BRB No. 01-0299

SAMUEL BENN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: Nov. 27, 2001
	)	
MAY SHIP REPAIR	)	
	)	
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.

Jacob Shisha (Tabek & Mellusi), New York, New York, for claimant.

Francis M. Womack III (Field Womack & Kawczynski), Jersey City, New Jersey, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-2456) 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 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 slipped and fell during the course of his employment as a welder on August 27, 1998. Claimant sustained injuries to his back, neck, and left shoulder, for which he received treatment from Drs. Parnes, Krishna, and Wilen. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from August 31, 1998, to May 29, 1999, and for temporary partial disability, 33 U.S.C. §908(e), from May 30, 1999, to February 5, 2000. Claimant sought compensation for continuing temporary total disability.

Employer requested relief from compensation liability under Section (8)(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge found that claimant is unable to perform his usual employment, and that employer established the availability of suitable alternate employment pursuant to a February 29, 2000, labor market survey. The administrative law judge found that claimant was entitled to compensation for total disability until February 29, 2000, and for partial disability from March 1, 2000, based on a loss of wage-earning capacity, 33 U.S.C. §908(c)(21), (e). The administrative law judge ordered employer to authorize MRI testing of claimant's cervical spine and shoulder and an EMG of the upper extremities, as prescribed by claimant's treating physicians. The administrative law judge found the medical treatment provided by Drs. Parnes and Krishna reasonable and necessary, and he ordered employer to pay their outstanding bills. The administrative law judge found that employer is not liable for Dr. Wilen's bills as claimant failed to seek authorization for treatment by Dr. Wilen. 33 U.S.C. §907(c); 20 C.F.R. §702.406. The administrative law judge found that claimant's condition reached maximum medical improvement on July 26, 2000, based on deposition testimony given that date by Dr. Parnes. Finally, the administrative law judge granted employer's request for Section 8(f) relief.

On appeal, employer contends the administrative law judge erred in finding the treatment provided by Dr. Parnes to be reasonable and necessary. Employer also asserts that the administrative law judge erred in determining the date of maximum medical improvement. Claimant responds, urging affirmance.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment...medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, the administrative law judge summarized the statements of Drs. Swearingen, Nehmer, and Mattei supporting employer's contention that treatment rendered by Dr. Parnes for claimant's back condition is excessive and unnecessary. The administrative law judge, however, credited the clinical judgment of Dr. Parnes as claimant's treating physician, to conclude that his services are reasonable and necessary. In this regard, Dr. Parnes stated in his deposition testimony that physical therapy, anti-inflammatory medications and roller bed therapy to stretch claimant's muscles is the best course of

treatment for claimant's back condition other than surgery. CX R at 19-22, 26, 50. Dr. Parnes also stated that he treats claimant symptomatically on an as needed basis, and that the treatment rendered alleviates claimant's acute back spasms and pain. *Id.* at 22, 28, 37. This course of treatment is supported by the opinion of Dr. Strauss, that claimant be treated nonsurgically with physical therapy and medication and, if necessary, paraspinal muscle blocks or epidural injections. CX I; CX S at 15-17. Contrary to employer's contention, the fact that Dr. Parnes's treatment is palliative and not curative does not prevent employer from being held liable if the expense is reasonable and necessary for the treatment of claimant's injury. Moreover, the treatment provided by Dr. Parnes is not duplicative of that provided by Dr. Krishna, as Dr. Krishna treated claimant with nerve block injections. Based on the record before us, we hold that the administrative law judge acted within his discretion in crediting the opinion of Dr. Parnes as the treating physician to find his treatments reasonable and necessary, and we affirm his ordering employer to pay Dr. Parnes's outstanding bills. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

We next address employer's challenge to the administrative law judge's finding that claimant's work injury reached maximum medical improvement on July 26, 2000. We agree that this finding cannot be affirmed as the administrative law judge did not render adequate findings of fact with respect to the evidence of record. 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), or as of the date the claimant's condition reaches maximum medical improvement, which is determined by medical evidence of record. *See Louisiana Ins. Gaur. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In the instant case, the administrative law judge credited deposition testimony by Dr. Parnes that he expects no improvement in claimant's back condition and that maximum medical improvement has been reached. The administrative law judge also credited the deposition testimony of Dr. Wilen, who perceived no change, and even a worsening, in claimant's back condition. Based on this evidence, the administrative law judge concluded that claimant's work injury reached maximum medical improvement as of the date of Dr. Parnes's deposition on July 26, 2000. However, the administrative law judge's findings do not indicate he considered that Dr. Parnes's opinion was in response to questioning as to whether claimant's condition had improved since the first 90 days after the work injury, (approximately November 27, 1998). CX R at 27. Moreover, Dr. Wilen's testimony was in response to questioning as to whether there had been any change in claimant's condition since Dr. Wilen first treated claimant on August 19, 1999. CX T at 4, 10. Additionally, the administrative law judge did not address Dr. Swearingen's opinion that claimant reached

maximum medical improvement on April 1, 1999.[1] EX 6. Given this evidence which could establish an earlier date of permanency, we are unable to conclude whether the administrative law judge "simply disregarded significant probative evidence or reasonably failed to credit it." *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997). Because the administrative law judge must in the first instance discuss all relevant evidence and explain what evidence he weighed and why, consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), *see McCurley v. Kiewest Co*., 22 BRBS 115 (1989), and because the Board cannot render more specific findings to supplement the administrative law judge's Decision and Order, *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 543 (2d Cir. 1982), we vacate the administrative law judge's findings with respect to the date of maximum medical improvement, and remand this case to the administrative law judge to make findings on this issue. *See Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998).

Accordingly, the administrative law judge's finding regarding the date claimant's condition became permanent is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1]We note that, contrary to employer's contention, the administrative law judge properly did not address the September 10, 1999, report of of Dr. Forschner, as there is no indication the report was admitted into the record. *See* CX R at 47-48.