BRB No. 89-1663

WILLIAM C. TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ATLANTIC & GULF STEVEDORES, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand from the Benefits Review Board and Order on Motion For Reconsideration of Frank J. Marcellino, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Thomas E. Cinnamond and Stan M. Haynes (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand from the Benefits Review Board and Order on Motion for Reconsideration (84-LHC-1440) of Administrative Law Judge Frank J. Marcellino awarding benefits 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).[1]

This case is before the Board for the second time. Claimant was driving a forklift at work on November 25, 1981, when he struck a blade on a ramp and injured his knees, back and head. Claimant returned to work on June 8, 1982 and continued to work until June 22, 1982, when he stopped because increased pain in his left leg and knee made it difficult for him to do the climbing

[1]An appeal by the Director, Office of Workers' Compensation Programs, BRB No. 89-1663A, was dismissed by the Board, at Director's request, by Order dated May 30, 1991.

involved in his job. Employer voluntarily paid claimant temporary total disability benefits from November 26, 1981 through June 7, 1982, and from June 22, 1982 through July 23, 1983.

In his original Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from November 26, 1981 until June 6, 1982, and from June 22, 1982 until July 23, 1983. Taylor v. Atlantic & Gulf Stevedores, Inc., No. 84-LHCA-1440 (December 4, 1984). Crediting Dr. Reahl's opinion, the administrative law judge also awarded claimant compensation under the schedule for a ten percent permanent partial disability of the left knee and five percent permanent partial impairment of the right knee commencing July 23, 1983. See 33 U.S.C. §908(c)(2). In so concluding, the administrative law judge rejected claimant's assertion that he was permanently totally disabled due to his knee injuries and found that claimant could perform alternate employment as a checker and temporary foreman. Because claimant's award under the schedule was for less than 104 weeks, the administrative law judge determined that Section 8(f), 33 U.S.C. §908(f), was not applicable and in a supplemental decision awarded an attorney's fee.

Claimant appealed the administrative law judge's denial of permanent total disability compensation to the Board. The Board affirmed the decision in part,[2] but remanded the case for the administrative law judge to determine whether claimant was capable of performing his usual work in light of the restrictions placed on him by his physicians. The Board instructed the administrative law judge that if he determined on remand that claimant was unable to do his usual work, claimant is entitled to permanent total disability compensation, holding that the administrative law judge erred in finding that suitable alternate employment was established since employer failed to meet its burden of demonstrating the availability of any specific jobs that claimant could perform. The Board also vacated the administrative law judge's finding that claimant's condition was permanent as of July 23, 1983, as it was not supported by substantial evidence, and remanded for further findings regarding the date of permanency. In addition, the Board remanded for additional findings relevant to Section 8(f). Taylor v. Atlantic & Gulf Stevedores, Inc., BRB No. 84-2835 (June 27, 1988)(unpublished).

On remand, the administrative law judge held a new hearing and reopened the record for the submission of additional evidence.

---

[2]The Board affirmed the administrative law judge's denial of claimant's Motion Ne Recipiatur and/or to exclude employer's post-hearing brief. In addition, the Board affirmed the administrative law judge's finding that he had no authority to order vocational rehabilitation. See generally, 33 U.S.C. §939(c)(2). Taylor v. Atlantic & Gulf Stevedores, Inc., BRB No. 84-2835 (June 27, 1988) (unpublished). Neither of these issues is raised in the current appeal.

At this hearing, claimant testified that subsequent to the initial hearing he worked as a truck driver from March 1986 through July 1986 for Rollins Corporation, and from January 3, 1987 until June 10, 1987 for Pacemaker Leasing. Claimant further testified that on June 10, 1987, he sustained an injury when his knees gave out as he attempted to remove a jack from under some pallets and that he has not worked since that date.

Although the administrative law judge conducted a new hearing on remand and allowed the parties to submit new evidence, in entering his Decision and Order On Remand the administrative law judge adhered strictly to the Board's remand order. He found that claimant was unable to perform his usual employment, and therefore awarded permanent total disability benefits commencing October 27, 1983, based on Dr. Reahl's permanency assessment. In addition, the administrative law judge found that employer was entitled to relief under Section 8(f). In an Order on Motion for Reconsideration, the administrative law judge affirmed his prior opinion dated May 9, 1989, and rejected employer's assertion that he erred in his Decision and Order on Remand in failing to find that claimant's July 10, 1987, accident was an intervening cause of his disability. The administrative law judge also rejected employer's assertion that he erred in finding that claimant's weak knees contributed to the subsequent 1987 injury, noting that he cited claimant's testimony in this regard as one of the many factors which led him to conclude that claimant is unable to perform his usual work. In addition, the administrative law judge rejected employer's assertion that he erred in finding that employer failed to establish the availability of suitable alternate employment on the rationale that the Board's remand order precluded reconsideration of this issue. Lastly, the administrative law judge rejected employer's assertion that it was entitled to an offset for benefits claimant received subsequent to the July 10, 1987, accident under the Pennsylvania workers' compensation statute, see 33 U.S.C. §903(e), on the rationale that these benefits were not being paid for the same injury for which benefits were sought under the Longshore Act.

On appeal, employer contends that the administrative law judge erred in holding employer liable for claimant's disability benefits subsequent to June 10, 1987, because the injury claimant sustained while working for another employer on that date is the supervening cause of his disability thereafter. In addition, employer maintains that the administrative law judge erred in concluding that claimant was permanently totally disabled, in determining that claimant remained temporarily totally disabled until October 27, 1983, and in failing to grant employer a Section 3(e) credit. Claimant responds, urging that the administrative law judge's decisions on remand be affirmed.

Initially, we agree with employer that the administrative law

judge's award of permanent total disability benefits cannot be affirmed. A claimant seeking compensation for total disability has the burden of establishing that because of his work injury, he is unable to perform his regular employment. Once a claimant establishes that he is unable to perform his usual work, he has established a prima facie case of total disability, and the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. See Newport News Shipbuilding and Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988).

Although in our previous decision, we instructed the administrative law judge to award claimant permanent total disability benefits if, on remand, he determined that claimant established his inability to do his usual work, this instruction was based on the absence of evidence of suitable alternate employment in the record before the Board. On remand, however, the administrative law judge chose to reopen the record for additional evidence, and it was within his discretion to do so. See 20 C.F.R. §§702.336, 702.338. At the hearing on remand, claimant's counsel conceded that one of the issues to be addressed on remand was suitable alternate employment. Transcript of October 19, 1988 (Transcript 2) at 6. Evidence was then introduced that claimant was employed subsequent to the first hearing as a truck driver. Although the administrative law judge properly determined that the fact that claimant performed work as a truck driver did not establish an ability to perform his usual employment, he erred in failing to consider whether this position constituted suitable alternate employment. Given claimant's concession that suitable alternate employment was an issue to be addressed at the second hearing, the fact that the administrative law judge chose to reopen the record for submission of new evidence and the admission of new evidence of suitable alternate employment which was not available at the time of the original hearing, we hold that the administrative law judge's failure to consider this evidence in making his award of benefits involved an abuse of discretion.[3] See generally Jourdan v. Equitable Equipment Co., 25 BRBS 317, 323 (1992)(Dolder J., dissenting).

Accordingly, we vacate the administrative law judge's finding of permanent total disability and remand this case in order for the administrative law judge to consider whether claimant's post-injury job as a truck driver constituted suitable alternate employment. A finding that claimant's post-injury job constituted

[3]We note that employer's argument before the administrative law judge could also be viewed as a motion for modification based upon a change of claimant's economic condition under 33 U.S.C. §922. Ramirez v. Southern Stevedores, 25 BRBS 260 (1992); Vasquez v. Continental Maritime of San Francisco,Inc., 23 BRBS 428 (1990).

suitable alternate employment upon remand would preclude an award of permanent total disability during the periods when claimant was working absent a showing of extraordinary effort on claimant's part or a beneficent employer. See Everett v. Newport News Shipbuilding and Dry Dock Co., 23 BRBS 316 (1989); Jordan v. Bethlehem Steel Corp., 19 BRBS 82 (1986). Claimant, however, would be entitled to permanent total disability compensation from the date of maximum medical improvement until the date claimant started to work as a truck driver for the reasons stated in Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

The next issue to be addressed on appeal is employer's assertion that the administrative law judge erred in holding it liable for the payment of claimant's permanent total disability compensation after claimant's June 10, 1987, accident. Employer argues that there is overwhelming evidence in the record which indicates that claimant's subsequent injury on June 10, 1987, while he was working for another employer, was a supervening cause of his disability thereafter. Although claimant asserts that employer is precluded from raising this issue on appeal because it was never raised before the administrative law judge, we disagree. We note that testimony was offered on this issue at the second hearing and that it was mentioned in employer's closing argument at the second hearing, see, e.g., Transcript 2 at 29-36, 95. In addition, this argument was addressed in both employer's post-hearing brief and its Memorandum in Support of its Motion for Reconsideration.

In the Decision and Order on Remand, the administrative law judge stated that claimant's 1987 accident occurred when his weak knees gave out, resulting in a pulled shoulder and back. Decision and Order on Remand at 3. In denying employer's motion for reconsideration of his finding that the 1987 injury was not an intervening cause of claimant's disability, the administrative law judge noted that the cases cited by employer, e.g., Cyr v. Crescent Wharf and Warehouse Co., 211 F.2d 454 (9th Cir. 1954); Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979), concerned situations where claimant suffered a subsequent non work-related injury which aggravated his existing work-related disability. In addition, the administrative law judge noted that, in the present case, claimant was not contending that the 1987 accident aggravated his 1981 injury and that the rate of compensation should be increased and that employer had not provided any relevant arguments explaining how the 1987 accident extinguished its liability. Order on Reconsideration at 1.

The administrative law judge's reasons for declining to fully consider this issue are insufficient. Employer is not liable for any disability resulting from a separate injury occurring after claimant left employment with employer if it is unrelated to the

first injury. If, however, the subsequent injury is the natural and unavoidable result of the work injury, then employer remains liable. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987), aff'd mem. No. 89-4803 (5th Cir. April 19, 1990). Thus, employer's argument that claimant sustained a separate injury, which caused his inability to work, while working for another employer in 1987, did state a theory which could relieve it of liability under the Act, and the administrative law judge erred in not fully considering this issue. Accordingly, his findings that claimant's 1987 injury was not an intervening cause of his disability and that employer is liable for the payment of claimant's compensation subsequent to the June 10, 1987 work injury are vacated.

The case is remanded for the administrative law judge to fully consider the evidence relevant to whether claimant's disability after June 1987 is the result of the 1987 accident, which would then be an intervening cause terminating employer's liability, or the natural and unavoidable result of the initial 1981 knee injury, in which case employer remains liable for claimant's entire resultant disability. We note that the administrative law judge did summarily conclude in his decision that the 1987 accident occurred when claimant's weak knees gave out, Decision and Order at 3, which supports a finding that the second accident was related to the first. See Bailey, 20 BRBS at 14. The administrative law judge did not, however, discuss the relevant testimony. In resolving this issue on remand, the administrative law judge should consider claimant's testimony at the second hearing that the 1987 accident occurred when his legs gave out and he went down to the ground, Transcript 2 at 34-6, and that this fall occurred because his legs were weak to start with, Transcript 2 at 36, as well as his testimony that he had a lot of trouble with his knees while working as a truck driver, Transcript 2 at 40, and that his knees got worse between 1984 and 1986, Transcript 2 at 64. The administrative law judge should also consider claimant's statement on cross-examination that the first pain he experienced at the time of the 1987 accident was pain in his back and shoulder, which then went down to his knees, Transcript 2 at 67, as well as any other relevant evidence.

Remand for reconsideration of the issue of whether the 1987 accident was a separate event is also required due to the administrative law judge's inconsistent treatment of this issue in deciding employer's entitlement to a credit under Section 3(e). Resolution of employer's argument that the administrative law judge erred in failing to award it a Section 3(e) credit for benefits received by claimant in his Pennsylvania workers' compensation claim for the 1987 injury is contingent upon whether claimant's 1987 accident was the natural result of the initial

1981 work injury or was an independent injury. Section 3(e) provides a statutory credit for state workers' compensation benefits paid to an employee for the same injury, disability, or death for which benefits are claimed under the Longshore Act. Shafer v. General Dynamics Corp., 23 BRBS 212 (1990). Although the administrative law judge found that the 1987 accident was not an intervening cause of claimant's disability, he inconsistently determined that the 1981 and 1987 injuries were separate and distinct injuries occurring five years apart in his decision on Section 3(e). On remand, the administrative law judge must reconsider employer's entitlement to a Section 3(e) credit consistent with his findings as to employer's liability for disability subsequent to the 1987 work injury. If the administrative law judge concludes that the 1987 injury was the natural result of the 1981 injury and that accordingly employer is liable for claimant's disability thereafter, employer is entitled to a Section 3(e) credit because employer's state compensation payments after the 1987 injury necessarily involve the same injury or disability for which compensation is being sought under the Act. If, however, the administrative law judge finds that claimant's 1987 injury was a separate injury causing claimant's disability thereafter, employer is not entitled to a Section 3(e) credit, since the only benefits for which compensation is being sought under the Act are those relating to the 1981 work injury. See generally Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992).

Employer's argument that the administrative law judge erred in finding that claimant was temporarily totally disabled through October 27, 1983 is, however, without merit. An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined by medical evidence. Jones v. Genco, Inc., 21 BRBS 12 (1988); Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988). Employer contends that the proper date of maximum medical improvement is July 26, 1983, the last date claimant saw Dr. Reahl prior to his two-month incarceration. Employer argues that claimant's condition did not change appreciably between July 26, 1983 and the October 27, 1983, date relied upon by the administrative law judge. We reject this assertion. Inasmuch as the administrative law judge's finding that maximum medical improvement was achieved as of October 27, 1983, is supported by Dr. Reahl's disability assessment as of that date, we affirm this finding. See generally Uglesich v. Stevedoring Services of America, 24 BRBS 180, 183 (1991).

Accordingly, the administrative law judge's determination as to the date of maximum medical improvement is affirmed. The administrative law judge's findings regarding the extent of claimant's disability, liability for claimant's compensation benefits subsequent to June 10, 1987, and employer's entitlement to a Section 3(e) credit are vacated, and the case is remanded for further consideration of these issues consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge