BRB No. 01-0535

DAVID S. FAULKINGHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: March 12, 2002
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Brunswick, Maine, for claimant.

Carol G. McMannus (Monaghan Leahy, LLP), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration (00-LHC-0386) of Administrative Law Judge David W. Di Nardi 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).

Claimant experienced bilateral knee pain as a result of his employment for employer as an electrician. Claimant was referred to Dr. Wickenden, who diagnosed degenerative arthritis and medial meniscus tears in both knees. Claimant stopped working on June 26, 1997, when he underwent arthroscopic surgery on his right knee. Claimant underwent

arthroscopic left knee surgery on October 16, 1997. Claimant has not returned to work. On January 9, 1998, Dr. Wickenden opined that claimant's arthritic knees had reached maximum medical improvement, and he imposed permanent work restrictions of no kneeling, squatting, or crawling, and no continuous sitting or standing for over an hour. Dr. Wickenden further limited claimant from repetitive climbing of ladders and scaffolding, to ascending and descending one flight of stairs per shift, and from repetitive lifting over 15 pounds. In October 1998, claimant reported increasing bilateral knee pain, particularly in his right knee. After Dr. Wickenden treated claimant's pain symptomatology with medication, weight loss, glucosamine, and synvisc injections in his right knee, claimant underwent a total replacement of his right knee on August 8, 2000. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from June 26, 1997, to January 8, 1998, and from August 8, 2000, and continuing. Employer paid compensation under the schedule for permanent partial disability, 33 U.S.C. §908(c)(2), (19), based on an impairment rating of 13.5 percent for each knee, from January 9, 1998, to July 11, 1999. At the April 19, 2000, hearing, claimant sought continuing compensation for temporary total disability from June 26, 1997.

Prior to issuing his decision, by Order dated August 10, 2000, the administrative law judge admitted post-hearing evidence submitted by claimant showing Dr. Wickenden's recommendation on June 8, 2000, that claimant undergo total replacement surgery for his right knee condition, and employer's July 11, 2000, letter authorizing the procedure. The administrative law judge provided employer with 30 days to respond to this evidence. In his decision, the administrative law judge found that claimant is unable to return to his usual employment and that his bilateral knee condition has not reached maximum medical improvement. The administrative law judge rejected employer's labor market survey and found that employer failed to establish the availability of suitable alternate employment. The administrative law judge thus awarded claimant ongoing temporary total disability benefits from June 26, 1997. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends the administrative law judge erred by admitting claimant's post-hearing evidence. Employer also asserts the administrative law judge erred in finding that claimant's knee injuries have not reached maximum medical improvement, and in finding that employer failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

Employer asserts it was prejudiced by the administrative law judge's post-hearing admission of evidence regarding claimant's pending knee replacement surgery. Specifically, employer contends that claimant was able to review all the evidence and testimony presented at the formal hearing before submitting evidence of his prospective knee surgery. Moreover, employer contends that the administrative law judge failed to comply with 29 C.F.R. §18.55 regarding the timely submission of evidence, by not finding good cause for admitting

evidence post-hearing. Employer argues the administrative law judge also failed to find that the evidence was new, relevant, and material, pursuant to 29 C.F.R. §18.54 and 20 C.F.R. §702.338. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if they are shown to be arbitrary, capricious, or an abuse of discretion. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In his August 10, 2000, Order, the administrative law judge rejected employer's objection to claimant's request to admit post-hearing evidence, and he gave employer 30 days to respond to claimant's evidence.

Initially, we reject employer's reliance on the regulations at 29 C.F.R. §§18.54, 18.55, as the specific regulations promulgated under the Act, 20 C.F.R. §§702.338, 702.339, are applicable here.[1] 29 C.F.R. §18.1; *Wayland v. Moore Dry Dock*, 21 BRBS 177 (988). In this case the administrative law judge specifically stated that the record had not closed at the time the post-hearing evidence was admitted, *see* Decision on Motion for Reconsideration at 1, and claimant's submission thus was not untimely.[2] Under the facts of this case, any error is

[1]Section 702.338 states that the administrative law judge "shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." Section 702.339 states that the administrative law judge is not bound by formal rules of evidence but "may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." *See also* 33 U.S.C. §923.

[2]Thus, employer's reliance on 29 C.F.R. §18.54 is misplaced, as that section provides for the close of the record at the conclusion of the hearing "unless the administrative law judge directs otherwise." As the administrative law judge here held the record open for post-hearing evidence and briefs, this is not a case involving submission of documents after the

harmless in the administrative law judge's not making a specific finding that claimant's evidence is relevant and material under Section 702.338, as the evidence clearly falls within this standard. Moreover, employer was given an opportunity to respond to the evidence, and employer thus has not shown any prejudice by its admission. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table). Accordingly, employer has not established that the administrative law judge abused his discretion in admitting claimant's post-hearing evidence. *Olsen v. Triple A*

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close of the record, and the remainder of Section 18.54, as well as 29 C.F.R. §18.55, does not apply.

Machine Shops, Inc., 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

We next address employer's challenge to the administrative law judge's finding that claimant's bilateral knee condition has not reached maximum medical improvement. We agree that this finding cannot be affirmed as the administrative law judge did not render adequate findings of fact with respect to the conflicting evidence of record. 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), or if he has any residual impairment after reaching maximum medical improvement, the date of which is determined by medical evidence. *See generally Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In the instant case, the administrative law judge summarily stated that claimant's knee condition has not reached maximum medical improvement "because of his recent surgery and because he has not recovered therefrom." Decision and Order at 29. The fact that claimant had surgery, however, does not preclude the possibility that claimant's condition had been permanent during an earlier pre-surgical period of time. *See generally Leech v. Service Engineering Co.*, 15 BRBS 18 (1982) (permanent partial disability lapses during subsequent period of temporary total disability, but does not disappear). Moreover, the mere fact of surgery does not compel the finding that claimant's condition is temporary, although the evidence may warrant such a finding. *See Kuhn v. Associated Press*, 16 BRBS 46 (1983); *see also Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1982).

In this case, the administrative law judge did not discuss the medical evidence relevant to whether claimant's condition was temporary or permanent at various points in time. Dr. Wickenden's January 9, 1998, report stated that claimant's knees had reached maximum medical improvement, and he assigned claimant permanent work restrictions. EX 4 at 8. Moreover, on April 23, 1998, Dr. Wickenden rated claimant's knees under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, CX 12, as did Dr. Brigham on November 9, 1998, EX 2 at 3. Dr. Wickenden stated in his deposition testimony that claimant's degenerative arthritis will only worsen and that his treatment was not curative but designed to alleviate claimant's symptoms of pain, stiffness and swelling. CX 14 at 7, 9-12. Dr. Wickenden also testified that knee replacement surgery will treat claimant's

symptoms, and that claimant's work restrictions may also be lessened. CX 14 at 16. As the administrative law judge did not fully consider the evidence of record in light of relevant law, we must vacate the administrative law judge's finding that claimant's bilateral knee condition has not reached maximum medical improvement, and we remand this case to the administrative law judge for reconsideration of this issue.

We next address employer's contention that the administrative law judge erred by finding that employer failed to establish the availability of suitable alternate employment. Where, as here, it is uncontested that claimant is unable to return to his usual employment, the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). A claimant can rebut employer's showing of suitable alternate employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment shown by employer to be suitable and available. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT).

In rejecting employer's labor market survey, the administrative law judge found that employer's vocational consultant, Arthur Stevens, Jr., failed to consider claimant's limited ability to commute due to his knee condition, Tr. 30-31, 51-52, and that Mr. Stevens misconstrued Dr. Wickenden's sitting and standing restriction as allowing claimant to continuously sit and stand for two hours or more. Dr. Wickenden stated that claimant is limited to one hour of continuous standing and sitting. *Compare* CX 15 at 6 *with* CX 14 at 15. The administrative law judge credited Dr. Wickenden's testimony that claimant should work fewer than 40 hours per week. CX 14 at 27. The administrative law judge also credited claimant's testimony and that of Dr. Wickenden to find unsuitable specific positions identified in the survey as a security guard job at MBNA and a greeter position at Wal-Mart, as these jobs require more standing and walking than reported by Mr. Stevens or than is within claimant's restrictions. *Compare* EX 6 at 17, 45,48, 56 *with* Tr. at 25; CX 14 at 27-28, 32-33. We affirm these findings of the administrative law judge as they are rational and supported by substantial evidence. *See generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

However, we hold that the administrative law judge erroneously rejected other

positions identified in employer's labor market survey based on a finding that he could not determine which employers in Mr. Stevens's labor market survey were contacted solely by telephone and which he personally visited in order to ascertain the physical requirements of the reported position. The labor market survey describes in a separately delineated section those reported jobs which were observed and the duration of each observation. EX 6 at 49-68. Moreover, employer is not obligated to present evidence that the physical requirements of the prospective jobs were personally observed if the job requirements are otherwise known. *See generally* *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge also erred by rejecting employer's labor market survey on the basis that there is no specific information addressing the job duties of the identified positions or whether the jobs are within the restrictions proscribed by Dr. Wickenden. The section of the survey listing the observed jobs also states the specific physical requirements of those jobs. EX 6 at 49-68. Moreover, elsewhere in the survey are job descriptions of the observed positions, including general physical requirements, as well as those positions that Mr. Stevens identified by telephone. EX 6 at 14-48. In this respect, it is the administrative law judge's function to determine claimant's medical and vocational restrictions and compare the restrictions with the specific job duties and physical requirements of the prospective job openings.[3] *See Hernandez*, 32 BRBS 109.

Mr. Stevens's labor market survey contains a general job description and the specific physical requirements of five, part-time jobs in Rockland, Maine, a commute of approximately eight miles from claimant's home, CX 15 at 10, that Mr. Stevens personally observed and he testified are appropriate for claimant: cell phone sales, EX 6 at 15, 53; two video store clerk jobs, EX 16 at 16, 54-55; cashier, EX 16 at 21, 63; and, grocery store clerk, EX 6 at 32, 66; *see also* CX 15 at 10, 18-20. The administrative law judge's rational

[3]The administrative law judge also credited claimant's testimony that he contacted some of the employers listed in the labor market survey. Decision and Order at 35. To determine whether claimant rebutted employer's evidence of suitable alternate employment, the administrative law judge is required to make specific findings regarding the nature and sufficiency of the job search undertaken by claimant in order to establish whether the job search was, in fact, diligent. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Livingston v. Jacksonville Shipyards, Inc*., 32 BRBS 123 (1998).

rejection of the MBNA and Wal-Mart positions based on claimant's testimony and Dr. Wickenden's opinion does not address the suitability of these five other jobs. Accordingly, as the administrative law judge did not fully discuss the evidence of record on this issue, we

vacate the administrative law judge's conclusion that employer failed to establish the availability of suitable alternate employment, and we remand the case for further findings. *Hernandez*, 32 BRBS 109.

Accordingly, the administrative law judge's award of temporary total disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge