2008, and to the fiscal year 2010 maximum rate of \$1,224.66 as of October 1, 2009. See *Lake*, 47 BRBS at 48-50; Vol. A BRBS at 3-122 (OWCP Notice No. 125), at 3-125 (OWCP Notice No. 129).

As previously discussed, the Board held in *Marko*, and reaffirmed in *Lake*, that at such time as the claimant's Section 8(a) compensation rate, *i.e.*, two-thirds of the claimant's average weekly wage at the time of his injury, falls below 200 percent of the applicable NAWW, the claimant's actual average weekly wage becomes the basis for his permanent total disability compensation rate, and he is then entitled to Section 10(f) annual adjustments. *Lake*, 47 BRBS at 49-50; *Marko*, 23 BRBS at 361 n.6. In this case, fiscal year 2011 was the first year in which claimant's Section 8(a) compensation rate, \$1,233.33, did not exceed the applicable Section 6(b)(3) maximum rate for that year, \$1,256.84. Thus, as of that time, claimant's Section 8(a) compensation rate, as adjusted pursuant to Section 10(f), became the basis for his compensation rate. See *id.* We therefore agree with claimant and the Director that, pursuant to the plain language of Section 10(f), claimant is entitled to receive, as of October 1, 2010, the benefit of the annual Section 10(f) adjustment to his previous year's compensation rate. We therefore modify the administrative law judge's Decision and Order to provide that claimant's compensation rate for fiscal year 2011 is \$1,256.84, which represents a 2.63 percent adjustment to his prior year's compensation rate of \$1,224.66.⁵ 33 U.S.C. §§906(b), 910(f), (g); Vol. A BRBS at 3-130 (OWCP Notice No. 133). In order to clarify how claimant's compensation rates for the ensuing years are to be determined, we further modify the administrative law judge's Decision and Order to reflect that claimant's compensation rate for fiscal year 2012 is \$1,295, which represents a 3.05 percent adjustment to his prior year's compensation rate of \$1,256.84, as rounded to the nearest dollar.⁶ Vol. A BRBS at 3-134 (OWCP Notice No. 135).

⁵ While this figure of \$1,256.84 ordinarily would be rounded to the nearest dollar figure pursuant to Section 10(g), 33 U.S.C. §910(g), in this instance it is limited by the terms of Section 6(b)(3), 33 U.S.C. §906(b)(3), to the fiscal year 2011 statutory maximum rate of \$1,256.84.

⁶ Consistent with this analysis, claimant's compensation rates are \$1,325 for fiscal year 2013, and \$1,346 for fiscal year 2014. 33 U.S.C. §§906(b), 910(f), (g); Vol. A BRBS at 3-146 (OWCP Notice No. 141); OWCP Notice No. 143.

Claimant next argues that the administrative law judge erred in failing to specify that employer's entitlement to a credit for disability benefits paid by employer applies to the temporary total disability benefits the administrative law judge awarded in his May 6, 2009 Order, as well as to the permanent total disability benefits awarded in the administrative law judge's subsequent Decision and Order issued on August 1, 2013.⁷ We agree with claimant and the Director that employer's credit extends to all benefits paid for all periods of disability, including the previously awarded period of temporary total disability. *See generally Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011); *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010). We therefore clarify the administrative law judge Decision and Order accordingly.

Lastly, claimant challenges the administrative law judge's denial of a concurrent scheduled permanent partial disability award for his work-related hearing loss. Recognizing that the administrative law judge's denial of a scheduled hearing loss award is consistent with the Board's decision in *Johnson*, 45 BRBS 27, and with related Board precedent, claimant notes his disagreement with these precedents in order to preserve this issue for judicial review. Pursuant to the Board's longstanding position that a claimant is not entitled to receive scheduled permanent partial disability benefits for one injury concurrently with total disability benefits for a separate injury, we affirm the administrative law judge's denial of a scheduled hearing loss award in this case. *Johnson*, 45 BRBS at 30; *see also Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111, 113 n.4 (2010); *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97, 98 (2007).

Accordingly, the administrative law judge's Decision and Order, Errata to Order and Decision Granting Benefits, and Order Denying Motion for Reconsideration are modified in part to award claimant permanent total disability benefits for the following periods at the following weekly rates:

July 28, 2008 - September 30, 2008	\$1,160.36
October 1, 2008 - September 30, 2009	\$1,200.62
October 1, 2009 - September 30, 2010	\$1,224.66

⁷ In the Order section of the August 1, 2013 Decision and Order, the administrative law judge ordered employer to pay claimant compensation for permanent total disability from July 28, 2008 and continuing. *See* Decision and Order at 20. The administrative law judge did not reiterate his prior award of temporary total disability benefits from October 9, 2005 through July 27, 2008, which were not the subject of claimant's motion for modification. The administrative law judge's subsequent Errata to Order issued on August 28, 2013, provided that employer is entitled to a credit for all payments employer previously made.

October 1, 2010 - September 30, 2011 \$1,256.84
October 1, 2011 - September 30, 2012 \$1,295
October 1, 2012 - September 30, 2013 \$1,325
October 1, 2013 - September 30, 2014 \$1,346

The administrative law judge's decisions also are clarified to reflect that employer's credit for benefits paid applies to the award of temporary total disability benefits from October 9, 2005 through July 27, 2008, as well as to the permanent partial disability benefits paid prior to the modification of that award. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge