BRB No. 97-1361

| | | |
|---|---|---|
| ROZELL RANDOLPH | ) | |
| | ) | |
| Claimant-Respondent | ) | DATE ISSUED: |
| | ) | |
| v. | ) | |
| | ) | |
| DELAWARE RIVER STEVEDORES, INCORPORATED | ) | |
| | ) | |
| | ) | |
| | ) | |
| and | ) | |
| | ) | |
| LIBERTY MUTUAL INSURANCE, COMPANY | ) | |
| | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Aloysius J. Staud (Fine and Staud), Philadelphia, for claimant.

John E. Kawczynski (Weber Goldstein Greenberg & Gallagher), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-0744) of Administrative Law Judge Ralph A. Romano 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 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. §321(b)(3).

On February 2, 1994, claimant sustained an injury to his knee in the course of

his employment as a car handler. Claimant received compensation for temporary total disability from February 3, 1994 through July 19, 1996, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Claimant sought a continuing award for total disability and continuing payment of medical benefits. After consideration of the evidence, the administrative law judge awarded claimant compensation benefits for temporary total disability from July 20, 1996 and continuing, based upon an average weekly wage of $673.19. The administrative law judge also awarded claimant continuing medical benefits.

On appeal, employer contends that the administrative law judge erred in failing to find that claimant's condition was permanent, in finding that employer failed to establish the availability of suitable alternate employment, and in awarding claimant continuing medical benefits. Claimant responds, urging affirmance.

Employer initially contends the administrative law judge erred in finding claimant's condition is not permanent. Specifically, employer contends that the administrative law judge failed to address its argument that claimant's knee injury has been so long lasting in nature and that his medical progress has been so limited as to render his condition permanent. We reject employer's contention. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. Tex. 1968), *cert. denied*, 394 U.S. 976 (1969). The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence and is not dependent on economic factors. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Trask v. Lockheed Shipbuilding & Construction Co.*, *17 BRBS 56 (1985).* Moreover, if a physician believes that further treatment should be undertaken, then a possibility of success exists, and even if, in retrospect, it was unsuccessful, the administrative law judge may find that maximum medical improvement has not occurred until the treatment is complete. *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).

In the instant case, employer contends that claimant's condition has become permanent based on the opinion of Dr. Resnick, employer's consulting physician, that claimant's injury has reached maximum medical improvement and that no further treatment is necessary or warranted. The administrative law judge, however, credited the opinion of claimant's treating physician, Dr. Lefkoe, who performed surgery on claimant's left knee on January 10, 1995, and who opined that claimant's injury has not reached maximum medical improvement and that rehabilitation

treatment is necessary.[1] CX D, H, J. The administrative law judge also relied on the reports of claimant's physical therapist which confirmed ongoing, progressive gains resulting in increased strength and pain. In crediting the opinion of Dr. Lefkoe, over that of Dr.Resnick, the administrative law judge concluded that Dr. Lefkoe, as the treating physician, is in a better and more informed position to evaluate claimant's condition than Dr. Resnick. Such a determination is within his discretion as the trier-of- fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). As the Board may not reweigh the evidence, we affirm the administrative law judge's crediting of Dr. Lefkoe's opinion, and the administrative law judge's consequent finding that claimant's condition remains temporary in nature as it is supported by substantial evidence.

Similarly, we reject employer's contention that the administrative law judge erred in awarding claimant continuing medical benefits under Section 7 of the Act. The administrative law judge considered Dr. Resnick's statement that he doubted any form of treatment in the future would have any significant impact or produce any further progress in claimant's condition. The administrative law judge weighed Dr. Resnick's statement, which he considered equivocal at best, against the contrary opinions of Dr. Lefkoe and his physical therapist, that claimant requires further medical treatment and rehabilitation, and, crediting Dr. Lefkoe's opinion, concluded that claimant established entitlement to continued medical care at employer's expense under Section 7 of the Act, as such care is appropriate, reasonable and necessary to treat the work injury. As the administrative law judge's award of continuing medical benefits is supported by substantial evidence, it is affirmed.

[1]Dr. Lefkoe performed a surgical arthroscopy, medial meniscectomy and partial synovectomy on claimant's left knee on January 10, 1995.

Finally, we reject employer's contention that the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment and that claimant therefore is totally disabled. It is uncontested that claimant cannot return to his usual work. The burden therefore is on employer to establish the availability of alternate employment that is suitable for claimant given, *inter alia*, his physical restrictions, age, education and vocational history. *See generally New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the instant case, the administrative law judge stated that employer's labor market survey consists of merely a listing of the names and addresses of ten prospective employers with respective job titles. The administrative law judge stated further that, inasmuch as no description of job duties and functions is provided, there is no way that he can determine whether the enumerated jobs are within claimant's physical restriction resulting from the work injury. The administrative law judge thus found the survey inadequate to satisfy employer's burden to establish the availability of suitable alternate employment. Although the vocational consultant's report states that the jobs are in the "sedentary-light" exertional category, in light of the lack of specificity regarding each job's requirements, we hold that the administrative law judge rationally found employer's labor market survey to be inadequate to establish the suitability of the positions. *See, e.g., Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989); *Williams v. Halter Marine Service, Inc.,* 19 BRBS 148 (1987). Consequently, we affirm the administrative law judge's award of total disability benefits.[2]

Accordingly, the administrative law judge's award of benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

[2]We note that employer additionally contends that the administrative law judge erred in failing to discuss the evidence of record bearing on claimant's willingness to work. Because the administrative law judge properly found the availability of suitable alternate employment is not established, however, he was not required to address the issue of whether claimant diligently sought work. *See Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied,* 479 U.S. 826 (1986).

JAMES F. BROWN

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge