

BRB Nos. 02-0758
and 02-0758A

DAVID K. WILSON)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
ATLAS WIRELINE SERVICES)	DATE ISSUED: 07/29/2003
)	
and)	
)	
CNA INSURANCE COMPANIES)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Lee J. Romero, Jr., Administrative
Law Judge, United States Department of Labor.

David K. Wilson, Ellisville, Mississippi, *pro se*.

Kevin A. Marks (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans,
Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals, and employer cross-appeals, the
Decision and Order on Remand (98-LHC-255) of Administrative Law Judge Lee J. Romero,
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). As claimant appeals without representation by counsel, we will review the administrative law judge's findings of fact and conclusions of law to determine whether they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

This case is before the Board for the second time. To reiterate the facts, claimant injured his low back on December 27, 1988, during the course of his employment with employer as a field engineer. On February 6, 1989, claimant had a lumbar hemilaminectomy and discectomy, which was performed by Dr. Lowry. Claimant obtained work as an auto parts service writer on January 22, 1990. He quit this job due to back pain on June 16, 1990 and has not worked since. Dr. Lowry subsequently recommended psychological counseling for depression and suicidal and homicidal ideation. Lynda Thoms, a psychological counselor, in December 1997, diagnosed depression and post-traumatic stress. Drs. Kamp and Maggio both opined that claimant is unable to work due to his psychological condition.

In his initial Decision and Order, the administrative law judge accepted the parties' stipulation that claimant sustained a work-related orthopedic injury. Next, the administrative law judge found claimant to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's psychological condition to his employment, and he concluded that employer failed to produce sufficient evidence to rebut that presumption. He then found that claimant's back condition reached maximum medical improvement on May 19, 1997, and that claimant's psychological condition had not yet reached maximum medical improvement. As he further found that employer failed to establish the availability of suitable alternate employment, the administrative law judge awarded claimant temporary total disability compensation from the date of the injury, December 27, 1988, to January 22, 1990, and from June 16, 1990, to the present, and continuing, 33 U.S.C. §908(b), and temporary partial disability compensation from January 22 to June 16, 1990. 33 U.S.C. §908(e). On reconsideration, the administrative law judge rejected claimant's contention that both his physical and psychological conditions are permanent. Employer was ordered to pay for reasonable and necessary, past and present, medical treatment for claimant's back and psychological conditions pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a). Lastly, the administrative law judge denied employer relief from continuing liability for compensation under Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge also found that employer was liable for a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, the Board affirmed the administrative law judge's finding that claimant's back injury reached maximum medical improvement on May 19, 1997, and that claimant is temporarily totally disabled due to his psychological injury. *Wilson v. Atlas Wireline Services*, BRB Nos. 99-0607/A (March 10, 2000) (unpublished). Claimant thereafter appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. In an unpublished opinion, that court remanded the case for the administrative law judge to clarify the basis for his award of temporary total disability benefits to claimant. *Wilson v. Atlas Wireline Service*, 260 F.3d 623 (5th Cir. 2001) (table), *cert. denied*, 534 U.S. 1078 (2002). In remanding the case, the court found the administrative law judge's award to be not merely ambiguous but also contradictory, stating that it was unable to "tell what the ALJ held, factually and legally, on the issue of permanent versus temporary disability." *Wilson*, slip op. at 8. Additionally, the court stated that if claimant would be permanently and totally disabled due to his back injury alone, he should not be penalized just because his totally disabling psychological condition had not reached permanency. If, on the other hand, claimant's total disability was due to a combination of his back injury and his psychological impairment, then the administrative law judge was correct to find claimant entitled to temporary total disability benefits. The court then rejected the contention that it should hold claimant entitled to permanent total disability from 1989 or another date based on his back injury alone; specifically, the court stated that it could not conclude that the evidence is so overwhelming in support of such a result that any other result reached by the administrative law judge would not be supported by substantial evidence. *Wilson*, slip op. at 9.

On remand from the circuit court, the administrative law judge reexamined the evidence of record relating to the nature and extent of claimant's disability and determined that claimant first achieved permanency as to his back condition on December 19, 1989, when Dr. Lowry assigned him a permanency rating of 15 percent, rather than on May 19, 1997, as he had found in his initial decision. Decision and Order on Remand at 12. In rendering this determination, the administrative law judge reasoned that even though claimant continued to seek treatment for pain after December 19, 1989, and Dr. Lowry continued his attempts to help claimant find pain relief culminating in the insertion of a morphine pump in 1997, the condition of claimant's back itself remained unchanged since 1989. The administrative law judge also reiterated his earlier finding that claimant could not return to his usual employment duties with employer and that employer did not establish the availability of suitable alternate employment. Thus, the administrative law judge found claimant's back injury alone to be permanently totally disabling and that the concurrent temporary disability from the psychological condition does not affect this determination. Finally, the administrative law judge denied claimant reimbursement for the medical expenses related to his hypertension, as this issue was being raised for the first time.

Accordingly, the administrative law judge awarded claimant temporary total disability benefits from December 27, 1988, the date of the injury, until December 19, 1989, the date he now found claimant's condition reached maximum medical improvement, permanent total disability benefits from December 19, 1989, to January 21, 1990, permanent partial disability benefits from January 21 to June 17, 1990, when claimant was employed by High Tech Automotive, and permanent total disability benefits thereafter, with cost of living increases effective October 1, 1990, and interest on all amounts owed by employer. *See* 33 U.S.C. §§ 908(a), (b), (c)(21); 910(f).

Claimant, representing himself, appeals the administrative law judge's decision on remand, arguing that pursuant to Section 14(e) of the Act, 33 U.S.C. § 914(e), he is entitled to penalty payments on 14 years of unpaid cost-of-living increases awarded and that the administrative law judge erred by declining to award him medical benefits for his hypertension. BRB No. 02-0758. Employer, in its cross-appeal, contends that the administrative law judge erred by reconsidering the issue of the date on which claimant's back condition became permanent, and in determining that it failed to establish the availability of suitable alternate employment within the restrictions imposed on claimant as a result of his back condition. BRB No. 02-0758A.

We first address employer's argument on appeal that the administrative law judge on remand exceeded the mandate issued by the United States Court of Appeals for the Fifth Circuit when he reconsidered the issue of the date on which claimant's back condition reached permanency. In its decision remanding the case to the administrative law judge for clarification, the Fifth Circuit specifically stated that it "simply [could] not tell what the ALJ held, factually and legally, on the issue of permanent versus temporary disability," as it relates to both the back and psychological conditions. *Wilson*, slip op. at 8. The court concluded that "the appropriate disposition is to remand the case for clarification." *Id.* Accordingly, we reject employer's contention of error and we hold that the administrative law judge properly concluded that the issue of the nature of claimant's disability, and specifically the date on which claimant's back condition reached maximum medical improvement, was before him pursuant to the court's remand.

Alternatively, employer challenges the administrative law judge's determination on remand that claimant's back condition reached maximum medical improvement on December 19, 1989; specifically, employer contends that the evidence of record does not support the administrative law judge's finding that claimant reached maximum medical improvement on that date. We disagree. An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, or if the

condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Thus, 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). In addressing this issue, the administrative law judge may rely upon an opinion which rates claimant's disability, as this is sufficient evidence of permanency. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

In the instant case, claimant underwent back surgery on February 9, 1989. On December 19, 1989, claimant's treating physician, Dr. Lowry, opined that claimant's back condition reached maximum medical improvement and he assigned a permanent impairment rating of 15 percent, as well as permanent work restrictions. Empl. Ex. 6 at 27. Claimant continued to complain of back pain and reported no significant changes or improvement in his condition. *See* Empl. Ex. 6 at 25. Dr. Lowry described his subsequent treatment of claimant as consisting of "pain controlling measures." Clt. Ex. 19 at 13-14. Specifically, Dr. Lowry regularly prescribed pain medication, had a spinal cord stimulator placed on claimant's back in June 1996 and, after claimant failed to obtain any relief from that device, had a morphine pump implanted in claimant's back. Following this last procedure, claimant reported significant improvement of his pain symptomatology, and Dr. Lowry thereafter testified that claimant's back condition stabilized as of May 19, 1997. Empl. Ex. 26 at 12-18, 29-31; Tr. at 57-61. On remand, the administrative law judge noted that Dr. Lowry offered two dates on which claimant's back condition reached maximum medical improvement, December 19, 1989 and May 19, 1997, and he concluded that although claimant may have received the maximum benefit for his ongoing pain symptoms in May 1997, the back condition itself achieved and remained permanent as of December 19, 1989, when it was rated by Dr. Lowry.¹ Decision and Order at 12. The administrative law judge also concluded that claimant's condition was permanent under *Watson*, 400 F.2d 649, as it was "long lasting" and indefinite in duration. As the record contains substantial

¹ Employer posits that when a deterioration in claimant's condition occurs subsequent to the date on which maximum medical improvement has been found, that prior date cannot be controlling. *See* Employer's brief at 22. Contrary to this contention, however, the nature of a disability is determined by the date of maximum medical improvement; thus, the worsening of a claimant's condition will not prevent a determination that claimant's condition became permanent at an earlier date. *See generally SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT)(5th Cir. 1996).

evidence supporting the administrative law judge's finding on this issue, specifically, Dr. Lowry's opinion that claimant reached maximum medical improvement and his rating of claimant's condition in December 1989, as well as claimant's testimony regarding the lack of a change in his condition from that time until 1996, we affirm his finding that claimant's back condition became permanent on December 19, 1989. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

Lastly, employer challenges the administrative law judge's finding that claimant is permanently totally disabled since, it avers, it has established the availability of suitable alternate employment. In his initial decision, the administrative law judge considered the medical, vocational, and surveillance evidence of record and determined that claimant was not realistically employable due to his back injury and psychological condition. The Board affirmed this finding as it was supported by substantial evidence. On remand from the Fifth Circuit, the administrative law judge again found that employer did not establish the availability of suitable alternate employment. Specifically, the administrative law judge, in light of his new determination on permanency, reevaluated the evidence and again determined that claimant cannot return to his employment duties with employer, that employer has identified no employment opportunities that would permit claimant to lie down for one hour per day as required, and that accordingly claimant remains totally disabled as a result of his back injury alone. Decision and Order on Remand at 14-15.

We reject employer's allegation of error. Contrary to employer's contention, the presence of videotape surveillance evidence does not establish that claimant has a wage-earning capacity, as claimant's ability to perform certain tasks does not satisfy employer's burden to establish suitable alternate employment. *See Pientrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Rather, once, as here, claimant establishes a *prima facie* case of total disability, the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the instant case, the administrative law judge fully considered all of the record evidence and rationally determined that claimant remains totally disabled as a result of the restrictions with his back injury. Decision and Order on Remand at 13-16. Specifically, the administrative law judge credited Dr. Lowry's opinion that the ideal job would allow claimant to lie down for an hour per day, Empl. Ex. 26 at 36, and the opinion of Dr. Stokes, a rehabilitation counselor, who stated that the identified jobs did not take this restriction into account. Empl. Ex. 30 at 53, 57-58. Thus, as employer has identified no reversible error in the

administrative law judge's findings on remand that claimant is totally disabled, we affirm that determination.

Claimant, in his appeal, argues that his hypertension is related to his back injury and residual pain and that therefore employer should be held liable for those medical expenses incurred as a result of his treatment for this condition. An award of medical benefits is contingent upon a finding of a causal relationship between claimant's medical condition and the work-related injury. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989). In the instant case, the administrative law judge on remand denied claimant's claim for these expenses because he concluded that claimant did not raise this argument at the original hearing or argue in his brief that his hypertension is work-related.² Initially, we note that claimant was represented by counsel through the issuance of the administrative law judge's initial decision. The record contains an LS-18 form dated October 27, 1997, Clt. Ex. 5, and an amended LS-18 form dated January 23, 1998, Clt. Ex. 6, which lists, among the issues presented, "Nature & extent of injury (back and psychological), mmi if any; and Liability of Employer for medical treatment." Notably absent from the record compiled before the administrative law judge at that time is an LS-18 form dated April 17, 1998, which lists the nature and extent of claimant's hypertension among the contested issues; rather, this document was submitted to the administrative law judge by claimant after his claim was remanded by the Fifth Circuit. *See* Clt. Ex. I. Moreover, while the parties discussed at the formal hearing the medical bills incurred as a result of claimant's back and psychological conditions, claimant's hypertension was not addressed.³ *See* Tr. at 17-19, 22, 23, 25. Subsequently, claimant's counsel did not address the compensability of claimant's hypertension in his post-hearing brief to the administrative law judge, *see* Claimant's October 20, 1998 post-trial brief, nor did his counsel raise this issue in his January 20, 1999 Motion for Reconsideration. *See* Claimant's January 20, 1999 Motion for Reconsideration.

Accordingly, as the record supports the administrative law judge's determination that the compensability of claimant's hypertension was not raised during the initial proceedings, we hold that the administrative law judge committed no error in declining to address this issue on remand. *See generally* 20 C.F.R. §802.405(b); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

² The Board stated in its initial decision that claimant was attempting to raise the issue of the compensability of his hypertension for the first time on appeal. *See Wilson*, BRB Nos. 99-0607/A, slip op. at 5 n.1.

³ On remand, the administrative law judge also noted the absence of any medical evidence attributing claimant's hypertension to his work injury or residual pain.

Claimant additionally contends that the administrative law judge erred in not finding that employer is liable for a penalty under Section 14(e) of the Act, 33 U.S.C. § 914(e), for its failure to pay Section 10(f) adjustments for the periods subsequent to December 19, 1989, the date on which he reached maximum medical improvement and thus the date on which he

became entitled to permanent total disability benefits.⁴ Section 14(e) authorizes the assessment of a 10 percent penalty in cases in which employer does not timely pay the benefits due or file a timely notice of controversion. *See* 33 U.S.C. §914(d); *Bonner v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part*, 600 F.2d 1288 (9th Cir. 1979); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). If employer does not file a timely notice of controversion, any Section 14(e) assessment attaches to all payments not timely made between the time the controversy arises, including unpaid amounts accrued prior to that date, and the date the notice of controversion is filed or the date of the informal conference, whichever is earlier. *See Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45, *aff'd on recon.* 27 BRBS 218 (1993); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991); *see also Nat'l Steel & Shipbuilding Co. v. U.S. Dept. of Labor, OWCP*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *see also Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT).

In this case, although Section 14(e) was raised as an issue before the administrative law judge, he did not address employer's liability for an assessment based on the difference between the benefits paid and the amounts due as a result of the additional benefits obtained by claimant on remand. We therefore remand the case for the administrative law judge to consider employer's liability for an assessment under Section 14(e) on the additional benefits obtained by claimant.

⁴Section 10(f) provides that, effective October 1 of each year, compensation for permanent total disability will be increased by the lesser of a percentage equal to the percentage by which the applicable average weekly wage exceeds the applicable national average weekly wage, or five percent. 33 U.S.C. §910(f); *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*). Thus, once the administrative law judge on remand revised the date on which claimant's condition reached permanency, claimant became entitled to annual cost-of-living adjustments on the compensation for his permanent total disability.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. The case is remanded to the administrative law judge for consideration of employer's liability for a Section 14(e) assessment.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge