BRB No. 99-0503

ROBERT E. REEVES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Mark W. Davis (Davis & Feder), Gulfport, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH , Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-LHC-1725) of Administrative Law Judge David W. Di Nardi 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, a machine operator, injured his back at work on October 7, 1996. Claimant returned to work on November 15, 1996, with temporary restrictions for two weeks and then was released to return to his usual work by Dr. McLeod. He resigned on January 31, 1997, before being laid off, in order to collect his retirement benefits. Claimant began employment with a different employer on May 1, 1997.

Employer voluntarily paid claimant temporary total disability benefits from October 8, 1996, through November 14, 1996. Claimant sought additional disability benefits. The administrative law judge found that claimant reached maximum medical improvement on November 14, 1996, and was not disabled after this date. Consequently, the administrative law judge denied claimant additional disability benefits. In his decision, the administrative law judge also denied claimant future medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, after initially stating that he would not address this issue as it was not timely raised.

On appeal, claimant challenges the administrative law judge's denial of additional disability and future medical benefits. Employer responds in support of the administrative law judge's denial of benefits.

Claimant initially argues that the administrative law judge erred in denying additional disability benefits from November 15, 1996, through January 30, 1997, while he was working for employer post-injury in his usual job. Claimant argues that the administrative law judge should have found him totally disabled for this time period based on his testimony that he was having leg pain while working. In determining that claimant was not totally disabled from November 15, 1996, through January 30, 1997, the administrative law judge acted within his discretion in rejecting claimant's testimony that he had difficulty performing his assigned duties since claimant did not report any problems to his employer and did not seek medical treatment until March 1997, almost two months after his voluntary resignation from the shipyard. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); Decision and Order at 18; Emp. Exs. 6, 7, 17; Cl. Exs. 4, 5; Tr. at 37-40, 48-49. Moreover, Dr. McLeod released claimant to his usual work after two weeks on light duty. Cl. Ex. 5. Consequently, we affirm the administrative law judge's denial of additional disability benefits from November 15, 1996, through January 30, 1997, as it is supported by substantial evidence.

Claimant next argues that the administrative law judge erred in denying disability benefits commencing January 31, 1997, after he voluntarily resigned. The Board has held that in cases of traumatic injury which renders claimant unable to perform his usual employment, claimant's voluntary retirement at a date post-injury does not affect the issue of whether he has a disability under the Act. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). The relevant inquiry in a traumatic injury case, such as this one, is whether claimant's return to his usual work is precluded by the work injury. *Id.* If claimant establishes an inability to return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

The administrative law judge did not address the medical evidence concerning claimant's ability to work after he left employer's employment. Having found claimant able to return to his usual work, he nonetheless found, in the alternative, that employer's labor market survey identified positions within claimant's restrictions. Decision and Order at 21-22. The administrative law judge also stated that claimant did not have a loss in wage-earning capacity as employer would have been able to provide work to claimant within his restrictions on and after January 31, 1997. Decision and Order at 22.

Inasmuch as the record contains evidence, which the administrative law judge did not discuss, concerning restrictions on claimant's employability after January 31, 1997, we must vacate the administrative law judge's denial of disability benefits, and remand this case to the administrative law judge for further consideration.[1] On remand, the administrative law judge must determine, based on the medical evidence and relevant credible testimony, whether claimant was unable to perform his usual work at any time after he resigned from employer. *See, e.g.,* Cl. Exs. 4, 5, 8; Emp. Exs. 6, 7, 16. If the administrative law judge finds claimant unable to perform his usual work, claimant has established a *prima facie* case of total disability, and the administrative law judge should determine whether employer established the availability of suitable alternate employment and whether claimant sustained a loss in wage-earning capacity. *See generally Avondale Shipyards, Inc. v. Guidry,* 967 F.3d 1059, 26 BRBS 30 (CRT)(5th Cir. 1992). The administrative law judge may determine if claimant has a loss in wage-earning capacity based on the wages of the suitable alternate employment jobs set out in employer's labor market survey. *See* Emp. Exs. 10, 22. Moreover, the job claimant obtained on May 1, 1997, with a different employer may constitute suitable alternate employment, and based on claimant's earnings in this job, the administrative law judge may calculate whether claimant has a loss in wage-earning capacity.[2] The alleged light duty job in employer's facility, however, cannot constitute suitable alternate employment as employer did not make this job available to claimant by offering him this job.[3] *See*

[1]For example, on April 30, 1997, Dr. McCloskey stated claimant was restricted from working the previous month, and he thereafter imposed permanent work restrictions on claimant. Cl. Ex. 4; Emp. Ex. 6.

[2]The parties stipulated that claimant's earnings in his post-injury job are $357.22 per week as of October 7, 1996, the date of injury, and that claimant's average weekly wage is $560.35. *See* Jt. Exs. 1, 2.

[3]Although Ms. Wiley, employer's employee relations manager, testified that employer would have been able to provide work for claimant within Dr. McCloskey's

Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231, 233 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990).

Claimant also argues that the administrative law judge erred in finding that claimant reached maximum medical improvement on November 14, 1996, based on Dr. McLeod's opinion. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Whether claimant's condition is permanent is primarily a question of fact based on the medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

The administrative law judge found that claimant reached maximum medical improvement on November 14, 1996, based on Dr. McLeod's opinion. Decision and Order at 17. This finding is neither rational nor supported by substantial evidence as Dr. McLeod stated on November 26, 1996, that, "I think this man has reached maximum improvement. However, I did not realize this was a workmen's compensation injury that needed a disability determination or a date of maximum improvement." Emp. Ex. 7 at 3. Furthermore, as claimant correctly contends, the administrative law judge did not address Dr. McLeod's referral to Dr. McCloskey on March 17, 1997, Cl. Exs. 4, 5, nor Dr. McCloskey's opinion that claimant reached maximum medical improvement on April 30, 1997, assuming that claimant does not have needed surgery. *See* Cl. Exs. 4, 8 at 8; Emp. Ex. 6. Thus, we vacate the administrative law judge's finding that claimant reached maximum medical improvement on November 14, 1996, and remand for further consideration of this issue.

Lastly, claimant argues that the administrative law judge abused his discretion in denying claimant's post-hearing request to raise his entitlement to back surgery and a second opinion proposed by Dr. McCloskey. Under 20 C.F.R. §702.336(b), an administrative law judge may in his discretion, at any time prior to the filing of a compensation order, upon the application of a party or upon his own motion,

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permanent restrictions and that if claimant had been laid off in February 1997 he most likely would have found another position in another area of the shipyard until he was called back to his usual work by June 18, 1997, she also testified that employer did not offer a job in its facility to claimant. *See* Emp. Exs. 9, 15; Tr. at 80, 82-84, 92.

consider a new issue raised by one of the parties. *Taylor v. Plant Shipyard Corp.*, 30 BRBS 90, 95 (1996).

Post-hearing, the administrative law judge admitted Dr. McCloskey's deposition in which the physician stated that claimant is in need of back surgery and a second opinion.[4] Cl. Ex. 8 at 7-8; Cl. Ex. 8 at Exhibit 2. Although the administrative law judge stated he would not address this issue, *see* Decision and Order at 8; ALJ Ex. 11, he nonetheless concluded summarily that claimant is not in need of future medical care as "both doctors" opined that claimant fully recovered from his work injury. *See* Decision and Order at 8, 23; ALJ Ex. 11.

We hold that the administrative law judge abused his discretion in his treatment of the issue regarding claimant's entitlement to future medical benefits. Despite stating that he would not address this issue, the administrative law judge nevertheless denied future medical benefits, stating claimant was fully recovered. This finding cannot be affirmed as the administrative law judge did not fully address all the medical evidence regarding claimant's condition. *See* discussion, *supra.* Moreover, the administrative law judge's finding that Drs. McLeod and McCloskey opined that claimant has recovered from his relatively minor incident on October 7, 1996, is not rational or supported by substantial evidence. On March 17, 1997, Dr. McLeod noted claimant's increasing back and leg pain, and stated claimant probably has spinal stenosis and is need of a myelogram and CT scan. CX 5 at 2. At this time, he agreed to turn claimant's care over to Dr. McCloskey at claimant's request. *Id.* Following a myelogram and CT scan, Dr. McCloskey stated he

[4]Claimant also asserts that the administrative law judge erred in not considering evidence on the issue of the nature and extent of his disability, citing n. 1 of the administrative law judge's Decision and Order which reads, "The request [claimant's request to raise a new issue based on the October 8, 1997 report of Dr. McCloskey] was denied as most untimely as Dr. McCloskey's report is dated October 8, 1997, a report which should have been filed with opposing counsel as part of the usual pre-hearing exchange." Decision and Order at 3 n. 1. We interpret this note as denying claimant's request to raise a new issue but not to exclude the October 8, 1997 report of Dr. McCloskey which was admitted into the record as Exhibit 2 to Dr. McCloskey's deposition at Claimant's Exhibit 8. Thus, in reconsidering the nature and extent of claimant's disability commencing January 31, 1997, on remand, the administrative law judge should consider this report.

suspected claimant has symptomatic lumbar canal stenosis at L4-5 with left leg radiculopathy. CX 4 at 27. In his October 8, 1997, report, Dr. McCloskey recommended surgery, which employer refused to authorize. Thus, the evidence of record does not support the administrative law judge's finding that claimant fully recovered such that he needs no further treatment.

Moreover, the reasons the administrative law judge provided in stating that he would not address claimant's entitlement to ongoing medical benefits, *i.e.,* raising it was violative of his prehearing order, was prejudicial to employer, and would unduly delay the disposition of this case, are not valid. *See* Decision and Order at 8; ALJ Ex. 11. First, the fact that claimant raised his entitlement to future medical benefits post-hearing is not violative of the administrative law judge's pre-hearing order as that rule pertains to the admission of evidence, and not the raising of a new issue. *See* ALJ Ex. 1. The regulation at 20 C.F.R. §702.336 governs the raising of new issues. In any event, the administrative law judge admitted Dr. McCloskey's deposition in his Decision and Order after informing the parties at the hearing that he would do so. Decision and Order at 2; Tr. at 9. Second, we do not agree with the administrative law judge, based on the facts of this case, that claimant's raising of a new issue post-hearing was prejudicial to employer. By letter dated October 8, 1997, more than one year prior to the hearing, Dr. McCloskey recommended surgery and a second opinion. Cl. Ex. 8 at Ex. 2; *see also* Cl. Ex. 8 at 7-8. His report was copied to employer's claims administrator, F. A. Richard. Cl. Ex. 8 at Ex. 2. On October 9, 1997, Monica Pickens from F.A. Richard returned a telephone call from Dr. McCloskey's office stating that, "they are not approving any further treatment for Mr. Reeves on his Oct. 7, 1996 injury." Cl. Ex. 8 at Ex. 3; *see also* Cl. Ex. 8 at 31-32. On October 11, 1997, claimant was informed that employer would not authorize further medical treatment. Cl. Ex. 8 at Ex. 3. Thus, employer was not prejudiced by claimant's raising of this issue post-hearing when it knew that Dr. McCloskey had recommended surgery and a second opinion. Lastly, we note that while there would have been a delay in the disposition of this case if the administrative law judge permitted the issue of claimant's entitlement to surgery to be fully addressed by the parties, this fact is not dispositive in this case. As claimant correctly noted in raising this issue, *see* CX 9, due process requires that employer be given the opportunity to have claimant examined by a physician of its choosing in order to ascertain the necessity of the proposed surgery. Nonetheless, any delay would have been mitigated by the fact that claimant was not in payment status. Thus, it would have been judicially efficient, on the facts of this case, for the administrative law judge to address all issues raised while the case was pending before him, instead of requiring claimant to file a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, in order to pursue this issue. *See* Decision and Order at 8, 23; Cl. Exs. 7, 9; Emp. Exs. 20, 23; ALJ Ex. 11. Consequently, we

vacate the administrative law judge's finding that claimant is not in need of future medical care, and we remand this case to the administrative law judge for further consideration of this issue based on all evidence of record, having given employer a chance to address the necessity of the proposed surgery.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is vacated as to the administrative law judge's findings regarding the nature and extent of claimant's disability after January 31, 1997, and his entitlement to future medical benefits, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge