BRB No. 10-0251

HERBERT H. REAVES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL INSPECTION CONSULTANTS	)	DATE ISSUED: 08/31/2010
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order Denying Employer's Motion for Reconsideration of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Andrew Hanley (Crossley McIntosh & Collier), Wilmington, North Carolina, for claimant.

Dana Adler Rosen (Clarke, Dolph, Rapaport, Hull, Brunick & Garriott, P.L.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Order Denying Employer's Motion for Reconsideration (2005-LHC-01835) of Administrative Law Judge Kenneth A. Krantz 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). This case is before the Board for the second time.

Claimant allegedly sustained injuries to his back and legs as a result of a trip and fall accident which occurred on June 4, 2002, while he was working for employer on an aircraft carrier; claimant was employed to repack valves. In his initial decision, the administrative law judge found that claimant did not demonstrate a harm that could have arisen from his work injury, and thus, he denied benefits. On appeal, the Board reversed the administrative law judge's finding that claimant's back and leg conditions are not work-related and remanded the case for the administrative law judge to address any remaining issues. *H.R.* [*Reaves*] *v. National Inspection Consultants*, BRB No. 07-0731 (Apr. 29, 2008) (unpub.). On remand, the administrative law judge found claimant entitled to periods of temporary partial, temporary total and permanent total disability benefits, as well as an ongoing award of permanent partial disability benefits and medical benefits relating to his back and leg conditions.[1] The administrative law judge also denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f), and subsequent motion for reconsideration.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance of the award of benefits.

Employer first argues that the administrative law judge committed several procedural errors on remand in that his decision: (1) does not comport with the Board's remand instructions; (2) addresses issues not properly before him; and (3) involves consideration of evidence improperly submitted in this case. Employer asserts that since claimant did not originally make a claim for disability benefits after October 4, 2006, it was erroneous for the administrative law judge to address this issue on remand. Employer also argues that the administrative law judge abused his discretion by relying on post-hearing evidence to reach conclusions on issues relating to the nature and extent of claimant's alleged disability.

We reject employer's contention that claimant did not claim entitlement to continuing benefits. From the inception of his claim, claimant sought, and employer refused to pay, benefits for temporary and permanent total disability benefits relating to

[1] Specifically, the administrative law judge awarded temporary partial disability benefits from June 4, 2002 through August 9, 2006, temporary total disability benefits from August 10, 2006 through December 9, 2007, permanent total disability benefits from December 10, 2007 through January 7, 2008, and ongoing permanent partial disability benefits from January 8, 2008.

the injuries claimant sustained as a result of his June 4, 2002, work accident. *See* Claimant's LS-18 Pre-Hearing Statement dated January 25, 2005; Employer's Brief in Support of Employer's Application for Section 8(f) Relief dated May 2, 2005; Employer's Statements of Contested Issues dated July 25, 2005, and May 10, 2006. Additionally, employer acknowledged in briefs submitted to the administrative law judge and the Board that claimant "made a claim for permanent total disability, permanent partial disability, and temporary total disability for the back, leg and ankle." *See* Employer's Post-Hearing Brief dated March 8, 2007, at 2; Employer's Response Brief dated August 21, 2007, at 2; Employer's Remand Brief dated November 28, 2008, at 2. At the hearing, the administrative law judge identified "claimant's entitlement to disability for back, leg, and ankle injuries" as among the issues presented by the parties for resolution, HT at 1, and the administrative law judge specifically stated in his first decision that an issue for resolution was whether claimant was entitled to benefits "to the present and continuing." Decision and Order at 2 (Apr. 20, 2007). Thus, contrary to employer's contention, it is clear that claimant sought ongoing disability benefits and that employer was well aware of a claim for such. *See generally Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

The Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge "to address any remaining issues," *Reaves*, slip op. at 5. Absent a post-appeal agreement by the parties on claimant's entitlement to benefits, the administrative law judge was required to consider claimant's entitlement to disability and medical benefits.[2] Thus, the administrative law judge's rendering of findings as to claimant's entitlement to benefits comports with the Board's decision and remand instructions.

Furthermore, we reject employer's contention that the administrative law judge improperly admitted claimant's supplemental evidence into the record and that employer was denied an opportunity to submit additional evidence on remand. Following the Board's remand of the case, in a Scheduling Order dated August 18, 2008, the administrative law judge stated that "[i]f either side wishes to supplement the evidentiary

[2] Contrary to employer's argument, the Board never implied or found that claimant was not disabled. The language relied upon by employer, *i.e.*, the Board's notation that "the fact that claimant testified that he was not placed under any work restrictions due to his edema may be relevant to disability, but is of no consequence to the inquiry concerning a causal relationship between the harm and the work accident," *Reaves*, slip op. at 4, n. 2, is not tantamount to a holding that claimant is not disabled. Rather, it merely reflects that the evidence regarding claimant's ability to perform work is not relevant to the issue of causation.

record it may move to submit additional documentary evidence and/or conduct a supplemental hearing." Scheduling Order dated August 18, 2008, at 1. Claimant thereafter requested 45 days in which to compile "bills, operative reports and statements regarding [claimant's back] surgery and his subsequent 29 day hospital stay."[3] In response, employer argued "that no additional evidence [should] be admitted to the record." In a Supplemental Scheduling Order dated September 12, 2008, the administrative law judge granted "claimant's request to hold the record open for receipt of evidence,"[4] and added that the issues of relevance, admissibility, or weight of the supplemental evidence "can be challenged by an opposing party just as they could be for evidence offered at a hearing." In his Decision on Remand, the administrative law judge acknowledged claimant's submission of evidence "to document post-hearing medical expenses and earnings information" and employer's objections "to several of these exhibits." Decision on Remand at 2. Having found that the issues raised by employer's objections go to the weight to be accorded the exhibits rather than to their admissibility, the administrative law judge admitted claimant's supplemental evidence into the record.

Thus, subsequent to the Board's remand decision the administrative law judge reopened the record for both parties to submit additional relevant evidence. In particular, employer was provided the opportunity to submit additional evidence, as well as to object to claimant's submission of evidence, and it is clear that the administrative law judge admitted claimant's supplemental evidence only after considering employer's objections. Therefore, employer's contentions that the administrative law judge improperly admitted the post-remand evidence submitted by claimant, that it was denied an opportunity to respond to such evidence, and that it was denied an opportunity to submit additional evidence with regard to the issue of suitable alternate employment, are directly contrary to the record. Employer has failed to establish that the administrative law judge abused his discretion by providing both parties with the opportunity to submit evidence on remand, or by admitting claimant's evidence in accordance with that ruling. *See* 33

[3] Claimant's request, which included "operative reports and statements" regarding claimant's back surgery, encompassed the reports of Dr. Alsina, who was the surgeon. Employer explicitly responded that it "has no objections to the medical records of Dr. Alsina." Motion Objecting to Claimant's Supplemental Exhibits dated November 10, 2008.

[4] Contrary to employer's assertion, the administrative law judge's Supplemental Scheduling Order did not limit the scope of evidence which the parties could submit on remand. Rather, the order, which was in response to claimant's request and therefore addressed the specific evidence which claimant sought to admit, extended the deadline within which "[t]he parties may proffer additional written evidence" from September 8, to October 23, 2008.

U.S.C. §927(a); 5 U.S.C. §556(c); 20 C.F.R. §§702.338-341; 29 C.F.R. §18.14 *et seq*.; *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Maraney v. Consolidation Coal Co*., 37 BRBS 97, 99 (2003); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 9 (2003). Consequently, we reject employer's procedural contentions.[5] 29 C.F.R. §18.29(a); *see also* 5 U.S.C. §556; 33 U.S.C. §§923, 927; 20 C.F.R. §702.331 *et seq*.; *see generally United States v. Hays*, 515 U.S. 737 (1995) (a blanket complaint is insufficient to establish a denial of due process).

Employer next argues that the administrative law judge erred in relying on Dr. Alsina's opinion to establish that claimant's condition reached maximum medical improvement because Dr. Alsina did not state that claimant's condition was permanent. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. While an administrative law judge may rely on a physician's opinion to establish the date of maximum medical improvement, a specific statement regarding maximum improvement is not required. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 171, *aff'd on recon. en banc*, 32 BRBS 251 (1998). A claimant may be found to have reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

In addressing maximum medical improvement, the administrative law judge reviewed the medical records of Dr. Alsina regarding claimant's decompression fusion surgery on August 10, 2006, and the continued improvement of his leg and back pain up through his last appointment on December 10, 2007.[6] The administrative law judge found that in his December 10, 2007, report Dr. Alsina noted excellent recovery in terms of the initial back and leg pain symptoms, and that unlike previous visits, at which a follow-up appointment was scheduled, Dr. Alsina commented that claimant should follow-up only on as as-needed basis. Relying on Dr. Alsina's documentation of claimant's improvement, as well as the absence of evidence that claimant sought any further treatment for his leg and back pain after his release from Dr. Alsina, the administrative law judge concluded that claimant reached maximum medical improvement as of December 10, 2007, because that is the date "on which [claimant]

[5] As a result, we reject employer's challenge to the administrative law judge's reliance on Dr. Alsina's post-hearing opinion. *See* discussion, *infra*.

[6] Specifically, the administrative law judge observed that following his surgery, claimant saw Dr. Alsina on September 11, 2006, October 25, 2006, December 4, 2006, March 5, 2007, June 18, 2007, and on December 10, 2007, and that the physician noted continued improvement at each of these visits.

ceased undergoing treatment with a view towards improving his condition." Decision on Remand at 25. As the administrative law judge applied the proper legal standard, and the record contains substantial medical evidence to support the administrative law judge's determination that claimant reached maximum medical improvement on December 10, 2007, that finding is affirmed. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Seidel v. General Dynamics Corp*., 22 BRBS 403 (1989).

Employer next contends that the administrative law judge erred in finding that claimant cannot perform his usual work. Employer also contends that the administrative law judge erred in declining to rely on employer's March 1, 2006, labor market survey and vocational evidence for the period commencing on August 10, 2006. In addressing claimant's entitlement to total disability benefits before he underwent surgery on August 10, 2006, the administrative law judge found that claimant was incapable of returning to his usual employment at the time he left work for employer on November 2, 2002. The administrative law judge rationally relied on claimant's complaints, as supported by medical records, that he had chronic leg swelling during his period of work with employer and that this condition resolved once he left his job, claimant's testimony that his back pain precluded him from lifting heavy loads, and Dr. Seidel's opinion dated July 16, 2003, that claimant's symptomatology was so bad that he could not work at all. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Harrison v. Todd Pacific Shipyards Corp*., 21 BRBS 339 (1988); *Golden v. Eller & Co*., 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). Thus, we affirm the administrative law judge's finding that claimant established his inability to perform his usual work due to his injury prior to his surgery on August 10, 2006, as it is supported by substantial evidence.[7]

We also affirm the administrative law judge's finding that claimant was unable to return to his usual work following his surgery and recovery therefrom. Claimant sought to return to work in October 2006 and was specifically precluded by Dr. Alsina from doing so. Cl. Ex. 15a. Claimant was prescribed a back brace which he wore until his March 5, 2007, visit to Dr. Alsina; after that time, he began to use it more sparingly. Dr. Alsina's notes describe claimant's complaints of pain, which lessened over time. Dr. Alsina, at all times, precluded claimant from bending at the waist. *Id.* The administrative law judge could rationally find, in view of the description of claimant's recovery and Dr. Alsina's permanent restriction against bending from the waist, that claimant was precluded from performing tasks associated with his regular employment of heavy lifting,

[7] The administrative law judge's finding that claimant was only partially disabled during this period is affirmed as it is unchallenged on appeal.

pulling, straining and jostling heavy valves out of the bottoms of ships.[8] We affirm the administrative law judge's finding that claimant established a *prima facie* case that he cannot return to his former duties repacking valves as that determination is rational and supported by substantial evidence. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The administrative law judge then observed that employer did not submit any new evidence regarding the availability of suitable alternate employment after claimant's recovery from his surgery. Although the administrative law judge found that employer's March 1, 2006 labor market survey and Ms. Byers's deposition testimony established the availability of suitable alternate employment for periods prior to claimant's surgery, the administrative law judge also found that given the extended length of time between the preparation of the labor market survey and claimant's recovery from his back surgery, he could not find that the survey remained valid. Specifically, he noted that there is no evidence that the jobs are suitable for claimant or that they remained available. Nonetheless, the administrative law judge found that the availability of suitable alternate employment was established as of January 8, 2008, by virtue of claimant's submission of wage records indicating that he resumed his job as a driver for several car dealerships after his final appointment with Dr. Alsina.

Once, as here, claimant establishes his inability to perform his usual employment, he is totally disabled unless and until his employer satisfies its burden of establishing the availability of suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine that a range of jobs exists and is reasonably available to claimant and suitable for him given his age, education, medical restrictions and vocational history. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). The administrative law judge's finding that employer's labor market survey is insufficient to meet its burden after claimant's recovery from back surgery is supported by substantial evidence, as he

[8] Although Dr. Alsina stated, in his December 10, 2007, report, that claimant had "no limitation on his current activities," we reject employer's contention that this statement required that the administrative law judge find that claimant was capable of performing his usual employment. This statement is properly viewed in the context of claimant's post-surgery activities, which Dr. Alsina described as walking, driving, and hunting from his garden. Dr. Alsina also stated in his December 10, 2007, report that claimant is restricted against bending at the waist, which the administrative law judge predominantly relied upon in finding that claimant remained incapable of performing his usual work.

rationally concluded that employer did not present any evidence indicating that these jobs were suitable and available during the critical period when claimant was able to return to work following his back surgery, *i.e.*, at some time after August 10, 2006. *See generally Tann*, 841 F.2d 540, 21 BRBS 10(CRT). As the administrative law judge's finding that employer did not establish the availability of suitable alternate employment following claimant's recovery from his August 10, 2006, back surgery is rational and supported by substantial evidence, we affirm his award of total disability benefits for the period from August 10, 2006, through January 7, 2008.[9] Furthermore, the administrative law judge's award of permanent partial disability benefits commencing on January 8, 2008, is affirmed as it is unchallenged on appeal.

Accordingly, the administrative law judge's Decision and Order on Remand and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[9] In light of our affirmance of the administrative law judge's award of benefits, we need not address employer's contention that claimant must return all compensation already paid by its carrier. In any event, we note that the Act does not provide for direct reimbursement of payments; rather an employer's right to reimbursement of an overpayment is limited to a credit against any unpaid installment or installments of compensation due. 33 U.S.C. §914(j).