BRB No. 97-1277

ROY M. SMITH	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order As To Employer's Motion for Reconsideration of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Keith W. Donahoe (Koonz, McKenney, Johnson, Depaolois & Lightfoot, P.C.), Washington, D.C., for claimant.

Michael D. Dobbs and Eric C.J. Anderson (Mell, Brownell & Baker), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Order as to Employer's Motion for Reconsideration (92-DCW-014) of Administrative Law Judge Frederick D. Neusner 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*. (1982), as extended by the District of Columbia Workmen's Compensation Act,

36 D.C. Code §501 *et seq.* (1973) (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)

This case is before the Board for the second time. On March 2, 1982, claimant sustained injuries to his back, neck, eye and left leg when he was assaulted by a passenger during the course of his employment with employer. As a result, claimant was unable to perform his usual duties as a station manager.[1] Employer voluntarily paid benefits for temporary total disability from March 2, 1982, until November 27, 1986, and for temporary partial disability from November 28, 1986, until March 12, 1988. Claimant sought additional compensation under the Act.

Based upon the parties' stipulations, in a Decision and Order dated March 15, 1988, Administrative Law Judge Edward J. Murty awarded claimant permanent partial disability benefits commencing September 3, 1982, premised on a loss of wage-earning capacity of $305.99 per week, plus appropriate medical expenses. Addressing employer's motion for relief under Section 8(f) of the Act, 33 U.S.C. §908(f), Judge Murty found that employer was liable for 104 weeks of permanent disability compensation from September 3, 1982, and that thereafter payment of benefits was the responsibility of the Special Fund.

In light of the worsening physical condition in his left knee and his inability to find any employment within his limitations, claimant requested modification of Judge Murty's Decision and Order pursuant to Section 22 of the Act, 33 U.S.C. §922. In a Decision and Order Granting Modification dated December 15, 1992, Administrative Law Judge Frederick D. Neusner found that claimant demonstrated a change in his condition sometime between November 5, 1987, and May 13, 1992, the dates of claimant's hearings on his claim. The administrative law judge additionally determined that claimant established that he is temporarily totally disabled from the performance of the duties of his usual employment, and that employer failed to establish the availability of suitable alternate employment. Consequently, he granted

[1]Claimant previously suffered injuries to his back, head, neck, and shoulder when the hood of a bus fell on his back in the course of his employment with employer on March 5, 1976. In light of those injuries, claimant was transferred from his position as a bus operator to that of a station manager.

claimant's request for modification and awarded him temporary total disability compensation at the rate of $462.56 per week from March 2, 1982, the date of injury, plus appropriate medical expenses, subject to a credit for compensation already paid. Moreover, he ordered employer to reimburse the Special Fund for all payments under the Act that the Special Fund disbursed to, or for the benefit of, claimant after March 2, 1982. Employer appealed this decision to the Board.

On appeal, the Board affirmed the administrative law judge's decision to grant modification and his finding that claimant was totally disabled as of February 22, 1988. The Board agreed with employer, however, that inasmuch as claimant's request was limited to increased benefits as of February 22, 1988, the administrative law judge erred in awarding claimant compensation dating back to the date of injury without providing employer with notice that the period prior to this date would be addressed or fully explaining his decision to retroactively alter the award. Accordingly, the Board vacated Judge Neusner's modification of Judge Murty's award of benefits prior to February 22, 1988, and remanded for him to reconsider claimant's entitlement to compensation during this period. In addition, the Board agreed with employer that the administrative law judge erred in concluding that claimant's condition remained temporary based on Dr. Jackson's recommendation of further treatment where Dr. Jackson also admitted that the treatment he prescribed, notably physical rehabilitation and if necessary surgery, had only "a slight chance of increasing -- or slowing down his degenerative change, his arthritic change as a result of his injury back in 1982," and that "neither one [of the two options for treatment] may work significantly." CX-16 at 64. Based upon this uncontroverted evidence that the benefits of further treatment are speculative, the Board reversed the administrative law judge's finding that claimant's condition was temporary, and remanded the case for him to determined the date of permanency. *Smith v. Washington Metropolitan Area Transit Authority,* BRB No. 93-1123 (May 21, 1996) (unpublished).

On remand, the administrative law judge found claimant was not entitled to increased compensation prior to February 1988. The administrative law judge further determined that claimant's condition became permanent on February 18, 1992, and awarded him temporary total disability benefits through that date and permanent total disability disability thereafter. Denying employer's subsequent motion for reconsideration, the administrative law judge rejected employer's argument that his decision should be modified to instruct the Special Fund to repay employer for any overpayment that it made between September 2, 1984 and February 22, 1988. In addition, he reaffirmed his prior determination that claimant's condition did not reach permanency until February 18, 1992, but agreed with employer that because it had previously paid claimant for 104 weeks of permanent

partial disability, he erred in holding employer liable for payment of an additional 104 weeks of permanent total disability compensation.

On appeal, employer challenges only the administrative law judge's finding on remand regarding the date of permanency. Employer argues that the administrative law judge's finding that claimant did not reach permanency until February 18, 1992, is neither supported by substantial evidence, nor in accordance with applicable law. Moreover, employer contends that this finding is inconsistent with the administrative law judge's findings in other parts of his decision, specifically where he recognized that Dr. Jackson found as early as February 1988 that claimant had a permanent knee condition and that significant improvement with treatment could not be guaranteed. Employer asserts that this evidence is consistent with applicable Board precedent holding that a condition may be considered permanent where anticipated treatment is not expected to improve claimant's condition. Claimant responds, agreeing with employer's position.

We agree with claimant and employer that the administrative law judge erred in determining the date claimant's condition reached permanency. The determination of when permanency is reached is primarily a question of fact based on medical evidence. *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997). An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), or if the condition has lasted for a lengthy period of time and appears to be of lasting and indefinite duration. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition. *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1992).

In the instant case, the administrative law judge determined that claimant's condition did not become permanent until the date of Dr. Jackson's February 18, 1992, report, as this was the first time Dr. Jackson stated that significant improvement could not be guaranteed with both surgery and physical therapy. The administrative law judge's finding in this regard, however, is not consistent with the record. Rather, the record reflects that four years earlier, on February 22, 1988, Dr. Jackson informed claimant that he suffered from post-traumatic chondromalacia, and a very definite patella-femoral pain syndrome, which he indicated was permanent

given the length of time it had lasted and that significant improvement even with the recommended arthroscopy was not certain. EX-6. Moreover, Dr. Jackson reiterated in his deposition testimony that while physical therapy and surgery were treatment modalities available to claimant since the time he first examined him in February 1988, "neither one may work significantly." CX-16 at 64.

The administrative law judge's finding that claimant's condition did not reach permanency until February 18, 1992, is further belied by Dr. Jackson's subsequent reports. When Dr. Jackson saw claimant again on August 8, 1988, and thereafter on June 27, 1990, he stated that his prior opinion remained unchanged, and that claimant had a 20 percent permanent partial disability of the left knee under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. EX-6 at 3,4. As Dr. Jackson did no more in his February 18, 1992, report than reiterate his prior conclusion in his February 22, 1988, report and his deposition testimony, we agree with employer and claimant that it does not provide substantial evidence to support the administrative law judge's finding that claimant's condition did not reach permanency until February 18, 1992. Inasmuch as Dr. Jackson's reports and testimony unequivocally support the conclusion that by 1988 claimant's condition had lasted for a lengthy period, resulting in a rateable physical impairment, we hold that on the facts presented, claimant had a permanent impairment as of February 22, 1988, as a matter of law. *See generally Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984); *Watson*, 400 F.2d at 654; *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., concurring and dissenting). Accordingly, we vacate the administrative law judge's finding that claimant's condition became permanent on February 18, 1992 and modify his Decision and Order on Remand to reflect the earlier permanency date of February 22, 1988. *See Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*).

Accordingly, the administrative law judge's finding regarding the date of permanency is vacated, and the award is modified to provide that claimant is entitled to benefits for permanent total disability as of February 22, 1988, and continuing. In all other respects, the Decision and Order on Remand and the Order As to Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge