BRB No. 11-0397

WISMITH GEFFRAND	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	DATE ISSUED: 01/20/2012
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom & Sinins), Hoboken, New Jersey, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2010-LHC-193) of Administrative Law Judge Ralph A. Romano 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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, on May 27, 2008, experienced back pain during the course of his employment as a cook at employer's Picatinny Arsenal facility in New Jersey.[1] Claimant subsequently received medical treatment for his ongoing complaints of back pain, including physical therapy and pain medication. Additionally, claimant was referred for, and thereafter sought, psychological counseling for depression. Employer voluntarily paid temporary total disability benefits to claimant between May 28, 2008, and March 4, 2009.

In his Decision and Order, the administrative law judge found that claimant's back condition reached maximum medical improvement as of March 8, 2010, and that claimant is unable to return to gainful employment. Thus, the administrative law judge awarded claimant temporary total disability compensation from May 28, 2008, to March 8, 2010, and permanent total disability compensation continuing from March 9, 2010. 33 U.S.C. §908(a), (b). The administrative law judge also held employer liable for claimant's medical expenses, and additionally awarded employer relief pursuant to Section 8(f) of the Act. 33 U.S.C. §§907, 908(f).

On appeal, employer challenges the administrative law judge's findings regarding the nature and extent of claimant's disability. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends that the administrative law judge erred in failing to find that claimant's back condition reached maximum medical improvement as of October 22, 2008. Claimant is entitled to temporary disability benefits until he reaches maximum medical improvement; the determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *See Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See, e.g., Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

Employer asserts that the opinion of Dr. Spielman establishes that claimant's back condition reached a state of permanency as of October 22, 2008. Specifically, on this date, Dr. Spielman recommended that claimant undergo an anterior lumbar fusion and, absent such surgical intervention, he opined that claimant's back condition had reached

[1]Claimant previously sustained a work-related injury to his back on November 8, 2006, for which he underwent a laminectomy and diskectomy at L5 – S1 on February 16, 2007. EX 20 at 1-5.

maximum medical improvement.[2] EX 22 at 38 – 39. Claimant continued to receive conservative treatment for his back condition, and he sought additional opinions regarding the recommended back surgery, which he ultimately declined to undergo. In addressing this issue, the administrative law judge found that the record was not clear as to the date claimant's treatment became palliative rather than curative. He thus found that claimant reached maximum medical improvement on March 8, 2010, the day claimant "definitively refused" to undergo the back surgery recommended by his physicians. Decision and Order at 7. The record supports the administrative law judge's implied finding that claimant, subsequent to October 22, 2008, was undergoing additional medical treatment with a view to improving his back condition; moreover, claimant subsequently sought advice regarding the recommended surgery, and he ultimately decided not to pursue a surgical course of treatment. *See* Tr. at 32. Accordingly, as substantial evidence supports the administrative law judge's finding that claimant did not reach maximum medical improvement until he refused surgery, we affirm March 8, 2010, as the date of permanency. *See Methe*, 396 F.3d 601, 38 BRBS 99(CRT); *Beumer*, 39 BRBS 98; *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Kuhn v. Associated Press*, 16 BRBS 46 (1983).

Employer also challenges the administrative law judge's award of total disability compensation to claimant; specifically, employer avers that it presented substantial medical evidence sufficient to establish that claimant is capable of sedentary employment. 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 Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

In addressing this issue, the administrative law judge credited the testimony of claimant and his wife, as well as the opinions of Drs. Steinway and Crain, in concluding that, as a result of the combination of claimant's physical and psychological impairments and his pain-related narcotic drug use, claimant is incapable of performing any work on a consistent, repeated, day-to-day, basis. Decision and Order at 5. In this regard, claimant testified that, despite having undergone medical treatment which included physical therapy and six epidural injections, he continues to experience back pain which radiates into his legs. Claimant further testified that he continues to be prescribed Percocet, Cymbalta, Lyrica, Xanax and Skelaxin, which make him sleepy and unable to focus, and that his pain requires him to repeatedly lie down for relief. *See* Tr. at 30 – 37. Claimant's testimony was supported by that of his wife who, in addition to corroborating

[2]In a letter dated March 16, 2010, Dr. Spielman again opined that claimant would benefit from surgical intervention. EX 38 at 2.

claimant's testimony regarding his inability to ambulate, testified that claimant's medications make him both confused and sleepy. *See id.* at 67 – 73. Dr. Steinway, a Board-certified orthopedic surgeon, opined that claimant is incapable of performing consistent and productive employment, including sedentary work, based upon the pain claimant experiences and the pain medication he is prescribed in order to treat that pain. *See* CXs 23 at 3; 28 at 26 – 28. Dr. Crain, a Board-certified psychiatrist, diagnosed claimant with a severe major depressive disorder and depression which limits claimant's ability to concentrate; as a consequence of these conditions, Dr. Crain opined that claimant is incapable of returning to any form of employment on a consistent basis.[3] CXs 20 at 6; 30 at 16 – 21.

The administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw his own inferences therefrom. *See Pennsylvania Tidewater Dock Co. v. Director, OWCP,* 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). On appeal, employer seeks a reweighing of the evidence, which the Board is not empowered to do. The administrative law judge rationally found the testimony of claimant and his wife credible. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge found the opinions of Drs. Steinway and Crain, who accepted as valid claimant's reports of persistent, chronic, and disabling pain, to be well-reasoned and documented. The administrative law judge's finding that claimant is incapable of returning to any work as a result of the combination of his work-related physical and psychological conditions, as well claimant's use of narcotic medication to control his pain, is supported by this testimony and the credited medical evidence.[4] *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Thus, as it is supported by substantial evidence, the administrative law judge's finding that claimant is incapable of any employment is affirmed. *See J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th

[3]In his decision, the administrative law judge specifically noted that Dr. Nielson, a psychiatrist who evaluated claimant in April 2009, similarly diagnosed claimant with severe major depression. Decision and Order at 5; CX 7 at 2.

[4]The administrative law judge acknowledged that employer presented evidence that claimant retains the ability to perform sedentary work; he rationally determined, however, that employer's evidence did not fully and adequately account for the combined effects of claimant's physical and psychological injuries. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Cir. 2010). Accordingly, we affirm the administrative law judge's award of total disability compensation as of May 28, 2008. *Id.*

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge