

JAMES D. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY	)	
COMPANY	)	
	)	DATE ISSUED:
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision On Remand of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Michael Broad, Oakland, California, for claimant.

Gerald A. Falbo (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Samuel J. Oshinsky (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision On Remand (86-LHC-1696) of Administrative Law Judge Vivian Schreter-Murray 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).

This case is on appeal to the Board for the second time. Claimant injured his back and buttocks on October 12, 1981, while working for employer as a marine machinist. He stopped working on October 17, 1981 due to back pain and has not worked since. Employer paid claimant temporary total disability benefits from October 17, 1981 and continuing. 33 U.S.C. §908(b). Claimant filed this claim for permanent total disability benefits on June 29, 1982. A vocational rehabilitation counselor, Mr. Farrell, worked with claimant for about three and one-half years and concluded, on June 13, 1985, that further vocational rehabilitation services would not benefit claimant. He did not identify any suitable, alternate work that claimant could perform.

In the original decision, the administrative law judge found that claimant's physical injuries resolved without residual impairment, and that claimant physically was able to return to work on March 15, 1992.<sup>1</sup> She found, however, that claimant is temporarily totally disabled due to drug toxicity resulting from taking the medication prescribed for his October 1981 injury. In so finding, the administrative law judge relied on a statement in the report of Dr. Trigiano, an orthopedic surgeon and rehabilitation specialist, that claimant should be detoxified, the fact that claimant was taking numerous pills daily, *i.e.*, as many as 28, and references in the vocational reports to claimant's use of medication and average dosage. The administrative law judge awarded claimant continuing temporary total disability benefits until such time as he shall be medically certified to be detoxified. She also held employer liable for medical expenses related to the detoxification process. The administrative law judge found that employer was not entitled to Section 8(f), 33 U.S.C. §908(f), relief because claimant's condition is temporary and there is no evidence of a contributory condition.

On appeal, employer urged affirmance of the administrative law judge's finding that claimant is not permanently totally disabled due to his work-related injury, but contended, alternatively, that the administrative law judge erred in denying it Section 8(f) relief. On cross-appeal, claimant contended that the administrative law judge erred in finding that he was fully recovered from the physical effects of his injury, and that he is disabled due to an addiction to his medication. Claimant contended the administrative law judge should have found him permanently totally disabled from the back injury.

In its decision, *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989), the Board vacated the

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<sup>1</sup>The administrative law judge found that claimant's low back strain reached maximum medical improvement on February 25, 1982.

administrative law judge's finding that claimant was temporarily totally disabled due to drug toxicity, holding that the evidence of record, particularly Dr. Trigiano's opinion, does not support the administrative law judge's finding. The Board noted that Dr. Hawkins, claimant's treating physician, opined that claimant is not "overdoing" his medication, and that Dr. Trigiano did not administer any blood tests to claimant to determine if he had a poisonous level of drugs in his body. The Board also noted that Dr. Trigiano stated that claimant is permanently totally disabled due to pain syndrome, obesity and his deconditioned state, none of which can be attributed to the work accident.

The Board held, however, that Dr. Trigiano's opinion that claimant's chronic pain syndrome is not work-related is legally insufficient to establish the absence of a causal connection between claimant's work and the pain syndrome because he stated that claimant's October 1981 accident was one incident, among others, in his life that had contributed to the syndrome. *Wilson*, 23 BRBS at 28.

The Board concluded that since neither Dr. Trigiano nor any other doctor of record who examined claimant gave him a full release to return to work, and that employer refused to take claimant back without such a release, claimant established a *prima facie* case of total disability due to his back injury. *Id.* The Board nonetheless remanded the case for the administrative law judge to determine from the medical evidence whether claimant is unable to perform his usual work due to his physical or emotional condition.<sup>2</sup>

In the Decision on Remand, the administrative law judge reaffirmed her holding that claimant is temporarily totally disabled due to his addiction to his medication based on Dr. Trigiano's opinion and references to drug usage in Mr. Farrell's reports. She emphasized that she found Dr. Trigiano's opinion that claimant should be detoxified credible whereas Dr. Hawkins' opinion that claimant was not abusing prescription drugs was not found to be credible. She therefore reaffirmed her award of temporary total disability benefits pending certification that claimant is detoxified.<sup>3</sup> The administrative law judge did not address whether claimant was permanently totally disabled from the work injury or from emotional problems resulting therefrom.

On appeal, claimant contends that in reaffirming her award of temporary total disability on the basis that claimant is addicted to his medication, the administrative law judge erroneously disregarded the Board's instructions. The Director agrees and contends that the Board should hold as a matter of law that claimant established a *prima facie* case of total disability. In the alternative, the Director, as well as claimant, contends that the case should be remanded for proper disposition but assigned to another administrative law judge. Employer responds, urging affirmance of the

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<sup>2</sup>The Board also instructed the administrative law judge that, if, on remand, she found that claimant is permanently disabled, she should readdress Section 8(f), noting that if claimant's obesity produced physically disabling symptoms, it might constitute a pre-existing permanent partial disability for purposes of Section 8(f). Additionally, the Board instructed the administrative law judge to consider counsel's entitlement to an attorney's fee on remand.

<sup>3</sup>In a Supplemental Decision and Order - Awarding Attorney Fee, the administrative law judge awarded an attorney's fee of \$6,570 plus \$975 in costs.

administrative law judge's Decision and Order.

We must reverse the administrative law judge's finding that claimant is temporarily totally disabled due to drug toxicity, holding as the Board did in its prior decision that the evidence relied on by the administrative law judge, *i.e.*, Dr. Trigiano's opinion and the references to claimant's drug usage in the vocational reports, does not support the administrative law judge's finding that claimant's continuing disability is due to drug addiction. *See Wilson*, 23 BRBS at 27. While Dr. Trigiano states that claimant should be detoxified, he makes no statement that claimant's large dosages of medication prevent him from working. Thus, his opinion cannot support a finding that claimant is disabled due to drug toxicity.

Moreover, under Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." (emphasis added). *See Wayland v. Moore Dry Dock*, 25 BRBS 53, 57 (1991). The administrative law judge therefore erred in failing to follow the Board's instructions regarding evaluating the evidence to determine if the physical or emotional effects of claimant's injury render him totally disabled.

As the Board stated in its prior decision, Dr. Trigiano's opinion that claimant is totally disabled due to his pain syndrome, of which the October 1981 incident is a component, and to his deconditioning and his obesity establish that claimant cannot return to his usual work due, at least in part, to the work injury. If the work injury plays any role in claimant's disability, the entire resultant condition is compensable. *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). Moreover, both Dr. Swartz and Dr. Hawkins stated that claimant is disabled from his usual work, and, in fact, is totally disabled. Because the medical evidence establishes that claimant cannot return to his usual work, we reaffirm the Board's holding that claimant has established a *prima facie* case of total disability. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). We additionally hold that claimant is entitled to permanent total disability benefits because the record contains no evidence of suitable alternate employment. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Therefore, we reverse the administrative law judge's award of temporary total disability benefits, and we modify her decision to reflect claimant's entitlement to permanent total disability benefits from the date of maximum medical improvement, February 25, 1982, and continuing. 33 U.S.C. §908(a).

Because we hold that claimant's condition is permanent, we must remand the case for a determination regarding employer's entitlement to Section 8(f) relief consistent with the Board's earlier decision on this issue. *Wilson*, 23 BRBS at 29; *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985).

Accordingly, the administrative law judge's finding that claimant is temporarily totally disabled due to drug toxicity is reversed. The Decision on Remand is modified to reflect claimant's entitlement to permanent total disability benefits. The case is remanded for consideration of employer's entitlement to Section 8(f) relief consistent with this opinion.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge