

TOPIC 8 DISABILITY

8.1 NATURE OF DISABILITY (PERMANENT V. TEMPORARY)

8.1.1 Generally

Section 8 identifies **four different categories** of disability and separately prescribes the methods of compensation for each. See Steevens v. Umpqua River Navigation, ___ BRBS ___ (BRB Nos. 00-1027 and 00-1027A) (July 17, 2001). In the **permanent partial disability** category, Section 8(c) provides a compensation schedule which covers 20 different specific injuries, 33 U.S.C. § 8(c)(1) - (20), and an additional provision that applies to any injury not included within the list of specific injuries. 33 U.S.C. § 908 (c)(21). In addition to permanent partial disability, the LHWCA provides for **permanent total, temporary total and temporary partial disability**. 33 U.S.C. §§ 908(a), (b), (e).

[ED. NOTE: The various categories of disability are addressed, infra, within the Topics individually numbered under 8.]

Compensation for a permanent partial disability must be determined in one of two ways. *First*, if the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of his average weekly wage for a specific number of weeks, regardless of whether his earning capacity has been impaired. See Henry v. George Hyman Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984). *Second*, in “all other cases” of permanent partial disability, Section 8(c)(21) authorizes compensation equal to two-thirds of the difference between the employee’s pre-injury average weekly wage and his post-injury disability pays two-thirds of the employee’s average weekly wage for the duration of the disability. 33 U.S.C. § 908(a). Temporary total disability pays two-thirds disability. 33 U.S.C. § 908(b). *Lastly*, compensation for temporary partial disability is two-thirds of the difference between the employee’s pre-injury average weekly wage and his post-injury wage-earning capacity, during the period of disability, up to a maximum of five years. Thus, the LHWCA clearly articulates the four types of disability and specifically provides separate means for calculating compensation for injuries resulting in each of these four forms of disability. Steevens v. Umpqua River Navigation, ___ BRBS ___ (BRB Nos. 00-1027 and 00-1027A) (July 17, 2001).

The standards for establishing entitlement to a scheduled award of permanent partial disability as opposed to an award for total disability under the LHWCA provide yet another key distinction between these forms of compensation. An employee with a scheduled injury under the LHWCA is presumed to be disabled, even though the injury does not actually affect his earnings. Bath Iron Works Corp. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT). As such, no proof of loss of wage-earning capacity was specified in the schedule. In contrast, for non-scheduled injuries, loss of wage-earning capacity is an element of the claimant’s case, for without the presumption that accompanies scheduled injuries, a claimant is not “disabled” unless he proves “incapacity because

of injury to earn the wages.” 33 U.S.C. § 902(10); Bath Iron Works Corp., 506 U.S. at 153, 26 BRBS 151 (CRT).

An injured worker's impairment may be found to have changed from temporary to permanent under either of **two tests**. Eckley v. Fibrex & Shipping Co., 21 BRBS 120, 122-23 (1988).

Under the **first test** a residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of **maximum medical improvement** (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Phillips v. Marine Concrete Structures, 21 BRBS 233, 235 (1988); Trask v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56, 60 (1985). Thus, an irreversible condition is permanent *per se*. Drake v. General Dynamics Corp., Elec. Boat Div., 11 BRBS 288, 290 n.2 (1979). **The date of the diagnosis of an irreversible medical condition is the date of permanency.** Crouse v. Bath Iron Works Corp, 33 BRBS 442(ALJ)(May 4, 1999), *see also*, Drake v. General Dynamics Corp., 11 BRBS 288(1979)(Held, an irreversible medical condition is permanent per se.).

Under the **second test** a disability will be considered permanent if the employee's impairment has **continued for a lengthy period** and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (**5th Cir.** 1968), *cert. denied*, 394 U.S. 976 (1969). *See also* Crum v. General Adjustment Bureau, 738 F.2d 474, 480 (**D.C. Cir.** 1984) (physician's evaluations of claimant indicated that his heart condition, although improved, was of indefinite duration); Air America, Inc. v. Director, OWCP, 597 F.2d 773, 781-82 (**1st Cir.** 1979); Care v. Washington Metro. Area Transit Auth., 21 BRBS 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment, with a view toward improving his condition. Leech v. Service Eng'g Co., 15 BRBS 18, 21 (1982).

A temporary deterioration of a permanently disabled worker does not render him temporarily disabled. Leech v. Service Engineering Co., 15 BRBS 18 (1982)(Held, a temporary total disability award subsumed the permanent partial award for the same injury, but that the underlying permanent partial disability did not disappear during the temporary exacerbation.).

8.1.2 Effect of Determination of Permanency

A finding that a disability is permanent has at least **three effects**. **First**, in the case of total disability, it allows the addition of a cost of living increase to the claimant's benefits. *See* 33 U.S.C. § 910(f). **Second**, only payments by employers made for permanent disability are credited against the 104-week obligation, for purposes of contribution by the Special Fund, under Section 8(f) of the LHWCA. *See* 33 U.S.C. § 908(f). **Third**, a claimant's entitlement to benefits for a scheduled disability begins on the date of permanency. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 (1985).

8.1.3 Permanency of Disability is a Medical Determination

The date on which a claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. Trask, 17 BRBS at 60; Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984); Rivera v. National Metal & Steel Corp., 16 BRBS 135, 137 (1984); Miranda v. Excavation Constr., 13 BRBS 882, 884 (1981); Greto v. Blakeslee, Arpaia & Chapman, 10 BRBS 1000, 1003 (1979).

A date of permanency may not be based, however, on the mere speculation of a physician. Therefore, a physician's statement to the effect that he "supposed" that he could project a disability rating was rejected as too speculative to support a rating of permanent disability. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). Compare this with Ion v. Duluth, Missabe and Iron Range Railway Co., 31 BRBS 75 (1997) (Claimant's date of MMI was one year after surgery for industrial knee injury, even though date was in the future, when substantial medical evidence supported finding.).

Before an injured worker's condition can be found to be permanent, both physical and mental factors must be considered. Hence, where the employee suffered both physical and emotional trauma and needed psychological treatment before he could return to work, he was not yet at the point of maximum medical improvement and was still considered disabled due to the psychological effects of his injury. Jenkins v. Kaiser Aluminum & Chem. Sales, 17 BRBS 183, 187 (1985).

It is the medical evidence that determines the start of permanent disability, regardless of economic or vocational considerations. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988). Thus, a judge must discuss the medical opinions of record regarding permanency, rather than relying on economic factors, such as the loss of a job, a return by the claimant to employment, or the likelihood of a favorable change in employment. See Dixon v. John J. McMullen & Assocs., 19 BRBS 243, 245 (1986) (erroneous for the ALJ to use the date that claimant was fired as the date of maximum medical improvement); Thompson v. McDonnell Douglas Corp., 17 BRBS 6, 9 (1984) (erroneous for ALJ to base permanency determination on date employee returned to work); Bonner v. Ryan-Walsh Stevedoring Co., 15 BRBS 321, 324 (1983) (unreasonable for ALJ to find permanency reached, based on physician's release of claimant to return to work, where the same physician specifically stated that he did not know the exact date on which claimant reached maximum medical improvement); Williams v. General Dynamics Corp., 10 BRBS 915, 918 (1979) (the date upon which the employee was rehired is not a reasonable basis for the date of maximum medical improvement).

Likewise, evidence of the ability to do alternative employment is not relevant to the determination of permanency. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 234 (1984), rev'd on other grounds sub nom. Director, OWCP v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990). See also Topic 8.2, infra.

In addition, the determination of the nature of a disability is not effected by an employee's enrollment in a rehabilitation program or the likelihood that he may become gainfully employed as a result. Price v. Dravo Corp., 20 BRBS 94, 96 (1987); Trask, 17 BRBS at 60. A determination by a vocational rehabilitation expert that an employee is unable to return to work is not a medical judgment and cannot form the basis for a finding of permanency of disability. Lusby v. Washington Metro. Area Transit Auth., 13 BRBS 446, 448 (1981). See also Topic 8.8, *infra*.

An ALJ must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401 (1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708 (1978).

8.1.4 Permanency Not Reached Where a Condition Is Improving

Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for an ALJ to find that maximum medical improvement has been reached. Dixon, 19 BRBS at 245. Similarly, where the treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the ALJ to conclude that the claimant's condition was temporary rather than permanent. Dorsey v. Cooper Stevedoring Co., 18 BRBS 25, 32 (1986), *pet. dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987).

In Stoute v. Shea-Ball, 13 BRBS 755 (1981), the Board held that the ALJ reasonably determined that the claimant's partial disability was temporary where the treating physician indicated that claimant's condition was improving, even though the same physician also characterized claimant's residual impairment as a permanent partial disability.

Permanency does not, however, mean unchanging. Accordingly, permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date. Watson, 400 F.2d at 654; Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988); Brown v. Bethlehem Steel Corp., 19 BRBS 200, 204, *aff'd on recon.*, 20 BRBS 26 (1987); Trask, 17 BRBS at 60. Thus, for example, the possibility that an employee who has been obese his whole life might alleviate his disability by losing weight is too speculative to foreclose an award for permanent disability. Vogle v. Sealand Terminal, 17 BRBS 126, 130 n.9 (1985).

Likewise, a prognosis stating that chances of improvement are remote is sufficient to support a finding that a claimant's disability is permanent. Walsh v. Vappi Constr. Co., 13 BRBS 442, 445 (1981); Johnson v. Treyja, Inc., 5 BRBS 464, 468 (1977). In *dicta*, the Board has remarked that even a prognosis that improvement and employment are "likely" at some unspecified time in the future

does not preclude a finding of permanency. Walsh, 13 BRBS at 445. In addition, where an employee's condition deteriorates after a physician rates it as stable, maximum medical improvement may be found. Davenport v. Apex Decorating Co., 18 BRBS 194, 197 (1986). Similarly, a temporary worsening of a condition does not render a permanent disability temporary. Leech v. Service Eng'g Co., 15 BRBS 18, 22 (1982).

8.1.5 Generally Permanency Is Not Reached Where Surgery Is Anticipated

The Board has held that where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. Kuhn v. Associated Press, 16 BRBS 46, 48 (1983). The Board has further held that where a claimant undergoes surgery, his condition is permanent only after recovery from surgery. Walker v. National Steel & Shipbuilding Co., 8 BRBS 525, 528 (1978); Edwards v. Zapata Offshore Co., 5 BRBS 429, 432 (1977).

The mere possibility of future surgery, by itself, however, does not preclude a finding that a condition is permanent. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. Morales v. General Dynamics Corp., 16 BRBS 293, 296 (1984), aff'd in part, part sub nom. Director, OWCP v. General Dynamics Corp., 769 F.2d 66 (2d Cir. 1985).

Also, a claimant's disability is permanent if the future surgery is not expected to improve the condition. Phillips v. Marine Concrete Structures, 21 BRBS 233, 235 (1988). In fact, if the employee's recovery or ability to do any work after surgery is uncertain or unknown, his disability may be found to be permanent. White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980). Where surgery would fail to alleviate or cure a claimant's underlying conditions and would only address the symptoms of a condition, but not the condition itself, it was found that MMI had been reached. Bunge Corp. v. Carlisle and T. Michael Kerr, Deputy Assist. Sec., OWCP, 227 F.3d 934 (7th Cir. 2000).

8.1.6 Effect of Second Occupational Injury on Date of Permanency

Where a physician designated a date of maximum medical improvement for an occupational injury but did not purport to set a date of maximum medical improvement for a second injury that was found to be causally related to the first occupational injury, the judge was justified in rejecting the physician's determination of the date of maximum medical improvement. James, 22 BRBS at 275.

8.1.7 Doubt Should be Resolved in Favor of the Claimant

If there is any doubt as to whether the employee has recovered, such doubt should be resolved in favor of the claimant's entitlement to benefits. Fabijanski v. Maher Terminals, 3 BRBS 421, 424 (1976), aff'd mem. sub nom. Maher Terminals, Inc. v. Director, OWCP, 551 F.2d 307 (4th Cir. 1977). But see Maher Terminals, Inc. v. Director, OWCP, 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993), cert. granted sub nom. Director, OWCP v. Greenwich Collieries, 510 U.S. 1068 (1994).