BRB No. 91-2017

ROBERT L. WOODRUFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:_____
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Albert H. Sennett (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-449, 91-LHC-450) of Administrative Law Judge Alfred Lindeman awarding benefits 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).

In 1986, while working as a longshoreman for employer, claimant injured his back and knees. The parties settled the case, and claimant's doctor, Dr. Lavorgna, found claimant's condition to be permanent and stationary as of March 30, 1988. He recommended claimant be retrained for alternate work. Tr. at 18, 47, 60, 70. Against his doctor's orders, claimant returned to his regular work on December 16, 1989. On May 15, 1990, claimant was involved in a forklift accident at work and injured his right knee and left shin but did not aggravate his prior back condition. He returned to

work after a two-week recuperative absence, and, on June 7, 1990, he sustained a second back injury when the truck he was driving at work was rear-ended by another truck. Tr. at 71-74. Claimant has not worked since then.

Employer voluntarily paid temporary total disability benefits from May 16 through June 3, 1990, for the knee injury, and from June 8 through July 5, 1990, for the back injury. It then ceased payments and controverted the nature and extent of claimant's disability. Emp. Ex. 1 at 35; Cl. Exs. 11, 14. Claimant filed a claim for compensation. Cl. Exs. 10, 12. The administrative law judge conducted a hearing in which the parties disputed the cause, nature, and extent of claimant's disability, and he found that claimant's June 7, 1990, injury caused claimant's present back condition.[1] Decision and Order at 3. The administrative law judge also concluded that claimant's condition has not reached maximum medical improvement because: 1) Dr. Lavorgna's reports indicate that claimant's condition has not improved since the June 1990 injury; 2) claimant was visibly uncomfortable at the hearing and testified he is still in pain; 3) claimant appears to be willing to work; and 4) the doctors believe that epidural steroid injections, which had not been administered before the hearing, might help. Therefore, the administrative law judge found claimant to be temporarily disabled until the injections are provided. *Id.* at 4. Additionally, the administrative law judge determined that claimant presented a *prima facie* case of total disability, but he would not address employer's evidence regarding the availability of suitable alternate employment until the effectiveness of the epidural treatment had been determined. Therefore, he concluded that claimant is temporarily totally disabled from June 8, 1990, and continuing.[2] *Id.* at 5. Employer appealed the decision in August 1991.

On January 2, 1992, while its appeal was pending, employer filed a motion for modification with the administrative law judge, informing him that the epidural injections were not successful and that, as of November 18, 1991, Dr. Lavorgna found claimant's condition to be permanent and stationary.[3] In its motion, employer requested relief from its obligation for temporary total disability benefits after November 18, 1991, and it sought a credit for any payments made after that date "against any further awards that may be made." In response, claimant agreed that his condition reached maximum medical improvement on November 18, 1991; however, he requested that the administrative law judge modify the award to reflect his entitlement to permanent total disability benefits. The administrative law judge has taken no action on employer's motion for modification as the appeal had been filed and the record transferred to the Board.[4]

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[1]This finding has not been challenged on appeal.

[2]The administrative law judge also awarded claimant medical benefits, *i.e.*, the cost of another opinion on the effectiveness of epidural treatment, and he determined that claimant's counsel is entitled to a fee for his services. Decision and Order at 5.

[3]Employer filed a second notice of controversion and a notice of final payment on December 31, 1991, contesting claimant's entitlement to temporary disability benefits and its liability for any permanent disability benefits.

[4]No party informed the Board of the motion or requested remand of the case.

In its brief to the Board, which was filed after the motion for modification, employer contends that the administrative law judge used an improper standard to determine whether claimant's condition reached maximum medical improvement. Specifically, employer argues that the administrative law judge erred in postponing a decision on maximum medical improvement based upon the possible success of the epidural treatments and upon claimant's purported willingness to work.[5] Claimant has not responded to this appeal.

A permanent disability is one that has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The question of whether a disability is permanent is a medical, not an economic, question, which may be determined by whether the claimant's condition has reached maximum medical improvement. *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981). Therefore, the administrative law judge must discuss the medical opinions of record and must not rely on the date the claimant returned to work. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In considering the medical evidence, the prognosis of possible future improvement and stabilization of a claimant's condition will not preclude a finding that his condition has reached maximum medical improvement. *Watson*, 400 F.2d at 654; *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985); *Meecke v. I.S.O. Personnel Support Dep't*, 10 BRBS 670 (1979). However, a claimant's condition may be considered temporary if he is undergoing treatment with a view toward improving his condition. *See Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). Moreover, because economic factors are not involved, the possibility of undergoing vocational rehabilitation does not affect a determination on the nature of a claimant's disability. *Trask*, 17 BRBS at 60-61; *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979), *aff'd mem.*, 638 F.2d 1232 (5th Cir. 1981).

In this case, Dr. Lavorgna testified that claimant's condition as of the date of the hearing, March 20, 1991, had not changed since his June 1990 injury. Tr. at 47. Drs. Stark and Andrew concluded on December 20, 1990, that claimant's condition was permanent and stable and that claimant has a pre-existing permanent partial disability but no ratable disability from his 1990 injuries. Emp. Ex. 1 at 3-4. The administrative law judge discredited the findings of Drs. Stark and Andrew, stating that they are not compatible with claimant's credible subjective complaints of pain. Decision and Order at 4. Moreover, the administrative law judge emphasized the doctors' agreement that epidural treatments might help claimant's condition. He also credited claimant's previous return to work as signifying a willingness to work.[6]

[5]Despite making these arguments, employer concludes that claimant's condition reached maximum medical improvement on November 18, 1991 -- after the epidural steroid treatment had been attempted. Emp. Brief at 3-4.

[6]Contrary to the administrative law judge's finding, claimant testified that he has not worked and has not looked for work since his June 1990 injury. Tr. at 86.

The administrative law judge considered an improper factor in assessing the nature of claimant's disability in that he credited claimant's alleged willingness to work, which is irrelevant, and he postponed a decision on permanency until claimant underwent epidural treatment, without considering the likelihood of long-term improvement.[7] *See generally Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd in part and rev'd in part on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1989); *Mendez*, 11 BRBS at 28-29. Moreover, there is a motion for modification pending before the administrative law judge, and the parties appear to agree as to a date of permanency. We, therefore, vacate the administrative law judge's award of temporary total disability benefits, and we remand the case for him to reconsider the nature of claimant's disability and any other issues raised in employer's motion for modification.

Accordingly, the administrative law judge's award of temporary total disability benefits is vacated, and the case is remanded for consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[7]We note, however, that the hearing in this case was held only nine months after claimant's injury.