BRB Nos. 99-0316
and 99-0316A

KENDRICK ROBERTS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
UNION DRY DOCK & REPAIR, INCORPORATED	)	DATE ISSUED: Dec. 15, 1999
	)	
and	)	
	)	
SIGNAL MUTUAL CLAIMS ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

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

Andrew R. Topazio (Marciano & Topazio), Hoboken, New Jersey, for claimant.

Francis Womack (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (97-LHC-2739) of Administrative Law Judge Ralph A. Romano 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).

On October 31, 1996, claimant, a welder, injured his head, back, neck, and left shoulder after falling off a ladder at work. Claimant has not returned to work. The administrative law judge awarded claimant temporary total disability benefits from November 1, 1996, to December 6, 1997, after which date employer's labor market report identified suitable alternate employment for claimant, and temporary partial disability benefits from December 7, 1997, through the present and continuing, as claimant's condition had not yet reached permanency. The administrative law judge held that employer did not establish that its offer on February 3, 1997, of a light duty welding job in its facility was suitable for claimant.

On appeal, claimant challenges the administrative law judge's findings that his condition was not yet permanent and that employer established suitable alternate employment on December 7, 1997, based on its labor market report. Employer cross-appeals the administrative law judge's finding that it did not establish suitable alternate employment through its offer of a light duty welding job in its facility.

Claimant initially challenges the administrative law judge's finding that his condition is not permanent, and he contends that the opinions of Dr. Bourdeau, his treating physician, and Dr. Kiell establish that he has in fact reached permanency. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Whether claimant's condition is permanent is primarily a question of fact based on the medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

In determining that claimant's condition was still temporary, the administrative law judge summarily concluded that the evidence failed to show that claimant reached maximum medical improvement as he is still treating with Dr. Bourdeau and as the parties failed in their post-hearing briefs to reference any evidence relevant to the date maximum medical improvement was reached. As claimant accurately argues in his brief, the administrative law judge did not discuss and weigh the opinions of Drs. Bourdeau and Kiell which are relevant to this issue.[1] We therefore

[1]On February 24, 1997, and October 10, 1997, Dr. Bourdeau stated that claimant's work-related injuries are chronic, permanent, and totally disabling in nature. *See* Cl. Exs. 18, 19. On August 22, 1997, and April 15, 1998, Dr. Kiell

vacate the administrative law judge's finding that claimant's condition is temporary, and we remand the case for reconsideration of this issue. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). We note that ongoing treatment does not necessarily preclude a finding of permanency. *See, e.g., Morehead Marine Services, Inc. v. Washnock,* 135 F.3d 366, 32 BRBS 8 (CRT)(6th Cir. 1998); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994).

Claimant also challenges the administrative law judge's finding that employer established suitable alternate employment on December 7, 1997, based on its labor market report. Claimant argues that the opinions of Drs. Bourdeau and Kiell establish that he is totally disabled; thus, the administrative law judge erred in finding him capable of some work in December 1997 based on employer's vocational evidence. Claimant also argues that he is totally disabled based on the results of magnetic resonance imagings (MRIs) administered in June 1997, showing that, with regard to claimant's shoulder, he has biceps tendinitis but no rotator cuff tear, and with regard to his back, posterior disc bulges at C3-4 and C 4-5, and disc herniations at C5-6 and C6-7. Once, as here, claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

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diagnosed work-related permanent neurological and neuropsychiatric disabilities and provided percentage disability ratings for them. *See* Cl. Exs. 16, 31.

In determining that employer established suitable alternate employment based on its labor market report, the administrative law judge acted within his discretion in crediting employer's labor market report over claimant's labor market report, as he found claimant's vocational assessment centered on what claimant said and did at the vocational interview whereas employer's vocational assessment identified claimant's functional capacity based upon the medical opinions of record.[2] *See generally Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1988); Decision and Order at 7; Emp. Ex. 9; Cl. Ex. 14. Although the opinions of Drs. Bourdeau and Kiell may conclude that claimant is totally disabled, as claimant notes, they do not preclude a return to suitable alternate employment by claimant since they identify restrictions for claimant. *See* n. 1, 2, *infra*. Moreover, the administrative law judge rationally determined that the results of the MRI's do not preclude claimant from working. Decision and Order at 6, and n.4. As the jobs in employer's labor market survey were within claimant's restrictions, we affirm the finding that employer demonstrated the availability of suitable employment and that claimant is only partially disabled.

We next address employer's appeal of the administrative law judge's finding that its offer of a light duty welding job did not constitute suitable alternate employment. Employer argues that the administrative law judge erroneously inferred that Mr. O'Reilly, employer's director of personnel and safety, would be assigning claimant his job assignments instead of Mr. Rivera, employer's yard foreman, and thus erred in relying on inconsistencies between the testimony of Messrs. O'Reilly and Rivera to find that the job employer offered was not shown to be suitable. Employer can meet its burden of establishing suitable alternate employment for claimant by offering him a suitable job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996).

We reject employer's contention, as the administrative law judge rationally determined that a clear description of the job was not ascertainable as Messrs. Rivera and O'Reilly defined the job differently.[3] *See generally Perini Corp. v.*

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[2]The administrative law judge did not identify claimant's restrictions of record but Dr. Bourdeau identified them as no heavy lifting and no sitting or standing for long periods of time. *See* Cl. Exs. 18, 19. Dr. Kiell identified claimant's restrictions as difficulty getting into a small space, bending, and lifting. *See* Cl. Ex. 32 at 58-59. Employer's labor market report took into account claimant's restrictions as to lifting and climbing. *See* Emp. Ex. 9.

[3]The administrative law judge accurately summarized the testimony of Mr. Rivera who stated that the job would accommodate claimant's lifting restriction of 30 pounds and require some bending, climbing, and twisting although claimant would

Heyde, 306 F.Supp. 1321 (D.R.I. 1969); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984); *Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); Decision and Order at 5-6. Furthermore, the administrative law judge rationally found that Mr. O'Reilly's description of the job could not be discounted, as he testified that he was the primary spokesman as to the job's requirements. As these findings are supported by substantial evidence, the administrative law judge's conclusion that this job was not sufficient to establish additional suitable alternate employment is affirmed.

Accordingly, the administrative law judge's finding that claimant's condition is temporary is vacated, and the case is remanded to the administrative law judge for further consideration of this issue. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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work in an area that is open and not in a hole that he would have to climb in with a lot of twisting. Tr. at 124-127, 134-135. The administrative law judge also accurately stated that Mr. O'Reilly acknowledged that only claimant's lifting restriction of 30 pounds would be accommodated, and that claimant would have to place himself wherever the particular welding job might take him. Tr. at 155-156, 161, 167.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge