

CHARLENE ONO (formerly known as)
 CHARLENE SHIROMA))
)
 Claimant-Petitioner)
)
 v.)
)
 STEVEDORING SERVICES OF)
 AMERICA)
)
 and)
)
 EAGLE PACIFIC INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest)

DATE ISSUED: _____

DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Joe Ling, Long Beach, California, for claimant.

Eugene L. Chrzanowski (Littler, Mendelson, Fastiff, Tichy & Mathiason), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-1015) of Administrative Law Judge Daniel L. Stewart 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 the 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 was involved in a work-related traffic accident on December 5, 1991. It is undisputed that claimant suffered an injury to her cervical spine in this accident, that she underwent surgery on February 26, 1992, and that as a result she is precluded her from performing her prior work duties as a UTR driver. Claimant returned to work on a part-time basis on August 23, 1993, performing work off the casual board as signalwoman and marine clerk until July 8, 1995, when she alleged she was forced to quit because of chronic headaches and depression resulting from her injury. Claimant sought temporary total disability under the Act from the date of injury until August 23, 1993, for the effects of her cervical injury. She also alleged that because of chronic headaches and a psychological condition resulting from the December 1991 work injury, she was temporarily partially disabled from August 23, 1993, through July 8, 1995, and permanently totally disabled thereafter.

The administrative law judge determined that claimant's cervical spine injury rendered her temporarily totally disabled until June 14, 1993, when Dr. Moffatt, the physician who performed her surgery, found that her cervical spine condition was permanent and stable and that her only work restriction was that she should not lift more than 25 pounds. Based on the medical opinions of Drs. Gillis and Klemes, the administrative law judge further found that although the work-related accident caused a temporary aggravation of a pre-existing headache condition which resulted in claimant's suffering from a "depressive disorder not otherwise specified," both of these conditions had resolved as of June 20, 1995. Accordingly, he denied claimant's claim for permanent total disability compensation commencing July 9, 1995, which was premised on these conditions, as well as her claim for medical expenses for psychiatric treatment provided by Dr. Kin commencing in July 1995.¹ After determining that claimant's actual earnings during the period she returned to work from August 1993 until January 1995 reasonably represented her post-injury wage-earning capacity, the administrative law judge awarded her temporary total disability compensation from the date of injury until June 14, 1993, temporary partial disability compensation from June 15, 1993 until June 19, 1995, and permanent partial disability benefits thereafter. In addition, he awarded her future medical benefits for her cervical spine injury.

¹The administrative law judge also denied claimant medical benefits for treatment rendered by Dr. Feiwell in November 1995. Decision and Order at 34. This finding is not challenged on appeal.

Claimant appeals the administrative law judge's finding that her chronic headaches and psychiatric problems after June 19, 1995, are unrelated to her work injury and the resultant denial of her claim for permanent total disability compensation and medical benefits. Claimant also asserts that the administrative law judge erred in finding that the date of maximum medical improvement for her cervical spine injury was June 14, 1993, rather than August 23, 1993. Finally, claimant asserts that in determining that her post-injury wage-earning capacity was \$248.95, the administrative law judge erred in only considering her wage records for the period from August 28, 1993 until January 28, 1995, as wage records were submitted for the entire period she worked post-injury. Claimant avers that consideration of this evidence establishes that she worked an average of 9.44 hours per week which, when multiplied by her undisputed hourly rate of \$21.78, results in a post-injury wage-earning capacity of \$205.60. Employer responds, urging affirmance. Claimant replies to employer's response brief.

Claimant initially contends that in denying her claim for permanent total disability, the administrative law judge erred in determining that the December 1991 work accident caused only a temporary aggravation of her pre-existing headache condition and a depressive condition which resolved by June 20, 1995. Claimant specifically avers that in making this determination, the administrative law judge erred in crediting the medical opinion of Dr. Gillis, who examined claimant only once and was not board-certified, over the contrary opinions of claimant's treating physician, Dr. Teacher, a board-certified neurologist, and Dr. Rothrock, an associate professor of neurology. Moreover, claimant contends that the administrative law judge erred in crediting Dr. Klemes's assessment of claimant's psychological condition over that provided by Dr. Kin, claimant's treating psychiatrist.

We reject claimant's arguments, as it is within the administrative law judge's authority to weigh the medical evidence. In the present case, the administrative law judge rationally refused to accept Dr. Rothrock's opinion that claimant was symptomatic for acquired migraine aura as a likely consequence of her closed head injury in 1991 based on the fact that Dr. Rothrock had not examined claimant since April 1993 and it was claimant's theory that her return to work in August 1993 caused her to experience the incapacitating headaches. Moreover, he also acted within his discretion in refusing to accept Dr. Curry's and Dr. Teacher's opinions that claimant's continuing headaches were due to the December 1991 work injury, EXS-16, 30, CX-B, and instead choosing to accord Dr. Gillis's opinion determinative weight based on the fact that only he had been made aware of claimant's significant pre-existing history of headaches. The administrative law judge may accept or reject all or any part of any medical opinion as he sees fit. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Although Dr. Gillis, an internal medicine specialist, initially agreed with Drs. Curry and Teacher that claimant's problem with headaches was due to her work-related injury, EX-20, after he was made aware of claimant's prior history and conducted an independent review of her medical records, he revised his opinion.² Based

² The record reveals that claimant underwent chiropractic care for a chronic headache condition in 1988 and 1989. EX-21.

on this new information, Dr. Gillis opined that claimant sustained no permanent impairment or disability as a result of headaches due to her 1991 work accident but rather only a temporary aggravation of her pre-existing headaches after which the frequency and intensity of her headaches returned to their pre-injury level. Tr. at 259-260, 293, 300-302.

Dr. Gillis's revised opinion provides substantial evidence to support the administrative law judge's finding that any work-related aggravation of claimant's pre-existing headache condition was only temporary. Moreover, since Dr. Gillis found that claimant's condition was stable as of the time he initially examined her on June 20, 1995, the administrative law judge also rationally inferred that claimant's headaches must have returned to their pre-injury level as of that date. Inasmuch as claimant has failed to establish any reversible error made by the administrative law judge in evaluating the conflicting medical evidence and making credibility determinations, we affirm his determination that any headaches claimant experienced subsequent to June 20, 1995, are unrelated to the December 1991 work injury.

The administrative law judge also rationally credited Dr. Klemes's psychiatric opinion over that provided by claimant's treating psychiatrist Dr. Kin under the same reasoning, finding that, unlike Dr. Kin, Dr. Klemes considered the effects of claimant's substantial prior history of headaches in assessing the cause of her depression and reviewed her prior medical records. See Decision and Order at 23-24, 28-29. Dr. Kin diagnosed claimant as suffering from major depression secondary to her December 5, 1991 work injury. CX-V at 4B. While Dr. Klemes also diagnosed claimant as suffering from a depressive disorder, he opined that claimant's psychiatric problem was causally related to her headaches; thus, to the extent that her headaches were due to the December 5, 1991 work injury, her depression resulting therefrom would also be work-related. Tr. at 70-72. Since Dr. Klemes related claimant's depression to her headaches and Dr. Gillis opined that claimant's work-related headaches ceased as of June 20, 1995, the administrative law judge rationally found, based on the totality of this evidence, that any depression claimant experienced after June 20, 1995, was unrelated to the December 1991 work injury.

The medical opinions of Drs. Gillis and Klemes thus provide substantial evidence to support the administrative law judge's finding that claimant's depression after June 20, 1995, is not related to her work injury. Inasmuch as claimant has failed to establish any reversible error in the administrative law judge's weighing of the evidence, his denial of the claim for permanent total disability compensation commencing July 6, 1995, is affirmed. In addition, his denial of the claim for medical benefits for psychiatric treatment provided by Dr. Kin commencing in July 1995 is also affirmed; any psychiatric treatment provided after June 20, 1995 was not for claimant's work-related injury. See *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

Claimant next argues that the administrative law judge erred in concluding that her cervical spine injury reached maximum medical improvement on June 14, 1993. Claimant asserts that Dr. Moffat's opinion does not provide substantial evidence to support the

administrative law judge's finding of permanency because he only declared her permanent and stationary with regard to recovery from her cervical surgery and follow up medical care, and did not consider the totality of her neurological problems or release her to return to work. Claimant avers that the record reflects that she continued to receive treatment for neurological problems from Dr. Teacher and physiotherapy subsequent to June 14, 1993, and relies upon a May 24, 1993, report from Ms. Terry, a registered nurse, stating that claimant remained temporally totally disabled indefinitely. Claimant asserts that in light of this evidence and the fact that Dr. Teacher did not rate claimant as permanent and stationary until August 19, 1993, or release her to return to work for the first time until August 23, 1993, the administrative law judge should have found that maximum medical improvement was not reached until August 23, 1993.

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). After review of the administrative law judge's Decision and Order in light of the evidence of record, we affirm his finding that claimant's cervical condition reached permanency as of June 14, 1993, based on his crediting of Dr. Moffat's testimony. Contrary to claimant's assertions, the record reflects that Dr. Moffat considered the totality of claimant's neurological complaints as well as her recovery from surgery in determining that her cervical condition reached permanency on June 14, 1993. EX-15. Inasmuch as Dr. Moffat's opinion provides substantial evidence to support the administrative law judge's finding and his decision to accord Dr. Moffat's opinion determinative weight based on his status as the neurosurgeon who performed claimant's surgery is rational, his finding that claimant's cervical condition reached maximum medical improvement as of June 14, 1993, is affirmed. See *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., concurring and dissenting); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Finally, we direct our attention to claimant's argument that the administrative law judge erred in calculating her post-injury wage-earning capacity. Claimant is correct that the administrative law judge erred in stating that no wage records were available for the period claimant worked from January 28, 1995 until July 9, 1995, see Decision and Order at 30, as the wage records for the entire period claimant worked post-injury are contained in the record at CX-Q. Inasmuch, however, as these records do not establish that claimant was only able to work an average of 9.44 hours per week,³ we reject claimant's argument

³The administrative law judge determined that claimant's post-injury wage-earning capacity was \$248.95 by dividing the actual number of hours she worked, 674.5, by the 59 actual weeks worked from August 28, 1993 until January 28, 1995, and then multiplying that figure by claimant's undisputed hourly rate of \$21.78. If claimant's employment records for the entire period she worked are considered utilizing the administrative law judge's method for determining claimant's post-injury wage earning capacity, claimant's post-injury wage-earning capacity would be \$251.34 (934 hours/ 81 weeks=11.54 hours per

that her post-injury wage-earning capacity is \$205.60. As use of these records does not support a significantly different or lower wage-earning capacity, and claimant does not contest the method employed by the administrative law judge for calculating her post-injury wage-earning capacity, his finding that claimant had a post-injury wage-earning capacity of \$248.95 per week is affirmed.

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

week x \$21.78).