BRB No. 11-0761

JOSEPH C. GUIDRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND OPERATING COMPANY, INCORPORATED	)	DATE ISSUED: 05/24/2012
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

James H. Domengeaux (Domengeaux Wright Roy & Edwards L.L.C.), Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2010-LHC-2153) of Administrative Law Judge C. Richard Avery 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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On October 4, 2005, claimant was working as a lead operator at employer's platform in the Gulf of Mexico, when he fell onto metal grating and sustained neck and knee injuries. The following day he was treated at a local clinic where he was diagnosed with contusions to both knees and released to work. CX-K. Over the next few months, he began experiencing weakness, balance issues, muscle spasms, back and leg pain, coordination problems, clonus, and hyper-reflexia. Tr. at 44-45; CX-O at 14. On April 4, 2006, Dr. Duval diagnosed claimant with a cervical cord contusion and two herniated discs in the cervical region which caused cervical myelopathy. Tr. at 6; CX-J; CX-O at 24. Dr. Duval recommended immediate decompression surgery to prevent claimant's condition from worsening. *Id*. Dr. Muldowny performed this surgery on April 6, 2006. CX-H. Claimant followed-up with extensive physical therapy, but, despite his treatments and a successful decompression surgery, his symptoms did not improve significantly. Tr. at 47-48; CX-N at 45-6 .

Employer paid claimant temporary total disability benefits from October 4, 2005, through January 9, 2009, and medical benefits. 33 U.S.C. §§907, 908(b). Claimant filed a claim for additional benefits, seeking a determination regarding the nature and extent of his work-related disability.

The administrative law judge found that claimant's condition reached maximum medical improvement as of October 26, 2006, and he awarded claimant permanent total disability benefits from that date, as he found that employer did not establish the availability of suitable alternate employment. 33 U.S.C. §908(a). Employer appeals the administrative law judge's findings that claimant's condition is permanent and that it failed to establish suitable alternate employment. Claimant responds, urging affirmance.

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement or if it has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, a possibility of improvement exists, 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); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 45 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986).

Moreover, a claimant may have reached maximum medical improvement even if his condition subsequently improves, *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998), or deteriorates, *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986).

In this case, Dr. Muldowny stated on October 16, 2008, and April 14, 2011, that the purpose of claimant's April 6, 2006, emergency surgery was to prevent further progression and paralysis and not to significantly improve his condition; therefore, he concluded claimant's condition reached maximum medical improvement within six to twelve months after surgery. He stated that, although not expected, some post-surgery improvement was possible, and that this was a reasonable timeframe for assessing any improvement.[1] CX-N at 21-22; CX-O at 32-34. Given Dr. Muldowny's testimony that the purpose of the surgery was "not to improve [claimant's] condition," and that claimant had not committed to any additional surgery, the administrative law judge "accept[ed] Dr. Muldowny's opinion that [c]laimant reached maximum medical improvement, if not the day of surgery certainly within six to twelve months thereafter." Decision and Order at 7. The administrative law judge therefore placed claimant at maximum medical improvement on October 26, 2006, exactly six months post-surgery. *Id*.

Employer contends that the administrative law judge erred in relying on Dr. Muldowny's deposition statements to support the date of maximum medical improvement because the statements were made in hindsight, and Dr. Muldowny treated claimant with "various alternatives and different modalities" to make claimant better until he first diagnosed a permanent neck condition on September 2, 2009. Thus, employer argues that claimant cannot be considered to have reached maximum medical improvement prior to September 2, 2009, when Dr. Muldowny reported that claimant's condition had reached maximum medical improvement. We disagree.

Dr. Muldowney's pre-surgery treatment notes reflected that the purpose of the surgery was to prevent claimant's condition from progressing, and his post-surgery treatment notes reflected that Dr. Muldowny followed claimant's condition and hoped for improvement over time. CX-I. Contrary to employer's assertion, however, none of Dr. Muldowny's post-surgery treatment notes indicated that he actively treated claimant with "various alternatives and different modalities." CX-I; *see Methe*, 396 F.3d 601, 38 BRBS

[1]Dr. Muldowny explained that post-surgery improvement is unpredictable; claimant's symptoms would not be cured or made tremendously better, and he might not see any significant improvement post-surgery, but there was also the possibility that he could see improvement in his pain, strength in the upper extremities, and spasticity, and that a "six- to twelve-month period is a reasonable time frame to wait to see how much improvement you would get." CX-N at 21-22; CX-O at 32-34.

99(CRT); *Carlisle*, 33 BRBS 133. Rather, his notes indicated he did not treat claimant with an eye toward improvement but merely followed claimant's post-surgery progress. Although Dr. Muldowny hoped there might be some decrease in pain or increase in range of motion, he believed that claimant's condition was permanent and unlikely to improve. CX-I. Further, Dr. Muldowny's expression of hope for improvement beyond six months post-surgery does not preclude a finding of permanency, as claimant's post-surgery prognosis was uncertain.[2] *McCaskie*, 34 BRBS 9; *Worthington*, 18 BRBS 200; *see also Kuhn*, 16 BRBS 46. Therefore, because Dr. Muldowny opined that a six-to-twelve month period is a reasonable period in which to expect improvement and his treatment notes indicated claimant likely had a permanent condition within the first six months post-surgery, the administrative law judge rationally placed claimant's condition at maximum medial improvement as of October 26, 2006.[3] *Methe*, 396 F.3d 601, 38 BRBS 99(CRT); *Carlisle*, 33 BRBS 133. Consequently, we reject employer's assertion of error.

Employer additionally argues that the administrative law judge erred in finding that claimant's condition reached permanency at all given Dr. Muldowny's April 14, 2011, deposition testimony, in which Dr. Muldowny recommended surgery to alleviate claimant's neck and shoulder problems that arose in February 2011. Although employer correctly asserts that Dr. Muldowny subsequently recommended additional surgery, this does not preclude a finding of permanency, as an underlying permanent disability does not disappear during periods of temporary disability due to subsequent surgery. *See, e.g., Leech v. Service Engineering Co.*, 15 BRBS 18 (1982). Further, as the administrative law judge rationally stated, "notwithstanding the fact there is talk of additional surgery, none is planned or committed to at this time." Decision and Order at 7; *see McCaskie*, 34 BRBS 9. Thus, we reject employer's assertion that Dr. Muldowny's recommendation for additional surgery precludes a finding of permanency. We affirm, as supported by

[2]On December 6, 2006, Dr. Muldowny stated, "We had an MRI taken sometime after surgery and verified that he had been completely decompressed. He still has persistent myelomalacia at the C4-C5 level. It may very well be that he has some permanent changes in the cervical cord, although, I am still hopeful that there will be some improvement with additional time." CX-I. On November 27, 2007, Dr. Muldowny stated, "He is not hurting enough to consider any more surgery at this point. I think he is basically in status quo position where I don't expect things to improve much at this point. Hopefully, his axial back pain will improve however as time goes by, I don't think his neurologic function is going to substantially improve." *Id*.

[3]On October 25, 2006, one day before the six-month mark, Dr. Muldowny stated, "I suspect that [claimant] may have maxed out on his improvement from neurologic function. We previously repeated his MRI to verify that all the compression on the cord was relieved and it was." CX-I.

substantial evidence, the administrative law judge's finding that claimant's condition reached maximum medical improvement on October 26, 2006. *McCaskie*, 34 BRBS 9.

Employer also contends the administrative law judge erred in failing to find suitable alternate employment established. Employer raises no specific challenge to the administrative law judge's rejection of the jobs offered in employer's labor market survey. Rather, employer asserts that claimant has the skills to return to sedentary work and could do so on a part-time basis, but he has stated he will not return to any work other than his previous employment. Thus, employer argues, claimant's attitude prevents employer from finding suitable alternative employment.

The administrative law judge credited the opinion of Dr. Muldowny that claimant is incapable of obtaining employment in the "real world,"[4] as supported by the opinions of vocational rehabilitation counselors, Glenn Hebert and Sy Arceneaux. Decision and Order at 8; EX 1 at 17; Tr. at 26. He also found that the only probative evidence of suitable alternate employment offered was a 2007 labor market survey, which contained a chart of job categories, but he rejected it as evidence of suitable alternate employment because it listed no specific available jobs or duties, and it did not account for claimant's physical restrictions. Decision and Order at 6, 8; EX 2.

Where, as here, it is uncontroverted that a claimant is unable to return to his usual employment duties as a result of his work-related injury, the burden shifts to the employer to establish the availability of jobs within the geographic area where the claimant resides, which, considering his age, education, work experience, and physical restrictions, he could realistically perform and secure. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Contrary to employer's assertion, the administrative law judge rationally found claimant to be totally disabled because no physician or vocational expert of record opined that claimant could realistically secure any employment. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010). Indeed, all of claimant's orthopedic surgeons thought it was improbable

[4]Dr. Muldowny stated it is "theoretically possible" that "there might be some sedentary work that [claimant] could do on a part-time basis. But I think from a practical standpoint, it would be very difficult to find something that would fit within his abilities." CX-O at 19-20.

that he would secure employment.[5] In addition, Mr. Hebert testified at the hearing "[t]here's just not a labor market for [a person with as many limitations as claimant] in this area,"[6] and employer's vocational expert, Mr. Arceneaux, stated that claimant's significant restrictions "present[ed] a monumental task in identifying employment" and he made no suggestions regarding available suitable alternate employment. Tr. at 26; EX 1 at 17. As the only labor market survey of record did not address claimant's restrictions or provide job descriptions, the administrative law judge properly found that employer did not establish the availability of suitable alternate employment.[7] We therefore affirm the administrative law judge's findings that employer did not establish the availability of suitable alternate employment and that claimant is totally disabled. *Rodriguez*, 42 BRBS 95.

[5]Mr. Hebert testified that he interviewed all of claimant's orthopedic surgeons, Drs. Muldowny, Duval, and Gidman, and they all stated claimant is capable of sedentary work, but thought it improbable he would be hired. Tr. at 25.

[6]In support, Mr. Hebert noted that claimant is over fifty years old, has an ongoing medical problem that requires another surgery, is a chronic pain patient, takes six or seven medications a day, has problems doing coordinated maneuvers, has problems driving, has only a high school diploma, has no transferable skills or computer skills, and because of the weakness in his hands and clonus in his feet, "drop[s] objects all day long" and is prone to tripping. Tr. at 24-26.

[7]Thus, employer's contention regarding claimant's "attitude" is inapposite. If employer had identified positions claimant could perform, claimant's willingness to work could be assessed in determining his diligence in seeking alternate work. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Accordingly, 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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge