

DAVID E. KOGUT	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: <u>Sept. 24, 2014</u>
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Offices of Scott Roberts, L.L.C.), Groton, Connecticut, for claimant.

Jeffrey E. Estey, Jr. (McKenney, Quigley, Izzo & Clarkin, L.L.P.), Providence, Rhode Island, for self-insured employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-LHC-00678) of Administrative Law Judge Jonathan C. Calianos 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 worked for employer as a shipfitter from 2003 until November 2009. In 2006, he injured his left knee at work. Employer paid claimant temporary total disability benefits from October 29 through November 12, 2006, November 13, 2006 through April 29, 2007, and November 9, 2009 through March 14, 2010, as well as all medical benefits. After recovering from knee surgery in 2007, claimant returned to light-duty, and then to full-duty, work until he had to undergo further surgery in 2009. In December 2009, one

month after the surgery, claimant's doctor, Dr. Murray, stated that claimant could return to work in three weeks, *i.e.*, early January 2010. EX 9. In March 2010, employer sent an inquiry to Dr. Murray regarding claimant's work status. On April 7, 2010, Dr. Murray stated that claimant was released to return to full-duty work with no restrictions. Since employer had not heard from claimant by April 12, 2010, although he had been sent a "five-day" letter in March, employer terminated claimant's employment effective April 7, 2010. EX 4-5. Claimant has not worked or applied for any job since. Claimant filed a claim for benefits for his knee injury and, in particular, claimed he was entitled to temporary total disability benefits from April 2011 when his doctor recommended additional knee surgery.

In August 2012, Administrative Law Judge Timothy J. McGrath found that, because claimant's knee injury is work-related, employer is liable for medical benefits, including the recommended knee replacement surgery. However, because he found that claimant was able to work at the time of his termination for failing to report to work, Judge McGrath found that claimant's loss of earning capacity following his 2010 termination is not related to his work injury and is not compensable. Therefore, he denied claimant's claim for total disability compensation. McGrath Decision and Order at 15-17. Subsequent to Judge McGrath's decision, on September 7, 2012, claimant underwent the recommended left total knee replacement surgery, and Dr. Murray thereafter stated that claimant was totally disabled from working between September 7, 2012 and January 10, 2013. CX 2 (June 11, 2013 hearing). Claimant sought temporary total disability benefits from employer for this period.<sup>1</sup> JX 1. Judge Calianos (the administrative law judge) denied benefits, finding that the focus is on whether claimant's loss of wage-earning capacity during the period in question was related to his work injury and not, as claimant asserted, on whether the surgery related to the work injury kept him from returning to his usual work. Calianos Decision and Order at 4 n.1. Judge Calianos found that Judge McGrath had already concluded that claimant was able to perform his usual employment at the time of his termination and that his termination was not related to the work injury. Therefore, any loss of wage-earning capacity after that date, because claimant has voluntarily not returned to any work, is due to the termination and not to the

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<sup>1</sup> Claimant sought benefits for the closed period because he and employer stipulated that Judge McGrath's 2012 findings precluded him from obtaining disability compensation after his release to return to work on January 11, 2013. JX 1. Judge Calianos did not address the extent of any impairment to claimant's knee pursuant to 33 U.S.C. §908(c)(2), as there is no evidence of record regarding any permanent impairment. The latest post-surgery report from Dr. Murray, dated January 2013, stated only that claimant could drive to and from physical therapy, was independent in his exercises but was still having trouble with stairs, and was capable of employment. CX 2 (June 11, 2013 hearing).

injury. Thus, there was no work-related loss of wage-earning capacity, and claimant is not entitled to temporary total disability benefits for the closed period following his 2012 surgery. *Id.* at 4. Claimant appeals the denial of total disability benefits, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in denying benefits, as it is clear that the surgery for the work-related knee condition rendered him totally disabled from performing any work for a finite period. As he asserts he has established a prima facie claim of total disability, claimant claims entitlement to total disability benefits because employer has not shown that his disability is only partial by establishing the availability of suitable alternate employment. Claimant also contends “the only time that temporary total disability benefits have been denied to a post-employment situation is in cases when the Claimant has voluntarily retired.” Cl. Br. at 3. Claimant avers the administrative law judge erroneously found he has voluntarily withdrawn from the workforce. We reject claimant’s contentions.

The legal test for determining the compensability of a work injury is whether work is unavailable to the claimant due to his work injury. *See McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988). The claimant bears the burden of establishing that his loss of wage-earning capacity is related to his work injury. *See, e.g., Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). Section 2(10) of the Act, 33 U.S.C. §902(10) (emphasis added), provides: “‘Disability’ means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]” Where a claimant is performing his usual work post-injury, and his inability to continue to do so is not due to the work injury, the employer does not have the burden of establishing the availability of suitable alternate employment. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff’d sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Rather, when a claimant leaves or is discharged from his usual work for reasons unrelated to his work-related injury, he does not have a “disability” within the meaning of the Act and is not entitled to total disability compensation. *Id.* (terminated for violation of company rule); *see Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001) (voluntarily retired); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989) (voluntarily retired); *see also* 33 U.S.C. §902(10);<sup>2</sup> *cf. Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997) (claimant is disabled

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<sup>2</sup> A similar rule applies in cases where the claimant ceases working in suitable alternate employment and, because of the claimant’s conduct, the employer is relieved of having to re-establish the availability of suitable alternate employment in order to preclude an award of total disability benefits. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996) (violating company policy); *Jaros v. Nat’l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988) (falsification of company records); *cf. Norfolk Shipbuilding &*

when he was physically unable to perform his usual work due to his injury at the time he took longevity retirement).

In this case, after claimant's 2009 surgery, he was released by his physician, and therefore was physically able to return to his usual work without restrictions and to earn wages. When claimant did not report to work after his release, employer terminated his employment.<sup>3</sup> Judge McGrath found that claimant's 2010 termination and subsequent loss of wage-earning capacity were not related to his work-related knee injury. Accordingly, claimant was not "disabled" at the time of his discharge. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 191 (1984). Judge Calianos found that claimant did not dispute Judge McGrath's finding. Calianos Decision and Order at 4. As claimant was not disabled within the meaning of the Act at the time he was terminated in 2010, his later work-related surgery, which took place while he still, of his own accord, was not working, cannot alter his disability status by mere virtue of the fact that it rendered him physically unable to work. Claimant had no wages to be replaced, *i.e.*, for these purposes, no wage-earning capacity, at the time of the 2012 surgery; thus he lost no earning capacity due to his surgery. *Brooks*, 26 BRBS 1; *Burson*, 22 BRBS 124; *Del Vacchio*, 16 BRBS 191. Consequently, we affirm the administrative law judge's determination that claimant is not entitled to temporary total disability benefits for the period between September 7, 2012, and January 10, 2013.

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*Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999) (employer has a renewed burden to establish the availability of suitable alternate employment when there has been an economic layoff at its facility). Such a claimant, however, retains any award of partial disability benefits to which he was entitled, and may receive a scheduled award after his "retirement." *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989); *see n. 1, supra*.

<sup>3</sup> Although claimant contends his departure from work was not a "voluntary retirement," it was reasonable for the administrative law judge to draw such a conclusion, as he found that claimant has not worked since his 2010 termination and that there is no evidence of any search for employment. Calianos Decision and Order at 3-4. In any event, both a voluntary retirement and a termination which is unrelated to the work injury have the same effect with regard to precluding a claimant's entitlement to compensation for total disability. *Hoffman*, 35 BRBS 148; *Brooks*, 26 BRBS 1.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge