BRB Nos. 13-0063
and 13-0063A

KARL DIERING	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
GLOUCESTER MARINE TERMINAL, INCORPORATED	)	DATE ISSUED: 09/23/2013
	)	
and	)	
	)	
COMPANION PROPERTY AND CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Thomas R. Uliase (Uliase & Uliase), Haddon Heights, New Jersey, for claimant.

Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2011-LHC-01865) of Administrative Law Judge Lystra A. Harris 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 was working as a checker on February 12, 2007, when a fork lift crushed his left leg. EX 8 at 42; EX 19 at 117. Claimant underwent multiple leg and foot surgeries. CX 2. Due to the development of necrosis, claimant's left fore-foot was amputated. After his discharge from the hospital, claimant continued his orthopedic treatment with Dr. Ostrum, but also treated for infection control with Dr. Pola de la Torre and for pain management with Dr. Kwon. Dr. Ostrum placed claimant's leg condition at maximum medical improvement "from an orthopedic point of view" on January 9, 2008, and issued permanent work restrictions. CX 4. Dr. Kwon placed claimant's leg condition at maximum medical improvement for pain management on June 18, 2008, noting that claimant's medications were all "palliative." EX 8 at 60. Claimant did not receive treatment for his left leg condition again until he had an x-ray on March 10, 2009, upon experiencing new pain in his left knee. Claimant was diagnosed with left knee chondromalacia and he began physical therapy. Thereafter, he did not seek additional treatment for his knee until after he fell on March 3, 2011, when his left knee gave out. CX 3. After the 2011 fall, Dr. Ostrum diagnosed a sprain and strain of the lateral collateral knee ligament and opined that claimant was disabled from work between March 4 and June 1, 2011. CX 4. Employer paid disability and medical benefits for the initial leg and foot injury. Claimant filed a claim for additional benefits for his knee conditions, as well as benefits for a psychological injury.[1]

The administrative law judge found that claimant does not suffer from a compensable psychological injury, but that his subsequent knee injuries are compensable. Although the administrative law judge found that claimant's leg/foot condition reached maximum medical improvement on June 18, 2008, she concluded that, because claimant's knee condition had not reached maximum medical improvement, claimant's overall condition was not permanent and claimant remains temporarily disabled. She also found that employer established the availability of suitable alternate employment as of June 18, 2008,[2] and she awarded claimant temporary partial disability benefits from June 18, 2008 until March 3, 2011, and continuing from June 2, 2011. 33 U.S.C. §908(e). As Dr. Ostrum opined claimant could not work from March 4 to June 1, 2011, due to the work-related knee condition, the administrative law judge awarded claimant temporary total disability benefits for this period. 33 U.S.C. §908(b); Decision and Order

[1]Although claimant never treated for depression after his work injury, he was diagnosed with depression related to his work injury by Drs. Bobrow, Rosenberg, and Holl. CXs 11-12; EX 7; HT at 71-83.

[2]Employer concedes claimant cannot return to his usual employment.

at 20-31. Claimant appeals and employer cross-appeals the administrative law judge's decision. Employer filed a brief in response to claimant's appeal.

Causal Relationship

Employer contends the administrative law judge erred in finding that claimant's knee conditions, pre- and post-March 2011, are work-related. When, as here, the Section 20(a) presumption is invoked and rebutted, 33 U.S.C. §920(a), the issue of whether there is a causal relationship between claimant's knee condition and his work injury must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In addressing whether the record as a whole establishes the work-relatedness of claimant's knee condition in this case, the administrative law judge accurately observed that the only physicians who stated opinions on this issue were Drs. Merola, Becan, and Arena. Dr. Merola attributed claimant's pre-March 2011 knee condition to his 2007 work injury, and Dr. Becan attributed claimant's post-March 2011 knee condition to his 2007 work injury. Dr. Arena did not attribute claimant's knee condition during either period to his work injury. CX 9 at 3, 9; CX 10; EX 1; EX 23 at 27-28.

With respect to claimant's pre-March 2011 knee condition, Dr. Merola found claimant's knee pain had progressed over time and was secondary to his amputation which significantly affected his ambulation. CX 10. Dr. Arena acknowledged that claimant's work injury involved a fracture of the tibia that extended to his left knee and resulted in a limited range of motion, but he concluded that claimant's knee pain was not related to his February 2007 injury. The administrative law judge found Dr. Arena's opinion to be inconsistent and Dr. Merola's opinion to be more reasoned and entitled to greater weight. As it is within her authority to credit and weigh the evidence, *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001), the administrative law judge gave little weight to Dr. Arena's opinion and found that claimant's pre-March 2011 knee condition is related to the 2007 work accident. Decision and Order at 19-20; EX 23 at 47, 66. Substantial evidence supports this finding, and we affirm it.

With respect to claimant's post-March 2011 knee condition, Dr. Becan stated that claimant's original injury affected the components and movement of the knee and that the instability and buckling were related to the February 2007 injury. CXs 9, 16. Dr. Arena stated that the March 2011 fall was related to claimant's work injury because it was the result of claimant's leg giving out; however, he concluded that the residuals of the fall were not so related. The administrative law judge found that Dr. Arena did not reconcile these statements and thus gave his opinion less weight. As the credited evidence attributes the 2011 fall to claimant's original work injury, and as it is well-settled that an employer is liable for any sequelae resulting from the original injury, *see* 33 U.S.C.

§902(2), substantial evidence supports the administrative law judge's finding that claimant's left knee condition resulting from the 2011 fall is also work-related. *See, e.g., Seguro v. Universal Maritime Service,* 36 BRBS 28 (2002); *Bass v. Broadway Maintenance,* 28 BRBS 11 (1994); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988). Thus, we affirm the administrative law judge's conclusions that claimant's knee condition, both pre- and post-March 2011, is work-related. *Id*.; *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Therefore, the administrative law judge properly found claimant's knee injury compensable.

Maximum Medical Improvement

Employer contends the administrative law judge erred in finding claimant entitled to continuing temporary disability benefits. Specifically, employer asserts that substantial evidence supports the finding that claimant's leg/foot condition became permanent as of June 18, 2008, and it was erroneous for the administrative law judge to "supersede" that date merely because claimant was later treated for a knee condition.

A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, or when the medical evidence establishes it reached maximum medical improvement. *See Louisiana Ins. Guaranty Ass'n v. Abbott,* 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Leech v. Service Engineering Co*., 15 BRBS 18 (1982). "Permanent," however, does not mean unchanging. Where an employee's condition only deteriorates after a physician rates it as stable, maximum medical improvement may be found. *Davenport v. Apex Decorating Co*., 18 BRBS 194 (1986). Moreover, a condition that has been declared permanent may later be re-characterized as temporary when the underlying condition worsens and a claimant again undergoes a healing process. *Pacific Ship Repair & Fabrication, Inc. v. Director, OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012).

In this case, claimant's treating physicians, Drs. Ostrum and Kwon, stated claimant had reached maximum medical improvement by January 9, 2008 and June 18, 2008, respectively. They both released him to return to work with restrictions. CX 4; EX 8. The administrative law judge found that claimant's left leg/foot condition achieved maximum medical improvement as of June 18, 2008, based on those opinions. Decision and Order at 24. Despite so finding, she then found that claimant's leg condition remained "temporary" because he later underwent treatment on his knee. *Id.* at 24, 26.

We hold it was erroneous for the administrative law judge to use the later knee treatment to "supersede" the date of maximum medical improvement for the original injury. As of June 18, 2008, claimant was no longer being treated to improve his leg and foot condition. Moreover, the first new knee pain did not commence until approximately

nine months after the leg and foot condition was found to be stable. CXs 3, 4; EX 8. As substantial evidence supports the finding that claimant's original leg/foot condition reached maximum medical improvement on June 18, 2008, we vacate the administrative law judge's finding that claimant's leg condition continued to be temporary after that date. We hold that claimant's leg/foot condition became permanent on June 18, 2008. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). Thus, we also vacate the award of temporary partial disability benefits from June 18, 2008 until March 3, 2011, and continuing from June 2, 2011. For the reasons explained below, claimant is limited to an award under the schedule for periods when his disability was both permanent and partial. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

We affirm the administrative law judge's finding that claimant is entitled to temporary total disability benefits from March 4, 2011 through June 1, 2011, when his work-related knee injury rendered him unable to work at all and he underwent a new healing period, as it is supported by substantial evidence and in accordance with law. *Benge*, 687 F.3d 1182, 46 BRBS 35(CRT). We remand the case to the administrative law judge for her to address, pursuant to applicable law, whether claimant lapsed into temporary disability for any other periods after June 18, 2008, for which claimant might be entitled to temporary partial disability benefits.[3] *Watson*, 400 F.2d 649; *Leech*, 15 BRBS 18;[4] *see also Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

Suitable Alternate Employment

Claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Specifically, claimant asserts the administrative law judge failed to address the effect of his not having a driver's license on his ability to obtain work. Where, as here, the parties do not dispute a claimant's inability to return to his former job duties, the claimant has established a prima facie case of total disability. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979). The burden thus shifts to the employer to demonstrate the availability of suitable alternate employment, which requires that it demonstrate the realistic availability of jobs which the claimant is capable of performing given his age, physical restrictions, and educational and vocational background. *Id.*; *see also New*

[3]This includes the period after claimant's temporary total disability ended on June 1, 2011. *See* discussion, *infra*, on suitable alternate employment.

[4]A permanent disability persists through periods of "temporary exacerbation." *Leech*, 15 BRBS at 21-22.

Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991).

Although the administrative law judge noted claimant does not have a driver's license, Decision and Order at 4, she did not address this fact in the context of her suitable alternate employment analysis. However, Mr. Pare, who conducted both labor market surveys, specifically noted therein that all the positions were accessible to claimant via public transportation. EXs 16, 17. Claimant states he does not qualify for *free* public transportation; however, claimant did not argue before the administrative law judge, and he does not suggest now, that public transportation is inaccessible to him or that any of the jobs contained in the labor market surveys are not accessible via public transportation. *See generally See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994) (relevant market is where the claimant lives); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996) (same). Therefore, as there is no real dispute that the jobs in employer's labor market surveys are accessible to claimant via public transportation, and as claimant raises no other challenge to the labor market surveys, we affirm the finding that employer established the availability of suitable alternate employment as it is supported by substantial evidence. *Mendoza v. Marine Personnel Co., Inc*., 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

Claimant next asserts the administrative law judge erred in finding he was only partially disabled as of June 18, 2008. Specifically, claimant asserts the administrative law judge's finding that he could perform suitable alternate employment as of June 18, 2008, the date Dr. Kwon released claimant to work, is inconsistent with her finding that his knee condition was not yet permanent. We disagree. We have held that June 18, 2008, is the date claimant's leg/foot condition became permanent. Thus, claimant's disability did not become "partial" prior to his leg condition's becoming "permanent."[5] In any event, a claimant's disability cannot become partial until suitable alternate employment is established. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Employer offered two labor market surveys, dated July 21, 2008, and January 22, 2011, which identified jobs available between April 29, 2008, and January 15, 2010. EXs 16, 17. The administrative law judge found that the jobs are suitable. As suitable jobs were shown to be available both before and after claimant's leg/foot condition reached maximum medical improvement, there is no error in the administrative law judge's using the date of

[5]In any event, the Act provides for an award of temporary partial disability benefits, which the administrative law judge entered in this case, where an employer establishes the availability of suitable alternate employment before the claimant's condition becomes permanent. 33 U.S.C. §908(e).

permanency as the date of the onset of partial disability in this case.[6] *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *see also Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991). Because claimant's injury was to his leg and foot, which are scheduled members, claimant is limited to an award under the schedule for any period his disability was permanent and partial. *See* 33 U.S.C. §908(c)(2) (leg), (4) (foot), (19) (partial loss); *Boone v. Newport News Shipbuilding & Dry Dock Co*., 37 BRBS 1 (2003). The case is remanded to the administrative law judge to determine if claimant is entitled to a scheduled award.

Claimant also challenges the administrative law judge's award of partial disability benefits after June 2, 2011. He asserts the administrative law judge erred in finding that employer did not need to re-establish the availability of suitable alternate employment as of June 2, 2011, with an updated labor market survey, following his period of temporary total disability. We disagree.

In this case, the administrative law judge found that claimant's treating physicians cleared him for sedentary work with permanent restrictions by June 18, 2008. CXs 4, 6. Following his fall in March 2011 and the temporary exacerbation of his knee condition between March 4 and June 1, 2011, Dr. Ostrum released claimant to return to sedentary work without any additional restrictions. CX 4. Based on this evidence, the administrative law judge rationally found that claimant "could have returned to the [suitable] alternative work identified in the [previous] labor market surveys." Decision and Order at 30-31. As the administrative law judge rationally found that claimant suffered no additional disability as a result of the temporary exacerbation in 2011, and his condition would have permitted him to return to the jobs identified as suitable in 2008, we affirm the finding that there was no need for employer to re-establish the availability of suitable alternate employment in 2011.[7]

Section 8(a)

Claimant next asserts the administrative law judge erred in failing to address his entitlement to the "presumption at 33 U.S.C. §908(a)" that he is permanently and totally disabled because he lost use of his left foot due to the 2007 work accident and he had

[6]The reference to March 12, 2008, on page 29 of the Decision and Order appears to be a typographical error, as the administrative law judge's award states that partial disability benefits are to commence on June 18, 2008. Decision and Order at 31, 35.

[7]Where there is no evidence of a residual disability from a claimant's temporary exacerbation, once the period of total disability ceases and the claimant's condition reaches maximum medical improvement, any scheduled award would resume, depending on its length. *See Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111, 113 n.4 (2010); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.4 (1985).

previously lost vision in his left eye due to a head injury in 1984. Claimant did not raise this issue at, or prior to, the hearing; he first raised entitlement to a "Section 8(a) presumption" in his post-hearing brief. Neither employer nor the administrative law judge addressed claimant's argument. Employer responds that there is no evidence of the total loss of claimant's eye or foot and, therefore, insufficient evidence to support claimant's contention.

Section 8(a) states in relevant part:

> Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability.

33 U.S.C. §908(a). Claimant's assertion is that, although his amputation was mid-foot, he has totally lost the use of his left leg as it was mangled in the 2007 accident, and he cannot walk without his brace. In support, claimant relies on *Collins v. Todd Shipyards Corp.*, 9 BRBS 1015, 1018 (1979), wherein the Board held that "total loss of use, where demonstrated by the totality of the evidence … is equivalent to actual physical loss." Thus, claimant asserts the loss of use of his leg coupled with the "undisputed" prior loss of vision in his left eye raised the presumption of permanent total disability under Section 8(a).

We reject claimant's argument that the administrative law judge erred in failing to address this contention. *See Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993). We agree with employer that, on the facts of this case, claimant cannot establish his entitlement to the Section 8(a) presumption of total disability because he has not shown the *total loss* of two members. In this case, the record is silent as to the extent of claimant's vision loss, but even assuming, arguendo, the loss in one eye is total, claimant's amputation was at mid-foot, and he concedes he can walk with a brace.[8] Thus, there is no total loss of use of the foot or the leg. Contrary to claimant's reliance on *Collins* to support his contention, the Board in *Collins* vacated the administrative law judge's application of the Section 8(a) presumption where the claimant suffered total loss of use of one foot but retained some use of the other. *Collins*, 9 BRBS 1015; *compare with Walker v. Pacific Architects & Engineers, Inc.*, 1 BRBS 145 (1974) (total loss of use of both legs). Therefore, we reject claimant's assertion of error with regard to the application of a Section 8(a) presumption.

[8]Moreover, Dr. Arena reported that he observed claimant's gait with and without the brace. EX 1.

Psychological Injury

Lastly, we address claimant's contention that the administrative law judge erred in finding that he does not have a compensable psychological injury. Claimant contends that he has been diagnosed with work-related depression,[9] and that the administrative law judge erred in crediting the opinion of Dr. Fenichel, employer's expert, that he does not suffer from any degree of depression. We reject claimant's assertion. Once the Section 20(a), 33 U.S.C. §920(a), presumption is invoked, as here, the employer can rebut the presumption by producing substantial evidence that the claimant's injury is not related to his employment. *See C & C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). If employer rebuts the Section 20(a) presumption, as here with Dr. Fenichel's opinion,[10] the presumption drops out of the case, and the administrative law judge must weigh all of the relevant evidence, with the claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

Contrary to claimant's assertion, the administrative law judge did not credit Dr. Fenichel's opinion to find there was no psychological injury. Decision and Order at 22, 26. Rather, in weighing the record as a whole, the administrative law judge gave less weight to Dr. Fenichel's opinion because she relied solely on claimant's statements and did not conduct objective testing. *Id*. at 21. Thus, although the remaining experts opined that claimant suffers some degree of depression related to his work injury, the administrative law judge found that claimant did not establish by a preponderance of evidence that he is disabled by a work-related psychological condition. She found that her observations of claimant did not corroborate the doctors' reports, which were based on claimant's self-reported complaints. That is, she found that claimant's behavior and testimony do not support finding that he has severe and disabling depression.[11] *Id*. at 22,

[9]Dr. Holl opined that claimant was "suffering from a minimal amount of adjustment disorder with depressed mood relative to the injury involving his left lower extremity and his physical limitations[,]" and he estimated a one percent impairment. EX 7. Drs. Bobrow and Rosenberg diagnosed major depression as a result of claimant's February 2007 work accident. CX 11; HT at 73, 77-78.

[10]Dr. Fenichel opined that claimant is not depressed. Specifically, he stated, "it is my opinion that [claimant] does not have a psychiatric disorder related to the work injury of 02/12/07 and from a psychiatric perspective, there are no restrictions in regard to [his] ability to return to work." EX 5 at 34-35.

[11]Although Drs. Holl, Bobrow, and Rosenberg each diagnosed some degree of depression attributable to claimant's work accident, when asked about his complaints relating to his leg injury at the hearing, claimant complained only of his physical limitations, not of any emotional ones. HT at 40, 53.

26; EX 19 at 51-52; HT at 40, 53. Therefore, as it is rational and supported by the record, we affirm the administrative law judge's finding that claimant failed to establish he has a disabling work-related psychological condition.

Accordingly, we vacate the administrative law judge's award of all temporary partial disability benefits and her finding that claimant's condition as a whole has not reached maximum medical improvement. We modify her decision to reflect that claimant's leg/foot condition became permanent on June 18, 2008. We remand the case for consideration of whether claimant's condition subsequently lapsed into temporary disability and to address claimant's entitlement to a scheduled award for periods he was permanently partially disabled. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge