BRB Nos. 91-0519
and 91-0519A

EUGENE M. HEIDLOFF)
)
Claimant-Respondent)
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v.)
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COLUMBIA I AND S, INCORPORATED) DATE ISSUED:
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and)
)
SAIF CORPORATION)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent)
Cross-Petitioner) DECISION and ORDER

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

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Randolph B. Harris, SAIF Corporation, Portland, Oregon, for employer/carrier.

Janet R. Dunlop, Counsel for Longshore (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Decision and Order (89-LHC-3019) of Administrative Law Judge Ralph A. Romano[1] 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 sustained a back injury on December 13, 1982, while working for employer aboard a Navy ship at Swan's Island. He underwent a lumbar laminectomy and diskectomy at L4-5 on December 24, 1982, and continued to be treated for his back as well as other related medical problems periodically. On August 5, 1988, Drs. Grewe and Waldram performed a combined laminectomy/spinal fusion. Employer voluntarily paid claimant temporary total and permanent partial disability compensation for various periods. Claimant has not worked since his 1982 injury and sought permanent total disability compensation under the Act.

The administrative law judge awarded claimant temporary total disability benefits from December 13, 1982, until January 16, 1984, and permanent total disability benefits thereafter. The administrative law judge further determined that during the period from May 27, 1987, through August 16, 1988, claimant was entitled to compensation based upon the stipulated compensation rate of $512.45 rather than at the $405.76 compensation rate which employer voluntarily paid, and that employer accordingly was liable for a Section 14(e) assessment on the amount owed. The administrative law judge also awarded claimant interest and an attorney's fee, as well as any outstanding and future work-related medical expenses. 33 U.S.C. §907.

On appeal, employer contends that the administrative law judge erred in awarding claimant permanent total disability benefits and in finding that claimant reached maximum medical improvement on January 17, 1984. Additionally, employer maintains that if claimant is permanently disabled, the case should be remanded for the administrative law judge to consider its entitlement to Section 8(f) relief. Claimant responds, urging that the administrative law judge's findings regarding the date of maximum medical improvement and the extent of his disability be affirmed. Claimant also expresses agreement with the Director's position on cross-appeal. The Director also responds, agreeing with employer that the case should be remanded for the administrative law judge to make specific findings of fact regarding the absolute defense and employer's entitlement to Section 8(f) relief, as is required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A).

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[1]The hearing took place before Judge Murrett who subsequently died. Pursuant to the parties' agreement, the Decision and Order was written by Judge Romano based on the record.

On cross-appeal, the Director contends that claimant is entitled to Section 10(f) adjustments and a Section 14(e) assessment on the adjusted amounts owed, as well as on the additional compensation received, for the period between May 27, 1987, and August 28, 1987. Employer replies, reiterating its argument regarding the date of maximum medical improvement and contending that if the date of maximum medical improvement is determined to be in 1989, as it asserts it should be, the Section 10(f) adjustments and Section 14(e) assessments sought by the claimant and the Director should be disallowed.

Extent of Disability

Employer first contends that the administrative law judge erred in finding claimant permanently totally disabled, as the testimony of its vocational specialist, Ms. Heffner, is sufficient to meet its burden of establishing the availability of suitable alternate employment. Employer asserts that claimant has chosen not to work and has effectively removed himself from the labor market. Employer maintains that Ms. Heffner's opinion should be credited over that of claimant's vocational expert, Dr. Rollins, who testified that claimant was unemployable, because her credentials are superior and her opinion better documented.

We reject employer's arguments. As it is undisputed that claimant could not perform his usual work, he established a *prima facie* case of total disability. Accordingly, the burden shifted to employer to demonstrate the availability of realistic specific job opportunities which claimant could perform, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Bumble Bee Seafood v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Royce v. Elrich Construction Co.*, 17 BRBS 157 (1985); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 (1984).

In the present case, both claimant and the employer introduced vocational evidence. Although Ms. Heffner did not interview claimant, after reviewing his medical records, she identified sedentary to light telemarketing, desk clerk, dispatcher, and security guard positions as suitable for claimant on a physical basis. *See* EX. 136; EX. 137 at 14.[2] After considering the testimony of both vocational experts, the administrative law judge concluded that Ms. Heffner's opinion was not sufficient to meet employer's burden. The administrative law judge found Ms. Heffner's opinion deficient because she did not inform potential employers of claimant's work-related limitations. In addition, the administrative law judge noted that many of the positions she identified involved verbal communication skills and clerical abilities which Ms. Heffner, having performed no testing, did not ascertain that claimant possessed. The administrative law judge also questioned whether the jobs identified were realistically available to claimant in view of his history of having only performed

[2]Claimant's treating orthopedic surgeon, Dr. Waldram, deposed that claimant should avoid any job requiring repetitive bending, repetitive and heavy lifting, prolonged sitting, and heavy pushing or pulling. CX. 1 at 18-19.

manual labor and his minimal educational background.[3] The administrative law judge further reasoned that rather than showing that claimant would likely be hired, Ms. Heffner's testimony appears to have shown the opposite. On the other hand, the administrative law judge found Dr. Rollins' opinion that claimant would not and could not obtain employment better reasoned. CX. 3. Because Dr. Rollins interviewed claimant and thoroughly familiarized himself with the treating physicians' views with regard to claimant's functional capacity, the administrative law judge viewed Dr. Rollins as being in a better position to render an informed opinion.

The Act does not require that a vocational expert contact prospective employers directly. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). The administrative law judge's decision that Ms. Heffner's opinion was insufficient because she did not inform prospective employers of claimant's limitations therefore does not provide a valid basis for his finding. Any error in this regard is harmless, however, because the administrative law judge reasonably concluded that Ms. Heffner's testimony failed to establish that the alternate work identified was suitable and realistically available to someone with claimant's lack of verbal skills, limited education, and work experience. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). Inasmuch as Ms. Heffner conceded in her deposition testimony that claimant did not currently possess the skills necessary for him to secure the alternate work identified and that he was not currently ready for placement, *see* EX. 137 at 51, it would have been irrational for the administrative law judge to have concluded otherwise.

Moreover, contrary to employer's assertions, the administrative law judge acted within his discretion in crediting Dr. Rollins' opinion over that of Ms. Heffner. *See Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1582 (1991). The administrative law judge found that Dr. Rollins' opinion that claimant lacked the capacity to secure employment was the better reasoned opinion. Dr. Rollins' opinion provides substantial evidence to support the administrative law judge's award of permanent total disability benefits. As employer has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting vocational evidence and making credibility determinations, we affirm his finding. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding*, No. 91-70743 (9th Cir. Sept. 17, 1993); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Employer's arguments regarding claimant's lack of diligence in locating alternate work need not be addressed; claimant's diligence in locating alternate work is irrelevant, where, as here, employer has failed to establish the availability of suitable alternate employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

[3]The administrative law judge found that the security guard and assembly positions were facially inappropriate apparently based on Dr. Waldram's deposition testimony to that effect. *See* CX. 1 at 19.

Maximum Medical Improvement

We also reject employer's argument that the administrative law judge erred in finding that claimant reached maximum medical improvement on January 17, 1984. Two legal standards have developed for determining whether a disability is permanent or temporary in nature. *See Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120, 122 (1988). Pursuant to the first standard, an employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Under the standard enunciated in *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g den.*, 404 F.2d 1059 (5th Cir. 1968)(*per curiam*), *cert. denied*, 394 U.S. 976 (1969), a disability is permanent, regardless of maximum medical improvement, if the condition is of lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.

Employer argues on appeal that the administrative law judge's finding that claimant reached maximum medical improvement on January 17, 1984, ignores six years of subsequent medical history, during which time claimant underwent several operations, not only for his back, but for other conditions.[4] Moreover, employer asserts that the administrative law judge's finding ignores the fact that claimant's condition substantially improved subsequent to his 1988 surgery. Employer contends that in determining the date of permanency, the administrative law judge should have credited the opinion of claimant's treating physicians, Drs. Waldram and Grewe, that claimant's condition became stationary sometime between July 22, 1989, and October 23, 1989, rather than the one-time medical assessment conducted by Orthopaedic Consultants in January 1984. Employer is essentially arguing that claimant's disability did not become permanent until 1989 because he continued to experience back problems necessitating treatment and surgeries up to that time.

We affirm the administrative law judge's finding that permanency was reached as of January 17, 1984, under the standard set forth in *Watson*. In concluding that claimant's condition became permanent as of January 17, 1984, the administrative law judge considered the fact that claimant underwent further surgery thereafter and continued to receive treatment between 1984 and 1989. He found these facts non-determinative, concluding that pursuant to *Watson* permanency exists when claimant's condition has continued for a lengthy time and it is apparent that improvement is unlikely through the normal healing process. The administrative law judge interpreted the 1989 opinions of Drs. Grewe and Waldram that claimant was "stable" or "medically stationary" at that time as describing claimant's status after his 1988 surgery. The administrative law judge rationally interpreted those opinions as not addressing maximum medical improvement in the context of claimant's overall condition relative to the 1982 injury.

Crediting the report of the Orthopaedic Consultants that claimant reached maximum medical

[4]During the interval between 1984 and 1989, claimant underwent esophageal and hernia surgeries.

improvement on January 17, 1984, as it was based upon a thorough examination conducted by three qualified physicians, well-reasoned, and fully documented, the administrative law judge accepted its conclusion as the most probative evidence on the issue. The administrative law judge noted that as of January 17, 1984, claimant's condition had continued for a lengthy period of time and, in retrospect, it was evident that from that point on claimant's condition was such that it became unlikely to improve through a normal healing process. Because the Orthopaedic Consultants' report provides substantial evidence to support the administrative law judge's finding that maximum medical improvement was reached under the *Watson* criteria as of January, 17, 1984, we affirm this finding. *See Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 61 (1985). Contrary to employer's assertions, the fact that claimant continued to undergo additional treatment and surgery does not preclude a finding of permanency where, as here, there is evidence which establishes that his disability is of a lengthy and indefinite duration, and lacked a normal healing period. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279, 286 (1990).

Section 8(f)(3)

Employer next contends that if claimant is entitled to permanent disability compensation, the case should be remanded for the administrative law judge to consider whether it is entitled to relief from continuing compensation liability under Section 8(f).[5] The Director responds, agreeing with employer that the case should be remanded on the facts presented in this case.

Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3) (1988), provides that a request for Section 8(f) relief which is filed after September 28, 1984, as in the instant case, must be presented to the district director prior to his consideration of the claim. Failure to do so will bar the payment of benefits by the Special Fund unless employer could not have reasonably anticipated that Special Fund liability would be at issue. Following the addition of this provision in 1984, the Secretary adopted a regulation implementing its requirements. 20 C.F.R. §702.321. This regulation provides that employer must request Section 8(f) relief and file a fully documented application in support of its request. *Tennant v. General Dynamics Corp.*, 26 BRBS 103, 106 (1992). While Section 702.321(b)(3) states that an application need not be filed where claimant's condition has not reached maximum medical improvement and no claim is raised for permanent benefits by the date of referral, in all other cases the failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the Special Fund. Such a failure is excused only where the employer could not have reasonably anticipated the liability of the Special Fund prior to the consideration of the claim. 20 C.F.R. §702.321 (b)(3). The Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director.

[5]Section 8(f) relief is available to employer if it establishes: (1) that the employee had a pre-existing permanent partial disability; (2) that the pre-existing disability was manifest to employer prior to the subsequent work injury; (3) that the employee's current disability is not due to the most recent injury alone. *See Bunge Corp. v. Director, OWCP (Miller)*, 951 F.2d 1109, 25 BRBS 82 (CRT)(9th Cir. 1991); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 147 (1991); 33 U.S.C. §908(f).

In the present case, employer submitted a handwritten letter to the district director on August 26, 1987, requesting Section 8(f) relief and setting out some of the supporting reasons. Emp. Ex. 96 at 204. In this letter, employer stated that the necessary documentation to adequately support the petition would be provided at a later time. On December 17, 1987, the district director sent employer a form letter, stating that its application for Section 8(f) relief was deficient under the regulations and that the case was being forwarded to the Office of Administrative Law Judges. Section 8(f) was listed among the contested issues in pre-trial documents.

At the hearing held before Judge Murrett, the Director moved for application of the absolute defense on the ground that employer had not timely provided the promised supporting documentation. Employer argued that it had submitted a list of medical exhibits, but the Director countered that it did not do so until the case had already been referred to the Office of Administrative Law Judges. After hearing argument from both parties, Judge Murrett granted the Director's motion from the bench. Tr. at 17. In the written Decision and Order in this case prepared by Administrative Law Judge Romano, however, there is no reference to the Section 8(f) issue.

The Director, the guardian of the Special Fund, agrees with employer that the case should be remanded to Judge Romano. The Director avers that since there is no mention of the Section 8(f) issue in Judge Romano's Decision and Order, and since the issue was raised at the formal hearing, the case must be remanded for the administrative law judge to make specific findings of fact on this issue, as is required by 29 C.F.R. §18.57(b)(1990), and the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A)(1988). In the absence of such findings, the Director asserts that the issue of Section 8(f) relief is not properly before the Board. As the interested parties are in agreement that the case should be remanded to the administrative law judge for consideration of claimant's entitlement to Section 8(f) relief and this issue was not addressed in the Decision and Order, the case is remanded for the administrative law judge to consider *de novo* whether employer's application requesting Section 8(f) relief complies with the requirements of Section 8(f)(3) and the regulation at 20 C.F.R. §702.321. *See Tennant*, 26 BRBS at 108. If the administrative law judge finds the bar does not apply, he must consider employer's request for Section 8(f) relief on the merits. In any event, in deciding this issue, the administrative law judge must explicitly set forth and adequately detail the rationale behind any findings made consistent with the requirements of the Administrative Procedure Act. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

Sections 10(f) and 14(e)

The Director contends on cross-appeal that, as the administrative law judge found that claimant reached maximum medical improvement on January 17, 1984, and was permanently totally disabled thereafter, he is entitled to Section 10(f) adjustments on his compensation beginning on October 1, 1984. The Director further alleges that claimant is also entitled to a Section 14(e) assessment of additional compensation on the difference between the amounts he was paid and the amounts he should have been paid between January 17, 1984, and August 28, 1987, the date of the informal conference. The Director further avers that claimant is also entitled to an additional assessment of compensation under Section 14(e), inasmuch as employer erroneously underpaid him between May 27, 1987, and August 16, 1988.

We agree with the Director. Section 10(f) of the Act provides for annual adjustments to permanent total disability compensation based upon the lesser of 5 percent or the increase in the national average weekly wage for the preceding year. 33 U.S.C. §910(f). In the present case, inasmuch as the administrative law judge found that claimant's permanent total disability commenced as of January 4, 1984, claimant is entitled to Section 10(f) annual cost of living adjustments commencing October 1, 1984. *See Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT) (9th Cir. 1990). Moreover, where, as here, an employer pays some compensation voluntarily but claimant is ultimately awarded compensation in an amount greater than that which employer voluntarily paid, employer is liable for a Section 14(e) assessment based solely on the difference. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979). In the present case, because claimant is entitled to annual Section 10(f) increases to his permanent total disability compensation rate commencing October 1, 1984, claimant is entitled to a Section 14(e) assessment based on the difference between the adjusted permanent total disability compensation rate and the unadjusted $512.45 compensation rate he was voluntarily paid between January 17, 1984 and May 27, 1987. With regard to the period from May 27, 1987 to August 16, 1988, when employer paid permanent partial disability and the administrative law judge found claimant permanently totally disabled, we note that the administrative law judge recognized that claimant was entitled to additional compensation during this period, and held employer liable for a Section 14(e) assessment on the difference between the compensation rate due claimant and the $405.76 rate he was paid from May 27, 1987, until August 28, 1987, the date of the informal conference. Decision and Order at 10, 12. On remand, the administrative law judge should amend his decision to reflect claimant's entitlement to Section 10(f) adjustments and employer's liability for the additional Section 14(e) assessments due.

Accordingly, the case is remanded to the administrative law judge for further consideration regarding employer's eligibility for Section 8(f) relief and claimant's entitlement to Section 10(f) adjustments and Section 14(e) assessments consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge