BRB No. 99-0932

LUIGI RELLA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEALAND SERVICE, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Keith L. Flicker and Robert N. Dengler (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (98-LHC-380) of Administrative Law Judge Ralph A. Romano 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, a longshoreman, injured his left index, long and ring fingers when a container crushed his left hand at work on December 18, 1994. Claimant underwent partial amputations of the left index and long fingers. Subsequently, claimant developed reflex sympathetic dystrophy (RSD) in his left wrist. Claimant's dominant hand is his left. Claimant was born in Italy, speaks primarily Italian, and testified through an interpreter at the hearing. Employer voluntarily paid claimant temporary total disability benefits from December 19, 1994, to April 19, 1996, and a scheduled 28 percent permanent partial disability award to the left hand. Employer admits that claimant cannot return to his usual

work. The administrative law judge found that employer did not establish the availability of suitable alternate employment based on the reports of Ms. Jackson and Mr. Hirschfeld, and found claimant reached maximum medical improvement on September 11, 1996, based on Dr. DiPaolo's opinion. Thus, the administrative law judge awarded claimant temporary total disability benefits from December 19, 1994, through September 11, 1996, and permanent total disability benefits from September 12, 1996, and continuing.

On appeal, employer challenges the administrative law judge's findings that it did not establish the availability of suitable alternate employment and that maximum medical improvement was reached on September 11, 1996. Claimant did not file a response brief.

We first address employer's argument that the administrative law judge erred in concluding that it failed to establish the availability of suitable alternate employment. Employer contends that its vocational experts, Ms. Jackson and Mr. Hirschfeld, identified jobs which accommodate claimant's limited English language skills. Employer also contends that the administrative law judge erred in not considering claimant's refusal to meet with and cooperate with its vocational experts. Where, as in the instant case, a claimant has established that he is unable to perform his usual employment duties due to a work-related injury, claimant has established a *prima facie* case of total disability. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). The burden then shifts to employer to demonstrate within the geographic area where claimant resides, the availability of realistic jobs which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing, and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). Claimant's unreasonable refusal to meet with employer's vocational consultant for an initial evaluation is a relevant consideration for the administrative law judge in determining the extent of claimant's disability. *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

In determining whether employer established the availability of suitable alternate employment, the administrative law judge found that the most important issue was the extent to which claimant is able to understand and communicate in English. The administrative law judge found that claimant had a marginal ability, at best, to understand and communicate in English. This finding is not challenged by employer on appeal. Considering claimant's ability to understand and communicate in English to be extremely restricted, the administrative law judge found that neither Ms. Jackson nor Mr. Hirschfeld identified suitable positions for claimant. The administrative law judge acted within his discretion in finding Ms. Jackson's opinion that claimant could perform the jobs of turn down attendant, room attendant, and porter was insufficient because she did not explain the change in her prior opinion conditioning the suitability of these jobs upon her vocational interview with

claimant to assess his communication skills. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961); Decision and Order at 5-6; Emp. Exs. C at 4, 7, 10-12; K at 18-19, 22, 25-26.[1] Contrary to employer's contention, the administrative law judge did consider the lack of a vocational interview by Ms. Jackson with claimant but found no evidence that claimant intentionally refused to meet with Ms. Jackson.[2] Decision and Order at 5 n. 6.

[1]All of the jobs identified by Ms. Jackson require at least a basic understanding of the English language. Emp. Exs. C at 6-7, 10-11; K at 25-26. Two of the three jobs required claimant to speak very simple English. Emp. Ex. K at 22, 25-26. One job required that claimant be able to speak English sufficiently enough to communicate during the interview. Emp. Ex. C at 16.

[2]The evidence establishes that claimant's counsel did not respond to Ms. Jackson's repeated requests for vocational interviews of claimant on February 23, March 27, April 18, 26, May 15, 23, and June 4, 1996, but not that claimant himself refused to meet with Ms. Jackson. Emp. Ex. C at 1, 2, 8, 9, 13, 14, 17; Emp. Br. at 20-21.

Likewise, the administrative law judge acted within his discretion in finding that the 14 positions identified by Mr. Hirschfeld (those of driver, assembler, machine operator, security officer, kitchen aide, utility worker, and dining room attendant) were not suitable for claimant since the administrative law judge found Mr. Hirschfeld's knowledge of the level of claimant's ability to communicate in English to be baseless. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); Decision and Order at 6-7; Emp. Exs. C, G. Mr. Hirschfeld's assessment of claimant's English language skills was based on his reading of claimant's deposition transcript, and the administrative law judge questioned how it was possible to determine claimant's communication skills from a reading of a deposition presumably taken with the aid of an interpreter.[3] Decision and Order at 6; Emp. Ex. C at 22, 24-26. Additionally, the administrative law judge acted within his discretion in finding that certain jobs identified by Mr. Hirschfeld were not suitable because they were based on claimant's ability to read and appropriately mark bills of lading[4] and the job of security officer was not suitable because he rationally found that it required claimant to communicate effectively in English. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); Decision and Order at 7 n. 9; Emp. Exs. C at 29, 33; G at 25, 27. Contrary to employer's remaining contention, the administrative law judge did consider the lack of a vocational interview by Mr. Hirschfeld of claimant but acted within his discretion in finding that there were other ways employer could have secured such an interview. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); 20 C.F.R. §702.341; 29 C.F.R. §18.21; Decision and Order at 6 n. 8. The administrative law judge noted that employer's expert could have attended claimant's deposition to personally observe claimant's ability to communicate in English or employer could have filed a motion to compel claimant to submit to a vocational interview with Mr. Hirschfeld.[5] As the administrative law judge rationally found that neither Ms. Jackson nor Mr. Hirschfeld identified suitable jobs for claimant, we affirm his finding that employer did not establish the availability of suitable alternate employment. Thus, we affirm the administrative law judge's award of total disability benefits.

Employer also challenges the administrative law judge's finding that claimant's condition reached maximum medical improvement on September 11, 1996, based on Dr.

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[3]Claimant's deposition was not offered into the record by either party.

[4]Claimant testified that he cannot read or write in English or Italian. Tr. at 39.

[5]Employer asserts that it could not have obtained a motion to compel with respect to Ms. Jackson's opinion because, at that time of her report, this case was not before the administrative law judge. Emp. Br. at 21. Employer, however, makes no such argument regarding Mr. Hirschfeld's opinion. In any event, employer is simply incorrect, as it may seek such an Order from the Chief Administrative Law Judge when a case is pending before the district director. *See Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).

DiPaolo's subsequent opinion to that effect. Employer contends that the date claimant reached maximum medical improvement is February 28, 1996, based on Dr. DiPaolo's initial opinion. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from 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). The administrative law judge's finding that claimant reached maximum medical improvement on September 11, 1996, based on the subsequent opinion of claimant's treating physician, Dr. DiPaolo, is affirmed as it is supported by substantial evidence.[6] *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); Decision and Order at 7; Cl. Exs. 5; 7 at 14-15, 37-38. Consequently, we affirm the administrative law judge's award of permanent total disability benefits from September 12, 1996.

[6]Dr. DiPaolo initially stated maximum medical improvement was reached on February 28, 1996, but later changed her opinion to September 11, 1996, as claimant presented at that time with a recurring cyst on his left index finger which required additional surgery which claimant elected not to have done. Cl. Exs. 5; 7 at 14-15, 37-38.

Accordingly, the administrative law judge's 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