

BARBARA HILLS)	
)	
Claimant-Respondent)	
v.)	
)	
CONTAINER STEVEDORING)	
COMPANY)	
)	
and)	
)	DATE ISSUED:_____
CRAWFORD AND COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Michael S. Hertzig (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order-Award of Benefits (88-LHC-1114) of Administrative Law Judge Ellin M. O'Shea rendered on a claim filed pursuant to the provisions of the Longshore and

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

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).

In her Decision and Order, the administrative law judge found that claimant sustained a work-related knee injury which rendered her permanently totally disabled as of August 22, 1986. The administrative law judge further determined that claimant was entitled to temporary total disability compensation from August 15, 1985 to April 14, 1986, and from May 19, 1986 through August 21, 1986. Finally, the administrative law judge determined that claimant was entitled to annual adjustments as provided in Section 10(f) of the Act, 33 U.S.C. §910(f), on all of the compensation awarded.

On appeal, the Director contends that administrative law judge erred in determining that claimant is entitled to Section 10(f) adjustments during her periods of temporary total disability.¹ The Director relies on *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT)(9th Cir. 1990), as controlling precedent in this case arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, asserting it mandates that the compensation rate for claimant's permanent total disability compensation be adjusted to factor out the intervening cost of living adjustments during claimant's periods of temporary total disability. The Director moves that the Board reverse the administrative law judge's Decision and Order in this regard and remand for the appropriate recalculation.

We agree with the Director that the administrative law judge erred in determining that claimant is entitled to inclusion of the Section 10(f) adjustment which accrued during her periods of temporary total disability in her permanent total disability benefits. Subsequent to the administrative law judge's Decision and Order in this case, the Ninth Circuit issued *Bowen* adopting the holding of the United States Court of Appeals for the Fifth Circuit in *Phillips v. Marine Concrete Structures Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), *vacating* 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989). The court thus held that nothing in the plain language of Section 10(f) suggests that Congress intended claimants who are permanently totally disabled to receive the benefit of intervening cost of living adjustments occurring during a prior period of temporary disability. Inasmuch as *Bowen* is controlling, we reverse the administrative law judge's determination that the compensation rate for claimant's permanent total disability must include the adjustment under Section 10(f) accruing during her periods of temporary total disability from August 15, 1985 to August 21, 1986, and hold that claimant is entitled only to the Section 10(f) adjustments accruing after she became permanently totally disabled on August 22, 1986. The district director must recalculate claimant's benefits in accordance with this opinion.

Accordingly, the administrative law judge's inclusion of adjustments pursuant to Section 10(f) accruing during claimant's temporary total disability in her permanent total disability award is

¹The Director's motion to remand filed on September 20, 1992 is accepted as his petition for review in this case.

reversed. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge