

JOHN WESTERMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
OCEAN REPAIR SERVICE)	DATE ISSUED:
)	
and)	
)	
STATE INSURANCE FUND)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-137) of Administrative Law Judge Robert J. Feldman 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).

On October 28, 1985, claimant, a ship rigger, sustained an injury to his left knee while working for employer. Employer voluntarily paid claimant compensation for this knee injury. Claimant stopped working on April 9, 1986. On November 1, 1988, claimant filed a claim for an occupational hearing loss. In his Decision and Order, the administrative law judge denied claimant compensation for his hearing loss because he was receiving total disability compensation for his knee injury. On appeal, claimant challenges the administrative law judge's denial of benefits for his hearing loss. Employer responds in support of the administrative law judge's denial of additional

benefits.

Claimant contends that the administrative law judge erred in not awarding benefits for his hearing loss. The administrative law judge properly denied claimant compensation for his scheduled hearing loss when claimant was receiving temporary total and permanent total disability benefits for his 1985 knee injury, as an award of total disability cannot run concurrently with a scheduled award. *Korineck v. General Dynamics Corp.*, 835 F.2d 42, 20 BRBS 63 (CRT)(2d Cir. 1987); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956); *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991); *Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); *James v. Bethlehem Steel Corp.*, 5 BRBS 707 (1977).

There is evidence of record, however, which the administrative law judge did not address, that claimant may have received partial disability benefits for his knee injury, and if total disability lapsed, claimant is entitled to receive his scheduled award during this time. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 (1985). The record reflects that claimant was receiving temporary partial disability benefits from July 6, 1988 through May 9, 1989. Emp. Ex. 10; Emp. Post-Hearing Br. at 2 n. 2. In light of the fact that the administrative law judge denied compensation for claimant's hearing loss claim for periods when claimant may have been receiving partial disability benefits for his knee injury, we vacate the administrative law judge's denial of benefits for the hearing loss. On remand, the administrative law judge must initially determine which type of compensation claimant received for specific periods. If the administrative law judge finds that claimant in fact received partial disability benefits for his 1985 knee injury after claimant's date of last exposure to injurious noise, the administrative law judge must award compensation for claimant's hearing loss for these periods based on the parties' stipulation.¹ *See generally Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993); *Turney*, 17 BRBS at 235.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

¹As stipulated by the parties, the schedule award would last for 18.76 weeks based on a 9.38 percent binaural hearing loss. Tr. at 6; 33 U.S.C. §908(c)(13)(B). Despite claimant's attempt to establish that Section 8(c) of the Act, 33 U.S.C. §908(c), provides for a schedule award in addition to compensation for temporary total disability, the Board has not interpreted the statute in that manner. *James*, 5 BRBS at 707. *Cf. Henry v. George Hyman Construction Co.*, 749 F.2d 65, 17 BRBS 39 (CRT)(D.C. Cir. 1984), where the court allowed an overlapping scheduled award and award of temporary total disability benefits arising out of the same work accident to a deceased claimant. In *Henry*, the court stated the Board's holding in *James* was arguably incorrect but noted that *James* involved a living claimant who could receive his scheduled award once the temporary total disability lapsed. *See also Turney*, 17 BRBS at 235 n. 4. We need not address claimant's reliance on *Henry* in this case because the instant case apparently involves a lapse of total disability to partial disability.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge