BRB No. 07-0938

R.O.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICE, INCORPORATED	)	DATE ISSUED: 05/28/2008
	)	
	)	
Self-Insured Employer	)	
Respondent	)	DECISION and ORDER

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

Robert J. DeGroot, Newark, New Jersey, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates, LLP), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Motion for Reconsideration (2006-LHC-01481) 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related back injury on January 21, 1999, while working for employer as a longshoreman. Employer voluntarily paid claimant temporary total disability compensation commencing January 21, 1999, and continuing. 33 U.S.C. §908(c)(21). Dr. Giordano performed lumbar decompression surgery on April 14, 2001.

Following this surgery, claimant's symptoms persisted and his condition progressively worsened. On May 14, 2003, claimant underwent thoracic decompression surgery performed by Dr. Roth, but that surgery did not resolve his symptoms. Claimant, who has not returned to gainful employment, subsequently filed a claim contending that he is permanently totally disabled by his work-related back injury.

In his Decision and Order, the administrative law judge determined that claimant established that he is totally disabled, inasmuch as he is unable to return to his previous employment as a longshoreman. Citing the parties' post-hearing briefs, the administrative law judge further found that it is undisputed that claimant's back condition reached maximum medical improvement on September 25, 2006. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from January 21, 1999, through September 24, 2006, and permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b). Claimant filed a timely motion for reconsideration, requesting that the administrative law judge reconsider his finding regarding the date on which claimant's medical condition became permanent. The administrative law judge summarily denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's finding that his work-related back condition reached maximum medical improvement on September 25, 2006. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in finding that claimant's condition reached maximum medical improvement as of September 25, 2006; specifically, claimant avers that the administrative law judge did not address the totality of the medical evidence of record when discussing this issue. We agree and, for the reasons that follow, we remand the case for further consideration by the administrative law judge.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). While an administrative law judge may rely on a physician's opinion to establish the date of maximum medical improvement, a specific statement regarding maximum improvement is not required; rather, the administrative law judge may use the date a doctor assigned claimant an impairment rating or permanent restrictions as such evidence may be sufficient to determine permanency. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 171, *aff'd on recon. en banc*, 32

BRBS 251 (1998); *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212, 222 (1994) (Smith, J., dissenting on other grounds), *rev'd on other grounds sub nom. Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). If a physician believes that further treatment is necessary, then a possibility of improvement may exist and, even if in retrospect the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). If surgery is anticipated, maximum medical improvement has not been reached. *Monta v. Navy Exchange Service Command*, 39 BRBS 104, 109 (2005). If, however, surgery is not anticipated or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *Id.; McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9, 12-13 (2006). *See also Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

In his decision, the administrative law judge stated that:

> It is undisputed that Claimant reached MMI as of September 25, 2006, the date Dr. Roth opined that claimant had reached MMI and was totally disabled due to his injury. (CB at 11; CX 3; EB at 5). I find that the evidence of record supports this assessment, thus claimant is entitled to permanent disability as of that date.

Decision and Order at 10. In finding that it was "undisputed" that claimant's back condition reached maximum medical improvement on September 25, 2006, the administrative law judge cited claimant's and employer's post-hearing briefs, in which employer asserted that statements by claimant in his post-trial memorandum demonstrate his agreement with employer that the medical evidence establishes that claimant reached maximum medical improvement as of September 25, 2006. *See* Employer's Post-Hearing Brief at 5. Specifically, employer refers to the claimant's post-trial memorandum in which he states that:

> "[Claimant] suffered injuries to his back, which has reached the maximum medical improvement. As of September 2006, he was found to be totally disabled as a physiological working unit."

Claimant's Trial Memorandum at 11. These sentences, however, do not support the interpretation assigned to them by the administrative law judge and employer. In the first sentence, claimant asserts that his condition had reached a state of permanency, but he does not specify a date on which maximum medical improvement was reached. In the second sentence, which references September 2006, claimant addresses the extent of his alleged disability, which he asserts was total as of that time. Since nature, *i.e.*,

permanency, and extent, *i.e.,* total or partial, of disability are distinct issues, this statement is not an assertion that maximum medical improvement was not reached until that date. Moreover, the parties were unable to agree to a stipulation on this issue.[1] In addition, in this same trial memorandum, claimant cites medical evidence submitted into the record supportive of an earlier maximum medical improvement date. Claimant's Trial Memorandum at 1-7. In his request for reconsideration of the administrative law judge's decision, claimant sought reconsideration of the finding that claimant did not reach maximum medical improvement until September 2006 in light of record evidence supportive of an earlier date.[2] Based upon the foregoing, the administrative law judge's statement that it is "undisputed" that claimant reached maximum medical improvement as of September 25, 2006, cannot be affirmed.

Section 702.338 of the Act's regulations, 20 C.F.R. §702.338, provides that the administrative law judge has the duty to inquire fully into matters at issue before him. In the instant case, as the parties did not file a stipulation regarding the date claimant reached maximum medical improvement and as claimant's trial memorandum does not

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[1]The record indicates that the date on which claimant reached maximum medical improvement was a contested issue before the administrative law judge. Claimant's pre-hearing statement lists "permanent total disability as of date of injury, date of first surgery or date of 1/9/2003…" as an issue to be presented for resolution at the hearing. ALJX 1. In listing the parties' stipulations at the hearing, employer's attorney specifically stated that the date of maximum medical improvement was not agreed to. Hearing Tr. at 6. Although counsel for both parties acquiesced to the administrative law judge's request that, subsequent to the hearing, they stipulate to the date on which maximum medical improvement had been reached, *id.* at 7, 86, no stipulation regarding this issue was submitted by the parties, and the administrative law judge's Decision and Order includes maximum medical improvement in the list of issues presented for resolution. *See* Decision and Order at 2-3.

[2]Specifically, claimant requested that the administrative law judge review Dr. Matthews' February 7, 2000 report stating that claimant remains permanently totally disabled, EX 1; Dr. Hutter's report dated March 16, 2000 stating that as claimant does not want to consider surgery, he has reached maximum medical improvement, EX 2; and Dr. Giordano's August 7, 2001 report stating that claimant has reached maximum medical improvement. EX 3. Claimant also attached to his request for reconsideration new evidence in the form of Dr. Roth's letter dated June 21, 2007. In its opposition to claimant's motion for reconsideration, employer objected to claimant's submission of new evidence and additionally argued that claimant had previously advocated for a maximum medical improvement date of September 25, 2006, and should not be permitted to change his position on the date maximum medical improvement was reached.

clearly assert that September 25, 2006, is the date on which he reached maximum medical improvement, the administrative law judge erred in finding that it is undisputed that claimant reached maximum medical improvement on that date. Furthermore, we reject employer's assertion that the administrative law judge properly considered the relevant evidence and made a determination regarding the maximum medical improvement date based on a weighing of that evidence. *See* Employer's Brief in Opposition to Claimant's Petition for Review at 7-10. As set forth *supra*, the administrative law judge summarily stated that he found that the record evidence supports a finding that claimant reached maximum medical improvement on September 25, 2006. Although the administrative law judge's Decision and Order contains a lengthy recitation of the medical evidence, *see* Decision and Order at 5-9, the administrative law judge did not address this evidence in his cursory discussion of the date on which claimant reached maximum medical improvement.[3] *Id.* at 10. The record in this case includes medical evidence which, if credited, might support a maximum medical improvement date earlier than September 25, 2006.[4] Thus, as the administrative law judge did not address the relevant medical evidence concerning the disputed date on which claimant reached maximum medical improvement, we must vacate his finding that claimant's condition became permanent on September 25, 2006, and remand this case for the administrative law judge to reconsider this issue in light of the applicable legal standards. *See, e.g., McKnight*, 32 BRBS at 171.

[3]The Board consistently has held that an administrative law judge must independently analyze and discuss the evidence, and must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See, e.g., Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112, 118 n.9 (2000), *aff'd* 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). *See also* 5 U.S.C. §557(c)(3)(A).

[4]In addition to the evidence summarized in the administrative law judge's decision, we note that his summary of the evidence does not include the U.S. Department of Labor progress report completed by Dr. Roth on July 6, 2004, in which he indicated that claimant was not a surgical candidate, that treatment was not being continued, and that claimant was permanently totally disabled. EX 4.

Accordingly, the administrative law judge's finding that claimant reached maximum medical improvement as of September 25, 2006 is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge