BRB No. 00-1133

HENRY K. HOFFMAN	)
	)
Claimant-Petitioner	)
	)
v.	) DATE ISSUED: Aug. 22, 2001
	)
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)
	)
Self-Insured Employer-Respondent	) DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-1886) of Administrative Law Judge Daniel A. Sarno, Jr., 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).

Claimant worked as a welder at employer's shipyard. On December 2, 1991, claimant injured his right knee, and was assigned a 28 percent permanent impairment rating of the right lower extremity by Dr. Fithian on July 21, 1992. Claimant returned to work with permanent restrictions in 1992 and was assigned light duty work in the copper shop, where he worked until 1995. In 1995, employer and the union entered into an agreement in which all workers within a certain age range were offered early retirement, in exchange for one year

of severance pay and continuing monthly retirement benefits. As he felt this offer was a "good deal," claimant accepted the early retirement package in 1995.

After his retirement, claimant continued to seek treatment for his knee injury. In November 1996, Dr. Stiles increased the impairment rating of claimant's right lower extremity by an additional five percentage points. Claimant subsequently underwent arthroscopic surgery on the knee in 1998 and a total knee replacement in 1999. Employer voluntarily paid permanent partial disability under the schedule for the 33 percent impairment to claimant's right leg pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2).[1] In addition, employer has paid all medical bills related to claimant's work injury pursuant to Section 7 of the Act. 33 U.S.C. §907. Following the knee replacement, claimant's physician opined that he is unable to perform any work. Thus, claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that the position claimant held in the copper shop from the date he returned from his injury in 1992 to the date he retired in 1995 constituted suitable alternate employment, and thus denied total disability benefits for that period. Moreover, the administrative law judge concluded that claimant voluntarily chose to retire in 1995 based on the severance package offered, and not because of his knee injury. Therefore, the administrative law judge found that claimant is not entitled to compensation for total disability after his voluntary retirement, and he denied additional benefits.

On appeal, claimant contends that the administrative law judge erred in finding that his former light-duty position established the availability of suitable alternate employment in 1998, as claimant's physician opined that he is not capable of any work. In addition, claimant contends that the administrative law judge erred in finding that a claimant who becomes totally disabled after voluntary retirement is barred from receiving permanent total disability benefits as he should have considered whether claimant intended to retire from the general workforce. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Claimant contends that the administrative law judge erred in failing to award

[1]Employer also voluntarily paid temporary total disability benefits for the periods from January 14, 1992 to April 7, 1992, February 4, 1994 to February 7, 1994, and February 26, 1998 to October 18, 1998. Cl. Ex. 3.

permanent total disability benefits from the date he was unable to work at any employment. A claim for total disability benefits under the Act requires that claimant establish a loss of wage-earning capacity. *See Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989); 33 U.S.C. §902(10). The Board has held that when a claimant voluntarily leaves the work force after sustaining a traumatic injury, the administrative law judge may deny total disability benefits on the basis that claimant failed to establish a loss in wage-earning capacity. *Burson*, 22 BRBS at 127.

In the instant case, the administrative law judge found that claimant's light duty position in the copper shop would have continued to be available to claimant if he had not taken the early retirement package, based on the credible testimony of claimant's former supervisor. Decision and Order at 4, n. 3. Moreover, the administrative law judge found that claimant accepted the early retirement package as he thought that it was "a pretty good opportunity," and he rejected claimant's testimony that his knee pain was a factor in his retirement decision. Decision and Order at 3, n.3; H. Tr. at 36. As the administrative law judge thoroughly considered the conflicting evidence of record, we affirm his finding that claimant voluntarily chose to retire in 1995 based on the severance package offered, and not because of his knee injury, as it is based on substantial evidence. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Inasmuch as the administrative law judge rationally concluded that claimant's retirement was voluntary, and not due to his injury, we reject claimant's contention that employer was required to show the continued availability of suitable alternate employment as any loss in wage-earning capacity is not due to claimant's injury.[2] *Burson*, 22 BRBS at 127.

We further reject claimant's contention that the administrative law judge erred in failing to consider whether claimant intended to retire from the "general workforce." In the context of occupational disease cases, "retirement" is defined as the voluntary withdrawal of an individual from the work force with no realistic expectation of return. 20 C.F.R. §702.601(c); *see Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Johnson v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 160 (1989);

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[2]In contrast, the Board has held that when a totally disabled claimant retires due to eligibility for an age and length of service retirement pension, the award of total disability carries over into retirement absent employer's showing the availability of suitable alternate employment. *See Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc., 22 BRBS 46 (1989); *see also* 33 U.S.C. §902(10), 908(c)(23). Contrary to claimant's contention, the administrative law judge did not apply this provision, as neither it nor the related provisions for compensating retirees with occupational diseases are applicable to claimant who has sustained a traumatic injury. The case cited by claimant, *Alcala v. Wedtech Corp.,* 26 BRBS 140 (1992), is inapposite to this case. In *Alcala*, the Board held that the claimant was not a voluntary retiree for purposes of the occupational disease provisions of Section 8(c)(23), as he left his position with the employer as a result of a work-related arm injury. Prior to a final determination of the extent of disability due to the arm injury, claimant became aware that he was suffering from an occupational disease. The Board held that, based on the facts of that case, the claimant was not a voluntary retiree because his ability to return to the workforce due to his arm injury was undetermined at the time the occupational disease became manifest. As the claimant was thereafter unable to return to his work due to his occupational disease, the Board held that he was entitled to compensation based on his loss in wage-earning capacity due to the occupational disease as opposed to the degree of his physical impairment due to the occupational disease. *Id.,* 26 BRBS at 146.

In contrast, in the instant case, claimant sustained a traumatic injury, returned to work and chose to accept a retirement package, which was a decision the administrative law judge rationally found unrelated to his knee injury. Following retirement at age 60½, he was not employed again, and thereafter sustained a worsening of his condition. *See* Tr. at 19. The increased impairment, however, did not increase claimant's loss of wage-earning capacity. Thus, claimant has not met his burden of establishing he has a loss in wage-earning capacity due to his injury. Claimant testified only that after he left the shipyard he inquired of a friend about potential employment, but was told his physical restrictions would preclude his employment.[3] Tr. at 28. Claimant, therefore, is not entitled to total disability benefits, and we affirm the administrative law judge's denial of such benefits. *See Burson*, 22 BRBS at 127. We note, however, that claimant is on an equal footing with a voluntary retiree who becomes aware thereafter of an occupational disease, inasmuch as he has been compensated for the degree of physical impairment due to the work injury, including the increased impairment arising after his retirement.[4] *See* 33 U.S.C. §§902(10), 908(c)(2), (19), (23);

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[3]Claimant's contention on appeal that it is evident he intended to seek other employment due to the "low" retirement pay is not based on any record evidence.

[4]Thus, claimant's concern that the administrative law judge's decision contravenes the overruling by the 1984 Amendments of the decisions in *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984), and *Aduddell v. Owen-Corning Fiberglass*, 16 BRBS 131 (1984), is unfounded. These cases precluded recovery by voluntary retirees whose occupational diseases became manifest after retirement. The 1984 Amendments overruled these cases, and

Burson, 22 BRBS at 127 (retiree entitled to schedule award after voluntary retirement); *see also Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989). Like such retirees, claimant is not entitled to total disability benefits.

Accordingly, the Decision and Order of the administrative law judge denying total disability benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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provide a recovery based on degree of physical impairment. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2). Although, as we have discussed, this is not an occupational disease case to which the 1984 Amendments apply, claimant has not been denied recovery for his injury.