BRB No. 97-1072

EDWARD F. GREEN	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
I.T.O. CORPORATION OF BALTIMORE	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Bernard J. Sevel (Sevel & Sevel, P.A.), Baltimore, Maryland, for claimant.

Stan M. Haynes (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand (85-LHC-1753) of Administrative Law Judge Frederick D. Neusner 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).

This case is before the Board for a third time. To recapitulate, claimant, on May 14, 1983, sustained fractures to his left ankle and left shoulder during the course of his employment as a climber with employer, when he fell approximately 15 feet from a container. Claimant's ankle injury required surgery; claimant's shoulder

was restrained by a sling for one month. Employer voluntarily paid claimant temporary total disability compensation from May 15, 1983 through September 1, 1984. 33 U.S.C. §908(b). Claimant's treating physician, Dr. Radwick, stated that claimant reached maximum medical improvement on June 27, 1984. Claimant did not return to his usual employment with employer; rather, at the time of the hearing in 1986, he was employed by Annapolis City Marina in a supervisory position. Claimant subsequently left that job and at the time of a deposition on January 8, 1991, was employed as a cook at St. Anthony's Rectory in Baltimore, Maryland, with a salary of $15,000 per year. Cl. Dep. at 28.

This case was initially heard by Administrative Law Judge G. Marvin Bober. In his Decision and Order, Judge Bober found that claimant is incapable of performing his previous employment duties with employer and that his average weekly wage at the time of his injury was $532. Judge Bober then concluded that although claimant's employment at Annapolis City Marina constituted suitable alternate employment yielding a salary of $15,600 per year, claimant had suffered no loss in wage-earning capacity as a result of his work accident, since additional employment opportunities yielding wages between $16,000 and $35,000 per year were available to him. Nonetheless, after finding that claimant sustained a 15 percent permanent partial disability to his left shoulder and a 25 percent permanent partial disability to his left ankle, Judge Bober awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), at a weekly rate of $354.67 ($532 x 2/3). Claimant appealed the award, challenging Judge Bober's calculation of both his average weekly wage and his post-injury wage-earning capacity.

In its Decision and Order, the Board vacated Judge Bober's determination of claimant's average weekly wage, and remanded the case for him to recalculate claimant's average weekly wage using the actual vacation and holiday pay earned by claimant, as opposed to that earned by two comparable longshoremen. The Board further held that Judge Bober erred by failing to consider whether claimant's actual post-injury earnings reasonably and fairly represented his post-injury wage-earning capacity; additionally, the Board determined that Judge Bober erred in concluding that claimant suffered no loss in wage-earning capacity. Specifically, the Board noted that Judge Bober's statement that claimant sustained no loss in wage-earning capacity could not be reconciled with his award of benefits. The Board thus remanded the case for Judge Bober to consider whether claimant's actual post-injury wages reasonably and fairly represented his post-injury wage-earning capacity and, if they did not, to calculate a dollar figure representing claimant's post-injury wage-earning capacity. Lastly, pursuant to *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), the Board instructed Judge Bober on remand to determine

whether claimant was entitled to benefits under both Section 8(c)(21) for any loss in wage-earning capacity occasioned by his shoulder injury, and under the schedule for his ankle injury. *Green v. I.T.O. Corp. of Baltimore*, BRB No. 87-2198 (July 25, 1990)(unpublished).

In his Decision and Order on Remand, Judge Bober found that claimant's average weekly wage at the time of injury was $599.19. He then found that a sales representative position paying $18,000 per year, or $305 per week,[1] reasonably and fairly represents claimant's post-injury wage-earning capacity. Judge Bober thus found that the compensation rate due claimant based on his loss in wage-earning capacity was two-thirds of the difference between $599 and $305. Next, Judge Bober noted that in an erratum issued on September 22, 1987, he had in fact awarded claimant permanent partial disability benefits under Section 8(c)(4), 33 U.S.C. §908(c)(4), for his scheduled ankle injury based on a 25 percent impairment. Judge Bober attempted to eliminate the effect of claimant's ankle injury on his loss in earning capacity by commencing claimant's award under Section 8(c)(21) at the end of the payment period for claimant's scheduled award.[2] Employer appealed the award contending that Judge Bober failed to properly factor out claimant's ankle injury, for which he received a scheduled award, from his unscheduled award.

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[1]Judge Bober made an adjustment for inflation to arrive at this figure.

[2]Thereafter, employer submitted a motion for reconsideration, contending that the administrative law judge failed to properly factor out claimant's ankle injury from his award pursuant to Section 8(c)(21), as directed by the Board's holding in *Frye,* 21 BRBS at 194. Judge Bober, in a Decision on Motion for Reconsideration, interpreted the holding in *Frye* as a directive to determine whether claimant's unscheduled injury was caused by the scheduled injury or was independently caused by the work accident. After finding that claimant's shoulder injury was not caused by his ankle injury, he reinstated his previous awards.

In its second Decision and Order, the Board agreed with employer's contention that commencing an award for loss of wage-earning capacity based on both the shoulder and the ankle injuries after the scheduled award for the ankle injury ran out does not compensate claimant in a manner consistent with *Frye* or *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980)[*PEPCO*].[3] Rather, the Board held claimant should receive benefits for the loss in wage-earning capacity caused only by his shoulder injury to run from the date of permanency concurrently with the scheduled award. However, the Board held that the record contains evidence which, if credited by the administrative law judge, would support a finding that claimant's loss in wage-earning capacity was due, at least in part, to his ankle injury, and thus remanded the case to the administrative law judge for consideration of whether claimant's ankle injury contributed to his loss of wage-earning capacity and therefore must be factored out of the award under Section 8(c)(21). *Green v. I.T.O. Corp. of Baltimore*, BRB No. 92-1638 (Oct. 27, 1995)(unpublished).

As Judge Bober was no longer with the Office of Administrative Law Judges, the case was assigned on remand to Administrative Law Judge Frederick D. Neusner (the administrative law judge) for a decision on the record. In his Decision and Order on Second Remand, the administrative law judge found that although claimant is disabled due to the shoulder impairment alone, he also suffers a loss in wage-earning capacity due, at least in part, to his ankle injury, and thus the effects of claimant's ankle injury must be factored out of the award under Section 8(c)(21) pursuant to *Frye.* In order to effectuate this, the administrative law judge found that the two injuries were equally disabling and thus concluded that fifty percent of claimant's wage loss is due to the ankle injury.[4]

On appeal, claimant contends that the administrative law judge ignored the prior undisturbed findings that claimant's inability to continue in his pre-injury work was solely the result of his shoulder injury. Moreover, claimant contends that the

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[3]The United States Supreme Court held in *Potomac Electric Power Co. v. Director,* OWCP, 449 U.S. 268, 14 BRBS 363 (1980) [*PEPCO*], that where a claimant is permanently partially disabled by an injury falling under the schedule, he is limited to a schedule award and cannot seek a higher recovery under Section 8(c)(21).

[4]The administrative law judge then found that as claimant's wage loss was computed to be $299 per week, and as the wage loss due to the ankle injury was $149.50 per week, the Section 8(c)(21) award was reduced to an amount equal to two-thirds of $149.50, or $99.66 per week.

administrative law judge's "factoring out" of the effect of claimant's ankle injury on his post-injury wage-earning capacity is arbitrary and not supported by the evidence. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Claimant contends on appeal that the administrative law judge erred in "factoring out" the effect of ankle injury on his loss in wage-earning capacity from his award under Section 8(c)(21) because his shoulder injury alone could account for his entire loss in wage-earning capacity. On remand, the administrative law judge considered the effect of the Board's holding in *Frye,* 21 BRBS at 194. In *Frye*, the claimant sustained injuries on March 10, 1977, to his right ankle and back when he jumped from a falling ladder. The claimant subsequently underwent ankle surgery. The employer voluntarily paid permanent partial disability benefits for a 40 percent loss of use of the right foot under the schedule. The claimant subsequently sought further compensation under Section 8(c)(21), arguing that, in addition to injuring his ankle, he had sustained a back injury and chronic pain syndrome. The administrative law judge denied the claim for additional compensation under Section 8(c)(21), concluding that the claimant's complaints were not due to any residuals of the work-related injury. The administrative law judge, relying on the decision of the Supreme Court in *PEPCO*, additionally concluded that since the claimant had sustained an ankle injury, his recovery was limited to that provided for under the schedule.

On appeal, the Board vacated the administrative law judge's findings that the claimant's back condition and chronic pain syndrome were not work-related, and remanded the case for the administrative law judge to reconsider the evidence in light of the Section 20(a) presumption. Moreover, the Board considered the question of whether the claimant is entitled to additional compensation beyond that provided for in the schedule if the claimant's back condition or chronic pain syndrome were determined to be work-related. In this regard, the Board held that where a claimant suffers two distinct injuries arising from a single accident, one compensable under the schedule and one compensable under Section 8(c)(21), he may be entitled to receive compensation under both the schedule and Section 8(c)(21). *Frye*, 21 BRBS at 198. In order to be entitled to an award of permanent partial disability benefits under Section 8(c)(21), claimant must first establish that he cannot return to his regular or usual employment due to his work-related injury. It was undisputed that the claimant was unable to perform his usual job as a Class A painter because it involved climbing ladders. However, it was not clear whether this restriction was due to his ankle or other conditions. Thus, the case was remanded for the administrative law judge to determine whether the claimant's inability to perform his usual job was due in part to his back pain and chronic pain syndrome. Moreover, as economic

disability must be shown for an award of benefits under Section 8(c)(21), the Board instructed the administrative law judge to consider whether these injuries contributed to a loss in claimant's wage-earning capacity. Then, since the scheduled injury was being compensated separately, the Board instructed the administrative law judge to eliminate from the Section 8(c)(21) award any loss in wage-earning capacity due to the scheduled injury. *Frye*, 21 BRBS at 197.

Claimant in the instant case suffered two distinct injuries in the work accident, an injury to his shoulder and an injury to his ankle, both of which, independently, have been found to restrict him from returning to his former employment as a climber and from performing some jobs he attempted post-injury. Following a review of the evidence, both Judges Bober and Neusner found that claimant is disabled from his usual work due to the shoulder injury alone as he is unable to lift, reach for objects, or lift his arm above his shoulder. *See* Decision and Order on Remand at 7; Decision and Order on Second Remand at 6. This does not mean, as claimant suggests, that the evidence establishes that the ankle injury did not also result in a loss of wage-earning capacity; rather, the administrative law judge's finding that claimant also could not return to his former employment due to the effects of his ankle injury is supported by substantial evidence.[5] However, the loss in wage-earning capacity due to the ankle injury does not necessarily affect the degree of disability due to the shoulder injury alone.

The purpose of the Board's holding in *Frye,* based on the Supreme Court's holding in *PEPCO,* is to avoid double recovery. There is no danger of double recovery, however, if claimant's shoulder injury alone could cause the entire loss in wage-earning capacity; claimant is entitled to benefits for the full loss in wage-earning capacity due to his shoulder impairment irrespective of the effect of his ankle injury on his loss in wage-earning capacity. As discussed earlier, the administrative

[5]The administrative law judge reviewed the evidence and found that in addition to the medical restrictions against climbing and jumping, claimant testified that he was prevented from performing his usual employment because his ankle pain and swelling prevented him from walking great distances and from rotating the ankle in the manner required by his work. He explained that owing to the condition of his ankle, he could not perform his work as a climber because he was no longer able to "get around." Tr. at 57-58. As the administrative law judge compared claimant's medical restrictions with the physical requirements of his usual employment, we affirm the administrative law judge's finding that claimant was unable to perform his usual employment due to the ankle injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

law judge found that independent of the ankle injury, claimant is unable to return his former employment due to his shoulder injury alone. Moreover, the administrative law judge found that claimant was unable to perform certain post-injury jobs that he attempted as his shoulder injury prevented him from lifting, reaching for objects, or lifting his arm above his shoulder, even though the ankle injury also prevented him from performing these jobs.[6] *See* Cl. Ex. 4; Dep. at 12, 39-40; Cohen Dep. at 29; Tr. at 55. Thus, the shoulder injury, by itself, caused claimant to suffer a loss in wage-earning capacity compensable under Section 8(c)(21). It was not the combined effects of the disabling shoulder injury and the "equally" partially disabling ankle injury which caused the loss in wage-earning capacity; rather, each injury on its own resulted in disability unaffected by the other. Consequently, as the loss in wage-earning capacity due to claimant's ankle injury does not affect the degree of disability due to the shoulder injury alone, claimant would not be receiving a double recovery for the same disability if he were fully compensated under both Section 8(c)(21) and the schedule at Section 8(c)(4). As the administrative law judge found that claimant has the same loss in wage-earning capacity due to the shoulder injury alone, we affirm this finding as it is supported by substantial evidence, and we modify the award to reflect claimant's entitlement to both a scheduled award for claimant's 25 percent ankle impairment and an unscheduled award for his full loss in wage-earning capacity of $299 per week under Section 8(c)(21), for claimant's shoulder injury, to run concurrently.

[6]Before obtaining his position at the marina, claimant unsuccessfully attempted to work for a landscaping company and at a warehouse.

Accordingly, the administrative law judge's Decision and Order reducing claimant's award of permanent partial disability under Section 8(c)(21) by fifty percent is vacated, and the award is modified to reflect claimant's entitlement to both the scheduled award for claimant's ankle injury and the full unscheduled award for claimant's shoulder injury under Section 8(c)(21). The decision is affirmed in all other respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge