BRB Nos. 93-1776
and 93-1776A

CHARLES BOWER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
COOPER/T. SMITH STEVEDORING,	)	
	)	
and	)	DATE ISSUED:
	)	
INSURANCE COMPANY OF NORTH AMERICA, AETNA INSURANCE COMPANY	)	
	)	
Employer/Carriers-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Charles Bower, Long Beach, California, *pro se*.

Roy D. Axelrod and Marjorie C. Bell (Littler, Mendelson, Fastiff, Tichy & Mathiason), San Diego, California, for employer/carriers.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals, and employer cross-appeals the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration (89-LHC-0028)

[1]Claimant was represented by counsel from 1985 until after the administrative law judge issued his first Decision and Order. Prior to 1985, claimant was not represented by counsel. *See* Tr. at 259-61.

of Administrative Law Judge Samuel J. Smith 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 was employed by Cooper/T. Smith as a marine clerk in Long Beach, California. On April 30, 1980, claimant suffered an injury when a "heister" forklift ran over both of his feet. As a result of this impact, claimant was spun around and slammed against the deck, with the vehicle coming to rest on both of his feet. The impact removed the flesh from his left foot, and the resulting injury caused the amputation of all of the smaller toes on his left foot, as well as the loss of the pad from his left foot. Claimant had subsequent surgeries to graft skin onto his foot. Claimant has sought benefits not only for the direct injury to his left foot, but also claims that he suffered a variety of consequential injuries. Employer voluntarily paid benefits through January 2, 1991, for various periods of temporary disability in the amount of $78,415.

After a formal hearing, the administrative law judge awarded claimant temporary total disability benefits from May 1, 1980 to November 24, 1986, and from January 10, 1990 to December 17, 1990, temporary partial disability benefits from November 25, 1986 to January 9, 1990, and permanent partial disability benefits under Section 8(c)(21), 33 U.S.C §908(c)(21), from December 18, 1990 and continuing. The administrative law judge determined that the industrial injury to claimant's foot resulted in consequential impairments and conditions which resulted in claimant's inability to perform his usual work. He also found that claimant reached maximum medical improvement on December 18, 1990, and that employer discharged its burden of demonstrating suitable alternate employment in the field of telemarketing; thus, he entered an award of permanent partial disability benefits for a loss in wage-earning capacity under Section 8(c)(21) for claimant's combined physical impairments.[2]

On claimant's *pro se* motion for reconsideration, the administrative law judge reiterated his finding that claimant's "compensable injuries" arose from his initial injury to the left foot, but that claimant was not totally disabled because home-based telemarketing positions found by employer constitute suitable alternate work. Decision on Motion for Reconsideration at 3-4. The administrative law judge further determined that a claim for a hearing loss which allegedly resulted from some of the medication for claimant's injury and resulting infections was barred pursuant to Sections 12 and 13 of the Act. 33 U.S.C. §§912, 913. The administrative law judge also ruled, however, that the presence of any hearing impairment, even if consequential, would not affect the extent of claimant's disability because the hearing loss was not separately compensable and did not affect claimant's ability to perform suitable alternate employment. *Id.*

Regarding that employment, the administrative law judge rejected claimant's "unproven allegations" that the home-based telemarketing job opportunities found by employer did not constitute suitable alternate employment. The administrative law judge also refused claimant's

[2]The administrative law judge found that claimant's post-injury wage-earning capacity in the identified suitable alternate employment, adjusted for inflation, is $124 per 40-hour week.

request to reconsider his average weekly wage. The administrative law judge noted that the parties had stipulated to an average weekly wage of $450, that claimant was represented by counsel at that time, and that the amount appeared reasonable and in accordance with law. *See* 33 U.S.C. §910(a), (b), (c). The administrative law judge denied claimant's motion for reconsideration, and these appeals followed.

I. Disability

In its cross-appeal, employer challenges the administrative law judge's finding that claimant is entitled to permanent partial disability benefits under Section 8(c)(21), 33 U.S.C. §908(c)(21), and asserts that claimant's recovery is limited to an award under the schedule for a 100 percent impairment to his left foot. We disagree.

In awarding permanent partial disability benefits under Section 8(c)(21), the administrative law judge relied on the Board's decision in *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1989). In *Frye*, the Board held that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant may receive a Section 8(c)(21) award for a loss in claimant's wage-earning capacity.

The administrative law judge in this instance reasonably found that claimant's overall impairment was derived in part from the initial injury to his left foot. The administrative law judge chronicled a variety of impairments, from the foot injury and resulting infected ulcers to conditions involving claimant's lower back and right hip, resulting from his altered gait, and concluded that they resulted from the "natural progression of [claimant's] scheduled injuries, and in particular from the left foot injury." Decision and Order at 31. Citing the opinions of Drs. Tang and Wells, the administrative law judge determined that these collateral impairments were not the results of specific trauma apart from than that inflicted on claimant's left foot. Nor were they due to the effects of claimant's age. Decision and Order at 30-31.

Moreover, this finding is supported by the presumption accorded by Section 20(a), 33 U.S.C. §920(a). In establishing that an injury arises out of his employment, a claimant is aided by the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), which applies to the issue of whether an injury is causally related to his employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The administrative law judge applied the Section 20(a) presumption as support for his finding that claimant's "non-scheduled" disabilities resulted from the 1980 left foot injuries. Decision and Order at 29. As found by the administrative law judge, employer introduced no evidence severing the potential causal connection between claimant's foot and his later hip, back and knee conditions. Because employer has failed to set forth specific and comprehensive evidence in support of its allegation that claimant's "non-scheduled" conditions are not related to his 1980 work-related foot injury, we affirm the administrative law judge's finding that

claimant's collateral back, hip and knee conditions are derived from his 1980 foot injury. *See Bass v. Broadway Maintenance*, 28 BRBS 11, 15-16 (1994); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). Accordingly, we reject employer's argument that the administrative law judge erred in finding that claimant is entitled to benefits under Section 8(c)(21).

Nevertheless, we hold that the administrative law judge's award of disability benefits under Section 8(c)(21) cannot be affirmed. In *Frye*, the Board held that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, claimant may receive a separate award under Section 8(c)(21); claimant, however, is limited to one award for the combined effect of his conditions, as he would have sustained only one compensable injury which has affected other parts of the body. *Frye*, 21 BRBS at 198. Subsequent to the administrative law judge's Decision and Order, the Board overruled this aspect of *Frye*, holding that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant is not limited to one award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury in addition to an award under the schedule for the initial injury. *Bass v. Broadway Maintenance*, 28 BRBS 11, 17-18 (1994). Because the administrative law judge found that claimant suffered from a scheduled injury to his left foot, we vacate the award of permanent partial disability benefits, and remand this case to the administrative law judge for a determination under *Bass* as to whether claimant is entitled to benefits under both Section 8(c)(21) and the schedule.[3] 33 U.S.C. §908(c)(4); *see also Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985).

II. Maximum Medical Improvement

Employer contests the administrative law judge's finding that claimant reached maximum medical improvement on December 18, 1990. Specifically, employer asserts that claimant's condition reached permanency by January 31, 1985, at the latest. We reject this contention.

[3]Claimant asserted that he suffered a hearing loss as a result of taking medication for osteomyelitis caused by the left foot injury. No evidence of this was submitted at trial, and employer asserted that any hearing loss claim was time-barred. Claimant did proffer a hearing test on reconsideration, but this evidence was rationally rejected by the administrative law judge as not timely presented. *See* 20 C.F.R. §702.338 (requiring relevant evidence to be submitted before the filing of a compensation order). Moreover, the administrative law judge found in any event that the hearing loss was not separately compensable, and he considered its effect when evaluating whether employer had demonstrated suitable alternate employment. Decision on Motion for Reconsideration at 4. Similarly, assertions of entitlement to consequential injuries to the right knee, arguably improperly rejected by the administrative law judge as time-barred, *see Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988); Decision on Motion for Reconsideration at 6, are also subsumed into the permanent partial disability award pursuant to Section 8(c)(21). *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Bass*, 28 BRBS at 17-18.

An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *Sketoe v. Dolphin Titan International*, 28 BRBS 212, 221 (1994)(Smith, J., dissenting on other grounds); *see Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 61 (1985). A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition. *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1992). Evidence that claimant's condition has stabilized supports a finding that claimant has reached maximum medical improvement. *See Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989).

The date of maximum medical improvement is primarily a question of fact based on medical evidence and subject to the reasonable discretion of the trier-of-fact. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In this instance, the administrative law judge found that medical opinions which suggested that claimant's condition had become permanent before 1990 were inconsistent. After reviewing the medical evidence of record, the administrative law judge relied on the opinions of Dr. Turpin, who performed a skin graft from claimant's left forearm to his left heel in 1990 and concluded on December 18, 1990 that the graft had healed and that claimant was permanent and stationary as of that date. Emp. Ex. 22. This view was consistent with that taken by Dr. Turpin in 1989 when he reported that he did not consider claimant's condition to become permanent "until his wound is closed." Cl. Ex. 1.

The administrative law judge's finding that claimant reached maximum medical improvement on December 18, 1990 is supported by substantial evidence and is within his discretion as the trier-of-fact. The administrative law judge rationally relied on the opinion of Dr. Turpin to establish the date of claimant's maximum medical improvement, notwithstanding the opinions of Dr. Tang that claimant's condition became permanent as early as September 1983. The administrative law judge acknowledged that Dr. Tang had treated claimant throughout, *see* Decision and Order at 35, yet was entitled to give less weight to this physician on the issue of permanency because Dr. Tang did not render a consistent opinion as to the point at which claimant's condition had stabilized. Further, the administrative law judge is not required to accord the opinion of claimant's treating physician dispositive weight. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Sketoe*, 28 BRBS at 222. Moreover, the administrative law judge found that surgery to improve claimant's condition was always anticipated since the first unsuccessful skin graft in 1981, *see Kuhn v. Associated Press*, 16 BRBS 46 (1983); Emp. Exs. 25 at 1-2, 30; Tr. at 149-150, and that claimant had problems with infections and ulcers to his foot until the successful 1990 surgery. We therefore affirm the administrative law judge's finding that claimant's condition reached maximum medical improvement on December 18, 1990 as supported by substantial evidence. *See Seidel*, 22 BRBS at 403.

III. Suitable Alternate Employment

Employer asserts that the administrative law judge improperly disregarded vocational evidence which establishes the availability of suitable alternate employment as early as 1983. Employer cites claimant's lack of cooperation in the efforts of vocational rehabilitation specialist Randy Brooks as evidence of claimant's failure to exercise diligence in seeking to find suitable alternate work.

Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (1989); *Trask*, 17 BRBS at 59. To establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual employment. In the present case, it is undisputed that claimant is incapable of performing his usual employment as a marine clerk. *See Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Accordingly, the burden shifted to employer to demonstrate the availability of suitable alternate employment within the geographic area where claimant resides which claimant is capable of performing given his age, education, physical restrictions, and work experience, and which he could secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988).

The administrative law judge in this instance was aware that claimant did not cooperate fully with Mr. Brooks from the inception of that counselor's efforts at identifying suitable work. *See* Decision and Order at 37-39. The administrative law judge, however, reasonably found that given claimant's age (77 at the time of the hearing) and the need for claimant constantly to care for his foot condition by changing dressings and soaking it, the home telemarketing positions identified by Mr. Brooks on November 25, 1986 were the only reasonable alternative jobs available to this claimant. *See* Decision and Order at 37; *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

Accordingly, we affirm the administrative law judge's finding that employer did not establish suitable alternate employment until Mr. Brooks identified the four telemarketing jobs in 1986. We also affirm the administrative law judge's finding on reconsideration that these home-based positions themselves constitute suitable alternate employment. Although claimant asserted on reconsideration that the telemarketing positions were not viable, because one employer was allegedly unable to obtain a necessary business license and was located too far from claimant's home, two other employers were supposedly out of business, and the training period for the fourth was prohibitively long, the administrative law judge was entitled to reject these assertions as "unproven."[4] Decision

[4]We note that the Board is not permitted to consider the documents claimant has attached to his briefs to the Board. 20 C.F.R. §802.310(b). If claimant believes that a mistake in fact was made in the decision below, or that his physical or economic circumstances have changed, he may seek modification before the administrative law judge pursuant to Section 22 of the Act, 33 U.S.C. §922. *See Metropolitan Stevedoring Co. v. Rambo*, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995); *Fleetwood*

on Motion for Reconsideration at 4.

IV. Conclusion

The administrative law judge's finding that claimant is not limited to an award under the schedule is affirmed. We also affirm the administrative law judge's determination with respect to claimant's average weekly wage,[5] as well as his finding that claimant's condition reached maximum medical improvement on December 18, 1990 on the basis of Dr. Turpin's conclusions. We affirm, as supported by substantial evidence, the administrative law judge's

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v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985).

[5]We find no error in the administrative law judge's denial of claimant's request for domestic services. Decision and Order at 41; Decision on Motion for Reconsideration at 6. Claimant, in his notice of appeal, reiterates his objection to the "settlement," or stipulation, by which the parties agreed to claimant's average weekly wage. Claimant contends that his pre-injury wages should also reflect lost work opportunities and the potential for union membership and resulting higher wages that were lost due to this injury. The administrative law judge did not err in holding the parties to their stipulation as to claimant's average weekly wage. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994). Moreover, post-injury events generally are not relevant to a determination of average weekly wage. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

findings that the telemarketing positions identified by Mr. Brooks on November 25, 1986 constitute suitable alternate employment as of that date.

The administrative law judge's denial of concurrent awards under Section 8(c)(21) and the schedule is, however, reversed in view of a change in the law subsequent to the date of the Decision and Order, and this case is remanded to the administrative law judge under *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994), for a determination of claimant's entitlement to benefits under the schedule, if any, in addition to his award of permanent partial disability pursuant to Section 8(c)(21). In rendering his findings on remand, the administrative law judge may not apply the "true doubt" rule.[6] *See Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994). We have also reviewed other specific contentions raised by claimant. In view of our disposition of this case, these arguments are either moot or are rejected for the reasons expressed above.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, and the Decision on Motion for Reconsideration, are affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[6]We have reviewed employer's allegations that the administrative law judge erred in employing the "true doubt" rule to resolve conflicts in the evidence. Despite the administrative law judge's use of this language, we see no reversible error in his factual determinations attributable to "true doubt." The administrative law judge made no specific findings that the evidence was in equipoise such as to require him to relieve claimant of the burden of establishing entitlement in a close evidentiary case.