

BRB No. 91-1915A

KENNETH NICAUD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FARMERS EXPORT COMPANY)	DATE ISSUED:
)	
and)	
)	
NATIONAL UNION FIRE)	
INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Jerome Friedman, Metairie, Louisiana, for claimant.

Roch P. Poelman (Hebert, Mouldoux & Bland), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (90-LHC-1055) of Administrative Law Judge Kenneth A. Jennings 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, an electrician, was injured during the course of his employment on October 28, 1980, when he slipped and fell, landing on his back on a steel grating. Claimant continues to suffer back pain and has worked only sporadically since the date of his injury.

In his Decision and Order, the administrative law judge found that claimant's continued

complaints of low back pain are related to his work injury, that claimant remained temporarily disabled, that claimant's disability is partial based upon the report of employer's vocational consultant establishing the availability of suitable alternate employment, that claimant has a residual wage-earning capacity of \$220 per week, and that employer is liable for the medical expenses of Dr. Doyle. Accordingly, the administrative law judge, in addition to granting past and future medical expenses, awarded claimant temporary total disability compensation from October 29, 1980, through October 28, 1981 (except for March 4, 1981), and temporary partial disability compensation commencing October 29, 1981, and continuing.

Employer thereafter appealed, and claimant cross-appealed, the administrative law judge's decision to the Board. BRB Nos. 91-1915/A. Employer subsequently filed a Motion to Stay Proceedings and For Remand to the Office of the Administrative Law Judges for modification proceedings pursuant to Section 22 of the Act, 33 U.S.C. §922. In an Order dated April 21, 1993, the Board dismissed employer's appeal, BRB No. 91-1915, held claimant's cross-appeal, BRB No. 91-1915A, in abeyance, and remanded the case to the Office of Administrative Law Judges. On October 5, 1993, the administrative law judge denied employer's motion for modification. By Order dated March 24, 1995, the Board dismissed as untimely employer's appeal, dated July 18, 1994, of the administrative law judge's Decision and Order Denying Motion for Modification. BRB No. 95-1152. In this Order the Board additionally lifted the abeyance in claimant's appeal in BRB No. 91-1915A and accepted employer's response to claimant's Petition for Review and brief as part of the record. The Board subsequently denied employer's motion for reconsideration in an Order dated May 17, 1995.

On appeal, claimant challenges the administrative law judge's findings regarding the nature and extent of his ongoing disability.

Claimant initially contends that the administrative law judge erred in determining that his condition remains temporary in nature. We agree. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *per reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(*per curiam*), *cert. denied*, 394 U.S. 976 (1969). Moreover, a condition may be considered to be permanent if the employee 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), *aff'g* 27 BRBS 192 (1993); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). The possibility that claimant might undergo treatment that might alleviate his disability may be too speculative to foreclose an award for permanent disability. *See Watson*, 400 F.2d at 654; *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985). In the instant case, the administrative law judge found that claimant's condition remains temporary based upon the opinion of Dr. Doyle that claimant's condition was not properly diagnosed until 1987 and that claimant had yet to receive proper medical treatment. *See* Decision and Order at 8. However, claimant, whose present condition is the result of an incident which occurred in 1980, is no longer undergoing medical treatment. *See* Tr. at 209-210.

Based upon this uncontroverted evidence, we hold that claimant's disability is permanent because it has continued for a lengthy period of time and appears to be indefinite in nature. *See Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). We therefore reverse the administrative law judge's finding that claimant's condition is temporary. As the date of permanency is primarily a question of fact based on medical evidence, we remand the case to the administrative law judge for a determination as to the date upon which claimant's condition became permanent. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

We note that the administrative law judge awarded claimant temporary partial disability compensation commencing October 29, 1981. However, Section 8(e) of the Act states, in relevant part, that temporary partial disability compensation "shall not be paid for a period exceeding five years." *See* 33 U.S.C. §908(e). Thus, on remand, it will be necessary for the administrative law judge to modify claimant's award of partial disability compensation consistent with his finding regarding permanency.

Lastly, claimant, without argument, summarily states that the administrative law judge erred in awarding claimant partial, rather than total, disability compensation. In support of this statement of error, claimant has filed with the Board his post-hearing memorandum.

The Board is authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees arising under the Act. *See* 33 U.S.C. §921(b)(3). The findings of fact in the administrative law judge's decision "shall be conclusive if supported by substantial evidence in the record as a whole." *Id.* The circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address that decision and demonstrate why substantial evidence does not support the result reached.

The Board's Rules of Practice and Procedure further provide that a party's petition for review to the Board shall list

the *specific* issues to be considered on appeal ... [and that] [e]ach petition for review shall be accompanied by a ... statement which: *Specifically* states the issues to be considered by the Board. . . .

20 C.F.R. §802.211 (a), (b) (emphasis added). Where a party is represented by counsel, mere assignment of error is not sufficient to invoke the Board's review. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

In the instant case, claimant's brief fails to identify any errors committed by the administrative law judge in determining the extent of claimant's disability; rather, claimant's brief addresses solely the issue of the nature of his disability. Claimant has not alleged why substantial evidence does not support the administrative law judge's finding that he is only partially disabled.

Mere incorporation of a post-hearing brief, without more, is insufficient to satisfy the requirements of the Act and regulations. Thus, as claimant has failed to raise a substantial question for the Board to review regarding the administrative law judge's finding that claimant's disability is partial, we affirm the administrative law judge's determination that claimant's disability is partial in extent.

Accordingly, the administrative law judge's finding that claimant's condition is temporary is reversed, and the case is remanded for further consideration consistent with this decision. 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