

BRB No. 98-0917

ELNORA SMITH)
)
 Claimant-Respondent)
)
 v.)
)
 NONAPPROPRIATED FUND) DATE ISSUED: _____
 PERSONNEL)
)
 and)
)
 COMMERCIAL UNION)
 INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Richard W. Withers (Sharp & Gay, P.A.), Jacksonville, Florida, for claimant.

Danny L. Kepner (Shell, Fleming, Davis & Menge, P.A.), Pensacola, Florida, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (96-LHC-755) of Administrative Law Judge Clement J. Kennington 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On October 26, 1979, while working as a cook, claimant slipped on some grease and fell, injuring her back, neck, shoulder and legs. Claimant has undergone numerous surgeries.¹ After each surgery, claimant reported an initial improvement, followed by a return of the preoperative symptoms. Claimant has not had any surgeries since May 1991. Employer paid temporary total disability benefits from September 1987 to May 1993, and additional benefits from September 1987 to October 1997, amounting to a total of \$56,702.40. The parties stipulated that claimant is now permanently totally disabled. The primary issue before the administrative law judge concerned the date claimant's condition became permanent.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement as of December 1984, based upon the testimony of Dr. Falco (claimant's treating physician), Dr. Morrow (claimant's former treating physician), claimant's testimony, and the entirety of the medical records presented. The administrative law judge then awarded cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f).

On appeal, employer challenges the administrative law judge's finding regarding maximum medical improvement and contends that claimant is not entitled to cost-of-living increases under Section 10(f) which accrued during her period of temporary disability. Claimant responds, urging affirmance.

Employer's assertion that the administrative law judge erred in finding that claimant reached maximum medical improvement in December 1984 rather than on January 11, 1993, is rejected. 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

¹Claimant underwent a cervical discogram on February 4, 1987, CX-8, a lumbar discogram and percutaneous discectomy on April 22, 1987, CX-9, arthroscopic surgery on her right shoulder on May 13, 1988, CX-10, arthroscopic surgery of her right shoulder on January 20, 1989, CX-11, and a lumbar discogram and microscopic discectomy on May 3, 1991, CX-12.

medical improvement must be affirmed if it is supported by substantial evidence. See *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

In the instant case, employer argues that the administrative law judge erred in concluding that claimant reached maximum medical improvement in December 1984 inasmuch as claimant underwent five surgeries after that date. Employer asserts that, even if the improvement from surgery was only temporary, determination of maximum medical improvement status is premature prior to surgery. Claimant contends that the administrative law judge's decision should be affirmed, as these surgeries were done to prevent further deterioration of claimant's body and took place a considerable amount of time after the injury.

The administrative law judge's finding that claimant reached maximum medical improvement in December 1984 is rational and supported by substantial evidence. Dr. Falco first treated claimant in 1993 and originally opined that she reached maximum medical improvement on January 11, 1993. However, Dr. Falco testified that this conclusion was based only on his treatment records and after he had the opportunity to review claimant's entire medical history, he opined that maximum medical improvement was reached in December 1984. CX-27 at 26. Dr. Falco stated that claimant's symptoms were consistent after this point and that he did not believe that the subsequent surgical procedures affected her date of maximum medical improvement, as the chance of her having any significant improvement at that late date was minimal.

The administrative law judge found Dr. Falco's testimony provided a reasonable and credible explanation, and he further found that the doctor's opinion was supported by his review of claimant's medical records, as well as the opinion of Dr. Morrow, claimant's former treating physician. Finally, the administrative law judge found claimant's testimony was credible and made evident that her condition has not changed since 1984. The administrative law judge is entitled to evaluate the credibility of the witnesses, and his conclusions may not be set aside unless they are inherently incredible or patently unreasonable. See *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Inasmuch as the administrative law judge fully weighed the evidence and his finding is supported by substantial evidence in the record, it is affirmed. See *Sinclair v. United Food and Commercial Workers*, 23 BRBS 148, 156 (1989).

We further reject employer's contention that the law stated in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), regarding cost-of-living adjustments under Section 10(f) should not apply to this case. The United States Court of Appeals for the Fifth Circuit held in *Holliday* that adjustments to

compensation pursuant to Section 10(f) of the Act, which are made to permanent total disability benefits annually to reflect the rise in the national average weekly wage, are to include intervening adjustments occurring during a claimant's previous period of temporary total disability. *Holliday*, 654 F.2d at 415, 13 BRBS at 741; *contra Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*) (overruling *Holliday*). As employer concedes, the United States Court of Appeals for the Eleventh Circuit, under whose appellate jurisdiction this case arises, has twice held that the rule in *Holliday*, which was decided prior to the creation of the Eleventh Circuit on September 11, 1981, is still binding in that circuit. See *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140 (CRT), *reh'g en banc denied*, 132 F.3d 48 (11th Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998); *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989). Employer's contention in this regard is therefore rejected.

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge