BRB No. 92-958

RICHARD HALLIGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GTE GOVERNMENT SYSTEMS CORPORATION	)	
	)	
	)	
and	)	DATE ISSUED:
	)	
KEMPER NATIONAL COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION AND ORDER

Appeal of the Decision and Order - Awarding Benefits of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

Michael A. Rayer (Jardine, Logan & O'Brien), Saint Paul, Minnesota, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-739) of Administrative Law Judge Charles W. Campbell 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).

Claimant, a mechanical and structural supervisory engineer, suffered a back injury on March 7, 1989 while working for employer on Kwajalein Island in Hawaii. On May 10, 1989, claimant underwent a foraminotomy, laminotomy, and disc excision bilaterally at L4-5,

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

which temporarily improved his back condition. Following this surgery, claimant had three

"syncopal" episodes (*i.e.*, fainting spells). Claimant subsequently returned to light duty work for employer from September 25, 1989 through March 20, 1990, at which time he testified that employer told him to stop working. Claimant has not worked since that date.

In his Decision and Order, the administrative law judge found that claimant's back injury, but not his syncopal episodes, was work-related, that claimant reached maximum medical improvement on January 6, 1990, and that claimant's average weekly wage at the time of his injury was $1,513.68. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from March 7, 1989 to January 6, 1990 and permanent total disability benefits thereafter.[1] 33 U.S.C. §908(a), (b).

On appeal, employer challenges the administrative law judge's findings regarding maximum medical improvement and claimant's average weekly wage. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in determining that claimant reached maximum medical improvement. In the alternative, employer contends that the administrative law judge erred in determining the date claimant reached maximum medical improvement. Specifically, employer contends that, since the orthopedists of record opined that additional surgery would improve claimant's back condition, maximum medical improvement has yet to be reached. In the alternative, employer contends that if claimant reached maximum medical improvement, the date should be modified to November 13, 1990, which is the date employer contends it was first notified that claimant's disability was work-related based on Dr. Miller's report. We reject employer's arguments.

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, *petition for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Mills v. Marine Repair Service*, 21 BRBS 115 (1988), *modified on recon.*, 22 BRBS 335 (1989). A determination of maximum medical improvement is primarily a question of fact based on medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 60 (1985). The Board has held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. *See Trask*, 17 BRBS at 60 (1985). Thus, the Board has held if anticipated surgery is not expected to improve claimant's condition, that condition may be considered permanent. *See White v. Exxon Co.*, 9 BRBS 138, 142 (1978) (Smith, S., J., dissenting), *aff'd mem.* 617 F.2d 292 (5th Cir. 1990); *see also Worthington v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 200, 202 (1986).

[1]Employer paid claimant disability benefits from April 12, 1989 through September 25, 1989. Employer filed a notice of suspension of payments on October 25, 1989 and November 7, 1989, and paid claimant his salary in lieu of compensation from March 20, 1990 through July 9, 1990. Alj. Ex. 2.

In this case, the administrative law judge found that claimant's condition reached maximum medical improvement on January 6, 1990, the date on which Dr. Ma opined that claimant should be limited to light duty work regardless of whether additional surgery was performed on his back. In this regard, we note that although Drs. Miller, Burton, Dowdle, Johnson, and Ma opined that further surgery was needed, Drs. Burton, Dowdle, Johnson, and Ma additionally stated that claimant would be permanently disabled from performing his usual work even if such surgery was performed. Moreover, Drs. Dowdle and Burton indicated that claimant had a heart condition which should be checked prior to claimant's undergoing surgery, and claimant himself testified he was afraid to undergo additional surgery. Tr. 60. The administrative law judge's finding of permanency as of January 6, 1990, is therefore supported by substantial evidence. We affirm that finding, as the record indicates that claimant's condition is one of long-standing duration. *See generally Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.* 20 BRBS 26 (1987), *rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1987); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

Employer next contends that the administrative law judge erred in calculating claimant's average weekly wage. At the formal hearing, the parties stipulated that claimant's total salary in the year preceding his March 1989 injury was $59,191.12. Tr. 28. In calculating claimant's average weekly wage, the administrative law judge added to this stipulated salary the paid-for living expenses provided by employer. Specifically, employer added to claimant's salary claimant's rent, $7920 a year; utilities, $3600 a year; and tuition for claimant's children, $8,000 a year. These additions yielded a yearly total of $78,711.12, which he then divided by 52 to result in an average weekly wage of $1,513.68. The administrative law judge obtained the costs of claimant's paid-for living expenses from claimant's hearing testimony. *See* Tr. 27-28. In challenging the administrative law judge's calculation, employer contends that claimant's average weekly wage should be based solely on claimant's annual salary, $59,191.12, divided by 52. Employer contends that the administrative law judge erroneously included claimant's living expenses in calculating claimant's average weekly wage as there was no documentation in the record of those expenses, and claimant's testimony alone is insufficient to establish their value. In this regard, employer contends that it was denied a proper opportunity for discovery because, despite its request prior to the hearing, claimant did not submit documentation regarding these paid-for living expenses.

Wages are defined in Section 2(13), 33 U.S.C. §902(13), of the Act as "the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (related to employment taxes)." 33 U.S.C. §902(13)(1988). The Board has held that while the plain language of Section 2(13) mandates that an advantage subject to tax withholding is a wage, it does not mandate that a benefit not subject to tax withholding is not a wage *per se*. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part on other grounds*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993). In this case, the administrative law judge as fact-finder rationally determined that claimant's testimony establishes that his paid-for

living expenses were intended to compensate him in part for his employment services, that these items were paid for under the terms of claimant's employment contract and that therefore they should be included in his average weekly wage. *See Cretan*, 24 BRBS at 43-44 (1990); *Lopez v. Southern Stevedores*, 23 BRBS 295, 301 (1990); *Denton v. Northrop Corp.*, 21 BRBS 37, 46-57 (1988); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6, 8 (1985). Further, claimant's testimony alone may be sufficient to support a finding regarding the appropriate figures. *See Carle v. Georgetown Builders, Inc.*, 14 BRBS 45, 50-51 (1981). Moreover, as the administrative law judge specifically noted in his decision, employer would be in the position itself to introduce evidence of the living expenses it paid claimant; for whatever reason, employer declined to do so. Accordingly, we hold that the administrative law judge correctly included claimant's rent, utilities and children's tuition in his calculation of claimant's average weekly wage.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge