

BRB No. 99-0795

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

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

Edward Tylicki (Pozzi Wilson Atchison, LLP), Portland, Oregon, for claimant.

Karen O'Kasey and Darien S. Loiselle (Schwabe, Williamson & Wyatt, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the third time this case has been before the Board. To recapitulate the facts, 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. 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, the Board vacated the administrative law judge's determination that claimant's condition became permanent as of the date of his work injury, holding that claimant's ability 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. The Board remanded the case for the administrative law judge to reconsider the issue of permanency under the proper legal standard, and instructed him to address all of the relevant record evidence regarding the nature of claimant's condition and provide a rationale for his ultimate findings. *Woulet v. Scappoose Sand and Gravel*, BRB No. 90-0807 (Feb. 28, 1996)(unpublished). On remand, the administrative law judge considered the medical reports of record and found that claimant's condition reached permanency on December 2, 1983, based on the independent evaluation of a panel of physicians consisting of Drs. Leonard, Stainsby and Higgins.

On appeal, claimant challenges the administrative law judge's finding that claimant's

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).

condition reached maximum medical improvement December 2, 1983. Specifically, claimant contends that the administrative law judge applied an incorrect standard in making this determination, and asserts that in cases of paralysis, the appropriate standard for determining the date of maximum medical improvement is the moment the paralysis becomes irreversible. Claimant contends that because the traumatic injury on August 11, 1980, resulted in immediate and irreversible paralysis, a finding of permanence from the moment of injury is appropriate, arguing that any minor functional improvements he attained were attempts at coping with his severe injury and did not reflect any change in his disabling condition. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. In a reply brief, claimant reiterates the contention that his disability became permanent on the date of the accident, August 11, 1980.

We hold that the administrative law judge in the instant case applied the correct standard in determining the date of maximum medical improvement. 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).

On remand, the administrative law judge applied the proper legal standard and addressed the medical opinions of record regarding permanency, rather than claimant's ability to return to work. In determining that claimant's condition reached maximum medical improvement on December 2, 1983, the administrative law judge relied on the report of Drs. Leonard, Stainsby and Higgins, composed on the same date. In their report, these physicians noted by history claimant's improvement since his August 11, 1980 injury, such that claimant gradually regained consciousness in the fall of 1980, was discharged from the hospital on January 27, 1981, received therapy and home health care, and at the time of the report was performing several basic functions such as bathing, walking with a cane, cooking and dressing himself, though each with difficulty. Claimant's continued significant difficulty with speech and language was acknowledged, but these doctors noted that claimant denied the need for more physical, occupational or speech therapy, and that he has been taking an art program at a community college. Ultimately, Drs. Leonard, Stainsby and Higgins diagnosed, *inter alia*, post-traumatic cerebral and brain stem contusion with residual cognitive impairments and post-traumatic seizures, and stated:

[T]he patient's condition is stationary from a neurological and orthopedic standpoint. There may be additional improvement in motor and cognitive functions but it is unlikely that these will make a significant difference in his severe level of disability. He is totally disabled from gainful employment. He is marginal in the activities of daily living and will continue to require homemaker assistance part-time. . . . The patient does not wish additional occupational, physical or speech therapy and it is unlikely that any of these services would make a significant impact on his present disability.

Emp. Ex. 46. The administrative law judge found that, with one exception, all of the other medical opinions showed that claimant did not reach maximum medical improvement prior to December 2, 1983. The administrative law judge noted Dr. Grewe's opinion that claimant was not yet medically stationary as of December 1980, *see* Emp. Ex. 64, and Dr. Buza's opinion that claimant was not medically stationary as of July 1, 1981. Emp. Ex. 10. Dr. Settle, in his July 27, 1982 report, checked the "no" box to the question as to whether claimant was medically stationary, and in subsequent reports in 1982 and 1983 noted claimant's continued improvement in his rehabilitation. Emp. Exs. 12, 26, 36. The administrative law judge rejected Dr. Kirkpatrick's opinion that claimant's condition was medically stationary on December 4, 1986, as he gave no opinion as to whether claimant reached maximum medical improvement on an earlier date.² Emp. Ex. 63. Lastly, the administrative law judge rejected Dr. Zipp's opinion that claimant's condition was medically stationary on the date of the accident, *see* Emp. Ex. 6, as it was outweighed by the other reports which showed claimant's continued improvement through December 1983. Relying on the opinion of Drs. Leonard, Stainsby and Higgins, the administrative law judge determined that claimant's condition plateaued on December 2, 1983, the date of their report.³ Decision and Order on Remand at 4-5. Thus, as the administrative law judge

²The administrative law judge also rejected this report as being internally inconsistent. In his May 2, 1989 report, Dr. Kirkpatrick stated that he treated claimant for lacerations in 1988, but then stated that December 4, 1986 was the last time he saw claimant and that his condition was medically stationary at that time. *See* Emp. Ex. 63; Decision and Order on Remand at 5.

³In arguing that the administrative law judge applied an erroneous standard, claimant's reliance on *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989), and *Meecke v. I.S.O. Personnel Support Dep't*, 10 BRBS 670 (1979), is misplaced. In *Dupre*, the claimant suffered immediate paralysis below the waist after falling out of a tree. Unlike the instant case, the administrative law judge's finding that the claimant was permanently disabled as of the date of the accident was not contested by the employer. *Dupre*, 23 BRBS at 88-89. In *Meecke*, the Board reversed the administrative law judge's finding of temporary disability, as the medical evidence established that the claimant's head condition had not changed since the date of her accident, and remanded the case for a determination of the date of permanency. *Meecke*, 10 BRBS at 675-676. By contrast, in the instant case, the credited medical

applied the proper legal standard, and the record contains substantial medical evidence to support the administrative law judge's determination that claimant reached maximum medical improvement on December 2, 1983, we affirm that finding. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

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

JAMES F. BROWN
Administrative Appeals Judge

evidence establishes that claimant's condition since the date of his accident continued to improve until it plateaued in December 1983. While it is apparent that claimant's ability to return to work has not changed since the date of the accident, economic considerations are not determinative in assessing whether a condition is deemed permanent. *See Price v. Dravo Corp.*, 20 BRBS 94 (1987).