BRB Nos. 97-1511,
99-1063 and 99-1063A

MICHAEL BROWN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: 7/7/2000
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Denying Compensation Benefits, Order Denying Claimant's Motion for Reconsideration, Decision and Order on Section 22 Modification and Order Denying Petitions for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Pat Byrne Whiteaker, Brookhaven, Mississippi, for claimant.

Christopher M. Landry, Metairie, Louisiana, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation Benefits and Order Denying Claimant's Motion for Reconsideration, and claimant appeals, and employer cross-appeals, the Decision and Order on Section 22 Modification and Order Denying Petitions for Reconsideration (94-LHC-863) of Administrative Law Judge Richard D. Mills 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, who worked as a fiberglass laminator for employer, suffered a work-related

injury to his lower back on June 10, 1991, after lifting a five-gallon jug. He was unable to continue his work for employer thereafter. After conservative treatment, claimant underwent a discectomy at the L4-5 level in April 1992, but continued to complain of pain in his back and right leg. He filed a claim under the Act seeking temporary total disability compensation. 33 U.S.C. §908(b). Employer voluntarily paid temporary total disability benefits from June 21, 1991 until March 2, 1993, and from October 25, 1994 until June 26, 1996.

In his initial Decision and Order Denying Benefits, issued on April 7, 1997, the administrative law judge found that claimant established a *prima facie* case of total disability. He further found that claimant reached maximum medical improvement on December 20, 1992, based on the opinion of Dr. Bazzone, the physician who performed claimant's surgery. The administrative law judge next found that employer established the availability of suitable alternate employment beginning on March 5, 1993, by virtue of four truck driving positions and a route sales driver position which the administrative law judge found were within claimant's physical limitations. After finding that the alternate employment exceeded claimant's pre-injury wage-earning capacity, the administrative law judge determined that claimant was not entitled to any further compensation, but found that claimant was entitled to medical benefits under Section 7 of the Act, 33 U.S.C. §907. In an order denying claimant's motion for reconsideration, the administrative law judge found that claimant contacted few of the 24 jobs listed in employer's job survey, and thus, reaffirmed his determination that employer established the availability of suitable alternate employment. Additionally, the administrative law judge reaffirmed his finding that the opinion of Dr. Davis, that claimant was not capable of any employment, was outweighed by the contrary medical evidence.

Thereafter, claimant appealed the administrative law judge's decisions to the Board. After the notice of appeal was filed, however, claimant filed a motion to re-open the record with the district director based on new medical evidence. In an Order dated November 25, 1997, the Board construed claimant's motion to re-open the record as a request for modification, and remanded the case for modification proceedings, which occurred before the administrative law judge on October 15, 1998. On April 19, 1999, the administrative law judge issued his Decision and Order on Section 22 Modification, wherein the administrative law judge found claimant's back condition had worsened based on the results of a discogram administered on August 15, 1997, and thus, that claimant established a change in condition. Relying on Dr. Whitecloud's opinion that claimant requires surgery and is unable to return to gainful employment, the administrative law judge awarded claimant temporary total disability compensation retroactive to August 25, 1997, the date Dr. Whitecloud reviewed the discogram findings. The administrative law judge further found that claimant was entitled to reimbursement for the treatment rendered by Dr. Whitecloud commencing on September 17, 1997, and all reasonable and necessary treatment as suggested by claimant's physicians, but denied reimbursement for the treatment rendered by Drs. Whitecloud, Aprill and Tim

Jackson prior to that date as claimant failed to seek authorization for their treatments. In a subsequent order, the administrative law judge denied both employer's and claimant's motions for reconsideration.

In his appeal of the Decision and Order Denying Compensation Benefits and Order Denying Claimant's Motion for Reconsideration (the 1997 decisions), BRB No. 97-1511, claimant challenges the administrative law judge's finding that claimant reached maximum medical improvement on December 20, 1992, arguing that he has remained temporarily totally disabled since the date of his accident and was under no obligation to seek alternate employment after December 20, 1992. Claimant further argues that the administrative law judge erred in finding that employer established suitable alternate employment and that claimant did not diligently seek employment. Employer responds, urging affirmance. In his appeal of the Decision and Order on Section 22 Modification and Order Denying Petitions for Reconsideration (the 1999 decisions), BRB No. 99-1063, claimant contends that the administrative law judge's retroactive reinstatement of benefits on August 25, 1997 was arbitrary, and reiterates his argument that he is entitled to temporary total disability compensation from the date of the accident. Employer has filed a cross-appeal of the administrative law judge's 1999 decisions, BRB No. 99-1063A, challenging the administrative law judge's award of benefits on modification. Specifically, employer contends that the administrative law judge erred in finding a change in condition, asserting that the medical evidence since 1997 merely reiterates the results of prior evaluations. In an Order issued on September 22, 1999, the Board consolidated claimant's appeals of the administrative law judge's 1997 and 1999 decisions, BRB Nos. 97-1511 and 99-1063, with employer's appeal of the 1999 decisions, BRB No. 99-1063A, for purposes of decision.

We first address the arguments raised by claimant in his appeal of the administrative law judge's 1997 decisions, BRB No. 97-1511. Claimant initially contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on December 20, 1992. Specifically, claimant argues that his April 1992 discectomy did not significantly improve his condition, and that Dr. Bazzone's opinion that claimant reached maximum medical improvement on December 20, 1992, is contrary to the objective evidence, as well as his own earlier opinion that further surgery may be needed.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason*

v. Bender Welding & Machine Co., 16 BRBS 307 (1984).

In his 1997 decision, the administrative law judge initially determined that claimant reached maximum medical improvement on December 20, 1992, based on the opinion of Dr. Bazzone, who performed claimant's surgery. *See* 1996 Emp. Ex. 10. The administrative law judge found this to be the most accurate date as the evidence showed that claimant had recovered from his surgery by this time, that no subsequent therapy, injections or rest alleviated claimant's complaints of pain, and that no physician advocated further surgery.[1] *See* 1997 Decision and Order at 12. Claimant, on appeal, points to a June 19, 1992, note from Dr. Bazzone in which he requested further myelographic studies and considered whether additional surgery should be performed. However, after further studies were performed, Dr. Bazzone opined on August 6, 1992 that claimant's disc effects were less severe than prior to the surgery, and concluded that further surgery was not necessary. *See* 1996 Emp. Ex. 10. Claimant further avers that the administrative law judge erred in discrediting claimant's subjective complaints of pain subsequent to December 20, 1992. However, even if the administrative law judge had made a contrary finding regarding claimant's complaints, it would not conflict with his finding that claimant reached permanency on that date. *See, e.g., Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). As the record contains substantial evidence to support the administrative law judge's determination that claimant reached maximum medical improvement on December 20, 1992, we affirm that finding. *See Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Ezell*, 33 BRBS at 19; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

[1]The administrative law judge further rejected the opinions of Drs. Danielson and Russo that claimant was temporarily disabled until 1996, as they were based chiefly on the subjective complaints of pain, which the administrative law judge found unreliable and inconsistent with the objective evidence.

Claimant next argues that the administrative law judge erred in not initially awarding total disability compensation.[2] Specifically, claimant asserts that the administrative law judge erred in failing to address the totality of the evidence regarding claimant's capacity to perform suitable alternate employment. Claimant alternatively argues that if suitable alternate employment is established, he met his burden of showing that he diligently yet unsuccessfully searched for employment, and therefore, he should be entitled to total disability under the Act. For the reasons that follow, we vacate the administrative law judge's denial of permanent total disability compensation and remand the case for reconsideration.

Where, as here, a claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the realistic availability of jobs in the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If employer establishes the availability of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

In rendering his determination that employer established the availability of suitable alternate employment, the administrative law judge relied on the opinions of Drs. Danielson and Russo that claimant is capable of light duty with alternate sitting and standing, *see* 1996 Emp. Exs. 14, 23 at 31-32, 26 at 35, and found that these opinions outweighed the 1993 opinion of Dr. Davis that claimant was not capable of employment, *see* 1996 Emp. Ex. 12. The administrative law judge further rejected the restrictions given by Dr. Bazzone. Dr. Bazzone restricted claimant from his usual employment for three months after December

[2]Even if claimant were only temporarily disabled, employer could establish suitable alternate employment, as this issue concerns the extent of claimant's disability and the same standards apply regardless of whether the nature of the disability is temporary or permanent. *See Bell v. Volpe/Head Constr. Co.*, 11 BRBS 377 (1979).

1992, and thereafter did not place any limitations on claimant, stating that claimant's limitations should be governed by his own pain responses. *See* 1996 Emp. Ex. 24 at 10, 16. The administrative law judge rejected these limitations as too reliant on claimant's subjective complaints. Thereafter, the administrative law judge found that employer established suitable alternate employment on the basis of four truck driving positions and a route sales driver position identified in its March 5, 1993, job market survey, finding that these jobs fit the definition of light duty. *See* 1997 Decision and Order at 13. Contrary to the administrative law judge's determination, however, both Drs. Danielson and Russo limited claimant to alternate sitting and standing, and there is no indication from employer's 1993 job market survey that the jobs listed would allow claimant to do so. While the administrative law judge found that the route sales driver position would have offered more opportunities for standing, the physical requirements of this job are not listed in the job survey. Moreover, the truck driving jobs required a specific type of license which claimant testified he did not have, *see* 1996 Tr. at 74, and significantly, the report states that it is based on Dr. Bazzone's limitations, which the administrative law judge rejected, and incorrectly assumes that "no restrictions have been assigned to" claimant. *See* 1996 Emp. Supp. Ex. 21 at 265. As the available jobs identified in employer's March 5, 1993, job market survey provide no means for determining whether the duties involved are within the physical limitations imposed on claimant by Drs. Danielson and Russo, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999). On remand, the administrative law judge must determine whether the jobs listed in the remaining job market surveys submitted by employer, *see* 1996 Emp. Supp. 21, are within the physical limitations imposed by Drs. Danielson and Russo. If, on remand, the administrative law judge determines that employer established the availability of suitable alternate employment, he must make specific findings regarding the nature and sufficiency of claimant's efforts to seek employment; we note that this inquiry is not limited to diligence in seeking jobs identified by employer. *See Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998).

We now consider the issues raised in claimant's and employer's appeals of the administrative law judge's 1999 decisions, BRB Nos. 99-1063 and 99-1063A. On appeal, claimant first contends that the administrative law judge's retroactive reinstatement of temporary total disability benefits on August 25, 1997, was arbitrary, and argues that he is entitled to temporary total disability compensation from the date of the June 10, 1991, accident. Employer asserts that the administrative law judge erred in finding a change in condition, arguing that the medical evidence since 1997 merely reiterates the results of prior evaluations.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic

condition. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). *See also Rambo*, 515 U.S. at 291, 30 BRBS at 1 (CRT). Moreover, the applicable legal standards are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *See Rambo*, 515 U.S. at 296, 30 BRBS at 3 (CRT); *Delay*, 31 BRBS at 197; *Vasquez*, 23 BRBS at 431.

In the instant case, the administrative law judge relied on the reports of Drs. Aprill and Whitecloud in finding that claimant established a change in his physical condition. Comparing the results of a discogram administered on August 11, 1997, by Dr. Aprill with earlier objective tests, the administrative law judge determined that the 1997 test showed a worsening of the disc at the L4-5 level.[3] *See* 1999 Decision and Order at 9. The administrative law judge credited Dr. Whitecloud's opinion, based on the 1997 discogram, that claimant was a candidate for a fusion at the L4-5 level, and that he was unable to return to any gainful employment until such operative intervention. *See* 1998 Cl. Ex. 1 at 2. In his Order Denying Petitions for Reconsideration, the administrative law judge reaffirmed his finding that while claimant has always had some abnormality at the L4-5 level, the 1997 discogram showed new damage and deterioration. The administrative law judge denied claimant's contention that applying August 25, 1997, as the date to reinstate benefits was arbitrary.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Thus, the administrative law judge's decision to credit the opinions of Drs. Aprill and Whitecloud is within his authority as fact finder. Moreover, as the evidence states that claimant needs further surgery and is temporarily totally disabled, we affirm the

[3] The administrative law judge found that the earlier evaluations showed "subtle posterior anular fissure," and "eccentric prominence of right posterolateral anulus" at the L4-5 level, while the 1997 exam showed "right posterolateral radial fissure" and a "concentric fissure of the outer anulus at the left posterolateral disc margin." *See* 1998 Cl. Ex. 1 at 6, 8.

administrative law judge's determination that claimant established a change in his physical condition, as it is supported by substantial evidence and reject employer's contention to the contrary. We also affirm the administrative law judge's award of temporary total disability compensation retroactive to August 25, 1997, the date the change in condition was established.

Lastly, claimant contends that the administrative law judge erred in denying reimbursement for medical treatment rendered by Dr. Tim Jackson, and in denying reimbursement for treatment rendered by Drs. Whitecloud and Aprill prior to September 17, 1997, as employer had refused to approve referrals to these physicians by Dr. Danielson. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Thus, even where a claimant is not entitled to disability benefits, employer may still be liable for medical benefits for a work-related injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d)(1) of the Act, 33 U.S.C. §907(d)(1), requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was reasonable and necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). An employer must consent to a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a). However, where a claimant receives medical treatment from his initial choice of physician, and employer does not refuse further treatment from that authorized physician, employer is not required to consent to a change of physicians where the treatment sought is duplicative of the treatment he was already receiving. *See Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Senegal*, 21 BRBS at 8.

In the instant case, the record contains letters by Dr. Danielson which refer claimant to

Dr. Joe Jackson, a neurologist, and to Dr. Timothy Jackson, an orthopedist.[4] The administrative law judge credited the exchange of letters between Dr. Danielson and employer which mentioned Dr. Joe Jackson, as he is referred to as a neurologist, and described the specific treatment he could provide. Finding that claimant failed to request authorization for the treatment by Dr. Timothy Jackson, the administrative law judge denied reimbursement for Dr. Timothy Jackson's treatment. *See* 1999 Decision at 10; 1998 Cl. Ex. 5 at 14-16. Next, the administrative law judge considered claimant's September 5, 1997 letter to employer, which requested authorization for surgery by Dr. Whitecloud, a spine surgeon, *see* 1998 Cl. Ex. 10, as a request for a change of physician, which was refused by employer on September 17, 1997. *See* 1998 Emp. Ex. 9. The administrative law judge then found that as claimant did not seek authorization for the treatment of Drs. Tim Jackson, Whitecloud and Aprill prior to September 1997, he denied reimbursement for their treatment.

We hold that the administrative law judge's denial of medical benefits cannot be affirmed. In his 1999 Decision and Order on Section 22 Modification, the administrative law judge acknowledged that the record contained evidence of employer's refusal to authorize treatment by physicians other than claimant's treating physician, specifically citing Dr. Danielson's letter of November 27, 1995, wherein the physician references employer's refusal to authorize treatment by Dr. Smith and Dr. Whitecloud. *See* 1998 Emp. Ex. 11 at 31; 1999 Decision at 6 n.9. However, the administrative law judge did not consider whether employer refused to authorize treatment as early as 1995, in which case claimant is released from the obligation to seek approval for subsequent treatment and need only establish that the treatment he subsequently procured was reasonable and necessary for his injury. *See Schoen*, 30 BRBS at 112; *Anderson*, 22 BRBS at 20. Moreover, the administrative law judge made no findings as to whether Dr. Danielson's referrals in 1995 were to specialists, and thus whether employer was required to consent to the referrals. *See Armfield*, 25 BRBS at 303; *Senegal*, 21 BRBS at 8. Based on the foregoing, the administrative law judge's denial of reimbursement for treatment provided by Dr. Whitecloud prior to September 17, 1997, and for treatment provided by Dr. Timothy Jackson and Dr. Aprill, is vacated, and the case is remanded for reconsideration of this issue.

Accordingly, with respect to the 1997 decisions, the administrative law judge's denial of permanent total disability compensation is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's 1997 Decision and Order Denying Compensation Benefits and Order Denying Claimant's Motion for Reconsideration are affirmed. With respect to the 1999 decisions, the administrative law judge's denial of reimbursement for medical expenses is vacated, and the

[4]Dr. Danielson is a neurosurgeon.

case is remanded for reconsideration. In all other respects, the administrative law judge's 1999 Decision and Order on Section 22 Modification and Order Denying Petitions for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge