BRB No. 08-0790

L.O.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAWAII STEVEDORES, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 07/27/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Granting Section 8(f) Relief of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Steven M. Birnbaum, San Rafael, California, for claimant.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Granting Section 8(f) Relief (2006-LHC-00322, 2006-LHC-00323, 2006-LHC-00324) of Administrative Law Judge Jennifer Gee 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 as employer's storeroom maintenance clerk until June 30, 2003. He had a number of regular duties including purchasing parts, parts pickup and delivery, inventory recordkeeping and control, billing, maintenance scheduling, time-card review, producing productivity reports and providing design assistance on special projects. In November 2002, claimant suffered an "evolving" stroke, which he contended began at work on November 8, 2002. Claimant reported to the emergency room on November 13, 2002, where he was diagnosed as suffering a left parietal stroke. Emp. Ex. 13. He underwent physical therapy and returned to work with reduced hours and duties in April 2003. In June 2003, claimant was told that his position was going to be eliminated and that he would be terminated.[1] Claimant testified that he was told that he could take a medical retirement rather than be terminated, and he accepted this option. H.Tr. at 177, 185; Cl. Ex. 11. After his retirement, claimant voluntarily returned to employer's facility to train his successor until he was asked to stop coming in September 2003. H.Tr. at 109-110, 186. Claimant filed an accident report for his November 2002 stroke in June 2003, and filed a claim under the Act on July 3, 2003. Claimant has not worked since he retired and sought permanent total disability benefits under the Act.

In her decision, the administrative law judge found that employer had no notice of a work-related injury until June 2003, when claimant filed an accident report and that, as claimant learned of the work-relatedness of his stroke by April 13, 2003, at the latest, notice was due by May 14, 2003. 33 U.S.C. §912(a). However, the administrative law judge also found that employer did not establish that it was prejudiced by the late notice. Thus, as employer had ample opportunity to investigate the claim, had access to all of claimant's medical records, and failed to make any specific argument that the delay hindered its ability to investigate the nature and extent of the injury, the administrative law judge found claimant's failure to file a timely notice of injury was excused. 33

[1] The position was not eliminated. It was to be made a part-time position, but at the time of the hearing it was still full-time. H. Tr. at 678.

U.S.C. §912(d); Decision and Order at 28. The administrative law judge also found that claimant established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his stroke was work-related, Decision and Order at 30, and that employer failed to establish rebuttal of the Section 20(a) presumption. *Id.* at 32.

In determining the nature of claimant's disability, the administrative law judge found that claimant remained temporarily disabled until March 14, 2005, the date he was examined by Dr. Keller and was found to be medically stationary. Decision and Order at 34. With regard to the extent of claimant's disability, the administrative law judge found that claimant was unable to return to his usual duties between November 12, 2002 and April 13, 2003, and thus, is entitled to temporary total disability benefits for that period. *Id.* at 35. The administrative law judge also found that although claimant returned to work between April 14, 2003 and June 30, 2003, he worked with limitations, including a reduced number of hours, and required an assistant during this period. She concluded that claimant is entitled to temporary partial disability benefits from April 14, 2003 to June 30, 2003. *Id.* at 39. Next, the administrative law judge credited claimant's testimony that he was offered a choice between termination and medical retirement in June 2003, and she determined that claimant did not voluntarily retire at that time. *Id.* at 37. Therefore, the administrative law judge found that this interim position does not establish the availability of suitable work as of July 1, 2003. After a review of the vocational evidence submitted by employer, including a labor market survey, the administrative law judge found that employer did not establish that the positions identified were suitable and/or available. *Id.* at 38. Therefore, she awarded claimant total disability benefits from July 1, 2003, and continuing. Employer was awarded Section 8(f) relief, 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred both in crediting the opinion of Dr. Keller, whose opinion had changed under the influence of claimant's attorney and, in "decertifying" Dr. Scaff as an expert in cardiology. Employer also contends that the administrative law judge erred in finding that claimant did not reach maximum medical improvement until March 14, 2005, and that claimant is not capable of returning to his former duties. Employer further avers that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment based on her finding that the jobs identified did not allow for frequent breaks, as this was not one of claimant's actual work restrictions. In addition, employer contends that the administrative law judge erred in finding that employer was not prejudiced by the lack of timely notice under Section 12(a), and that employer did not establish rebuttal of the 20(a) presumption. Claimant responds, urging affirmance of the administrative law judge's findings that employer was not prejudiced by his failure to file a timely notice of injury, and that claimant suffers from a totally disabling work-related

injury. However, claimant agrees that the administrative law judge erred in finding that maximum medical improvement was not reached until March 14, 2005.[2]

Section 12

Initially, we address employer's contention regarding whether claimant's failure to file a timely notice of injury was prejudicial to employer. Section 12(a) of the Act requires that claimant must, in a traumatic injury case, give employer written notice of his injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and his employment. *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice of the injury pursuant to Section 12(a). *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). In this case, the administrative law judge found that claimant testified that he became aware that his stroke was work-related between November 2002 and April 2003, but claimant did not give employer notice of a potentially work-related injury until June 2003 when he filed an accident report. Thus, the administrative law judge concluded that the notice of injury was untimely filed; this finding is unchallenged on appeal.

However, Section 12(d) of the Act, 33 U.S.C. §912(d), provides:

> Failure to give such notice required by Section 12(a) shall not bar any claim under this chapter (1) if the employer . . . or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure [for one of the enumerated reasons]. . . .

[2] Employer filed a reply brief contending that claimant's post hearing letter to the administrative law judge informing her that he had rectal cancer was highly prejudicial. We reject this contention as employer makes no specific allegation of prejudice other than to allege that the letter would cause the administrative law judge to be more sympathetic to claimant. The administrative law judge thoroughly reviewed the evidence of record and substantiated her findings.

Because Section 12(d) is written in the disjunctive, claimant's failure to file a notice of injury will not bar a claim if any of three bases is met: employer had actual knowledge of the injury, employer was not prejudiced by the failure to give formal notice, or the district director excused the failure to file. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon.*, 18 BRB 1 (1985). Pursuant to Section 20(b), employer bears the burden of producing substantial evidence that none of these bases applies. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). Prejudice under Section 12(d)(2) may be established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate the injury to determine the nature and extent of the illness or to provide medical services. *See, e.g., Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir.1998), *cert. denied*, 525 U.S. 1102 (1999). A conclusory allegation of prejudice or an inability to investigate the claim when it is fresh is insufficient to meet employer's burden of proof. *See Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

The administrative law judge found that employer offered no evidence as to how its investigation was impeded by the untimely notice other than vague allegations. In addition, the administrative law judge found that employer made no allegation that there could have been a different course of medical treatment with earlier notice. The administrative law judge noted that prior to the hearing employer deposed claimant twice and had him evaluated by a psychologist three times. We also note that claimant's co-workers, who were familiar with his working habits, as well as his supervisor and other management personnel, were available to provide testimony at the hearing or in depositions. We, therefore, affirm the administrative law judge's finding that employer did not establish it was prejudiced by claimant's late notice of injury as it is supported by substantial evidence. *Bustillo*, 33 BRBS 15. Employer's contention that it could not timely investigate the incident, and thus, was prevented from possibly establishing that claimant could have returned to work earlier is without merit given the administrative law judge's finding that claimant remains unable to return to his former duties. *Jones Stevedoring Co.*, 133 F.3d 683, 31 BRBS 178(CRT).

Section 20(a)

Employer contends that the administrative law judge erred in crediting Dr. Keller's testimony that the changes in his causation opinion were not influenced by claimant's attorney. Decision and Order at 23. The administrative law judge relied on Dr. Keller's opinion to establish invocation of the Section 20(a) presumption that

claimant's stroke was related to the stress he suffered at work. Dr. Keller generated two separate reports for claimant's former counsel, Mr. Easley. The original report, which was not initially submitted into evidence, was written in more general terms, using qualifiers such as "possible" or "probably." For example, in his first report, Dr. Keller stated that claimant's stroke occurred possibly as early as November 8 while the patient was working. However, in the final report submitted into evidence, Dr. Keller opined that claimant suffered a cerebrocascular accident which began on November 8, 2002, while claimant was working.

In finding that Dr. Keller's opinion is credible, the administrative law judge addressed employer's contention that Dr. Keller's opinion was unduly influenced by contact with claimant's previous counsel. She credited the doctor's testimony that he did not feel the language in his initial report accurately reflected the certitude he felt that claimant's stroke began at work and that claimant's hypertension, which resulted in the stroke, was affected by the stress claimant experienced at work. Decision and Order at 23. Dr. Keller specifically testified that he uses "all-inclusive" language in his non-forensic reports but felt that in medical litigation it detracted from the assuredness of his opinion.[3] As the administrative law judge addressed employer's objections regarding the credibility of Dr. Keller's opinion, and rationally rejected them, we hold that the administrative law judge did not err in crediting Dr. Keller's testimony that the substance of his opinion was unaffected by his interaction with claimant's counsel. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Furthermore, although employer does not directly contest the administrative law judge's finding that this evidence is sufficient to invoke the Section 20(a) presumption that claimant's stroke was work-related, we affirm the administrative law judge's finding that Dr. Keller's opinion is sufficient to invoke the presumption. *See Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 Fed. Appx. 249 (4th Cir. 2007).

Employer also contends that the administrative law judge erred in finding that the evidence is insufficient to establish rebuttal of the Section 20(a) presumption. In order to rebut the Section 20(a) presumption, an employer must present substantial evidence that claimant's employment did not cause or aggravate his injury. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS

[3] In any event, the doctor's use of the word "possible" in his initial opinion does not necessarily undermine its force. The Board has held that a doctor's acknowledgement of other "possible" causal connections does not render his opinion equivocal. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer first contends there is substantial evidence that the stroke did not occur while claimant was at work on November 8, 2002. In this regard, the administrative law judge found that employer relied on the lack of medical documentation for claimant's alleged right arm weakness he sustained on November 8, 2002, as evidence that claimant did not actually experience such a symptom at work. The administrative law judge credited claimant's explanation that he was not thinking clearly when he sought treatment at the emergency room on November 13, 2002, but recalled telling someone at the hospital about experiencing the right arm weakness on November 8. The administrative law judge also credited Dr. Keller's testimony that it is not unusual for a patient to forget a symptom or for medical histories taken in emergency rooms to be incomplete. Moreover, claimant contended that the stroke in November 2002 was caused by cumulative work stress and thus claimant need not establish that the harm occurred or working conditions existed on any particular day. *See generally Bell Helicopter Intern'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). It is undisputed that claimant was diagnosed as having suffered a stroke by at least November 13, 2002. Thus, we reject employer's contention that the Section 20(a) presumption is rebutted due to a lack of evidence that the stroke occurred at work on November 8, 2002.

In her discussion of the rebuttal evidence, the administrative law judge also rejected employer's contention that claimant did not actually experience work-related stress. Employer contends on appeal that there is substantial evidence that claimant's job was not stressful and that any extra work performed by claimant outside of his normal work hours was voluntary. While this issue is usually addressed under a discussion of whether a *prima facie* case is established under Section 20(a), *i.e.*, whether claimant established the existence of working conditions which could have caused the harm here, employer raises it to rebut the Section 20(a) presumption. The law is well-established that in a case involving allegations of stressful working conditions, claimant is not required to show unusually stressful conditions in order to establish a *prima facie* case; rather, even where stress may seem relatively mild objectively, claimant may recover if an injury results. *See Konno v. Young Bros., Ltd*, 28 BRBS 57 (1994); *see generally Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). The issue in such situations is the effect of this stress on claimant. *Id.* The administrative law judge credited claimant's testimony that he found his job to be stressful and that he worked several hours each evening at home. The administrative law judge also found that claimant's testimony was corroborated by the testimony of Mr. Abe and Mr. Oishi, the employees who succeeded claimant in the shopkeeper position. Both employees testified that they found the job to be demanding and stressful. H.Tr. at 88,114, 117, 128; Cl. Exs. 12, 13. In addition, we note that the medical questionnaires filled out by claimant in the four years prior to the stroke indicated that he felt extreme stress from his job. Cl. Ex. 1. As the administrative law judge's finding that claimant established stressful working conditions which could

have caused his stroke in November 2002 is supported by substantial evidence, we affirm this finding.

In order to establish rebuttal of the Section 20(a) presumption, employer also submitted the report of Dr. Scaff, who opined that emotional stress does not affect the hypertensive process and that claimant's stroke was caused by hypertension. Thus, Dr. Scaff concluded that claimant's stroke was not causally related to his alleged stress at work. Emp. Ex. 6. The administrative law judge reviewed Dr. Scaff's reports and testimony and found that his opinion is not entitled to any weight. Specifically, the administrative law judge found that his statements are contradictory as he agreed that emotional stress raises blood pressure and that an individual who experiences stress every day at work would have elevated blood pressure. H. Tr. at 570. Moreover, the administrative law judge found that Dr. Scaff provided inadequate justification for his opinion that any stress experienced by claimant at work would not affect his hypertension as the study on which his opinion was based addressed only whether chronic stress causes or predisposes an individual to hypertension, but does not address the contribution of stress to the hypertensive process. H. Tr. at 569. The administrative law judge also found that Dr. Scaff's research was inadequate and thus concluded that his opinion is entitled to little weight.

On appeal, employer contends that the administrative law judge erred in "decertifying" Dr. Scaff as an expert in cardiology after the hearing without giving employer a chance to respond. At the hearing, the administrative law judge "certified" Dr. Scaff as an expert in cardiology after *voir dire*. H. Tr. at 521. However, in her decision, she found that Dr. Scaff was not a credible witness and that his unreliable research methods "afford his opinions relatively little weight," and thus she "decertified" Dr. Scaff as an expert in cardiology. Decision and Order at 25. We reject employer's contention that the administrative law judge's decision to "decertify" Dr. Scaff establishes reversible error, as there is no legal effect to this finding when considered in context. The administrative law judge fully discussed Dr. Scaff's opinion and its underlying rationale, as well as the other medical evidence of record, and found that it is not entitled to any probative weight. *See generally Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). As the administrative law judge is entitled to weigh the evidence and the Board may not substitute its credibility determinations for those of the administrative law judge, *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988), we affirm the administrative law judge's rejection of Dr. Scaff's opinion. Thus, we affirm the administrative law judge's finding that the evidence does not establish rebuttal of the Section 20(a) presumption as it is rational and supported by substantial evidence. *C&C Maine Maintenance Co. v. Bellows,* 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 1(CRT) (2d Cir. 2008).

Extent of Disability

Employer contends that the administrative law judge erred in finding that claimant is totally disabled as a result of his stroke. Initially, employer contends that claimant is capable of returning to his former duties as a storeroom shopkeeper, and thus the administrative law judge erred in finding that claimant established a *prima facie* case of total disability. In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). The administrative law judge found that claimant established he was unable to return to his former duties between November 12, 2002, and April 13, 2003, the date he returned to limited duty. In addition, the administrative law judge found that claimant was unable to return to his usual employment from July 1, 2003, and thereafter. The administrative law judge based her decision on the opinion of Dr. Keller and claimant's testimony that he could not return to his storeroom clerk position. Dr. Keller found that as a result of his stroke claimant cannot write or type as well as before, his thinking is not clear, he cannot speak as well, and he is slower in everything he does. Moreover, the administrative law judge found that the time pressure element of the shopkeeper position is too demanding for claimant in his present condition, and that claimant required assistance to perform the job during his temporary return in 2003. The administrative law judge rejected employer's contention that Dr. Goodyear's opinion supports a finding that claimant could have performed his usual employment after the stroke, as the physician did not account for the fact that claimant was receiving assistance with his duties during his temporary return and that claimant was not asked to remain in his capacity as a storeroom clerk. The administrative law judge noted that Dr. Goodyear explicitly stated that he would require additional information before rendering an opinion on the question of whether claimant could return to work. Emp. Ex. 20. The administrative law judge also rejected employer's contention that claimant voluntarily withdrew from the workforce as she rationally credited claimant's testimony that he believed that his options were early retirement or termination. Decision and Order at 7. We affirm the administrative law judge's finding that claimant established a *prima facie* case that he cannot return to his former duties as the shopkeeper as she fully reviewed the evidence of record and made specific credibility determinations that are rational and supported by substantial evidence. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *see also McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT)(D.C. Cir. 1988)(claimant cannot return to a job that employer has withdrawn).

As we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment, which requires that it establish the availability of specific jobs that claimant is capable of performing given his physical restrictions and educational and vocational background. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In this case, the administrative law judge reviewed the suitability of the position claimant was performing prior to his retirement and of the positions identified by Mr. Stauber in a labor market survey. Employer contends that the administrative law judge erred in finding that claimant was restricted to employment that allows for frequent breaks based on the recommendation of Dr. Palozzi. Employer does not contest the administrative law judge's finding that claimant is restricted to sedentary work that is not intellectually stimulating, stressful and demanding. *See* Decision and Order at 37.

Initially, the administrative law judge rejected employer's contention that the position as a shopkeeper claimant worked from April 13, 2003, to July 1, 2003, at its facility establishes the availability of continuing suitable alternate employment. The administrative law judge credited claimant's testimony that he believed he had to retire from this position or he would be terminated and thus found that the job was no longer available. Further, the administrative law judge found that employer's representative, Mr. Arakawa, did not adequately address why claimant was "laid-off" from this position as the position had not been eliminated, and she did not credit Mr. Arakawa's testimony that he had asked claimant to stay on as a storeroom clerk. As the administrative law judge's finding is supported by substantial evidence, and employer has raised no error on appeal, we affirm the administrative law judge's finding that the shopkeeper position claimant performed from April 1, 2003 to July 1, 2003 does not establish continuing suitable alternate employment. *See generally Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

Employer also introduced into evidence a labor market survey identifying 24 potential jobs. In compiling the labor market survey, Mr. Stauber, employer's vocational consultant, considered the following of claimant's restrictions: able to sit for up to 60 minutes; able to alternate from sitting to standing/walking; should avoid repetitive performance of fine movements with right arm and hand; should avoid ladder climbing; should avoid working at heights; should avoid heavy lifting/carrying; able to follow verbal directions; and able to communicate articulately. The administrative law judge compared the specific requirements of the jobs identified with claimant's physical restrictions to determine whether they are suitable. *See generally Fox v. West State Inc.*, 31 BRBS 118 (1997).

The administrative law judge found that the evidence does not indicate that Mr. Stauber considered claimant's restriction to jobs that are not intellectually stimulating, stressful or demanding. Specifically, she found that only two of the positions give any indication about the pace of the work, and that the supervisory-type jobs directly contravene this requirement. Decision and Order at 37. The administrative law judge found that Mr. Stauber's report was based on the false belief that during his brief return to work claimant had been successfully performing the shopkeeper duties at the level of performance as before his stroke. With regard to the specific positions, the administrative law judge found that the four office clerk/administrative assistant positions require data entry, which is inconsistent with claimant's restriction on fine movements, motor speed and dexterity. Similarly, the four service writer/consultant positions require data entry and computer literacy and have no statement against prolonged typing. The administrative law judge also rejected the dispatcher positions which require fine movements and dexterity. The administrative law judge found that the scheduler position cannot be suitable alternate employment because there is no job description from which she can assess the qualifications and physical demands. Employer does not appeal these findings, and we affirm the administrative law judge's findings that these positions are not suitable as they are supported by substantial evidence.

Employer contends that the administrative law judge erred in rejecting the remaining positions based on her finding that they do not accommodate claimant's need to take frequent breaks. The administrative law judge based this finding on Dr. Palozzi's recommendation that claimant "take care of himself physically, get plenty of rest, and take frequent breaks." Cl. Ex. 7. While Dr. Palozzi, a neuropsychologist, testified that she was not specifically addressing claimant's ability to work, Emp. Ex. 19, she reported that claimant's emotional well-being was a concern and opined that claimant's cognitive difficulties would be more pronounced in stressful situations. Cl. Ex. 7. In determining claimant's work restrictions, the administrative law judge reviewed the opinions of Drs. Keller, Goodyear and Palozzi. She found that Dr. Keller determined that any future work would have to be sedentary, and not intellectually stimulating, stressful, and demanding, and that claimant had an inability to do fine movements with his right arm and hand. Cl. Ex. 6. Dr. Goodyear reported that the tests he administered showed that claimant had a mild to moderate impairment in fine motor speed and dexterity in the dominant right hand, Emp. Ex. 8, and Dr. Palozzi encouraged claimant to take frequent breaks. Cl. Ex. 7. The administrative law judge considered the totality of claimant's condition and concluded that the labor market survey was not compiled after consideration of all of claimant's limitations. Although Dr. Palozzi's recommendation was not labeled a "work restriction," the administrative law judge properly reviewed the totality of the medical evidence of record and applied the physicians' findings to the issue of claimant's ability to perform the jobs identified in the labor market survey. Moreover, the administrative law judge found that the labor market survey had little value as Mr. Stauber mistakenly believed that claimant had successfully returned to his former employment prior to his

retirement. We affirm the administrative law judge's finding that the jobs listed in employer's labor market survey do not establish the availability of suitable alternate employment as it is rational and supported by substantial evidence. *See generally Wilson v. Crowley Marine*, 30 BRBS 199 (1996).

Nature of Disability

Lastly, employer contends, and claimant agrees, that the administrative law judge erred in her finding of the date claimant reached maximum medical improvement.[4] Employer contends that Dr. Keller stated that claimant reached maximum medical improvement in late 2003, and thus the administrative law judge erred in finding maximum medical improvement was not reached until March 14, 2005. 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. *See Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968), *cert. denied,* 349 U.S. 976 (1969). It is well established that an employee may be considered to be permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding & Constr. Co.,* 17 BRBS 56 (1985). Moreover, an employee has reached maximum medical improvement, and thus permanency, when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Accordingly, the determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co.,* 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988).

The administrative law judge rejected Dr. Scaff's opinion regarding claimant's date of maximum medical improvement as she found it relates solely to claimant's underlying hypertension. Moreover, she found that Dr. Goodyear's opinion that claimant "can probably be considered" at maximum medical improvement as of January 19, 2007, is too speculative. Thus, the administrative law judge relied on the opinion of Dr. Keller to determine the date claimant reached maximum medical improvement. Dr. Keller first examined claimant on March 14, 2005, H. Tr. at 343, and prepared a report in August 2005. He stated in his report that "since the onset of his stroke the patient has had some improvement. It is felt that he is generally stationary and his disabilities are permanent. I

[4] We note that claimant did not file a cross-appeal and thus may not raise contentions of error in his response brief. *See Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989).

would say the stability occurred sometime in his recovery phase of late 2003." Cl. Ex. 6. The administrative law judge found that Dr. Keller did not explain or substantiate his opinion that claimant had stabilized by late 2003. Since Dr. Keller did not examine claimant until March 14, 2005, and he recommended no further treatment at that time, the administrative law judge found that the evidence establishes March 14, 2005 as the date of maximum medical improvement, and not the earlier date referenced in Dr. Keller's report.

While the date a doctor opines that claimant's injuries stabilized and became permanent may be sufficient to establish maximum medical improvement, *see Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989), the administrative law judge acted within her discretion in finding Dr. Keller's opinion that claimant's condition stabilized by late 2003 was not explained by Dr. Keller or corroborated by other evidence. Thus, we affirm the administrative law judge's finding that claimant did not reach maximum medical improvement until March 14, 2005, when Dr. Keller first examined claimant. *See generally Reposky v. Int'l Transp. Services,* 40 BRBS 65 (2006).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge