BRB No. 96-0644

EDMOND J. RICHOUX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADM/GROWMARK RIVER SYSTEM, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

William J. Perry (The Perry Law Firm), New Orleans, Louisiana, for claimant.

Joseph J. Lowenthal, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-1752) of Administrative Law Judge James W. Kerr, Jr., awarding benefits 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 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).

On April 9, 1988, claimant injured his left leg while working as a millwright for employer. Claimant was initially treated at employer's request by Dr. Cashio, who took an x-ray and performed arthroscopic surgery. After remaining out of work for 6-8 weeks, claimant attempted to return for a few weeks on several occasions, but experienced pain and recurrent effusions in his left knee. On January 23, 1989, claimant began treating with Dr. Gessner, who performed an arthroscopic procedure and recommended that claimant undergo a total knee replacement and/or a tibial osteotomy. Employer voluntarily paid temporary total disability compensation to claimant for several periods through January 21, 1992, and permanent partial disability benefits under the schedule from January 21, 1992 until February 12, 1993. Employer also authorized claimant to undergo either a tibial osteotomy or total knee replacement surgery as recommended by Drs. Gessner, Shoji, and Habig, and voluntarily paid temporary total disability compensation from March 18, 1993, until September 29, 1993 in anticipation of the surgery. Claimant, however, ultimately opted not to undergo the surgery due to a history of phlebitis. Claimant has not attempted to work since beginning treatment with Dr. Gessner and sought continuing temporary total disability compensation under the Act commencing February 13, 1993.

The administrative law judge found that although claimant established he was unable to perform his pre-injury employment due to his work injury, he was not totally disabled because employer had established the availability of suitable alternate employment paying $4.40 per hour as of June 21, 1990, and claimant did not exercise due diligence in securing alternate work. The administrative law judge further determined that claimant's condition reached maximum medical improvement and accordingly was permanent as of April 6, 1992, based on the opinion of claimant's treating physician, Dr. Gessner. Accordingly, he awarded claimant temporary total disability compensation from April 11, 1988, until June 20, 1990, based on claimant's average weekly wage of $892.86; temporary partial disability compensation from June 21, 1990 until April 5, 1992, based on claimant's demonstrated ability to earn $4.40 per hour in suitable alternate employment; and scheduled permanent partial disability benefits for a 25 percent permanent impairment of the left leg thereafter under Section 8(c)(2) and (19) of the Act, 33 U.S.C. §908(c)(2),(19). He also held employer liable for claimant's medical benefits and interest.

On appeal, claimant challenges the administrative law judge's denial of continuing temporary total disability compensation, contending that the administrative law judge erred in concluding that his condition reached permanency, that employer had demonstrated the availability of suitable alternate employment, and that claimant failed to make a diligent effort to return to work. Employer responds, urging affirmance.

Initially, we reject claimant's argument that his condition has not yet reached permanency because future surgery is recommended by Drs. Gessner and Habig. An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 61 (1985). A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition.

Abbott v. Louisiana Insurance Guaranty Association, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1992). Thus, if anticipated surgery is not expected to improve the employee's condition, the condition may be permanent. *See Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., concurring and dissenting); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990).

In the present case, after considering the relevant medical opinions, the administrative law judge acted within his discretion in according determinative weight to the deposition testimony of claimant's treating physician, Dr. Gessner, that barring any further surgery, which claimant had reasonably refused to undergo, claimant had reached maximum medical improvement on April 6, 1992. CX 3; *see generally Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). Moreover, the medical opinions of Drs. Habig, Gessner, and Shoji provide corroborative testimony, as they were in agreement that surgery would only relieve some of claimant's pain but would not improve his condition. Tr. at 162, 163; CX 3 at 55, 56; EX 2. Inasmuch as the administrative law judge's finding of permanency is supported by substantial evidence and claimant has failed to raise any reversible error, the administrative law judge's finding that claimant's condition reached permanency on April 6, 1992 is affirmed. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Sketoe*, 28 BRBS at 222; *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

We also affirm the administrative law judge's denial of total disability benefits as of June 21, 1990, because it is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. Where, as here, claimant establishes that due to his work-related injury he is not capable of returning to his former employment, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show the general availability of job opportunities within the geographical areas where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1991); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991). If the employer makes such a showing, the claimant may nonetheless be totally disabled if he demonstrates that he diligently tried and was unable to secure such employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258, 260 (1988).

In concluding that employer met its burden of establishing the availability of suitable alternate employment in this case, the administrative law judge credited the testimony of Deborah Bailey, a vocational rehabilitation expert with Crawford and Company, regarding a June 21, 1990 survey performed by Ms. Toups, another vocational rehabilitation counselor who worked there. After evaluating claimant and considering the December 1989 restrictions of Dr. Gessner, EX 7, and

the May 29, 1990, restrictions imposed by Dr. Shoji, EX 2, and conducting a labor market survey on June 20, 1990, Ms. Toups identified 10 available sedentary job opportunities which she believed were consistent with claimant's mental and physical capacities and transferable skills. The 10 jobs identified, which were located within a 10-mile radius of claimant's residence, were for a bench repairer of small appliances, newspaper delivery driver, dispatcher, gate tender, parking lot cashier, sewing machine operator, bridge operator, and ticket sales person. Although claimant reiterates the argument he made below that the jobs identified in the June 20, 1990, labor market survey are insufficient to establish the availability of suitable alternate employment because they fail to account for his functional illiteracy, we disagree. The administrative law judge rationally found this assertion undermined by claimant's demonstrated ability to read portions of his deposition at the hearing and his testimony that he had a sixth grade education and successfully completed community college courses in blueprint, sheet metal and welding. Decision and Order at 17; Tr. at 19, 90, 105, 106. Moreover, he credited the testimony of Ms. Bailey that claimant possessed the mental and physical capacities and transferable skills necessary to compete for and perform the jobs listed in the June 20, 1990, labor market survey. *See* Decision and Order at 17; Tr. at 175, 178, 179, 193. *See generally Sketoe*, 28 BRBS at 223, 224; *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990); *Jones*, 21 BRBS at 14.

Similarly, we reject claimant's argument that the June 20, 1990, labor market survey does not establish the availability of suitable alternate employment because it fails to account for the fact that he is unable to drive or operate heavy equipment because of pain medication he is taking. The administrative law judge specifically considered this argument and rationally rejected it based on the testimony of Dr. Gessner, who prescribed the medication, that it would not affect claimant's ability to work, CX 3 at 37, 45, 60, and claimant's testimony that he did not take the prescription medication regularly, Tr. at 50. Decision and Order at 18.

Finally, we reject claimant's argument that the June 20, 1990, labor market survey cannot properly support the administrative law judge's denial of total disability compensation because it was prepared prior to the time claimant reached maximum medical improvement. Maximum medical improvement is an indication of the nature of claimant's disability, while the availability of suitable alternate employment is an indication of the extent of disability. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Where, as here, claimant is released to return to sedentary work with restrictions prior to reaching maximum medical improvement and his restrictions thereafter remain the same, *compare* Tr. at 178, CX 3 at 18, 20, 26-28, with EX 2, the showing of suitable alternate employment need not coincide with the date of maximum medical improvement to establish the absence of total disability. *See generally Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Hogan*, 23 BRBS at 293-294. Inasmuch as the vocational testimony of Ms. Bailey and Ms. Toups in conjunction with Dr. Shoji's approval of all but two of the positions identified in the June 20, 1990, labor market survey,[1] EX 7, provide substantial evidence to support the administrative law judge's

[1]Dr. Shoji felt that the bench repair and newspaper delivery positions would have to be modified to exclude stooping, kneeling, or lifting a weight from the ground, for them to be suitable for

suitable alternate finding and claimant has failed to establish any reversible error, we affirm this determination. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

The administrative law judge's finding that claimant failed to exercise reasonable diligence in securing alternate work is also affirmed. In making this determination, the administrative law judge noted that claimant testified at the hearing that he did not contact Crawford & Company upon receiving the June 20, 1990, labor market survey and did not contact the potential employers listed in the survey or apply for any of the jobs listed because of the low pay offered. Moreover, he noted that while claimant stated that he did not apply for the jobs because he did not think he could perform the duties, claimant had never actually inquired about the requirements of the jobs. Decision and Order at 18; Tr. at 102, 103, 105-108. Inasmuch as the administrative law judge reasonably concluded that claimant failed to demonstrate a diligent effort to return to work based on claimant's testimony, we affirm this determination. Because employer established the availability of suitable alternate employment on June 21, 1990, and claimant did not establish due diligence in attempting to secure alternate work, we affirm the administrative law judge's denial of temporary total disability compensation after that date. *See generally Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366 (1990). Moreover, as claimant is only partially disabled, we affirm the administrative law judge's determination that upon reaching maximum medical improvement on April 6, 1992, he was limited to an award under the schedule. *See generally Sketoe*, 28 BRBS at 222; *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

---

claimant. EX 7.