BRB No. 98-1199

TERRY L. PERKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: May 24, 1999
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Tony B. Jobe, Madisonville, Louisiana, for claimant.

Joseph J. Lowenthal (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Benefits (96-LHC-990) of Administrative Law Judge James W. Kerr, Jr., 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 sustained an injury to his pelvis while working for employer on June 13, 1994. Claimant has not returned to work since this injury occurred. Claimant initially selected Dr. Butler to be his treating physician; Dr. Butler thereafter referred claimant to Dr. Doyle. After treating with Dr. Doyle, claimant was examined by Dr. Djuric on one occasion. Employer voluntarily paid claimant temporary total disability compensation from June 14, 1994 to September 4, 1995, and permanent partial disability compensation thereafter, *see* 33

U.S.C. §908(b), (c)(21), as well as all of claimant's medical charges excluding the physical examination performed by Dr. Djuric. 33 U.S.C. §907. Subsequently, claimant sought ongoing total disability compensation under the Act.

In his Decision and Order, the administrative law judge initially found that claimant reached maximum medical improvement on November 7, 1995. Next, the administrative law judge determined that claimant failed to cooperate with employer's vocational counselor, that employer established the availability of suitable alternate employment, and that claimant sustained no loss of post-injury wage-earning capacity; accordingly, the administrative law judge denied claimant's claim for ongoing compensation benefits subsequent to February 10, 1995. Lastly, the administrative law judge concluded that since claimant had not sought authorization for his examination by Dr. Djuric, employer is not required to reimburse claimant for that visit.

On appeal, claimant argues that the administrative law judge erred in failing to reopen the record for the purpose of admitting post-hearing evidence. Additionally, claimant contends that the administrative law judge erred in finding that his condition is permanent in nature, in addressing the issue of suitable alternate employment, and in denying him reimbursement for the examination performed by Dr. Djuric. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Admissability of Evidence

Claimant initially contends that the administrative law judge erred in failing to admit two written reports by Dr. Doyle into the record. In support of this contention, claimant asserts that these reports would establish that his physical condition remains temporary in nature. Although Dr. Doyle was listed as a potential witness in claimant's November 8, 1995, pre-hearing statement, claimant did not call Dr. Doyle as a witness at the July 28 and 29, 1997, formal hearing; rather, the record was left open for claimant to acquire additional information from that physician. Thereafter, in an Order dated September 2, 1997, the administrative law judge granted claimant an additional two and one-half months, specifically until November 14, 1997, to conduct post-trial discovery. Although claimant secured an October 21, 1997, report from Dr. Doyle, he made no attempt to submit this report into the record within the time frame set by the administrative law judge. Rather, after receiving a second report from Dr. Doyle on November 24, 1997, ten days after the record closed, claimant, on December 2, 1997, filed a motion to reopen the record to admit the testimony and reports of Dr. Doyle. In an Order dated December 30, 1997, the administrative law judge denied claimant's motion, implicitly finding, *inter alia*, that, as one of Dr. Doyle's reports which serves as the basis for claimant's motion was dated before the close of the record, claimant had not diligently developed his claim.

It is well-established that the administrative law judge has the discretion to hold the

record open after a hearing for the receipt of additional evidence; however, a party seeking to have evidence admitted must exercise diligence in developing its claim. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46, 50 (1989); *Sam v. Loffland Brothers Co.*, 19 BRBS 228, 230 (1987). The Board has interpreted the relevant provisions of the Act's implementing regulations, 20 C.F.R. §§702.338, 702.339, as affording administrative law judges considerable discretion in ruling on requests for the admission of evidence into the record. *See Wayland v. Moore Dry Dock*, 21 BRBS 177, 180 (1988). In the instant case, claimant has failed to establish that the administrative law judge abused his discretion in declining to reopen the record, having held it open for several months after the hearing. Accordingly, claimant contention of error is rejected. *See Smith*, 22 BRBS at 50.

Nature of Disability

Claimant next challenges the administrative law judge's finding that he reached maximum medical improvement on November 7, 1995. Specifically, claimant avers that the administrative law judge erred in relying upon the reports of Dr. Doyle in reaching this conclusion. For the reasons that follow, we affirm the administrative law judge's finding.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co.*, 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 medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

On November 7, 1995, approximately one year and five months after claimant's accident, Dr. Doyle, claimant's treating physician at the time, stated that claimant's physical examination was relatively normal and she released claimant to sedentary work. *See* CX-2 at 8. Thereafter, on January 9, 1996, Dr. Doyle similarly could not "find much clinically wrong" with claimant. *See id.* at 1. Thus, the medical evidence relied upon by the administrative law judge reflects that claimant's condition plateaued as of November 7, 1995. *See generally Louisiana Ins. Guaranty Ass'n Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). Accordingly, as the record contains substantial evidence to support the administrative law judge's determination that claimant reached maximum medical improvement on November 7, 1995, we affirm that finding. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Extent of Disability

Next, claimant contends that, as his condition has not yet reached permanency, the administrative law judge erred in addressing the issue of whether employer established the availability of suitable alternate employment. Claimant additionally avers that it is premature to address the issues of his due diligence in seeking post-injury employment and his loss of wage-earning capacity. Claimant's contentions are without merit.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56 (1985). Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to establish the existence of realistically available job opportunities within the geographical area where claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions, is realistically able to secure and perform. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

Contrary to claimant's argument on appeal, an award of partial disability compensation may be entered by the administrative law judge even if claimant's condition is temporary in nature. *See McKnight v. Carolina Shipping Co.,* 32 BRBS 165 (1998), *aff'd on recon. en banc,* 32 BRBS 251 (1998). Specifically, an award of benefits for a temporary partial disability under Section 8(e), 33 U.S.C. §908(e), is based on a claimant's reduced earning capacity, similar to an award under Section 8(c)(21), 33 U.S.C. §908(c)(21).[1] *See Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). Thus, as it is immaterial whether the nature of claimant's condition was temporary or permanent, we hold that the administrative law judge in the instant case properly considered the issue of whether employer met its burden of establishing the availability of suitable alternate employment. Moreover, as the administrative law judge's specific findings that employer met its burden of establishing the availability of suitable alternate employment, that claimant did not diligently seek work post-injury, and that claimant sustained no loss of wage-earning capacity post-injury are not challenged by claimant on appeal, these findings are affirmed.

[1]Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury weekly wage and his post-injury wage-earning capacity. *See* 33 U.S.C. §908(h).

Section 7

Lastly, claimant argues that the administrative law judge erred in determining that employer is not liable for the medical charges incurred by claimant as a result of his treatment with Dr. Djuric. Section 7 of the Act, 33 U.S.C. §907, describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant's request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). Employer must consent to a change of physician where claimant has been referred by his treating physician to a specialist skilled in treating claimant's injury. *See generally Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988); 20 C.F.R. §702.406(a).

In the instant case, claimant last treated with Dr. Doyle on March 29, 1996, at which time Dr. Djuric, an associate of Dr. Doyle's, examined claimant without charge or the recording of a report. On April 28, 1997, over one year later, claimant visited Dr. Djuric's new practice, which was located approximately 100 miles from claimant's residence; claimant has not returned to Dr. Djuric since this single visit.

In denying claimant's request that he hold employer liable for Dr. Djuric's single examination of claimant on April 28, 1997, the administrative law judge found that no authorization had been sought for this examination and no evidence was presented to show that claimant's choice of physicians was not a specialist. Claimant, on appeal, does not assert that Dr. Doyle was not his choice of physician, *see* Claimant's brief at 16; Tr. at 131; RX-15; thus Dr. Doyle's release of claimant cannot be viewed as a refusal of treatment by employer's physician. *See Slattery Assoc., Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44 (CRT)(D.C. Cir. 1984). Claimant, moreover, does not assert that he sought employer's authorization for his visit to Dr. Djuric on April 28, 1997, nor does he cite to any evidence

that Dr. Djuric is a specialist skilled in treating his injury. We, therefore, affirm the administrative law judge's finding that employer is not liable for the medical treatment provided by Dr. Djuric, as that determination is in accordance with law.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge