BRB No. 93-0507

WILLIE A. TURNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELLER & COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
GEORGIA INSURERS INSOLVENCY POOL	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Denial of Motion for Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Herbert J. Chestnut (Herndon & Chestnut), Savannah, Georgia, for claimant.

Richard C. E. Jennings (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Denial of Motion for Reconsideration (92-LHC-212) of Administrative Law Judge Thomas M. Burke awarding benefits 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 worked as a longshoreman for employer. Claimant injured his back and leg on November 16, 1985, when he slipped on a ladder and fell backward, catching his foot and knee in a rung and then landing on the deck of the ship on his back. Claimant returned to work in February 1986 still experiencing back pain and taking medication. Claimant, while working for Ryan-Walsh,

was injured again on September 27, 1986, when he was struck on the side of the head by a frozen side of beef. This resulted in a gash above his left eye, and neck pain and headaches. Claimant returned to work two days later and continued to work until January 1987. A suction diskectomy was performed in May 1987 and the physicians of record found that claimant is unable to perform work as a longshoreman as of July 7, 1988. Claimant received temporary total disability benefits, based on an average weekly wage of $672.81, from November 17, 1985 to March 2, 1986 and from January 14, 1987 through the time of the hearing.

In his Decision and Order, the administrative law judge found that claimant's disability is due to the injury of November 16, 1985, and that therefore employer is liable for claimant's benefits. As employer did not offer evidence of suitable alternate employment, the administrative law judge found claimant entitled to permanent total disability benefits. Employer's motion for reconsideration was summarily denied.

On appeal, employer contends that claimant's disability is due to the injury of September 27, 1986, rather than to the injury of November 16, 1985, and that it, therefore, is not the responsible employer. Employer further contends that claimant is not entitled to permanent total disability benefits because he did not cooperate with the vocational rehabilitation counselors. Lastly, if claimant is totally and permanently disabled as a result of the November 1985 injury, employer contends that permanent total disability benefits should commence on March 1, 1991, rather than on November 17, 1985. Claimant responds, urging affirmance of the award of benefits.

Employer contends that claimant's disability is due to the September 1986 injury, which occurred while claimant was employed by Ryan-Walsh, as claimant was able to work and did not complain of pain running down his leg until after the 1986 injury. In multiple traumatic injury cases, the courts and the Board have held that if the disability results from the natural progression of a prior injury, and would have occurred notwithstanding the subsequent injury, then the responsible employer is the one at the time of the initial injury; if, however, the subsequent injury aggravated the initial injury, then the subsequent employer is liable. *See, e.g., Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991), *aff'g Vanover v. Foundation Constructors*, 22 BRBS 453 (1989). In this case, the administrative law judge rationally found that the evidence of record is sufficient to establish that claimant's disability is due to the 1985 accident as Drs. Holland and Kelly stated that claimant's disability is due to his original fall. Cl. Exs. 1, 3, 6; Emp. Ex. 16. Dr. Holland specifically stated that the 1986 "beef incident" did not aggravate claimant's condition. Cl. Ex. 16. Further, contrary to employer's contention, the administrative law judge permissibly found Dr. German's testimony that he could not state within a reasonable degree of medical certainty that the "beef incident" is casually related to claimant's back problem, too uncertain to be credited over Dr. Holland's opinion. Emp. Ex. 15 at 16-17. We therefore affirm the administrative law judge's finding that claimant's disability was caused by the November 1985 injury and that employer therefore is liable for claimant's benefits, as it is supported by substantial evidence of record. *Foundation Constructors*, 950 F.2d at 624, 625, 25 BRBS at 77 (CRT).

Employer next contends, citing *Rogers Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986), that claimant should not be found totally and permanently disabled as claimant did not cooperate with rehabilitation efforts. Where it is undisputed that claimant cannot return to his usual work, the burden shifts to employer to

establish the availability of suitable alternate employment. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The Board has affirmed a finding that claimant is entitled only to partial rather than total disability benefits because of a failure to cooperate with vocational rehabilitation counselors in evaluating the extent of disability. *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). However, the Board has also rejected the contention that a claimant impeded the rehabilitative process where he met with counselors and submitted to vocational testing. *Piunte v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990). Further, as the administrative law judge notes, employer misinterprets *Rogers Terminal*, as the burden placed on claimant to exercise reasonable diligence in obtaining alternate employment does not displace employer's initial burden to show evidence of alternate job availability. *See Rogers Terminal*, 784 F.2d at 691, 18 BRBS at 83 (CRT).

In the instant case, employer did not submit any evidence of any alternate employment opportunities, but rather, submitted reports from rehabilitation counselors allegedly detailing claimant's failure to cooperate and to complete the GED program. We, however, reject employer's contention that claimant so inhibited vocational rehabilitation efforts that an award for total disability is inappropriate. Steven A. Yuhas, a rehabilitation counselor, worked with claimant in 1989 and 1990. Contrary to employer's contention, he stated that claimant was cooperative and submitted to a wide range of achievement tests, intelligence tests and various strength tests. Dr. Routon, who worked with Mr. Yuhas, also found claimant cooperative, and limited claimant to light work. Emp. Exs. 6, 10. James S. Waddington, a rehabilitation counselor, evaluated claimant in 1988 and 1989. In February 1989, noting claimant's depression and restricted activity level, Mr. Waddington concluded that claimant was uncooperative, somewhat hostile and not motivated to work, and he therefore did not perform vocational testing. Emp. Ex. 11. All the rehabilitation counselors were aware of claimant's physical limitations and educational and vocational background and one counselor was able to evaluate claimant's physical and vocational strengths and weaknesses through testing. Thus, employer's ability to identify suitable alternate employment was not hampered by claimant's lack of cooperation with Mr. Waddington in light of the other data available to it. *Piunte*, 23 BRBS at 367. Inasmuch as employer did not attempt to identify suitable alternate employment, we affirm the administrative law judge's finding that claimant is totally disabled. *Hite v. Dresser Guiberson Dumping*, 22 BRBS 87 (1989).

Employer lastly contends that if claimant is found to be totally disabled due to the injury of November 1985, then permanent total disability benefits should commence as of March 21, 1991, the date Dr. Routon found maximum medical improvement, and claimant should receive temporary total disability benefits for the periods he was unable to work before March 21, 1991. The administrative law judge awarded claimant permanent total disability benefits for the period from November 17, 1985 to March 2, 1986, and commencing again on June 14, 1987. Dr. Holland testified that claimant reached maximum medical benefit with a 20 percent impairment on March 26, 1988, increased his disability finding to 22 percent, and in June 1989 found a 25 percent impairment. Emp. Exs. 16 at 12, 16; 18. Dr. Routon found claimant had reached maximum medical improvement on February 22, 1990, and March 21, 1991. Cl. Ex. 7. Permanent disability is a disability that has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal hearing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). As employer notes, the administrative law judge awarded permanent benefits based from the date of claimant's injury rather than making a finding as to when claimant's disability became permanent. As the evidence of record is conflicting on this issue, we remand the case to the administrative law judge to determine the date on which permanent disability benefits should commence.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated insofar as it sets the onset of permanent total disability on November 17, 1985, and the case is remanded to the administrative law judge 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

REGINA C. McGRANERY
Administrative Appeals Judge