BRB No. 13-0048

ROBERT L. VOGEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GUNDERSON MARINE, INCORPORATED	)	DATE ISSUED: 09/26/2013
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration and Modifying Decision of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration and Modifying Decision (2008-LHC-01991) of Administrative Law Judge Jennifer Gee 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).

Claimant worked for employer as a fitter/welder. On March 12, 2003, he fell from a ladder while welding inside a tank. Claimant suffered a skull fracture, small right frontal hemorrhage, and left temporal contusion. He had post-concussion seizures and spent four days in intensive care before being discharged from the hospital. Although he wished to return to work, claimant continued to suffer severe headaches, shoulder and hip pain, seizures, erratic sleep patterns, and problems with balance, brain processing speed, memory, and mood and temper regulation. Claimant was released to modified work with employer on April 12, 2003. Claimant's last day of work for employer was July 31, 2004, when he fell asleep for a second time that month while welding at work. EX 51 at 226; Decision and Order at 22.

Due to claimant's sleeping episodes at work, he was evaluated for a sleep disorder on September 29, 2004. Dr. LeFor diagnosed severe hypersomnia, "most likely to be posttraumatic." EX 51 at 234. Claimant subsequently completed a work-hardening program. On January 10, 2005, Dr. Hoeflich declared claimant medically stationary and released him to work. However, employer disagreed, asserting that claimant would not be fit to work until his sleep problem had resolved. CX 28 at 89. As a result, claimant underwent additional testing by Dr. Rich, a neurologist who specializes in sleep disorders, on February 13-14, 2005. Claimant continued to treat with Dr. Rich, but the treatment notes are not of record.

The administrative law judge found that the last of claimant's multiple work-related medical conditions, hypersomnia, reached maximum medical improvement by October 9, 2006, and that claimant is entitled to temporary and permanent disability benefits for his injuries caused by the March 12, 2003, work accident, based on an average weekly wage of $686.65 and a residual wage-earning capacity of $630.90.[1] The administrative law judge additionally found claimant is not entitled to consult with Dr. Spencer at employer's expense. Claimant appeals these findings, and employer responds, urging affirmance.

Maximum Medical Improvement

Claimant contends the administrative law judge erred in finding his hypersomnia condition became permanent on October 9, 2006, alleging it became permanent on

[1]The administrative law judge awarded claimant temporary total disability benefits from March 13 to April 13, 2003; temporary partial disability benefits from April 14, 2003 through July 30, 2004; temporary total disability benefits from July 31, 2004 through October 8, 2006; and ongoing permanent total disability benefits from October 9, 2006. 33 U.S.C. §908(a), (b), (e), (h).

February 8, 2006, or May 25, 2006, at the latest. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). 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).

In this case, claimant sustained multiple injuries, and the administrative law judge discussed and made findings regarding the date each of claimant's eleven conditions reached maximum medical improvement. The only condition at issue here is claimant's hypersomnia. Dr. Rich submitted a report dated May 25, 2006, wherein he changed claimant's medication and recommended psychiatric intervention. CX 34 at 98. Although subsequent records from Dr. Rich are not of record, on December 13, 2006, Dr. Hoeflich stated that "since I last saw [claimant] on 6-14-06, apparently Dr. Rich has stated there is nothing further that he can do for him."[2] EXs 42, 74, 48 at 218. Claimant first saw Dr. Shergill, a pulmonologist and sleep specialist, on October 9, 2006. Dr. Shergill diagnosed hypersomnia, indicating that claimant's sleep disorder had lasted for over three years and that post-traumatic hypersomnolence is seen as "something to struggle with." EX 46 at 212.

Based on Dr. Hoeflich's December 2006 report, the administrative law judge inferred that Dr. Rich had determined sometime after June 14, 2006, that claimant's posttraumatic hypersomnia was a persistent condition of indefinite duration.[3] The administrative law judge also inferred that Dr. Rich must have reported his final opinion prior to employer's evaluation by Dr. Shergill, "because both logically and based on its prior actions in this case, the [employer] would only request such an evaluation if a physician requested it or to evaluate whether more medical services were necessary." Decision and Order at 79. However, as the administrative law judge found that the exact date Dr. Rich rendered his final opinion could not be determined, she relied on Dr. Shergill's report of October 9, 2006, to find that claimant's condition was permanent as it was of lasting or indefinite duration. Decision and Order at 81; EX 46 at 212.

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[2]Nonetheless, Dr. Rich referred claimant to Dr. Root for treatment for pre-existing sleep apnea.

[3]Specifically, the administrative law judge inferred that Dr. Rich "settled on a diagnosis of posttraumatic hypersomnia, had attempted all feasible means of treating its symptoms (via the multiple medications he gave the Claimant trials of), and was of the opinion that no further medical intervention was likely to change the Claimant's condition." Decision and Order at 80.

Contrary to claimant's assertions, the administrative law judge's finding that claimant's hypersomnia reached maximum medical improvement by October 9, 2006, is rational and supported by substantial evidence. Dr. Rich did not state claimant's condition was permanent in his May 25, 2006 report, and he referred claimant for additional treatment. Dr. Hoeflich's December 2006 report supports the inference that Dr. Rich opined that claimant's condition reached permanency sometime after June 14, 2006. The administrative law judge also rationally inferred that employer's request that claimant be seen by Dr. Shergill was motivated by an additional treatment request or disability report by Dr. Rich. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Dr. Shergill, in his October 9, 2006 report, detailed the lengthy testing and treatment claimant had undergone for his sleep disorder. EX 46 at 207-212. He stated that post-traumatic hypersomnolence is something people struggle with as there are a lot of factors that affect the ability to attain a normal sleeping pattern. Therefore, as Dr. Shergill confirmed that claimant's sleep disorder had persisted for a long period of time and beyond a normal healing period, we affirm, as supported by substantial evidence, the administrative law judge's reliance on Dr. Shergill's opinion to find that claimant's hypersomnia condition became permanent on October 9, 2006.[4] *See Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Watson*, 400 F.2d 649.

Residual Earning Capacity

Claimant next challenges the administrative law judge's calculation of his weekly post-injury wage-earning capacity for the period he was entitled to temporary partial disability benefits. The administrative law judge calculated claimant's average weekly wage to be $686.65. In so doing, she found that claimant worked 260 days in the year prior to the injury. This number included the days claimant worked, as well as the holidays, sick days, and vacation days for which claimant was paid but did not work. Decision and Order at 103. In calculating claimant's residual earning capacity, the

[4]We reject claimant's assertion that the administrative law judge ignored the medically stationary date of February 8, 2006, by both Drs. Curioso and Hoeflich. The administrative law judge specifically found that Dr. Hoeflich's opinion was entitled to limited weight because she is a physical medicine specialist and claimant's conditions fell outside of her body of knowledge. Decision and Order at 56. Further, with respect to Dr. Curioso, who treated claimant's seizures, the administrative law judge found her opinion entitled to reasonable weight only as it relates to her general neurological expertise, "[a]s opposed to more focused specialties related to neurology, such as sleep disorders." Decision and Order at 57 n.78. The administrative law judge is entitled to weigh the evidence and to draw her own conclusions therefrom. *See Goldsmith*, 838 F.2d 1079, 21 BRBS 30(CRT); *Duhagon*, 31 BRBS 98.

administrative law judge found that claimant was paid for 2,929.5 hours, including hours worked, paid time off/sick time (PTO), holidays, and vacation days. She multiplied this number by claimant's 2003 hourly rate of $14.86 and divided the total hours by the 69 weeks claimant worked between April 14, 2003, and July 30, 2004. The administrative law judge arrived at a post-injury wage-earning capacity of $630.90 per week. Decision and Order at 105. On reconsideration, the administrative law judge corrected her wage-earning capacity calculations, finding that claimant was actually paid for 2,889.5 hours[5] and that there were 67.57 weeks between April 14, 2003, and July 30, 2004. Thus, the administrative law judge calculated claimant's post-injury wage-earning capacity as $635.46 per week.[6] Order on Recon. at 5; EX 6 at 57-76.

Claimant asserts that the post-injury wage records show he actually worked 2,552.8 hours between April 14, 2003, and July 30, 2004. EX 6 at 57-76. Claimant does not explain how he arrived at this number. As the wage records support the administrative law judge's calculation, we affirm the finding that claimant actually worked 2,541.1 hours between April 14, 2003, and July 30, 2004. *See Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982).

Claimant further asserts that the administrative law judge erred in including in the wage-earning-capacity calculation the 348.4 hours of PTO, holiday pay, and vacation pay paid to claimant during this period. Claimant contends that while he may have received pay for these hours while he was disabled, they do not represent his post-injury earning capacity because some of the pay was earned through work before claimant's injury. We agree that the administrative law judge's analysis is incomplete as she did not explain the basis for including the "special" pay in claimant's post-injury wage-earning capacity.

Pursuant to Section 8(h), 33 U.S.C. §908(h), a claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity in his injured capacity. *See, e.g., Long v. Director, OWCP*, 767 F.2d 1578, 1582, 17 BRBS 149, 153(CRT) (9th Cir. 1985). Whether wages are received during a period of disability is not determinative of this inquiry. Rather, the issue is whether the claimant earned the wages in his disabled condition. If wages are earned before, but received after, an injury, they are a measure of pre-injury earning capacity; therefore, they cannot fairly and reasonably represent a post-injury wage-earning capacity under Section 8(h). *Eagle Marine Services v. Director, OWCP*, 115 F.3d 735, 31 BRBS 49, 51(CRT) (9th Cir. 1997); *see also Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998). The administrative

[5]2,541.1 regular hours plus 348.4 hours of holiday pay, PTO, and vacation time equals 2,889.5 hours.

[6]2,889.5 hours x $14.86 per hour = $42,937.97; $42,937.97 ÷ 67.57 weeks = $635.46 per week.

law judge thus incorrectly stated that all compensation claimant received during this post-injury period should be included in his wage-earning capacity calculation. Order on Recon. at 5. Therefore, as the administrative law judge did not address whether the 348.4 hours of special pay she included in claimant's wage-earning capacity were earned while claimant was disabled, we vacate the wage-earning-capacity calculation and remand the case for her to reconsider claimant's post-injury wage-earning capacity in view of applicable law. On remand, the administrative law judge also should correct the typographical error in her Order on Reconsideration to reflect that there are 67.71 weeks between April 14, 2003, and July 30, 3004, and not 67.57 weeks.[7]

Treatment with Dr. Spencer

Claimant lastly contends the administrative law judge erred in finding that he is not entitled to consult Dr. Spencer, an anti-seizure specialist, at employer's expense. Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), provides that when the employer or carrier learns of its employee's injury, either through written notice or as otherwise prescribed by the Act, it must authorize medical treatment by the employee's chosen physician. Once the claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or district director. 20 C.F.R. §702.406. An employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to request authorization. 33 U.S.C. §907(d); *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982).

In this case, claimant chose Dr. Hoeflich as his physician on July 6, 2004. EX 30 at 161. Dr. Hoeflich referred claimant to a number of specialists, including Dr. Curioso, a neurologist, to treat his seizures and headaches. CX 23 at 81. On April 10, 2008, claimant asked employer for authorization to consult Dr. Spencer, a neurologist, about his headaches and seizures, and to get a neuropsychological examination. CX 5 at 5. Employer declined on April 17, 2008, because Dr. Curioso was claimant's approved neurologist and Dr. Hoeflich had not recommended a change in neurologists. CX 6 at 7; 20 C.F.R. §702.406(a). In June 2008, Dr. Curioso discharged claimant. EX 63 at 280. In July 2008, Dr. Hoeflich also terminated her treatment of claimant, but she recommended he find a new neurologist for management of his seizure medications. EX 74 at 411; CX 35 at 99. Employer agreed to authorize treatment with a new physician, and claimant chose Dr. Ash, also a neurologist, and not Dr. Spencer, as his new attending physician. Considering these facts, the administrative law judge found that employer did not deny claimant appropriate treatment, because, when claimant first requested Dr. Spencer, he was under the appropriate care of both an attending physician and a

[7]Both parties concede that the administrative law judge erred in stating there are 67.57 weeks, rather than 67.71 weeks, in this time period, and that claimant is entitled to compensation for 67.71 weeks.

neurologist, neither of whom referred claimant to Dr. Spencer. Decision and Order at 107-108. Further, when given the opportunity to choose a new attending physician, claimant chose Dr. Ash, and not Dr. Spencer and employer approved the change. *Id*. Thus, on the facts of this case, substantial evidence supports the administrative law judge's finding that claimant is not entitled to consult with Dr. Spencer at employer's expense. Claimant freely chose a new physician and was not denied adequate and appropriate treatment.[8] *Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT); *Swain*, 14 BRBS 657. Thus, we affirm the administrative law judge's finding.

Accordingly, we vacate the administrative law judge's post-injury wage-earning capacity finding, and we remand the case for further consideration of that issue. In all other respects, 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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[8]As the administrative law judge properly found, claimant may request a change of physician from the district director. 20 C.F.R. §702.406.