



BRB No. 19-0015

TERRY BRANDON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
REYNOLDS METALS COMPANY	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE	)	DATE ISSUED: 11/13/2019
COMPANY c/o ESIS	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Justin L. Williams (Williams Attorneys, PLLC), Corpus Christi, Texas, for claimant.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Benefits (2016-LHC-01678) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> We must affirm the administrative law judge's findings of fact and conclusions of law if they 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 injured his right knee on September 21, 1998, during the course of his employment as a maintenance mechanic for employer. Employer accepted the compensability of this injury. When claimant filed his claim on February 10, 1999, he additionally sought medical benefits for injuries to his left knee and left shoulder. EX 3.

From October 16, 1998 to May 22, 2002, claimant underwent four right knee and three left knee surgeries, which included bilateral total knee replacements, and two left shoulder arthroscopic surgeries. EXs 22-36. On August 14, 2002, claimant requested that his treating physician, Dr. Heckman, refer him for impairment ratings of his knees and left shoulder. EX 38 at 1. The impairment assessment stated claimant has a 50 percent right lower extremity impairment, a 75 percent left lower extremity impairment, and a 14 percent left upper extremity impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (5th ed. 2000). EXs 39, 40.

Subsequently, claimant underwent left shoulder arthroscopies on September 23, 2004 and March 1, 2007. EXs 45, 48. Claimant also complained of right shoulder pain at a Department of Labor-ordered Independent Medical Examination (DOL-IME) on February 21, 2000. EX 31. Claimant told Dr. Heckman his right shoulder problem was related to a fall he took while on crutches after a total knee replacement. EX 35 at 7. Employer controverted claimant's entitlement to benefits for this alleged work-related injury. Claimant reiterated his right shoulder complaint to Dr. Heckman in January 2002, and he received a lidocaine injection. EX 35 at 1-2. Dr. Heckman's January 20, 2006 report states that a November 2005 MRI showed a right rotator cuff tear. EXs 46; 49 at 5.

An informal conference was conducted in October 2006 to address employer's liability for the right shoulder condition. EXs 6, 49. Dr. Brownhill conducted a DOL-IME

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<sup>1</sup> Claimant's petition states he is deceased and this appeal is filed on behalf of his estate. Cl. Pet. for Rev. at 1; *see M.M. [McKenzie] v. Universal Maritime APM Terminals*, 42 BRBS 54 (2008); 20 C.F.R. §802.402(b).

on November 9, 2006. EX 47. He opined that claimant's right shoulder and lower back complaints are consequences of the work injury, that arthroscopic surgery would "most probably" be appropriate, and that claimant was not at maximum medical improvement due to his right shoulder and back problems. *Id.* at 11. Dr. Heckman recommended surgery in November 2007 to repair the right rotator cuff tear, which employer declined to authorize. EX 49 at 5. In lieu of surgery, claimant received lidocaine injections for pain management and impingement. *Id.* at 7-9. On March 26, 2009, Dr. Heckman stated "[claimant] has reached the point of maximum medical improvement. He should be considered permanently and totally disabled. He without a doubt could not return to his former job . . . ." EX 50.

On July 30, 2009, employer requested Section 8(f) relief from continuing compensation liability, 33 U.S.C. §908(f); employer's application averred that claimant's work injuries reached maximum medical improvement on August 14, 2002. EX 9 at 14-15. After submission of an amended application, the district director approved employer's request on November 18, 2015; the approval letter stated that claimant's work injuries reached maximum medical improvement on March 26, 2009. EXs 11 at 18-19; 15.

The case was referred to the Office of Administrative Law Judges. The parties submitted proposed stipulations, which included their agreement that August 14, 2002, was the date of maximum medical improvement for claimant's left and right knees and left shoulder. EXs 17-18. On March 10, 2017, the administrative law judge issued a decision pursuant to the parties' stipulations. EX 19. By Order dated March 17, 2017, he granted the motion for reconsideration of the Director, Office of Workers' Compensation Programs (the Director), and vacated the decision on the basis that the stipulations did not reflect the date of maximum medical improvement stated in the district director's November 2015 approval letter. EX 21. The administrative law judge instructed "[a]ll parties to confer and resubmit any proposed joint stipulations setting forth corrected and clarified stipulations" for approval. March 17, 2017 Order at 2. Claimant and employer agreed on his entitlement to, and employer's liability for, disability benefits from the date of injury. Employer and the Director, however, disagreed on the date of maximum medical improvement, thus prompting further consideration by the administrative law judge.

In his September 26, 2017 decision, the administrative law judge determined claimant underwent further treatment on his shoulders and left knee after August 14, 2002, Dr. Heckman changed the date of maximum medical improvement to March 26, 2009, as "he and other physicians recommended additional procedures to improve Claimant's condition," and Dr. Heckman thereafter foreclosed the possibility of future surgeries to aid claimant's functioning. Decision and Order at 24. The administrative law judge thus concluded that claimant's work injuries reached maximum medical improvement on March 26, 2009. *Id.*

Claimant appealed the administrative law judge's decision. Subsequently, the parties filed a joint motion to dismiss the appeal without prejudice because the administrative law judge's decision addressed only the date of maximum medical improvement, but neither awarded nor denied benefits. By Order issued March 28, 2018, the Board dismissed the appeal. *Brandon v. Reynolds Metals Co.*, BRB No. 18-0047 (Mar. 28, 2018). On remand, the administrative law judge issued a Supplemental Decision and Order Awarding Benefits dated August 14, 2018, which incorporated his finding that claimant's work injuries reached maximum medical improvement on March 26, 2009. The administrative law judge awarded temporary total disability benefits from September 21, 1998 through March 25, 2009, and ongoing permanent total disability benefits from March 26, 2009. The Special Fund's liability commenced 104 weeks after March 26, 2009.<sup>2</sup> 33 U.S.C. §908(f).

Claimant appeals, contending he is entitled to compensation for permanent total disability from August 14, 2002, when he avers his injuries reached maximum medical improvement.<sup>3</sup> The Director responds, urging affirmance of the award. Employer has not filed a response brief.

Claimant contends the administrative law judge's finding that he reached maximum medical improvement on March 26, 2009, rather than August 14, 2002, is erroneous. He states Dr. Heckman opined that his bilateral knee and left shoulder injuries reached maximum medical improvement on August 14, 2002, after he had healed from numerous surgeries, and contends that any treatment after that date was palliative rather than curative.

The administrative law judge thoroughly summarized the pertinent evidence and the contentions of the parties regarding the date of maximum medical improvement. Decision and Order (Sept. 26, 2017) at 2-24. He explicitly rejected the argument that any treatment claimant received after August 2002 was only palliative rather than curative. *Id.* at 25. He

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<sup>2</sup> The finding of permanency as it relates to the claim for Section 8(f) relief is affirmed as employer has not appealed it. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). The Director correctly contends that claimant's appeal cannot affect this finding. *See Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988) (claimant has no standing to raise issues concerning Section 8(f)); *Beltran v. California Shipbuilding & Dry Dock*, 17 BRBS 225 (1985) (private parties' stipulations cannot bind the Special Fund without the Director's agreement).

<sup>3</sup> This would entitle claimant to Section 10(f) cost-of-living adjustments from the onset of permanent total disability. 33 U.S.C. §910(f); *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc).

found the evidence supports the finding that claimant's physicians sought to improve his condition until March 26, 2009, when Dr. Heckman stated he reached maximum medical improvement after the additional treatment and procedures. *Id.*

A claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition or his condition is of lasting and indefinite duration and beyond a normal healing period. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see also McCaskie v. Aalborg Cserv Norfolk, Inc.*, 34 BRBS 9 (2000). A permanent impairment rating may also indicate maximum medical improvement. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). If a physician believes that further treatment should be undertaken, then 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. *Methe*, 396 F.3d at 605-606, 38 BRBS at 102(CRT). If surgery is anticipated, maximum medical improvement has not been reached. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018); *McCaskie*, 34 BRBS 9.

The record evidence supports the administrative law judge's finding. After Dr. Heckman opined in August 2002 that claimant's bilateral knee and left shoulder injuries reached permanency, claimant underwent left shoulder surgery in September 2004, after which Dr. Heckman prescribed physical therapy. EX 45 at 3. At that time, he also recommended revision surgery for left knee patellofemoral instability, which claimant declined.<sup>4</sup> *Id.* On November 9, 2006, Dr. Brownhill stated claimant had not reached maximum medical improvement because of the additional injuries to his right shoulder and back. EX 47 at 11.

Claimant had another left shoulder surgery in March 2007 to repair a compensable aggravation and underwent another round of physical therapy. EX 48. In September 2007, Dr. Heckman opined claimant's knees may require a revision arthroplasty and his shoulders may require "another 3 to 4 months to work through any ongoing issues."<sup>5</sup> EX 49 at 4.

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<sup>4</sup> Dr. Heckman instead prescribed a knee brace. EX 45 at 3.

<sup>5</sup> Dr. Heckman stated on September 26, 2007, that it was difficult to determine whether claimant had reached maximum medical improvement because of his numerous conditions. EX 49 at 4. However, he stated claimant's knees were at maximum medical improvement, even though claimant might require a revised arthroplasty. *Id.*

Surgery for claimant's right shoulder was recommended on both November 7, 2007, and January 30, 2008, but it was not approved; claimant instead received an injection to alleviate pain. *Id.* at 5-8. On June 6, 2008, Dr. Heckman stated claimant had not reached maximum medical improvement because "we have not got a disposition associated with the right shoulder." *Id.* at 9. It was not until March 26, 2009, that Dr. Heckman stated claimant's bilateral knee and shoulder injuries and lumbar spine were at maximum medical improvement. EX 50.

In arriving at his decision, the administrative law judge is entitled to draw his own inferences and conclusions from the evidence, *see Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012), and the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision.<sup>6</sup> *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Claimant has not identified any factual or legal error in the administrative law judge's decision. The administrative law judge permissibly concluded that claimant received ongoing curative treatment after August 2002, and his finding that all of claimant's work injuries reached maximum medical improvement on March 26, 2009, is supported by substantial evidence in the form of Dr. Heckman's opinion. *Abbott*, 40 F.3d at 126, 29 BRBS at 24-25(CRT); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Ezell v. Direct Labor*, 33 BRBS 19 (1999). Therefore, we affirm the award of temporary total disability benefits until March 26, 2009.

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<sup>6</sup> There is no support for claimant's contention that Dr. Heckman's March 26, 2009 letter was intended to state that claimant was continuously at maximum medical improvement as of August 14, 2002. *See* Cl. Br. at 2-3.

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

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge