

MICHAEL T. BREMBY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 11/15/2005
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Third Remand (97-LHC-2640) of Administrative Law Judge Richard K. Malamphy 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 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).

This case is before the Board for the fourth time. Claimant injured his left wrist on April 5, 1995, while grinding welds. On October 31, 1995, Dr. Freund removed a non-work-related ganglion cyst and two other abnormalities from claimant's left wrist. CX 1 at 10-11. Claimant returned to restricted duty on November 16, 1995. Starting on May 29, 1996, claimant's work restrictions were lifted and then reinstituted on several

occasions. Dr. Freund imposed the last set of restrictions on November 1, 1996, with an expiration date of February 20, 1998. On December 6, 1996, employer laid off claimant from his light duty job at employer's facility for economic reasons. Claimant commenced full-time employment with Norfolk Naval Shipyard on February 24, 1997. Claimant sought temporary total disability benefits from December 6, 1996, through February 24, 1997.

In his first Decision and Order, Administrative Law Judge Fletcher E. Campbell, Jr., found that claimant failed to present sufficient evidence to establish invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and found that claimant's wrist injury is not work-related. Thus, the administrative law judge denied benefits. On appeal, the Board reversed the administrative law judge's finding of no causation, held that claimant's condition is work-related as a matter of law, vacated the administrative law judge's denial of disability compensation, and remanded the case for the administrative law judge to reconsider claimant's entitlement to disability benefits. *Bremby v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 99-0325 (Dec. 16, 1999)(unpub.).

On remand, Judge Campbell found that claimant did not establish a *prima facie* case of total disability; alternatively, he found that employer established the availability of suitable alternate employment during the period at issue, and he therefore once again denied the compensation benefits sought by claimant. Claimant again appealed. The Board held that Judge Campbell erred in considering whether claimant established a *prima facie* case of total disability, but affirmed the finding that employer established that suitable alternate employment was available from December 6, 1996, to February 24, 1997. The case was remanded for Judge Campbell to consider whether claimant rebutted employer's evidence of suitable alternate employment by establishing that he diligently sought employment post-injury. *Bremby v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 02-0216 (Oct. 24, 2002)(unpub.).

On remand, Judge Campbell found, *inter alia*, that claimant did not establish due diligence in seeking employment, and he again denied claimant's claim for benefits. Claimant appealed the administrative law judge's finding that he was not diligent in seeking employment. The Board affirmed the finding that claimant was not totally disabled from December 6, 1996, to February 5, 1997, but remanded the case for the administrative law judge to address the date on which claimant's condition reached maximum medical improvement, which would determine whether claimant could receive an award of temporary partial disability compensation for the period between his

December 6, 1996, layoff, and February 5, 1997.¹ *Bremby v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0590 (June 8, 2004) (unpub.).

In his Decision and Order on Third Remand, Administrative Law Judge Richard K. Malamphy (the administrative law judge)² found that claimant's condition reached maximum medical improvement on November 1, 1996, and that therefore claimant is not entitled to temporary partial disability compensation for the disputed period of time. Accordingly, the administrative law judge denied the compensation benefits sought by claimant.

In the present appeal, claimant challenges the administrative law judge's finding that his condition reached maximum medical improvement on November 1, 1996. Specifically, claimant argues that the factors upon which the administrative law judge relied in addressing this issue are insufficient to support his rejection of the only medical report which addressed the date on which claimant's condition reached maximum medical improvement, that the administrative law judge substituted his judgment for that of a physician regarding a medical issue, and that the evidence of record establishes that maximum medical improvement was reached on February 5, 1997, the date reported by Dr. Freund, his treating physician. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

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). 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. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). In this regard, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

¹ This determination was necessary since, while the Act's schedule is the exclusive remedy available to claimant once his condition reaches permanency, *see Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980), an award of temporary partial disability compensation based on a loss of wage-earning capacity is appropriate if claimant's disability remained temporary during the relevant period of time. *See* 33 U.S.C. §908(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1988).

² The case was reassigned to Judge Malamphy when Judge Campbell retired in June 2004. Decision and Order on Third Remand at 4.

In concluding that claimant reached maximum medical improvement on November 1, 1996, the administrative law judge found, based upon the record before him, that claimant's last set of restrictions were imposed on that date and that the record supports a conclusion that claimant's condition had stabilized at that time. *See* Decision and Order at 7; CX 1 at 20-21. In challenging this finding, claimant asserts that his condition had not reached maximum medical improvement until February 5, 1997, as opined by his treating physician, Dr. Freund. In a letter dated April 21, 1997, Dr. Freund wrote that claimant "appears to have reached maximum medical improvement as of his last visit in the office on February 5, 1997." EX 25. In his subsequent deposition taken on May 11, 1998, Dr. Freund testified that claimant reached maximum medical improvement "about a year and a-half ago," and that the restrictions which he placed on claimant in January 1997 did not change in February 1997 and remain in effect. CX 1 at 19, 23. In addressing this issue, the administrative law judge acknowledged Dr. Freund's initial statement that claimant reached maximum medical improvement on February 5, 1997, but found that opinion to be inconsistent with the physician's treatment of claimant. Specifically, the administrative law judge found that, as Dr. Freund placed his final set of restrictions on claimant on November 1, 1996, and he subsequently did not change those restrictions, it appeared obvious that claimant's condition stabilized as of the date of the implementation of those restrictions, November 1, 1996. Moreover, the administrative law judge noted that the fact that claimant's condition remained unchanged through the date of the second hearing in this case, May 16, 2001, a period of approximately five years, is indicative of the permanency of claimant's condition.³ *Id.*

In his role as factfinder, the administrative law judge is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). The administrative law judge discussed the relevant evidence in addressing the issue of the nature of claimant's disability, and claimant has not established that the administrative law judge committed reversible error in this regard. Accordingly, we affirm the administrative law judge's finding that as claimant's work-related condition stabilized as of November 1, 1996, he reached permanency as of that date, as that determination is supported by substantial evidence and is in accordance with law. *See generally Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989).

³ Amy Lanman, employer's vocational consultant, wrote that she met with Dr. Freund on March 25, 1998, and he confirmed the following restrictions for claimant which have remained in effect since November 1, 1996: limited lifting to 10 pounds with maximum carrying distance of 20 feet, no vertical ladders, no pushing/pulling with left hand, no firm grasp with left hand and no vibratory tools. EX 22 at 2.

Accordingly, the administrative law judge's Decision and Order on Third Remand denying claimant's claim for temporary partial disability benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge