BRB No. 05-0244

RONALD QUEEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED:
	)	10/26/200510/26/20052005
Self-Insured	)	
Employer-Petitioner	)	

DECISION and ORDER

Appeal of the Decision and Order and the Order on Reconsideration of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Lawrence P. Postal (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order on Reconsideration (2003-LHC-02508) of Administrative Law Judge Jeffrey Tureck 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a severe fracture of the right ankle on March 3, 1999, during the course of his employment for employer as a driver. Dr. Pollack performed surgery to debride the open wound, stabilize the fractures and reconstruct some tendons. EX 35 at 12-13. Claimant developed post-traumatic arthritis in his ankle joint. Claimant was examined at employer's request on March 29, 2000, by Dr. Weiner, who opined that claimant's work injury was at maximum medical improvement, that claimant has a 40 percent permanent partial impairment of the right lower extremity, but that claimant likely would require fusion surgery. Dr. Pollack examined claimant on May 10, 2000, and concurred with Dr. Weiner's assessment of claimant's work injury, but also stated it

was likely that claimant would need fusion surgery. In April 2001, Dr. Pollack opined that claimant should undergo the ankle fusion surgery to relieve his pain. The surgery was postponed until March 2002 due to claimant's sustaining a heart attack. Dr. Pollack opined that the fusion surgery improved claimant's ankle condition and he revised claimant's impairment to 27 percent. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from March 4, 1999, to March 28, 2000, and for permanent partial disability under the schedule for a 27 percent impairment, 33 U.S.C. §908(c)(4).

In his decision, the administrative law judge found that claimant's work injury reached maximum medical improvement on August 6, 2002, after claimant had recovered from the ankle fusion surgery. The administrative law judge found that a job claimant was offered as a dispatcher established the availability of suitable alternate employment as of March 29, 2000. The administrative law judge credited the later impairment rating of Dr. Pollack to find that claimant is entitled to compensation for a 27 percent permanent impairment. Thus, the administrative law judge ordered employer to pay claimant compensation for temporary total disability from March 3, 1999, to March 28, 2000, for temporary partial disability from March 29, 2000, to March 28, 2002, based on a loss of wage-earning capacity of $1,122 per week, for temporary total disability from March 28 to August 6, 2002, and for permanent partial disability for a 27 percent impairment of the right foot. 33 U.S.C. §908(b), (c)(4), (e). On reconsideration, the administrative law judge rejected employer's contention that he erred in finding that claimant's work injury reached maximum medical improvement on August 6, 2002.

On appeal, employer challenges the administrative law judge's finding that claimant reached maximum medical improvement on August 6, 2002, rather than on May 10, 2000. Claimant has not responded to this appeal.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 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), or if he has any residual impairment after reaching maximum medical improvement, the date of which is determined by medical evidence. *See generally Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In finding that claimant did not reach maximum medical improvement until after he recovered from the ankle fusion surgery on August 6, 2002, the administrative law judge first observed that Drs. Weiner and Pollack noted, in 2000, the likelihood that

claimant would require fusion surgery to relieve pain due to his work injury. EXs 9, 11. The administrative law judge found that the surgery was not prescribed at that time because it is a drastic remedy involving the complete loss of ankle movement and claimant's pain did not yet mandate the procedure. EX 35 at 57. The administrative law judge credited the 27 percent impairment rating Dr. Pollack ascribed after the March 2002 fusion surgery as evidence that claimant's condition had improved from the 40 percent impairment claimant had in March 2000. EX 25. The administrative law judge found that the fusion surgery benefited claimant's right ankle condition by reducing his pain and improving the functioning of his right foot. The administrative law judge rejected employer's contention that claimant's injury reached maximum medical improvement on May 10, 2000, inasmuch as it was premised on the expectation that claimant's ankle would worsen even if he underwent fusion surgery. The administrative law judge summarized his findings by stating that fusion surgery was clearly contemplated by Drs. Pollack and Weiner, the surgery occurred as soon as practicable under the circumstances, and, thereafter, claimant's condition significantly improved. The administrative law judge concluded that claimant's work injury, therefore, did not reach maximum medical improvement until he recovered from the fusion surgery on August 6, 2002.

On reconsideration, the administrative law judge rejected employer's contention that he had not considered whether the evidence established that claimant's condition was of indefinite duration and not improving as of May 10, 2000, *i.e.*, the *Watson* standard. The administrative law judge found that Dr. Pollack did not state in May 2000 that claimant had fully recovered from his work injury, and that subsequent events necessitated the fusion surgery. Instead, Dr. Pollack opined in May 2000 that further surgery would be necessary, but he properly waited until all other treatment options had been undertaken. Accordingly, the administrative law judge affirmed his previous determination that claimant's work injury did not reach maximum medical improvement until he recovered from the ankle fusion surgery.

The Board is not empowered to reweigh the evidence, and the administrative law judge's weighing of the evidence must be affirmed if it is rational and supported by substantial evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). If surgery is anticipated, then maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 46 (1983); *cf. McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000) (surgery postponed indefinitely; maximum medical improvement reached). In this case, the administrative law judge rationally credited the opinions of Drs. Weiner and Pollack that claimant's work injury would require ankle fusion, which was performed as soon as practicable. In addition, the surgery improved claimant's ankle condition and his impairment rating decreased. Thus, substantial evidence supports the administrative law judge's finding that claimant's work injury reached maximum medical improvement after he recuperated

from the fusion surgery on August 6, 2002, and this finding is affirmed.[1] *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *see generally Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[1] Employer's contention that the administrative law judge's analysis does not comport with the Administrative Procedure Act (APA) is without merit. In his decision and order and on reconsideration, the administrative law judge fully addressed all the relevant evidence, and stated on which evidence he relied and which evidence he rejected and why. This analysis comports with the APA. *See H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).