BRB No. 01-0322

CLYDE E. EVANS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE PORT TERMINALS	)	DATE ISSUED: Dec. 5, 2001
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Edward E. Boshears, Brunswick, Georgia, for claimant.

G. Mason White and James D. Kreyenbuhl (Brennan, Harris & Rominger LLP), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHCA-2942) of Administrative Law Judge Jeffrey Tureck 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 if they 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).

On October 13, 1995, while working as a diesel mechanic for employer, claimant

sustained a severe injury to his left hand when oil from a pressurized hose was injected into the palm of that hand. Claimant, who has not returned to work since this injury occurred, subsequently underwent multiple irrigation and debridement surgeries on his left hand. In his Decision and Order, the administrative law judge initially found that claimant reached maximum medical improvement on December 30, 1996. Next, the administrative law judge determined that employer established the availability of suitable alternate employment as of February 2, 1998, and that claimant sustained a 70 percent impairment to his left hand. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from October 13, 1995 through February 1, 1998, and permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(3) thereafter.

On appeal, claimant contends that the administrative law judge erred in finding that his condition is permanent in nature and that employer affirmatively established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment as of February 2, 1998; specifically, claimant avers that the administrative law judge erred by failing to consider claimant's age and psychological condition when addressing this issue.[1] We disagree. Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties as a result of his work-related injury, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting).

[1]Claimant was 65 years of age at the time of the formal hearing.

In the instant case, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment based upon the multiple positions identified by Mr. Yuhas, employer's vocational consultant. After reviewing claimant's vocational profile, medical history, and physical restrictions, Mr. Yuhas prepared labor market surveys in January 1998 and April 1999, each of which identified entry level or unskilled employment opportunities, such as desk clerk and security guard positions, which he opined were suitable for claimant. *See* Emp. Ex. 6; Tr. at 102-108. Contrary to claimant's assertions on appeal, Mr. Yuhas specifically testified that he considered claimant's age when working on claimant's case and that, moreover, prospective employers were made aware of claimant's age when they were contacted. *See* Tr. at 108, 110, 118-119. Lastly, Mr. Yuhas stated that he had been in repeated contact with Dr. Morales, claimant's treating physician, who thereafter approved many of the positions identified by Mr. Yuhas as being suitable for claimant. *See* Emp. Ex. 6. In contrast, the administrative law judge specifically determined that the contrary opinion of Mr. Shields, claimant's vocational counselor, that claimant is unemployable is not credible based upon his failure to conduct a job search or labor market survey, his decision not to seek the opinion of claimant's treating physician regarding claimant's ability to work, and his unexplained conclusion that claimant is limited to sedentary work, which is contrary to the opinion of Dr. Morales that claimant could perform light employment duties.[2]

[2]Mr. Shields testified that he had no recollection of the medical records that he reviewed in evaluating claimant. Additionally, Mr. Shields stated that he did not deem it important whether or not claimant was taking medications, and that, in his opinion, while medical reports were relevant insofar as they shed light on a claimant's functional capacity, medical doctors themselves are incapable of rendering a determination as to whether or not an individual is able to work a certain number of hours in a certain type of job. *See* Tr. at 70, 78-79, 82.

Moreover, contrary to claimant's assertion on appeal, the administrative law judge noted claimant's testimony regarding his alleged ongoing psychological condition. Contrary to claimant's self-diagnosis of an ongoing psychological condition, the administrative law judge found that claimant last visited with a psychiatrist in December 1995, at which time he was told that he did not have to return, and that claimant presently takes only medication prescribed for his wife.[3] *See* Tr. at 37-39, 48.

We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). In the instant case, Mr. Yuhas's testimony, his accompanying labor market surveys, and the approval of the identified positions by Dr. Morales establish that multiple entry level positions are available within claimant's physical restrictions. It follows that the administrative law judge's finding that claimant is capable of performing the identified jobs is supported by substantial evidence and consistent with law. *See Wilson,* 22 BRBS 459; *Jones v. Genco*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment, and his consequent award of partial disability benefits to claimant as of February 2, 1998.

Claimant next challenges the administrative law judge's finding that he reached maximum medical improvement on December 30, 1996. Specifically, claimant avers that the administrative law judge erred in relying upon the report of Dr. Morales in reaching his conclusion on this issue. For the reasons that follow, we affirm the administrative law judge's finding.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120

[3] Our review of the record reveals no medical evidence supportive of a finding that claimant's alleged mental condition precludes his ability to obtain post-injury employment. Contrary to claimant's implied contention, a mental impairment alone is insufficient to support a finding of total disability. Moreover, as set forth *infra*, Dr. Morales in February 1998 approved many of the positions identified by employer as being suitable for claimant.

(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. *See Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 349 U.S. 976 (1969). Thus, where the record contains evidence that claimant's condition was of a lasting and indefinite duration, a prognosis that the employee's condition may improve in the future does not preclude a finding of permanency. *Mills v. Marine Repair Serv.,* 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). Moreover, an administrative law judge need not search for a medical opinion that specifically references "maximum medical improvement;" rather, he may rely on an opinion which rates claimant's disability, as that is sufficient evidence of permanency. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Accordingly, 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).

In the instant case, Dr. Morales treated claimant and performed claimant's multiple surgical procedures from the time of his injury through the date of the formal hearing. On December 30, 1996, approximately fourteen months after claimant's accident, Dr. Morales opined that a physical examination of claimant's left hand indicated that claimant had sustained a 70 percent disability to that hand. *See* Emp. Ex. 5 at 295. While subsequent examinations of claimant's left hand revealed the presence of foreign body granulomas, which were surgically removed, the record contains no indication that claimant received a rating subsequent to December 1996. To the contrary, Dr. Morales' numerous medical reports indicate that claimant's post-December 1996 examinations were essentially unchanged. *See* Emp. Ex. 5. Accordingly, as the record contains substantial evidence to support the administrative law judge's determination that claimant reached maximum medical improvement on December 30, 1996, we affirm that finding. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (19998); *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Despite this finding on maximum medical improvement, the administrative law judge ultimately concluded that claimant's disability became permanent on February 2, 1998, the date on which employer established the availability of suitable alternate employment. He therefore awarded claimant temporary total disability compensation from the date of injury, October 13, 1995, through February 2, 1998, and permanent partial disability compensation under the schedule thereafter. It is well-established, however, that determining whether disability is temporary or permanent goes to the nature of a claimant's disability, while determinations as to whether it is total or partial are relevant to its extent. Thus, maximum medical improvement establishes that a disability has become permanent rather than

temporary, while demonstrating the availability of suitable alternate employment proves that a disability has become partial rather than total. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.). Consistent with the administrative law judge's findings, we therefore modify the administrative law judge's award of benefits to reflect claimant's entitlement to temporary total disability compensation during the period of October 13, 1995 through December 29, 1996, permanent total disability compensation for the period of December 30, 1996 through February 1, 1998, and permanent partial disability compensation under the schedule thereafter. *See* 33 U.S.C. §908(a), (b), (c)(3).

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to permanent total disability compensation during the period of December 30, 1996 through February 1, 1998. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge