BRB No. 10-0541

LARRY JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEL MONTE TROPICAL FRUIT COMPANY	)	
	)	
and	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY c/o BROADSPIRE	)	DATE ISSUED: 06/15/2011
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Andrew Z. Schreck (Downs & Stanford, P.C.), Sugar Land, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2009-LHC-01466) 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 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 sustained a work-related back injury on October 10, 1990 while working as a longshoreman for employer. As a result of his October 1990 injury, an administrative law judge awarded claimant temporary total disability benefits from October 11, 1990 through September 5, 1991, 33 U.S.C. §908(b), and permanent total disability benefits from September 6, 1991, and continuing. 33 U.S.C. §908(a). On May 8, 2008, claimant filed a claim under the Act for permanent partial disability benefits for a 24.4 percent binaural hearing loss, based on a January 22, 2008 audiogram. 33 U.S.C. §908(c)(13); CXs 3, 4, 9.

In his Decision and Order, the administrative law judge found that claimant sustained a 24.4 percent binaural hearing loss related to his exposure to noise during his employment with employer, which ordinarily would entitle him to 48.8 weeks of permanent partial disability benefits pursuant to Section 8(c)(13) of the Act. The administrative law judge determined, however, that this scheduled award of permanent partial disability benefits is subsumed in claimant's total disability award for his October 10, 1990, back injury. The administrative law judge therefore denied the claim for permanent partial disability benefits but found claimant entitled to all necessary medical care for his work-related hearing loss. 33 U.S.C. §907.

On appeal, claimant contends the administrative law judge erred as a matter of law in finding that he is not entitled to receive scheduled permanent partial disability benefits for his work-related hearing loss concurrently with total disability benefits awarded to him as a result of a different injury. Employer responds, urging affirmance of the administrative law judge's decision.

In this case, the administrative law judge properly found that as claimant was last exposed to injurious noise on October 10, 1990, the date he stopped working for employer due to his back injury, any entitlement to permanent partial disability benefits for his hearing loss would commence on that date.[1] Decision and Order at 17; *see Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 100 (2009); *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97, 99 (2007); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). In concluding that claimant is not entitled to receive a scheduled hearing loss

[1]Claimant's assertion that he was regularly exposed to injurious noise for twelve years prior to October 10, 1990, is insufficient to establish that he sustained a work-related loss of hearing prior to the onset of his total disability due to his back injury. In the absence of audiograms predating October 10, 1990, when claimant was last exposed to noise while working for employer, that date represents the time of injury for purposes of claimant's hearing loss claim. *See Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

award, the administrative law judge relied on the longstanding principle that a claimant may not receive concurrently a scheduled permanent partial disability award for one injury and a total disability award for another injury, as claimant cannot receive compensation greater than that for total disability. *See Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111, 113 n.4 (2010); *Stinson*, 41 BRBS at 98; *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.4 (1985); *Rathke v. Lockheed Shipbuilding & Constr. Co.*, 16 BRBS 77 (1984); *Mahar v. Todd Shipyards Corp.*, 13 BRBS 603 (1981); *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); *Collins v. Todd Shipyards Corp.*, 5 BRBS 334 (1977). The Board has held that, in a case in which the claimant sustains two injuries, one of which is totally disabling and the other which would result in a scheduled award, the claimant can receive scheduled benefits only where he is able to show that the permanently partially disabling injury occurred prior to the onset of total disability. Under such specific circumstances, the claimant may recover scheduled benefits accruing between the onset of partial disability and the onset of total disability. *See Stinson*, 41 BRBS at 98-99; *Rathke*, 16 BRBS at 79 n.2; *Mahar*, 13 BRBS at 606; *Tisdale*, 13 BRBS at 170-172. The record in this case does not contain any audiograms predating the onset of claimant's total disability, and thus claimant has not produced evidence that he sustained a permanent partially disabling injury, *i.e.*, a loss of hearing, prior to the onset of his work-related total disability on October 10, 1990.

Claimant first contends that the Board's decision in *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010), supports his entitlement to concurrent scheduled and total disability awards. In *Bogden*, the claimant advanced the same argument made by claimant in this case; specifically, claimant asserted that a scheduled hearing loss award could be paid concurrently with his award of total disability benefits for a separate injury sustained to his back. The Board, however, expressly declined to address this argument. *Id.* at 44. Rather, the Board agreed with the claimant's alternative argument that he was entitled to the resumption of his scheduled hearing loss award on the date that his permanent total disability award for his back injury converted to a permanent partial disability award for that injury. *Id.* at 44-45. Thus, the concurrent awards endorsed by the Board in *Bogden* involved two permanent partial disability awards: a permanent partial disability award for the claimant's hearing loss pursuant to Section 8(c)(13) and a permanent partial disability award for the claimant's back injury pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). Therefore, contrary to claimant's contention, *Bogden* does not support a finding of entitlement to the concurrent scheduled hearing loss and total disability awards sought by claimant in the present case.

In support of his contention that his award of temporary total disability benefits does not preclude his entitlement to a concurrent scheduled award,[2] claimant cites the decision of the United States Court of Appeals for the District of Columbia Circuit in *Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984). Specifically, claimant relies on the court's discussion of the language contained in the preface of Section 8(c) of the Act, which pertains to compensation for permanent partial disability: "[i]n case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with [Section 8(b) or 8(e)] . . . ." 33 U.S.C. §908(c).

In *Henry*, the deceased employee had sustained a work-related injury to his right foot for which he underwent surgery. Because of the employee's underlying diabetes and vascular problems, his injured foot did not heal properly, thus necessitating the amputation of his right leg below the knee. The employee subsequently died of cardiac arrest, and the parties stipulated that his death was causally related to the work injury. In the appeal before the court, it was uncontested that the employee was temporarily totally disabled from the date of his injury until the time of his death pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b), and that he also had an underlying scheduled permanent partial disability, due to the amputation of his right lower leg, pursuant to Section 8(c)(4), 33 U.S.C. §908(c)(4), at the time of his death. *Henry*, 749 F.2d at 71, 17 BRBS at 43-44(CRT). The employee's widow sought payment of the scheduled award pursuant to Section 8(d)(2) of the Act, 33 U.S.C. §908(d)(2).[3] In opposing the widow's entitlement to any unpaid scheduled benefits, the employer cited the decision of the United States Court of Appeals for the Ninth Circuit in *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956), for the proposition that a temporary total disability award may not be paid

[2]Claimant was awarded temporary total disability benefits for his back injury from October 11, 1990 to September 6, 1991, when his condition became permanent and his permanent total disability award commenced. Claimant makes no specific contention that his scheduled award can run concurrently with his permanent total disability award, and the administrative law judge properly found that a scheduled award is not payable while claimant is receiving permanent total disability benefits. *Korineck v. General Dynamics Corp., Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987); *Stinson*, 41 BRBS at 98.

[3]Section 8(d)(2) of the Act states:

> Notwithstanding any other limitation in Section 909 of this title, the total amount of any award for permanent partial disability pursuant to subdivision (c)(1)-(20) of this section unpaid at time of death shall be payable in full [to eligible survivors] in the appropriate distribution.

concurrently with a scheduled award.[4] *Henry,* 749 F.2d at 71, 17 BRBS at 44(CRT). The *Henry* court stated that *Rupert* did not support the employer's position, and instead interpreted *Rupert* to disallow only concurrent awards for scheduled permanent partial disability and *permanent* total disability, as opposed to *temporary* total disability. *Henry*, 749 F.2d at 72 and n.28, 74, 17 BRBS at 44 and n.28, 46(CRT). In this regard, the court quoted the *Rupert* court's statement that the preface to Section 8(c) expressly provides for scheduled awards "in addition to" compensation for temporary total disability and temporary partial disability, but "significantly omits any mention of subdivision (a) covering cases of 'permanent total disability.'" *Henry*, 749 F.2d at 71, 17 BRBS at 44(CRT), quoting *Rupert*, 239 F.2d at 276. The court therefore held that "[i]n light of the plain language of the statute, . . . a scheduled award for permanent partial disability under Section 8(c)(4) may be paid concurrently with an allowance for temporary total disability." *Henry,* 749 F.2d at 72, 17 BRBS at 44(CRT). Thus, the court held the

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[4]In *Rupert,* 239 F.2d 273, the court held that the claimant's award of permanent total disability benefits for multiple injuries sustained in a single work accident precluded an additional scheduled award for disfigurement resulting from the same accident. In so holding, the court first relied on the statutory framework of the Act, stating that:

> The view that §8(c) sets forth 'a series of classifications of injuries for permanent partial disability,' and is not applicable to cases of 'permanent total disability' (33 U.S.C.A. §908(a)), finds support in the language of §8(c) providing for 'permanent partial disability,' which expressly declares that awards thereunder shall be 'in addition to' compensation for 'temporary total disability' and for 'temporary partial disability' paid in accordance with 'subdivision (b) or subdivision (e) of this section, respectively'; but significantly omits any mention of subdivision (a) covering cases of 'permanent total disability.' (Id. §908(b) and (e) and (a).)

Id. at 276. The court further reasoned that:

> Any interpretation permitting an award of compensation for facial disfigurement to be super-imposed upon an award for 'permanent total disability' which presupposes a permanent loss of all earning capacity, would run counter to the manifest spirit and purpose of the enactment.

Id. at 276-277. *See also Korineck v. General Dynamics Corp., Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987) (endorsing the above-cited analysis of the Ninth Circuit in *Rupert*, and holding that the claimant was not entitled to a scheduled permanent partial disability award for hearing loss as he already was receiving benefits for permanent total disability due to his back condition).

widow was entitled to the unpaid scheduled benefits pursuant to Section 8(d)(2).

In this appeal, claimant argues that, in light of the *Henry* decision, he is entitled to receive a scheduled award for his hearing loss concurrently with the *temporary* total disability award for his back injury. *See* n. 2, *supr*a. We reject claimant's contention that the decision in *Henry* controls this case as it is distinguishable based on its specific facts and, thus, we decline to extend its holding to the factual situation presented in this case.[5] In *Henry*, the employee's entitlement to temporary total disability and scheduled permanent partial disability benefits arose *from the same injury* and, thus, the court had no occasion to consider the issue presented in this case as to whether a claimant may receive concurrent awards of temporary total disability and scheduled permanent partial disability for two distinct injuries. In this regard, the *Henry* court stated that the plain language of Section 8(c) supports the conclusion that a scheduled award may be paid concurrently with a temporary total disability award. 749 F.2d at 72, 17 BRBS at 44(CRT). Read in context, however, this statement can be attributed to the particular facts of that case, in which the employee was temporarily totally disabled and had an *underlying* scheduled permanent partial disability *from the same injury* at the time of his death.

In addition, the legislative history of the 1934 Amendments to the Act, which amended the preface of Section 8(c) and 8(c)(22), persuades us that the court's holding in *Henry* does not control the factual situation presented by this case which involves two separate and distinct injuries. Section 8(c)(22) of the Act, as originally enacted in 1927, provided that in a case involving temporary total disability and a scheduled permanent partial disability, both resulting from the same injury, if the temporary total disability continued for a longer period than the number of the weeks in the schedule, the claimant was entitled to temporary total disability benefits only for the period in excess of the period specified in the schedule. 33 U.S.C. §908(c)(22) (1927). This provision led in some cases to incongruous results.[6] *See Baltimore & Philadelphia Steamboat Co.*, 284 U.S. 408 (1932); *see also Southern Stevedoring & Contracting Co. v. Sheppeard*, 1

[5]Moreover, we note that this case does not arise within the jurisdiction of the District of Columbia Circuit, but rather within that of the United States Court of Appeals for the Eleventh Circuit, which has not spoken on this issue. The Board therefore is not constrained to apply the decision in *Henry* to the case before us.

[6]Specifically, a claimant who had a prolonged period of temporary total disability followed by a small scheduled permanent partial disability award could receive a smaller award for his entire disability, both temporary total disability and permanent partial disability, than he would have received for his temporary total disability alone if he had no subsequent permanent partial disability. *See* 78 Cong. Rec. 9170 (1934).

F.Supp. 867 (S.D. Tex. 1932). The 1934 Amendments to the Act rectified the anomalous results of the original version of Section 8(c)(22) by amending both the preface to Section 8(c) and Section 8(c)(22). *See* 78 Cong. Rec. 9170 (1934); *see generally Luckenbach S.S. Co. v. Norton*, 23 F. Supp. 829 (E.D. Pa. 1938). Specifically, the 1934 Amendments stated in the Section 8(c) preface that permanent partial disability benefits "shall be in addition to" temporary total disability benefits.[7] Thus, the legislative history indicates that the purpose of the amendments of the preface of Section 8(c) was to allow for the payment of temporary total disability and temporary partial disability benefits *in addition to*, rather than concurrent with, scheduled permanent partial disability benefits *for the same injury*. In other words, the Section 8(c) preface and Section 8(c)(22) were amended to ensure that a claimant receives full compensation for all disability resulting from the same injury.

In light of this legislative history, we do not construe the phrase "in addition to" contained in the preface of Section 8(c) to permit a claimant to receive concurrently a scheduled permanent partial disability award for one injury and a temporary total disability award for a separate and distinct injury. As previously discussed, longstanding case precedent holds that a claimant is not entitled to concurrently receive scheduled permanent partial disability benefits and total disability benefits, whether the total disability is permanent or temporary; the reasoning underlying this position is that a claimant cannot be more than totally disabled and, thus, cannot receive compensation greater than that for total disability. *See Thornton*, 44 BRBS at 113 n.4; *Stinson*, 41 BRBS at 98; *Turney*, 17 BRBS at 235 n.4. The Board's position on this issue has not been overturned by any circuit court in the 26 years since the District of Columbia Circuit's decision in *Henry* and, for the reasons discussed herein, we are not persuaded that the court's holding in *Henry* invalidates the Board's precedent on the facts presented in this case. Therefore, the Board will adhere to its longstanding position that a claimant cannot be more than totally disabled and, consequently, may not receive concurrently a scheduled award for one injury and a total disability award for a separate injury. *See id.* We therefore affirm the administrative law judge's finding that claimant is not entitled to receive scheduled permanent partial disability benefits for his work-related loss of hearing concurrently with either his temporary or permanent total disability award for his October 10, 1990, back injury.

[7]In 1948, the preface to Section 8(c) was again amended to additionally provide that permanent partial disability benefits "shall be in addition" to temporary partial disability benefits. 1948 Amendments to the Act, June 24, 1948.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge