BRB No. 92-387

JESSIE YOUMANS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PALMETTO STEVEDORING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
GEORGIA INSURERS INSOLVENCY POOL	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Richard C.E. Jennings (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (90-LHC-2168) of Administrative Law Judge Robert J. Shea 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, on July 22, 1983, sustained an injury to his right foot while in the course of his employment with employer. A fusion was performed on March 2, 1984; thereafter, claimant's complaints of pain persisted and he eventually underwent four surgical procedures. Employer voluntarily paid temporary total disability benefits to claimant from July 23, 1983 to January 2, 1984, and from February 8, 1984 to August 24, 1988; additionally, employer voluntarily paid

claimant permanent partial disability benefits for a 20 percent impairment to his right foot. Claimant subsequently filed a claim for permanent total disability benefits under the Act.

At the formal hearing, the administrative law judge, after noting that employer had submitted vocational reports into the record, denied employer's request to keep the record open for the purpose of deposing a vocational counselor. In his Decision and Order dated September 24, 1991, the administrative law judge accepted the parties' stipulation that claimant reached maximum medical improvement on August 25, 1988. After subsequently finding that claimant is unable to return to his usual employment duties as a longshoreman, the administrative law judge awarded claimant temporary total disability benefits from July 23, 1983 to January 2, 1984, and from February 8, 1984 to August 24, 1988, and permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b). Next, relying upon the decision of the United States Court of Appeals for the Eleventh Circuit in *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), the administrative law judge found claimant to be entitled to adjustments for the period of his temporary total disability award pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f).

On appeal, employer contends that the administrative law judge erred in denying its request to leave the record open to depose a vocational counselor. Employer further argues that since claimant suffered a scheduled injury, he is not entitled to permanent total disability benefits. In the alternative, employer asserts that since claimant has not exercised due diligence in obtaining other employment, he is not entitled to permanent total disability benefits. Lastly, employer challenges the administrative law judge's inclusion of Section 10(f) adjustments accruing during the period of claimant's temporary total disability in his permanent total disability award. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Employer initially contends that the administrative law judge erred by not leaving the record open following the formal hearing in order for employer to depose a vocational counselor. We disagree. An administrative law judge has the discretion to hold the record open after a hearing for the receipt of additional evidence, but a party seeking to admit evidence must exercise diligence in developing its claim prior to the hearing. *See Smith v. Ingalls Shipbuilding, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Brothers Co.*, 19 BRBS 229 (1987). In the instant case, the administrative law judge specifically noted that employer had submitted into evidence vocational reports from 1988 and 1990,[1] with which employer was "less than satisfied." Tr. 43, 45. The administrative law judge noted that these vocational reports, in concluding that a return to work would not be possible for claimant, took into account Dr. Baruch's opinion regarding claimant's physical capabilities, Dr. Brown's opinion regarding claimant's mental capabilities, and claimant's educational background and work history. *See* Decision and Order at 4; Cl. Exs. 10, 12; Emp. Ex. 10. Thus, employer's assertion that claimant's treating physician, Dr. Baruch, softened his position in his deposition regarding claimant's physical capabilities, and, therefore, that the vocational reports it submitted were based on false information is without merit, since Dr. Baruch unequivocally testified that claimant would never be able to continue gainful employment in a job that requires standing, walking or climbing. *See* Baruch Dep. at 22, 27. Thus, in the instant case, employer, as evidenced by its having obtained the results of numerous vocational reports prior to the formal hearing, was given ample opportunity

[1]We note that the record contains four rehabilitation reports. *See* Cl. Exs. 10, 11, 12, 13.

to develop and submit evidence regarding the extent of claimant's disability. The administrative law judge did not abuse his discretion in denying employer's request to depose a vocational counselor simply because employer was not satisfied with the results of its previous vocational counselor's reports. *See Smith*, 22 BRBS at 46. Accordingly, employer's contention of error is rejected.

Contrary to employer's next contention, a claimant is not limited to receiving compensation benefits pursuant to the schedule set forth at Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), once it has been is established that claimant is totally disabled as a result of a work-related injury to a member of the body encompassed by that schedule. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366-367 n.17 (1980). Thus, the administrative law judge committed no reversible error when, after determining that claimant was incapable of resuming his usual employment duties with employer, he awarded claimant permanent total disability compensation pursuant to Section 8(a) of the Act, 33 U.S.C. §908(a).

In the alternative, employer contends that, since claimant has not exercised due diligence in obtaining other employment, the administrative law judge erred in awarding claimant permanent total disability benefits. We disagree. Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment which claimant is capable of performing. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). 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. *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). In the instant case, employer failed to establish the availability of suitable alternate employment; thus, the administrative law judge was not required to address the issue of whether claimant has diligently sought work. *See, e.g., Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). We therefore need not address employer's contentions pertaining to claimant's alleged lack of due diligence in seeking employment.

Lastly, employer contends that the administrative law judge erred in determining that claimant is entitled to Section 10(f) adjustments for the periods of his temporary total disability, pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Holliday v. Todd Pacific Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), since that decision was subsequently overruled by the Fifth Circuit in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), *vacating* 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989).[2] In *Holliday*, 654 F.2d at 415, the United States Court of Appeals for the Fifth Circuit

[2]Contrary to the statement contained in employer's brief, we note that the administrative law judge based his application of Section 10(f) to the instant case not pursuant to the Fifth Circuit's decision in *Holliday*, 654 F.2d at 415, but rather to the Eleventh Circuit's decision in *Hamilton*, 890 F.2d at

held, without discussion, that the permanent total disability rate accorded an employee should include all intervening Section 10(f) adjustments which accrued during the employee's previous period of temporary total disability.[3] Subsequently, in *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, specifically accepted as binding precedent the Fifth Circuit's decision in *Holliday*.[4] The court further stated that *Holliday* would apply until the court, sitting *en banc*, overruled it. After *Hamilton*, the Fifth Circuit sitting *en banc* overruled its decision in *Holliday*, and held that adjustments pursuant to Section 10(f) of the Act were not to include those accruing during periods of temporary total disability. *Phillips*, 895 F.2d at 1033, 23 BRBS at 36 (CRT). While the Board has previously expressed its disagreement with the Fifth Circuit's holding in *Holliday*, *see Scott v. Lockheed Shipbuilding & Construction Co.*, 18 BRBS 246 (1986), we are compelled nonetheless to apply *Hamilton* in this case because it arises within the jurisdiction of the Eleventh Circuit, and that court has not overruled *Hamilton*. We therefore hold that the administrative law judge committed no reversible error in awarding claimant Section 10(f) adjustments for his previous periods of temporary total disability.[5]

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

1143. *See* Decision and Order at 5.

[3]Section 10(f) of the 1972 Act provided:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the enactment of this subsection shall increase by a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

33 U.S.C. §910(f)(1982).

The Longshore and Harbor Workers' Compensation Act Amendments of 1984 limit Section 10(f) adjustments to the lesser of a Section 6(b), 33 U.S.C. §906(b), calculation or 5 percent. 33 U.S.C. §910(f)(1988).

[4] In so doing, the court noted that in *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(*en banc*), it had adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[5] We note that the Board's decision in *Stanfield v. Fortis Corp.*, 23 BRBS 230 (1990), does not mandate a different result in this case, since that decision was issued prior to the Board's receipt of the Eleventh Circuit's decision in *Hamilton*.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge