



BRB No. 15-0314

RUSSELL L. MOODY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: <u>May 10, 2016</u>
HUNTINGTON INGALLS,	)	
INCORPORATED	)	
	)	
Self-Insured	)	ORDER on
Employer-Petitioner	)	RECONSIDERATION

Claimant has filed a timely motion for reconsideration of the Board’s Decision and Order in *Moody v. Huntington Ingalls, Inc.*, \_\_ BRBS \_\_, BRB No. 15-0314 (Mar. 10, 2016) (pub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer responds, urging the Board to reject claimant’s motion.

In his motion, claimant avers that the decision of the Virginia Supreme Court in *McKeller v. Northrop Grumman Shipbuilding, Inc.*, 777 S.E.2d 857 (Va. 2015), supports his claim for temporary total disability benefits during the period of recovery from surgery for a work-related injury. In *McKeller*, the Virginia Supreme Court concluded that an injured worker’s retirement did not preclude him from receiving a temporary total disability award under Va. Code Ann. § 65.2-500 because his “incapacity for work” was total. *McKeller*, 777 S.E.2d at 862.

We reject claimant’s contention. The Virginia statute and case law interpreting it are not instructive in this case because the Longshore Act specifically defines “disability” in Section 2(10), 33 U.S.C. §902(10). See *Jordan v. Va. Int’l Terminals*, 32 BRBS 32 (1998) (state law may be instructive where the Act does not define a term). Section 2(10) defines “disability” as the “incapacity because of injury to earn the wages which the employee was receiving at the time of injury. . . .” In this case, claimant’s “incapacity to earn” the wages he was receiving at the time of injury was caused by his voluntary retirement from the workforce prior to his undergoing surgery. Therefore, claimant’s disability is not compensable under the Act. *Moody*, slip op. at 3-4.

Accordingly, claimant's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's decision is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge