BRB No. 93-1384

CARL J. GRUNDER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION OF BALTIMORE	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order On Remand of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Michael W. Prokopik (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (88-LHC-0646) of Administrative Law Judge Edward J. Murty, 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).

This case is before the Board for the second time. To reiterate briefly the facts of this case, claimant fell during the course of his employment on January 8, 1986, primarily injuring his right knee. On January 11, 1987, claimant underwent surgery for a total right knee replacement. Following physical therapy and a surgical manipulation in March 1987, claimant underwent additional surgery in March 1988 to replace the prosthetic tibial component which had loosened from the original surgery.

In his initial decision in this case, the administrative law judge concluded that claimant was permanently and totally disabled as a result of his January 8, 1986 work injury. He also found that October 10, 1988 is the date of maximum medical improvement, and he granted employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Employer's subsequent Motion for Reconsideration was denied.

Employer appealed this decision to the Board. *See Grunder v. I.T.O. Corp. of Baltimore*, BRB No. 90-0897 (Oct. 14, 1992)(unpub.). The Board determined that the administrative law judge's conclusory finding that October 10, 1988, is the date upon which claimant reached maximum medical improvement was insufficient to comply with the Administrative Procedure Act's requirement that the administrative law judge set forth his rationale in his Decision and Order. The Board thus vacated the administrative law judge's finding of October 10, 1988, as the date of maximum medical and remanded the case for the administrative law judge to discuss the relevant evidence of record and provide a rationale for his finding of maximum medical improvement. *See Grunder*, slip op. at 3-4.

On remand, the administrative law judge once again concluded that October 10, 1988, was the date upon which claimant's condition reached maximum medical improvement, noting that that date was the only date following claimant's surgery suggested by any physician to mark maximum medical improvement.

On appeal, employer challenges the administrative law judge's finding of maximum medical improvement as of October 10, 1988, contending that the administrative law judge failed to comply with the Board's remand order. Claimant has not responded to this appeal.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A finding that claimant's condition had stabilized by a certain date is tantamount to a finding that claimant reached maximum medical improvement on that date. *See Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). Thus, an administrative law judge may rely on a physician's opinion to establish the date of maximum medical improvement. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148 (1989).

Employer contends that the administrative law judge, on remand, failed to comply with the Board's instructions; specifically, employer asserts that the administrative law judge failed to reconsider the evidence of record and render findings of fact as directed by the Board in its initial decision. We disagree.In its initial decision, the Board instructed the administrative law judge on remand to discuss the relevant medical evidence of record regarding the date upon which claimant's condition reached maximum medical improvement. On remand, the administrative law judge noted that both Drs. Klinefelter and Kan agreed that claimant needed surgery, that Dr. Klinefelter opined that such surgery was the only way by which claimant's knee condition could improve, and that Dr. Brouillet subsequently performed that surgery. The administrative law judge subsequently accepted October 10, 1988, the date upon which Dr. Brouillet opined that maximum medical improvement had been reached, as the date of maximum medical improvement, noting that this date was the only date post-surgery suggested by any physician to mark maximum medical improvement. In crediting the date of maximum medical improvement set forth by Dr. Brouillet, the physician who performed claimant's surgery, the administrative law judge implicitly credited that opinion over the opinion of Dr. Klinefelter who, although stating that claimant reached maximum medical improvement on October 1, 1986, further opined that surgery could improve claimant's condition. Inasmuch as the administrative law judge found that all the physicians of record recommended surgery, the

administrative law judge's decision to credit the only post-surgery date of maximum medical improvement set forth by the physicians of record is neither inherently incredible or patently unreasonable; accordingly, we affirm the administrative law judge's finding that claimant reached maximum medical improvement on October 10, 1988, as that finding is supported by substantial evidence. *See generally Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge