BRB No. 05-0396

JOHNNY L. ABSHIRE, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OPERATORS AND CONSULTING SERVICES, INCORPORATED	)	DATE ISSUED: 12/19/2005
	)	
and	)	
	)	
ALASKA NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Richard J. Hymel, Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Motion for Reconsideration (2003-LHC-2302) of Administrative Law Judge Lee J. Romero, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was working as a lead operator at employer's facility in May 2001 when he injured his right knee. He has not worked since. Tr. at 37-40. On June 26, 2001,

claimant underwent diagnostic arthroscopy which revealed medial and lateral meniscus tears, an ACL tear/deficiency and osteoarthritis. Dr. Budden, his treating orthopedic surgeon, performed partial medial and lateral meniscectomies to repair the meniscus tears. Cl. Exs. 9 at 88-89, 12 at 14. Employer paid claimant temporary total disability benefits from May 23, 2001 through November 27, 2001, permanent partial disability benefits from November 18, 2001, through January 29, 2003, and medical benefits. 33 U.S.C. §§907, 908(b), (c)(2). Claimant filed a claim for permanent total disability benefits.

The administrative law judge found that claimant's condition reached maximum medical improvement as of November 2, 2001, and he awarded claimant permanent total disability benefits from November 3, 2001, through June 18, 2002, when he found that employer established the availability of suitable alternate employment. The administrative law judge awarded claimant permanent partial disability benefits from June 19, 2002, until February 18, 2003. As of February 19, 2003, when Dr. Budden withdrew claimant's clearance to work because his condition had deteriorated, the administrative law judge awarded claimant permanent total disability benefits. Decision and Order at 18, 20-21. The administrative law judge denied employer's request to reconsider his decision and amend it to reflect Dr. Budden's opinion that claimant's condition was not yet permanent. Employer appeals the administrative law judge's finding that claimant's condition is permanent. Claimant has not responded to the appeal.

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement or if it has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of success exists, and even if, in retrospect, it was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 45 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986). Moreover, a claimant may have reached maximum medical improvement even if his condition subsequently improves, *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998), or deteriorates, *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986).

In this case, because the doctors agree claimant needs knee replacement surgery and is not at maximum medical improvement, employer argues that there is no evidence to support the administrative law judge's finding that claimant's condition is permanent. Moreover, employer argues that it was erroneous for the administrative law judge to rely on Dr. Budden's 2001 opinion when Dr. Budden later withdrew that opinion, and for the administrative law judge to fail to acknowledge that claimant now anticipates surgery and therefore cannot be considered as having reached maximum medical improvement, pursuant to *Abbott*.[1] In light of the facts of this case, we reject employer's assertions, and we affirm the administrative law judge's decision. Contrary to employer's arguments, this case is not analogous to *Methe* and *Abbott*, as claimant herein was not undergoing continuous treatment, but, rather, had been found to have stabilized sufficiently for his physician to release him from care. Only later did claimant's condition deteriorate, warranting a return to treatment and a withdrawal of his clearance to work.

After claimant underwent surgery to repair the meniscus tears and declined to undergo ACL reconstruction surgery, Dr. Budden conservatively treated claimant with medication and physical therapy until his condition reached a plateau on November 2, 2001. Cl. Exs. 9 at 30-41, 88-89, 12 at 14. At that time, Dr. Budden determined that claimant's condition reached maximum medical improvement but that claimant could not return to work until he underwent a functional capacity evaluation (FCE). Cl. Ex. 9 at 34-35. Based on the FCE completed in January 2002, Dr. Budden determined that claimant could perform medium duty work. *Id.* at 32. On May 16, 2002, Dr. Budden reported that he discharged claimant from his care as of January 24, 2002.[2]

In June 2002, claimant returned to Dr. Budden's care, claiming an increase in pain and requesting treatment from a pain management specialist. Dr. Budden reminded claimant that the surgical options were still available, and claimant scheduled the ACL reconstruction surgery for September 2002. Testing by the anesthesiologist revealed a cardiac deficiency, so claimant was unable to undergo the reconstruction surgery. Cl. Ex. 9 at 27-29, 81. Because claimant's pain and discomfort continued, in October 2002 Dr. Budden prescribed a knee brace and recommended total knee replacement surgery. *Id.* at 17-26. On June 20, 2003, Dr. Budden stated that claimant "is not now at maximum

[1]In its brief before the Board, employer states that it approved the surgery on January 11, 2005, which was the same date the administrative law judge denied employer's motion for reconsideration. This fact is thus not in the record before us.

[2]Dr. Budden opined that the ACL deficiency would likely aggravate claimant's pre-existing arthritis, eventually requiring a total knee replacement. The treatment option as of January 2002 was to perform an ACL reconstruction, but claimant rejected this surgery. Cl. Ex. 9 at 30-31.

medical improvement as far as his right knee is concerned, and he never has been at maximum medical improvement."[3] Cl. Ex. 9 at 14, 12 at 20-24, 30-31. In July 2003, claimant had cardiac surgery and was medically cleared for knee surgery scheduled for August 21, 2003; however, the surgery was canceled due to non-verification by employer's carrier. *Id.* at 11, 13. Dr. Budden continued to treat claimant and to note further deterioration of the right knee condition to the extent that claimant's left knee was now worsening as a result of overcompensation. *Id.* at 1-10.

The administrative law judge found that claimant's condition reached maximum medical improvement on November 2, 2001, because of Dr. Budden's "credible and reasoned medical opinion[.]" Decision and Order at 18. He acknowledged that Dr. Budden's June 2003 opinion regarding claimant's need for total knee replacement meant that claimant is no longer at maximum medical improvement and he concluded that Dr. Budden's opinion on the matter "is uncontradicted." However, the administrative law judge rejected Dr. Budden's statement that claimant "was never" at maximum medical improvement, finding that it was contradicted by Dr. Budden's earlier opinion. Decision and Order at 21. In his order on employer's motion for reconsideration, the administrative law judge explained that Dr. Budden's initial opinion concerning the date of maximum medical improvement was reasonable, persuasive and supported by substantial evidence, while Dr. Budden's later statement that claimant had never been at maximum medical improvement was unsupported because it contradicted the earlier finding. Order at 3-4.

We affirm the administrative law judge's finding that claimant's condition reached maximum medical improvement on November 2, 2001. At that time, Dr. Budden felt that claimant's condition had reached a plateau and, absent the recommended surgery, which claimant had declined, there would be no further improvement. The administrative law judge rationally credited this opinion. Based on this substantial evidence of record, we hold that the administrative law judge rationally found that claimant's condition became permanent. *Carlisle*, 33 BRBS at 139. That claimant's condition later deteriorated and Dr. Budden changed his mind about whether maximum medical improvement had been reached does not require the administrative law judge to find that the previous opinion was negated, as the administrative law judge may credit all or any

[3]Dr. Budden explained in his February 2004 deposition: "I guess at one point I was trying to get him back to work, to gainful employment; and when I first stated months earlier that he was at maximum medical improvement, I figured that that was the best he's going to get without further intervention. And, at this point, I think Mr. Abshire [wants] a knee replacement, and I think a knee replacement probably would improve his condition. . . ." Cl. Ex. 12 at 24-25. Dr. Budden also stated that the knee replacement would decrease claimant's pain. *Id.* at 26.

part of a physician's opinion. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *McCaskie*, 34 BRBS at 12-13; *Carlisle*, 33 BRBS at 139; *Davenport*, 18 BRBS at 196-197. Moreover, an underlying permanent disability does not disappear during periods of temporary disability due to subsequent surgery. *See, e.g.*, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). Thus, unlike *Abbott*, *Methe*, and *Diosdado*, where doctors continued to treat the claimants with a view toward further improvement but were ultimately unsuccessful,[4] Dr. Budden ceased treating claimant for a period of seven months and then recommenced treatment in light of the deterioration that had occurred.[5]

[4]In *Methe*, the claimant's doctor originally stated that the claimant's condition reached maximum medical improvement in September 2001. He later determined that the true date of maximum medical improvement was in June 2000, because, in hindsight, there had been no improvement since June 2000 despite further treatment. The court applied *Abbott* and held that there can be no retroactive determination of maximum medical improvement and that if a claimant is undergoing treatment with a view toward improving his condition, then his condition cannot be considered permanent until the treatment is completed. *Methe*, 396 F.3d 601, 38 BRBS 99(CRT); *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Diosdado*, 31 BRBS 70.

[5]The fact that claimant returned to Dr. Budden's office on November 28, 2001, shortly after Dr. Budden determined that claimant's condition had stabilized, does not alter our decision. Although claimant complained of pain, Dr. Budden found that claimant's condition had not changed, and he saw nothing that would prevent the completion of the FCE. Cl. Ex. 9 at 33. Thereafter, claimant did not seek additional treatment until June 2002.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge