

THOMAS WUOLLET)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SCAPPOOSE SAND AND GRAVEL)	DATE ISSUED:
)	
and)	
)	
ARGONAUT INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION AND ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Karen O'Kasey (Schwabe, Williamson & Wyatt), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (89-LHC-0417) of Administrative Law Judge Alexander Karst 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On August 11, 1980, claimant was struck on his neck, head and arm by a chain or cable during the course of his work with employer. Claimant was in a coma for approximately five months following this incident and has since been in extensive rehabilitation therapy.

This case is before the Board for the second time. In the original decision in this case, Administrative Law Judge Murty noted that the parties stipulated that claimant was totally disabled

since the date of injury, August 11, 1980, and ordered employer to pay temporary total disability benefits from the date of injury.¹ Claimant subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting that Judge Murty failed to determine the date upon which claimant became permanently disabled. Administrative Law Judge Alexander Karst (the administrative law judge) found that claimant became permanently totally disabled on the date of his accident, August 11, 1980, because "he then became irreversibly paralyzed and otherwise so impaired as to preclude any further competitive employment." Decision and Order at 3. Accordingly, the administrative law judge modified Judge Murty's Order to change the characterization of claimant's disability from temporary total disability to permanent total disability as of the date of claimant's injury, August 11, 1980.

On appeal, employer contends that the administrative law judge erred in finding that August 11, 1980, is the date of maximum medical improvement. Claimant responds, urging affirmance.

Employer contends that, in determining the date of maximum medical improvement, the administrative law judge erred in utilizing the date upon which claimant was rendered competitively unemployable. We agree. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if it has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The determination of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). Thus, the Board has held that, when addressing the permanency of claimant's disability, the administrative law judge should discuss the medical opinions of record regarding permanency rather than relying on the date that claimant returned to work. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

In the instant case, the administrative law judge, without considering all of the medical evidence of record, concluded that claimant's condition became permanent as of the date of his injury, August 11, 1980. Specifically, after initially acknowledging that claimant's condition has both improved and deteriorated since the date of his injury, the administrative law judge concluded that claimant's condition became permanent on the date of his injury because "he then became irreversibly paralyzed and otherwise so impaired as to preclude any future competitive employment." *See* Decision and Order at 3. We agree with employer that the administrative law judge applied an erroneous legal standard when determining the date upon which claimant's condition became permanent. The Board has held that a claimant's ability to return to work is irrelevant to ascertaining the *nature* of his disability, since medical rather than economic considerations determine whether his condition can be deemed permanent. *See Price v. Dravo Corp.*, 20 BRBS 94 (1987). We therefore vacate the administrative law judge's determination that claimant's condition became permanent as of the date of his work injury, and we remand the case for the administrative law judge to reconsider the issue of permanency under the proper legal standard. *See Ballesteros*, 20 BRBS at 184; *Price*, 20 BRBS at 94.

¹Employer appealed this decision to the Board; the Board affirmed Administrative Law Judge Murty's finding that claimant satisfied the "status" requirement for jurisdiction under the Act. *Wuollet v. Scappoose Sand and Gravel*, 18 BRBS 108 (1986).

In remanding the case, we note that the record contains conflicting medical evidence regarding the date claimant reached maximum medical improvement. Dr. Zipp opined that claimant was medically stationary upon his hospitalization on the day of the work-incident. *See* Exhibit 6. In a December 1, 1983, report acknowledged by the administrative law judge, a panel of three physicians opined that while claimant's motor and cognitive functions may improve, his condition was stationary from a neurological and orthopedic standpoint. *See* Exhibit 46. Moreover, Drs. Buza, Settle, Kilpatrick, and Grewe each offered conflicting opinions as to the nature of claimant's condition. *See* Exhibits 10, 12, 36, 63, 64. Lastly, the record contains evidence that claimant's ongoing rehabilitation efforts have resulted in his ability to walk slowly with a cane, ride a three-wheeled bicycle, handle a wheelchair, and take college art classes. *See* Exhibits 41-59. Thus, on remand, the administrative law judge must address all of the relevant evidence of record regarding the nature of claimant's condition and provide a rationale for his ultimate findings. *See Ballesteros*, 20 BRBS at 184.

Accordingly, the administrative law judge's Decision and Order is vacated insofar as the administrative law judge finds August 11, 1980, to be the date of maximum medical improvement, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge