

BRB Nos. 88-809
and 91-272

JULIO GIONTI)
)
 Claimant-Petitioner)
)
 v.)
)
 GENERAL DYNAMICS) DATE ISSUED:
 CORPORATION)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeals of the Decision on Motion for Reconsideration and Decision and Order on Modification Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry & Neusner), Groton, Connecticut, for claimant.

Edward J. Murphy, Jr. (Murphy and Beane), Boston, Massachusetts, for employer.

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

PER CURIAM:

Claimant appeals the Decision on Motion for Reconsideration and Decision and Order on Modification Awarding Benefits (86-LHC-1763) of Administrative Law Judge David W. Di Nardi 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).

Claimant, on July 22, 1976, sustained injuries to his back, shoulder and skull when he was struck by two utility poles while in the course of his employment with employer; claimant subsequently developed weakness in his left knee as a result of the July 1976 work-related incident. In September 1976, claimant underwent surgery on his knee for a torn medial meniscus; a follow-up surgical procedure was thereafter performed in March 1977. Claimant continued to experience knee, neck, and lower back pain and, on August 20, 1981, underwent arthroscopic surgery on his knee; claimant has not worked since the July 1976 work-incident.

In his Decision and Order dated January 4, 1988, the administrative law judge found that

claimant's knee and back conditions are related to his 1976 work accident, that claimant was unable to return to his former employment as a result of those conditions, and that employer had not submitted any evidence of suitable alternate employment. After further determining that, due to claimant's unwillingness to be examined by employer's physicians and a vocational rehabilitation counselor, there was no credible evidence that claimant reached maximum medical improvement, the administrative law judge awarded claimant temporary total disability benefits. 33 U.S.C. §908(b). Claimant's Motion for Reconsideration was subsequently denied in a Decision on Motion for Reconsideration dated February 4, 1988.

Claimant filed an appeal of the administrative law judge's decision with the Board, challenging the administrative law judge's determination that claimant's condition was not permanent. BRB No. 88-809. Subsequent to his notice of appeal, claimant sought modification with the administrative law judge, contending that there had been a mistake in a determination of fact. On March 28, 1989, the administrative law judge issued an order in which he found that claimant's motion for modification was proper; the administrative law judge then ordered claimant to submit the appropriate applications to the Board so that the case could be remanded to him. In an Order dated August 31, 1989, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings.

In a Decision and Order on Modification Awarding Benefits dated April 4, 1990, the administrative law judge reaffirmed his finding that claimant is totally disabled. Next, after determining that claimant's problems are now psychological, the administrative law judge concluded that claimant reached maximum medical improvement on March 1, 1988, the date of claimant's last examination with Dr. Franek. In crediting the opinion of Dr. Franek, the administrative law judge rejected claimant's assertion that maximum medical improvement had been reached on July 18, 1980, based upon the report of Dr. Kessler, since (1) this report indicated that claimant required extensive medical treatment for his knee and back, (2) the report did not mention claimant's psychological problems, and (3) under Section 22 of the Act, 33 U.S.C. §922, he could not modify his 1988 Decision and Order based on a report which pre-dated that decision. Lastly, the administrative law judge found that employer is entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing gastrointestinal problems and personality disorder.

On appeal, claimant challenges the administrative law judge's finding that claimant's disabling condition became permanent as of March 1, 1988.¹ BRB No. 91-272. In response, employer, in urging affirmance of the administrative law judge's decisions, asserts that claimant cannot rely upon newly submitted evidence to establish an earlier date of maximum medical improvement.

In this case, appeals of both the administrative law judge's initial decision declining to find claimant's condition permanent and the decision on modification of that initial finding under Section 22, 33 U.S.C. §922, are before the Board. Both appeals present the issue of whether the administrative law judge's findings regarding the permanency of claimant's condition are supported by substantial evidence. Since both parties have raised arguments about the scope of modification, at the outset we will address the administrative law judge's statements in this regard. Modification of a decision is permitted based on a mistake of fact in the initial decision or a change in the claimant's condition. *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). When considering a motion for modification, the administrative law judge is permitted to have before him the record from the prior hearing. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). In order to obtain modification for a mistake in fact, however, the modification must render justice under the Act. *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976).

In the instant case, Dr. Kessler's July 18, 1980 report, upon which claimant relies in support of his contention that maximum medical improvement was reached in July 1980, was submitted into evidence at the 1986 hearing, *see* Cl. Ex. 5-3; thus, the report was properly before the administrative law judge at the time of the initial decision and in the modification proceeding. *See Dobson*, 21 BRBS at 174. On modification, although the administrative law judge erred in stating that this report could not be used by claimant to seek modification of the original decision, *see Aerojet-General Shipyards, Inc.*, 404 U.S. at 254, the administrative law judge subsequently considered the report when addressing the issue of permanency. Therefore, any error committed by the administrative law judge in making this statement is harmless, since the administrative law judge properly considered the record as a whole when addressing claimant's request for modification.²

¹In an Order dated March 19, 1992, the Board reinstated claimant's appeal of the administrative law judge's Decision on Motion for Reconsideration, BRB No. 88-809, and consolidated that appeal with claimant's appeal of the administrative law judge's Decision and Order on Modification Awarding Benefits, BRB No. 91-272. 20 C.F.R. §802.104.

²We note, however, that the administrative law judge incorrectly stated that claimant's modification request was based upon a change in claimant's condition. *See* Decision and Order on Modification at 8. Claimant actually requested modification based upon a mistake of fact in the finding in the initial decision. *See* Cl. Ex. 25 at 3.

As the sole issue presented by both appeals concerns the permanency of claimant's condition, we will review the record as a whole for substantial evidence supporting the administrative law judge's finding that claimant's disability was temporary from 1976 until 1988. The permanency of any disability is a medical rather than an economic concept. *See generally Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988). A disability is generally considered permanent as of the date the claimant's condition reaches maximum medical improvement, or if it has continued for a lengthy period and appears to be of a lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Mills v. Marine Repair Service*, 21 BRBS 115 (1988), *modified in part on recon.*, 22 BRBS 335 (1989). A determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Moreover, if anticipated surgery is not expected to improve the claimant's condition, the condition may be permanent. *See Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), *vacating* 877 F.2d 1231, 22 BRBS 83 (5th Cir. 1989). Furthermore, the date a doctor rates a condition may be deemed to be the date of maximum medical improvement. *See generally Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 100 (1979).

In the instant case, claimant sought, and the administrative law judge initially awarded, total disability benefits solely on the basis of his knee condition. *See* Original Decision and Order at 9-10. On modification, however, the administrative law judge found a maximum medical improvement date with regard to claimant's personality disorder.³ Regarding claimant's knee condition, for which total disability benefits were awarded, all the physicians of record indicate that claimant's condition has not improved since the work accident and is long-lasting in nature. Specifically, in a report dated July 18, 1980, Dr. Kessler, whom the administrative law judge credited when addressing the extent of claimant's orthopedic problems, recommended various forms of treatment for claimant's knee and back conditions, stating:

This patient has been considered totally disabled for any type of gainful employment since the time of the accident on July 22, 1976. The prognosis for eventual complete functional and symptomatic recovery of the lumbar injury and the injury to his left knee is guarded. In my opinion, this patient will not be able to return to any type of employment requiring heavy lifting, pulling or pushing, prolonged standing or weight bearing and prolonged sitting.

Cl. Ex. 5-5; Emp. Ex. 24. This opinion appears consistently throughout Dr. Kessler's reports from 1978 until 1982. Cl. Ex. 5. Additionally, during his deposition testimony, Dr. Kessler

³We note that neither party contests the administrative law judge's implied finding that claimant's current psychological problems are related to his July 1976 work injury. *See* Modification Decision and Order at 6-9.

unequivocally stated that claimant has a permanent disability in his knee and lower back and that at no point did he feel claimant would be able to return to work due to his knee condition. Emp. Ex. 23 at 13, 18.

Dr. Kessler's prognosis is supported by the opinions of Drs. Garrahan and Rowe. On March 22, 1979, Dr. Garrahan stated: "The prognosis looks extremely poor. At the moment, [claimant] is wearing a long-leg brace but it sounds like reexploration [sic] of the extremity for the relief of pain from the sensitive nerve is in order." Cl. Ex. 7. In his report of June 22, 1983, Dr. Rowe, while recommending further surgery, opined that he did not consider claimant physically able to return to full work. Cl. Ex. 8-8. Thus, the record contains no evidence that claimant's knee condition, for which he was awarded benefits by the administrative law judge, improved subsequent to July 18, 1980. Rather, the uncontroverted medical reports of record indicate that claimant's knee condition is long lasting in nature and has not improved since July 18, 1980, approximately four years after the work accident occurred. Accordingly, as claimant has established by substantial evidence that his knee condition has not improved subsequent to July 18, 1980, we vacate the administrative law judge's finding that claimant reached maximum medical improvement on March 1, 1988, and modify the administrative law judge's decision to reflect that claimant's knee condition reached maximum medical improvement, and thus permanency, as of July 18, 1980, approximately four years after his work-related accident.⁴ See *Watson*, 400 F.2d at 649.

⁴We note that our decision to modify the administrative law judge's decision to reflect an earlier date of maximum medical improvement, based upon claimant's knee condition, is supported by the testimony of Dr. Franek, claimant's psychiatrist, who testified that claimant's psychological condition is long lasting, indefinite, and was in place as early as 1978. Cl. Ex. 24 at 14.

Accordingly, the administrative law judge's Decision on Motion for Reconsideration and Decision and Order on Modification Awarding Benefits are modified to reflect July 19, 1980, as the date upon which claimant's disabling condition became permanent. In all other respects, the administrative law judge's Decision on Motion for Reconsideration and Decision and Order on Motion for Modification are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge