

BRB No. 98-0554

ANTHONY KENNISON )  
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 Claimant-Petitioner ) DATE ISSUED:  
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 v. )  
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 RYAN-WALSH, INCORPORATED )  
 )  
 and )  
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 HOMEPORT INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order and Decision on Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Harry C. Arthur, Houston, Texas, for claimant.

Edward J. Patterson, III (Fulbright & Jaworski, L.L.P. ), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Decision on Claimant's Motion for Reconsideration (96-LHC-1602) of Administrative Law Judge C. Richard Avery 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 July 6, 1993, claimant injured the lower part of his back while lifting a bale of cotton. Subsequently, on May 24, 1995, claimant returned to work and, while working several hours loading 110 pound bags of beans in the hold of a vessel, reinjured his back.

In his Decision and Order, the administrative law judge, based upon the testimony of Dr. Lazarz, found that claimant reached maximum medical improvement on October 14, 1996. The administrative law judge noted that at the time of his deposition on October 14, 1996, Dr. Lazarz stated that, although surgery was recommended, claimant could lift between 10-20 pounds, and he released claimant to light duty work. In addressing the issue of the nature of claimant's disability, the administrative law judge also noted that there was videotape evidence which demonstrated that claimant could perform light duty work. Accordingly, the administrative law judge found claimant entitled to temporary total disability compensation from May 24, 1995 to October 13, 1996, and permanent total disability compensation from October 14, 1996 to May 9, 1997, the date upon which employer established the availability of suitable alternate employment. In denying claimant's subsequent motion for reconsideration, the administrative law judge stated that the rationale for his determining that claimant had reached maximum medical improvement was previously stated, and that if surgery is later elected or indicated, claimant's status could change, but until such an event occurs, the evidence lends itself to the conclusion that claimant's medical condition had plateaued, and that he was capable of working with restrictions.

On appeal, claimant challenges the administrative law judge's finding regarding the nature of claimant's disability. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in determining that claimant reached maximum medical improvement on October 14, 1996, the date on which Dr. Lazarz released claimant for light duty work. We agree. It is well-established that a claimant is entitled to temporary disability benefits until he reaches maximum medical improvement, the date of which is determined by medical evidence. A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. See *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994). Furthermore, the Board has held that, when addressing the permanency of claimant's disability, the administrative law judge should discuss the medical opinions of record rather than relying on the date claimant was able to return to work. See *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

In the instant case, the administrative law judge relied upon the deposition

testimony of Dr. Lazarz in concluding that claimant had reached maximum medical improvement on October 14, 1996.<sup>1</sup> Our review of the record, however, reveals that when Dr. Lazarz was specifically asked at his deposition if he felt that claimant had reached maximum medical improvement at this time, he responded in the negative; moreover, Dr. Lazarz went on to recommend two alternative surgical procedures which could benefit claimant. See CX-10 at 38. Specifically, Dr. Lazarz stated that a laminectomy, or removal of the pressure off the nerve, would render claimant capable of performing light work, whereas if a fusion were added to this procedure, claimant would have the potential of doing heavier work. *Id.* Lastly, Dr. Lazarz's opinion that claimant could at this time overcome the pain and discomfort that he presently experiences and return to some type of gainful employment, see *id.* at 46, pertains to the issue of the extent of claimant's disability and, thus, is insufficient to establish maximum medical improvement. Accordingly, based upon this credited and uncontroverted testimony, we reverse the finding of the administrative law judge that claimant's condition reached maximum medical improvement on October 14, 1996, and we modify his decision to reflect that claimant is entitled to temporary total disability through May 9, 1997.<sup>2</sup>

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<sup>1</sup>In addressing this issue, the administrative law judge specifically declined to rely upon the opinions of Drs. Pennington and Andrew. See Decision and Order at 15.

<sup>2</sup>We note that claimant's brief statement that Dr. Lazarz did not indicate or imply that he was releasing claimant to light duty work does not rise to an adequately briefed challenge of the administrative law judge's finding that employer established suitable alternate employment as of May 9, 1997. See generally *Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988). Therefore, the administrative law judge's decision to terminate claimant's benefits as of that date is affirmed.

Accordingly, the administrative law judge's finding that claimant reached maximum medical improvement on October 14, 1996 is reversed, and the administrative law judge's decision is modified to provide that claimant's disability was temporary in nature, continuing through May 9, 1997. In all other respects, the administrative law judge's Decision and Order and Decision on Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge