BRB No. 96-1301

DANIEL ION	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY	)	
	)	
and	)	
	)	
SIGNAL ADMINISTRATION	)	DATE ISSUED:_____
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

Larry J. Peterson, St. Paul, Minnesota, for employer/carrier.

Joshua T. Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (96-LHC-2204, 95-LHC-2205) of Administrative Law Judge Daniel L. Leland 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 worked for employer for 24 years as a composite mechanic. His position was abolished in December 1992, so he worked as a mechanic trainee for employer in a storage facility from then until July 30, 1993. In March 1993, during the course of his work as a trainee, claimant fell and injured his lower back and left knee. In March and May 1993, claimant underwent surgeries on his wrists to relieve his work-related carpal tunnel syndrome. After he returned to work in July 1993, claimant injured his neck while climbing a ladder. Claimant was laid off in July 1993. Tr. at 34-39. He was called back in January 1994 as a welder, but was assigned to shoveling snow for nine days. Tr. at 39-40, 59. Claimant sought total disability benefits for the combination of his injuries.

The administrative law judge determined that claimant's knee condition would reach maximum medical improvement on May 31, 1996.[1] Decision and Order at 7. He also found that claimant is capable of performing jobs in the "sedentary" category only, and he permitted claimant to conduct a post-hearing job search based on the jobs identified at the hearing by employer's vocational consultant, Mr. Utities. Relying on claimant's post-hearing affidavit, the administrative law judge determined that claimant was duly diligent but was unable to secure the identified employment; therefore, he concluded that claimant is totally disabled and is entitled to benefits under Section 8(a), 33 U.S.C. §908(a).[2] The administrative law judge also determined that claimant's average weekly wage is $570, and he awarded medical benefits. Additionally, he ordered employer to pay interest on the overdue medical expenses, and he awarded employer Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability. *Id.* at 7-10. Employer appeals the administrative law judge's awards of permanent total disability benefits and interest on the medical benefits, and claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

[1]The hearing was held on December 6, 1995, and the administrative law judge issued his decision on May 20, 1996.

[2]The administrative law judge denied claimant's request for a separate award under the schedule for his knee injury. Decision and Order at 8.

Maximum Medical Improvement

Employer contends the administrative law judge erred in forecasting the date on which claimant's knee condition would reach maximum medical improvement.[3] Claimant responds, arguing that the administrative law judge's finding is supported by substantial evidence. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Claimant first injured his left knee in 1975 in a motorcycle accident, and thereafter, he underwent a partial medial meniscectomy to repair a torn medial collateral ligament. He re-injured it in 1992, and underwent surgery in 1994. In March 1993, claimant fell at work, causing instability in the anterior cruciate ligament in his left knee which was repaired in an operation in May 1995. Cl. Ex. 11 at D1, H6, H10; Emp. Ex. 1 at 34; Tr. at 53-55. Claimant testified that his surgeon, Dr. Carlson, wanted to assess the condition in May 1996, one year after surgery. Tr. at 59. Dr. Barnett, a Board-certified orthopedic surgeon hired by employer, stated on November 17, 1995, that claimant's knee was permanently disabled with an impairment of 29-30 percent. However, he opined that claimant's left knee condition would not reach maximum medical improvement until one year after surgery, *i.e.*, May 1996. Emp. Ex. 6; Emp. Ex. 7 at 9, 12-15. Both Dr. Person, an orthopedic surgeon, and Dr. Downs, claimant's treating physician, as of November 1995, felt that all of claimant's conditions had reached maximum medical improvement and that further conservative treatment would not be beneficial. Cl. Ex. 11 at D2, S2, S4. The administrative law judge gave greater weight to Dr. Barnett's opinion and found that claimant's knee condition "will reach maximum medical improvement on May 31, 1996 and that his disability becomes permanent as of that date." Decision and Order at 7.

Employer argues it was improper for the administrative law judge to use a future date on which to convert claimant's temporary disability to permanent disability. Employer does not request a finding that maximum medical improvement occurred on an earlier date, but asserts only that claimant should receive a new medical assessment of his knee condition after May 1996. We reject employer's argument, as the administrative law judge's finding regarding the date of maximum medical improvement is supported by substantial evidence in the record. Initially, there is no evidence that claimant's knee impairment is a temporary condition; the evidence of record supports a finding of

[3]The parties agree that claimant's other conditions have reached maximum medical improvement and are permanent.

permanency at least by the date chosen, if not earlier. The administrative law judge, moreover, expressly relied on the opinion of Dr. Barnett, employer's expert, to arrive at his conclusion that claimant's knee condition will reach maximum medical improvement one year after surgery. Despite the fact that May 31, 1996, had not arrived as of the dates of the doctor's examination or the issuance of the administrative law judge's decision, the administrative law judge acted within his discretion in crediting Dr. Barnett's opinion to set the date of maximum medical improvement, as he set this date with regard to the normal healing period following knee surgery and not merely on the eventuality that claimant's condition may further improve in the future. *Cf. Mills v. Marine Repair* Service, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). As the record contains substantial medical evidence to support the administrative law judge's determination, we affirm his finding that claimant's knee condition would reach maximum medical improvement on May 31, 1996. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

Suitable Alternate Employment

Employer also contends the administrative law judge erred in finding claimant to be totally disabled, arguing that claimant is capable of performing sedentary or light duty work and that Mr. Utities' credible testimony established the availability of suitable alternate employment. Employer further avers that the administrative law judge erred in allowing claimant to conduct a post-hearing job search based on the jobs identified by Mr. Utities and in not permitting it an opportunity to cross-examine him afterward. To establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment due to his work-related disability. Once claimant makes such a showing, employer may establish that claimant is at most partially disabled by demonstrating the availability of other jobs claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Claimant can rebut employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

It is undisputed that claimant is unable to return to his former work, *see* Decision and Order at 7; therefore, he has established a *prima facie* case of total disability, and the burden shifts to employer to present evidence of suitable alternate employment. Mr. Utities, employer's vocational consultant, conducted a job search for claimant purportedly based on the limitations set by Drs. Barnett and Person, and he determined that claimant

can perform sedentary or light work.[4] Tr. at 90, 103-104. He identified numerous jobs in both categories he believed claimant could perform. Tr. at 104-107, 116-119. For example, he identified light duty positions such as cashier, desk clerk, auditor, security guard and human service technician. In the sedentary category, he found jobs such as telemarketer, dispatcher, clerk, and salesman. Tr. at 104-107, 117. There is no written report from Mr. Utities in the record, and employer did not inform claimant of the positions prior to the hearing. *See* Tr. at 127-129.

Based on the medical evidence, the administrative law judge rationally found that light work is not suitable for claimant and that he can only perform sedentary work in accordance with the doctors' restrictions. *See* n.4, *supra*. The administrative law judge then allowed claimant to conduct a post-hearing job search to try to secure the employment identified by Mr. Utities. After his search, claimant filed an affidavit stating that he diligently contacted numerous employers, both those identified by Mr. Utities and others he located on his own but none offered to hire him. Affidavit (Jan. 5, 1996). The administrative law judge credited claimant's affidavit and deemed his search diligent, and he found that claimant rebutted employer's showing of suitable alternate employment, thereby establishing his right to total disability benefits. Decision and Order at 7-8. Employer alleges the administrative law judge abused his discretion in permitting a post-hearing job search, and further alleges the administrative law judge improperly failed to permit it to cross-examine claimant or any of the potential employers after the search.

Employer correctly argues it need not act as an employment agency for claimant, *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165, nor place claimant in a specific job or establish that he was offered a specific job. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). Moreover, employer is not required to inform claimant in advance of alternate job opportunities it has located. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). However, we hold it was within the administrative law judge's discretion to permit claimant to conduct a post-hearing job search in view of employer's failure to inform claimant of the jobs identified by Mt. Utities prior to the hearing, as it is the administrative law judge's duty to inquire fully into all

[4]Dr. Barnett stated that claimant must avoid long-term standing and walking, squatting, stooping, lifting or carrying over 30 pounds, work on ladders or inclines, running, and changing position quickly. Emp. Ex. 6; Emp. Ex. 7 at 17. Dr. Barnett further stated that subject to the above restrictions, claimant can work full-time; however, he is restricted to sedentary work. Emp. Ex. 7 at 17. Dr. Person set forth approximately the same restrictions. Cl. Ex. 11 at S2, S4.

relevant matters. *See generally Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990); 20 C.F.R. §§702.338, 702.339.

Nevertheless, we agree with employer that the administrative law judge violated its right to due process of law by failing to provide employer with an opportunity to cross-examine claimant or respond to his post-hearing affidavit regarding the job search. *See generally Richardson v. Perales*, 402 U.S. 389 (1971); *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951). Therefore, we vacate the administrative law judge's findings that claimant conducted a diligent job search and rebutted employer's evidence of the availability of suitable alternate employment, and we remand the case for further proceedings and consideration. On remand, the administrative law judge must give employer an opportunity to refute claimant's post-hearing affidavit, and he must reconsider the issue of suitable alternate employment in light of all the evidence.

Interest

Finally, employer contends the administrative law judge erred in awarding interest on claimant's past-due medical benefits. Specifically, it asserts that the administrative law judge erred in relying on *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991), as neither the United States Court of Appeals for the Eighth Circuit, in whose jurisdiction this case arises, nor the Board has addressed the issue of interest on past-due medical expenses since *Hunt* was decided. Claimant and the Director respond, urging the Board to affirm the award of interest on the past-due medical expenses.

Previously, the Board declined to award interest on medical benefits not paid by the claimant. In *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988) (Feirtag, J., dissenting), the Board reversed the administrative law judge's award of interest on medical benefits. It first reasoned that because there was no evidence of record establishing that the claimant made any direct payments to the medical providers or that they charged claimant interest on his unpaid bills, the purpose of interest, *i.e.*, to fully compensate a claimant, is not served by awarding to the claimant in that case interest on medical expenses. *Pirozzi*, 21 BRBS at 296-297. The Board also denied interest on payments employer makes directly to the providers. It reasoned that the equitable principles which mandate interest on unpaid disability benefits are not present in the case of medical benefits owed to a provider as the needs of such provider are not similar to those of an injured employee. *Pirozzi*, 21 BRBS at 297; *see also Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd on other grounds mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

In *Hunt*, the claimant's physicians, Dr. Hunt and Dr. DiPalma, intervened in claimant's claim for benefits, seeking payment for medical services rendered after the date the employer ceased paying benefits. The administrative law judge held the employer liable for disability and medical benefits; however, he denied the doctors interest on overdue medical expenses, and he denied them an attorney's fee. *Hunt*, 999 F.2d at 420-421, 27 BRBS at 85-86 (CRT). The Board affirmed the administrative law judge's denial of both interest and an attorney's fee to the doctors. *Bjazevich*, 25 BRBS at 241 n.1, 243-244.

The Ninth Circuit, on the doctors' appeal, deferred to the Director's position that interest is payable on sums owed for medical services. The court held that there is no statutory impediment to awarding interest on past-due medical expenses, noting that interest may be included in the "reasonable value" of medical services pursuant to Section 7(d)(3), 33 U.S.C. §907(d)(3).[5] As a policy matter, the Ninth Circuit agreed with the reasoning in *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145 (CRT) (5th Cir. 1992), that in some instances medical benefits may be considered "compensation" under the Act because an employee is personally liable for his medical expenses and such liability may be just as debilitating as a loss of income due to a work injury.[6] *Hunt*, 999 F.2d at 422, 27 BRBS at 88-89 (CRT). The court further noted that if interest were not payable on overdue medical benefits, the result could be a "chilling effect" on the provision of medical services and would result in a windfall to employers. *Id.* The Ninth Circuit thus rejected the Board's rationale in *Pirozzi* that a distinction must be made between those cases in which a claimant seeks reimbursement for medical services and those cases where employer owes payment to the medical provider directly. *Hunt*, 999 F.2d at 421-423, 27 BRBS at 87-89 (CRT).

Inasmuch as the Ninth Circuit's decision in *Hunt* adopted the reasonable interpretation of the Director that interest should be awarded on all past-due medical benefits, we adopt the approach espoused by the Ninth Circuit in *Hunt* and overrule the Board's decisions in *Pirozzi* and *Caudill* to the contrary.[7] *See generally Foundation*

[5]Section 7(d)(3) states: "The Secretary may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee."

[6]The United States Court of Appeals for the Fifth Circuit held that medical benefits are "compensation" for purposes of enforcement proceedings under Section 18(a). *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145 (CRT) (5th Cir. 1992).

[7]We note that the Director did not participate in any of the appeals to the Board that addressed this issue.

Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991). We thus hold that interest may be assessed on sums owed for medical services, whether

the costs were initially borne by the claimant or the providers.[8] Consequently, we reject employer's argument, and we affirm the award of interest on claimant's outstanding medical benefits.

Accordingly, the administrative law judge's finding that claimant is totally disabled is vacated, and the case is remanded for further action in accordance with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
NANCY S. DOLDER
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

[8]We reject employer's contention that interest is not payable in this case because unlike in *Hunt,* claimant's medical providers in the instant case did not intervene to seek payment of their bills. Moreover, the interest is payable by employer to whomever payment is owed, either claimant or the provider.