BRB No. 03-0332A

MARY MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Jan. 28, 2004
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Breit Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (01-LHC-2893) of Administrative Law Judge Fletcher E. Campbell, 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 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).

While working for employer as a welder, claimant injured her right knee on July 1, 1986. She began seeking medical care from Dr. Wardell in August 1999, and Dr. Wardell performed surgery on the knee on August 1, 2000. Dr. Wardell removed claimant's damaged medial meniscus and shaved her damaged femoral condyle, the cartilage which coats the end of the thigh bone. Dr. Wardell imposed various restrictions

on claimant on January 12, 2001, and assigned claimant a 10 percent permanent impairment rating of the right knee. CXS 1-4. The parties stipulated to the period for which claimant was entitled to temporary total disability, temporary partial disability, and to a 10 percent permanent partial impairment based on Dr. Wardell's opinion. On June 11, 2001, the district director entered an Award of Compensation based on this agreement. CX 10.

Claimant did not return to work with employer, but worked at various other jobs, where she earned considerably less than she had with employer. Claimant continued to see Dr. Wardell about every three months. On February 13, 2002, during one of these visits, Dr. Wardell reported that he was upgrading claimant's restriction on standing. JX 1 at 7; CX 1 at 2. Claimant thereafter filed a motion for modification based on a change in condition.[1] Specifically, claimant alleged that she did not reach maximum medical improvement on January 12, 2001, when Dr. Wardell imposed various restrictions and assigned her a 10 percent impairment, but, rather, on February 13, 2002, when he lifted the restriction against standing, and that she is therefore entitled to an additional period of temporary partial disability compensation.[2]

In his Decision and Order, the administrative law judge found, based upon the testimony of Dr. Wardell, that claimant reached maximum medical improvement on February 13, 2002, and that claimant was thus entitled to an additional period of temporary partial disability compensation.[3] Accordingly, the administrative law judge granted claimant's motion for modification. 33 U.S.C. §922. On appeal, employer

[1] An award based upon the agreements and stipulations of the parties is subject to modification pursuant to Section 22, 33 U.S.C. §922. *See Lucas v. Louisiana Ins. Guar. Ass'n*, 28 BRBS 1 (1994).

[2] A knee injury resulting in permanent partial disability is compensated pursuant to the schedule at Section 8(c)(2) of the Act, 33 U.S.C. '908(c)(2). An award of benefits for a temporary partial disability under Section 8(e) of the Act, 33 U.S.C. '908(e), is based on a claimant=s reduced earning capacity. *See Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992).

[3] In the "Discussion" portion of his decision, the administrative law judge referred to claimant's date of maximum medical improvement as February 12, 2001. Following claimant's request for modification, the administrative law judge issued an errata order, changing the date to February 12, 2002.

challenges the administrative law judge's finding regarding the date upon which claimant's condition reached maximum medical improvement. Claimant responds, urging affirmance.[4]

Employer contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on February 13, 2002, rather than on January 12, 2001. Specifically, employer avers that a change in claimant's restrictions subsequent to January 12, 2001, is an insufficient basis for determining that claimant had not previously reached maximum medical improvement. We disagree. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). In his decision, the administrative law judge relied upon the testimony of Dr. Wardell in determining that claimant's condition reached maximum medical improvement on February 13, 2002.

Dr. Wardell initially restricted the amount of time that claimant was allowed to stand to less than five hours per day, EX 2; pursuant in part to this restriction, the parties stipulated that claimant was entitled to permanent partial disability compensation for a 10 percent impairment to her right leg as of January 12, 2001. Dr. Wardell thereafter deposed that claimant had about 80 percent normal range of motion in her knee at that time. JX 1 (Depo. of Dr. Wardell) at 5. He subsequently lifted claimant's standing restriction altogether when, during her February 13, 2002 office visit, claimant exhibited a full range of motion in her right knee for the first time. *Id.* at 7. Dr. Wardell explained that claimant's condition improved between January 12, 2001 and February 13, 2002, in that during this period claimant regained approximately 20 percent motion in the knee, indicating less chronic inflammation and greater strength of the hamstring muscles. *Id.* at 8. According to Dr. Wardell, his assignment of a ten percent permanent partial impairment rating on January 12, 2001, was based on a five percent anatomical loss of claimant's medial meniscus and a five percent loss due to the cartilage damage over the medial femoral condyle, *id.* at 12, and that this rating has not changed because it is based strictly on the real definition of impairment, which is based on anatomical loss. *Id.* at 12-13. Dr. Wardell testified that he normally uses physical examination findings rather than subjective complaints to determine maximum medical improvement. *Id.* at 21. Dr. Wardell also stated that claimant has maintained this full range of motion in her right knee during her subsequent two visits to him and that from a clinical standpoint claimant is as strong as she can get at this point. *Id.* at 8-9. Dr. Wardell thus concluded that, in retrospect, claimant reached maximum medical improvement on February 13, 2002, rather than on the earlier date in January 2001.

[4] Pursuant to a motion filed by claimant, the Board on April 22, 2003 issued an Order dismissing claimant's appeal, BRB No. 03-0332.

In rendering his determination on this issue, the administrative law judge specifically set forth at length and fully considered the totality of Dr. Wardell's testimony. He then concluded that the uncontradicted medical evidence of record establishes that the condition of claimant's right knee improved after January 12, 2001,[5] and that claimant thus reached maximum medical improvement on February 13, 2002, when Dr. Wardell opined that claimant was as "strong as she can get". *See* Decision and Order at 4. As the administrative law judge's finding that claimant reached maximum medical improvement on February 13, 2002, is supported by substantial evidence, the administrative law judge's finding on this issue is affirmed. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[5] Dr. Wardell's testimony constitutes the only evidence of record addressing this issue.