BRB No. 09-0664

IVAN LAIKUPU (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED: 05/26/2010
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Partial Benefits, Order Denying Claimant's Motion for Reconsideration and Granting Respondents' Motion for Reconsideration in Part, and Amended Decision and Order Awarding Partial Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Patrick B. Streb (Weltin Streb & Weltin, LLP), Oakland, California, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Partial Benefits, Order Denying Claimant's Motion for Reconsideration and Granting Respondents' Motion for Reconsideration in Part, and Amended Decision and Order Awarding Partial Benefits (2006-LHC-1719) 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 findings of fact and

conclusions of law of the administrative law judge which 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).

The deceased employee, a heavy equipment operator, injured his right hand and wrist on May 16, 2002. He underwent several surgeries on his wrist and returned to work on October 6, 2003, even though he continued to suffer persistent pain.[1] Although decedent initially refused additional surgical procedures, he again underwent surgery on October 1, 2004 in an attempt to relieve his pain.[2] His treating physician, Dr. Atkinson, reported that he would try to return decedent to work in March 2005. CX 5 at 3. However, on February 22, 2005, decedent suffered a fatal coronary arrest unrelated to his work injury. Employer voluntarily paid temporary total disability benefits from May 16, 2002 to September 30, 2003 and from September 28, 2004 to February 22, 2005. EX 4. The employee's widow (claimant) sought benefits pursuant to Section 8(d)(1) of the Act, 33 U.S.C. §908(d)(1), which provides for an award to the survivor of an injured employee who dies from causes unrelated to the work injury if he is receiving compensation for scheduled permanent partial disability at the time of his death.

In her Decision and Order Awarding Partial Benefits, the administrative law judge found that the employee's condition was not at maximum medical improvement at the time of his death and, therefore, no benefits are payable under the schedule. However, the administrative law judge awarded benefits for one additional day of temporary total disability, as well as reimbursement of $1,129.40 in travel expenses.[3] Both parties requested reconsideration of this decision. On reconsideration, the administrative law judge relied on Dr. Singer's opinion to reject claimant's assertions that decedent had suffered additional cumulative trauma at work following his first surgery and that he had reached maximum medical improvement prior to the additional trauma. The administrative law judge also denied reconsideration of her finding that decedent had not reached maximum medical improvement prior to his death. The administrative law judge

[1] Decedent underwent a right carpal tunnel release and a right wrist and hand flexor tenosynovectomy on September 16, 2002. CX 5 at 43. On May 5, 2003, he underwent a diagnostic and operative arthroscopy of the right wrist, right wrist synovectomy and debridement of scapholunate and lunotriquetral interosseous ligament tears. CX 5 at 40.

[2] The surgery consisted of a right ulnar shortening osteotomy with autogenous bone grafting. CX 5 at 38.

[3] Because of the decedent's complaint of pain, Dr. Atkinson ordered him off work on October 14, 2003, to return to work on October 15, 2003. Decision and Order at 9.

granted employer's motion to admit evidence on the issue of travel expenses, and found that claimant had requested expenses which had already been paid. In her amended Decision and Order, the administrative law judge modified her prior decision to award claimant only $74.60 in travel expenses.

Claimant appeals, contending that the administrative law judge erred in finding that decedent had not reached maximum medical improvement following his May 16, 2002, injury, such that she is not entitled to benefits pursuant to Section 8(d)(1). Claimant also contends that the administrative law judge erred in finding that decedent did not sustain a cumulative trauma injury from his work activities following his return to work on October 1, 2003, such that he was permanently partially disabled prior thereto and any temporary disability at the time of death was due to a new injury. Claimant further avers that the administrative law judge erred in permitting employer to introduce new evidence in conjunction with its motion for reconsideration of the award of travel expenses. Employer responds, urging affirmance of the administrative law judge's decisions.

Claimant first contends that the administrative law judge erred in finding that decedent's May 16, 2002, injury had not reached maximum medical improvement at the time of his death in February 2005. Section 8(d)(1) of the Act states, "If an employee who is receiving compensation for permanent partial disability pursuant to Section 8(c)(1)-(20) dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, …" 33 U.S.C. §908(d)(1);[4] *see Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, *mod. on other grounds on recon.*, 28 BRBS 156 (1994); *see also Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). An award of scheduled benefits is predicated solely on the existence of a permanent anatomical impairment to a member listed in the schedule. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). A disability may be permanent when 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. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 640 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Permanency also may be established as of the date the employee reaches maximum medical improvement as determined by a

[4] The unaccrued portion of the award is payable to eligible survivors under Section 8(d)(1). Any benefits accruing prior to death are payable to the employee's estate. *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, *mod. on other grounds on recon.*, 28 BRBS 156 (1994).

physician, such as the date that a permanent impairment rating is given. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Dr. Atkinson, an orthopedic surgeon and hand specialist, was the decedent's treating physician. Following the first two surgical procedures in September 2002 and May 2003, decedent was released to return to work on October 6, 2003. Dr. Atkinson stated on September 22, 2003, that he anticipated decedent's condition would be stable and ratable in about two months. CX 5 at 12. On January 13, 2004, decedent was examined by Dr. Singer. He reported that decedent was in considerable pain and stated that additional surgery might improve his condition. Dr. Singer stated that if decedent refused surgery, he had a four percent impairment to the upper extremity. CX 6. Decedent returned to Dr. Atkinson on February 24, 2004; Dr. Atkinson also recommended additional surgery, but decedent refused as he did not want to miss work. CX 5 at 10-11. Dr. Atkinson stated that if decedent did not have surgery, he considered the wrist condition to be "stable and ratable" at that time. *Id.*

Decedent subsequently decided to undergo additional surgery, which was performed on October 1, 2004. CX 5 at 9. On November 15, 2004, Dr. Atkinson stated he would try to return decedent to work in six weeks. *Id.* at 5. However, when Dr. Atkinson last saw decedent on January 24, 2005, approximately one month before he died, he reported that decedent was still in pain and that an attempt at work would not be made until March 2005. CX 5 at 3. After decedent's death, Dr. Atkinson analyzed the objective data from the December 2004 and January 2005 visits, such as grip strength, pronation, supination, and extension, and opined that decedent had a six percent impairment of the right wrist and a one percent impairment of the forearm. *Id.* at 1. In his deposition, Dr. Atkinson stated that decedent was not at maximum medical improvement in January 2005. Dep. at 25. He opined that decedent was likely close to maximum medical improvement at the time of death, as he had anticipated returning decedent to work around March 1. *Id.* at 19. Dr. Atkinson also stated, however, that generally six months, or April 2005, is the time frame for full recovery from surgery. *Id.* at 33. He inconsistently stated both that he was speculating as to the likelihood of permanency at the time of death and that to a reasonable degree of medical probability decedent had reached permanency as of the date of death. *Id.* at 33, 35.

The administrative law judge found that decedent's condition was not permanent as of the date of death. She found that, as Dr. Atkinson had not examined decedent after January 24, 2005, and admitted that he was speculating, she would not rely on his opinion to find that decedent's condition was permanent as of the date of death. The administrative law judge found that the objective data on which Dr. Atkinson relied, as well as physical therapy notes through February 18, 2005, showed that decedent was

continuing to improve. *See* CXs 5 at 3-8; 7. The administrative law judge also stated that decedent's short-term physical therapy goals, though met by February 18, had taken longer than anticipated such that it was likely that his long term goals, those of restoring strength and returning work, would not have been met by the March 14 date set by the therapist. *See* CX 7 at 115.

We affirm the administrative law judge's finding that decedent's condition was not at maximum medical improvement prior to his death. The administrative law judge acted within her discretion in declining to credit that portion of Dr. Atkinson's deposition testimony that decedent had reached maximum medical improvement on the grounds that it was speculative and not supported by the contemporaneous treatment records. It is well-established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh that evidence. *See, e.g., Burns v. Director, OWCP,* 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge provided rational bases for declining to credit Dr. Atkinson's opinion. *Id.* Accordingly, we affirm the administrative law judge's finding that decedent had not reached maximum medical improvement after his October 2004 surgery as of the time of his death. *See Dixon v. John J. McMullen & Assoc.*, 19 BRBS 243 (1986).

Claimant next argues that the administrative law judge erred in not awarding benefits for the four percent impairment assigned by Dr. Singer on January 13, 2004, because decedent had reached maximum medical improvement at that time and/or the subsequent surgery and ensuing disability were due to cumulative trauma he sustained following his return to work in October 2003. *See Henry v. George Hyman Constr. Co.*, 15 BRBS 475 (1983), *rev'd on other grounds* 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984) (existing permanent partial disability is compensable under Section 8(d) notwithstanding that employee was temporarily totally disabled at time of death).

On January 13, 2004, Dr. Singer stated that decedent's wrist was not stable and ratable, as he had "considerable symptoms in his wrist." CX 6. Dr. Singer recommended further surgery, stating that it was reasonably likely to offer some relief for decedent's pain and impairment of function. Dr. Singer stated, however, that if decedent did not undergo additional surgery, his impairment to the upper extremity at that time was four percent. *Id.* The administrative law judge found that since decedent had undergone the recommended surgery, the rating given by Dr. Singer was negated by the terms of his own opinion. Moreover, the administrative law judge relied on Dr. Singer's statement that decedent's condition was not stable in January 2004.

We affirm this finding as it is supported by substantial evidence and in accordance with law. A condition is permanent where an employee is no longer undergoing treatment with a view towards improving his condition. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). Where surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 46 (1983). As decedent's condition was not stable and the impairment rating was contingent upon his not undergoing surgery, and decedent underwent additional surgery with a view toward improving his pain and functional capacity, the administrative law judge rationally found that decedent's condition was not permanent in January 2004. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

On reconsideration, the administrative law judge rejected claimant's contention that decedent's continued work aggravated his condition, such that he was at maximum medical improvement prior to the aggravation. Although decedent complained of pain and an inability to perform aspects of his work, the administrative law judge found that there are no contemporaneous medical records reporting that decedent's work after October 6, 2003, aggravated his condition.[5] The administrative law judge declined to find from Dr. Atkinson's deposition testimony that decedent's work aggravated his condition because of the absence of contemporaneous records supporting the opinion.[6] The administrative law judge found it just as likely that the pain from the original injury and surgery led decedent to finally have additional surgery in October 2004. Thus, the administrative law judge found that decedent's original injury had not reached maximum medical improvement at the time of his death, such that no scheduled benefits are payable.

We affirm this finding as it is within the administrative law judge's discretion to rely on the contemporaneous medical reports and to infer that decedent's condition was due to the original injury. The administrative law judge gave a rational reason for

[5] Dr. Atkinson's February 23, 2004, report states that decedent did not want to undergo surgery at that time, as he needed to keep working for financial reasons. CX 5 at 10-11.

[6] Claimant's counsel asked Dr. Atkinson if decedent's work put more pressure on his wrist and caused increased pain. Dr. Atkinson replied that decedent had persistent pain in spite of his initial surgery. He said that decedent had a job that required a lot of use of his hand. Dr. Atkinson replied, "yes, yeah, uh-huh" to the question whether decedent's work subjected him to "increased trauma," and responded affirmatively to the statement that "apparently" the pain increased to the point that decedent decided to have additional surgery. Dep. at 16-17.

rejecting Dr. Atkinson's deposition testimony surmising that decedent's continued work aggravated his condition. *See generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). Therefore, as it is supported by substantial evidence, we affirm the finding that decedent's condition did not reach maximum medical improvement prior to his death and the consequent denial of benefits under the schedule and Section 8(d).

Claimant also appeals the administrative law judge's decision to admit on reconsideration employer's evidence that it had already paid some of the claimed mileage expenses. Claimant avers that such evidence was admitted in violation of 29 C.F.R. §18.54(c). In her initial decision, the administrative law judge awarded claimant reimbursement for mileage expenses of $1,129.40, pursuant to 33 U.S.C. §907(a), noting that employer had not objected to the request. In its Motion for Reconsideration, employer sought admission of evidence showing it had previously paid some of the claimed expenses.[7] Claimant objected to the admission of this evidence because the record was already closed, citing 29 C.F.R. §18.54(c).[8]

The administrative law judge acknowledged Section 18.54(c), but, relying on 29 C.F.R. §18.29, giving her the authority to ensure a "fair and impartial hearing," she admitted the payment documentation into the record and modified her decision to disallow the costs that had been reimbursed. The administrative law judge stated that the prohibition against double recovery outweighed employer's failure to object to the claimed costs before the record closed. In her amended decision, the administrative law judge awarded claimant $74.60 in travel expenses, noting that claimant did not dispute employer's prior payments.

[7] Employer submitted documents showing that decedent had been reimbursed for 55 of the 58 trips he made to medical appointments; claimant acknowledged that $964.10 had been received.

[8] Section 18.54(c) states:

> Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record. However, the administrative law judge shall make part of the record, any motions for attorney fees authorized by statutes, and any supporting documentation, any determinations thereon, and any approved correction to the transcript.

We affirm the administrative law judge's decision to admit this evidence on reconsideration. Section 23(a) of the Act, 33 U.S.C. §923(a), provides that the administrative law judge is not bound by "common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties." *See also* 33 U.S.C. §702.339. In this case, the administrative law judge did not abuse her discretion in admitting employer's documentation on reconsideration in order to award only those additional expenses to which claimant was entitled. *See Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732–733 (1981) (within administrative law judge's discretion to exclude evidence offered in violation of pre-hearing order). Therefore, claimant's contention of error is rejected and the award of expenses of $74.60 is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Partial Benefits, Order Denying Claimant's Motion for Reconsideration and Granting Respondents' Motion for Reconsideration in Part, and Amended Decision and Order Awarding Partial Benefits are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge