BRB No. 90-1696

LENO J. GUIDRY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BOOKER DRILLING COMPANY	)	
	)	
and	)	
	)	
MID-CONTINENT UNDERWRITERS	)	DATE ISSUED:
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification Awarding Temporary Benefits of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Sidney Patin (Henderson, Hanemann & Morris), Houma, Louisiana, for claimant.

Elizabeth Haecker Ryan (Montgomery, Barnett, Brown, Read, Hammond & Mintz), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification Awarding Temporary Benefits (85-LHC-593) of Administrative Law Judge Ben H. Walley 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 December 26, 1981, claimant, a floor hand for employer, injured his back while breaking pipe. Although claimant underwent several surgeries, he has been unable to return to his usual work

since his injury. Claimant sought compensation under the Act. In the original Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from December 26, 1981 through March 20, 1986, the date Dr. Hamsa found claimant to have a 16 percent permanent impairment. Finding employer established the availability of suitable alternate employment, the administrative law judge awarded claimant permanent partial disability compensation thereafter. Claimant's motion for reconsideration was denied in a Decision and Order dated November 3, 1987. Neither of these decisions was appealed.

After the issuance of the initial Decision and Order, claimant's back condition allegedly worsened. On August 15, 1987, claimant fainted twice at a restaurant, allegedly due to low blood pressure caused by back pain. Although an ambulance was called, claimant went home that night. The next day, however, claimant was seen in the emergency room at Mercy Hospital by Dr. Chisesi, an orthopedic surgeon, for complaints of continued severe back pain and lightheadedness. Claimant remained hospitalized until August 25, 1987 for additional testing. Although Dr. Chisesi continued to treat claimant for several months, in October 1987 he ultimately returned to Dr. Hamsa, his initial free choice of physician, because employer allegedly refused to pay for Dr. Chisesi's treatment. On November 10, 1987, Dr. Hamsa performed spinal fusion surgery on claimant. In December 1987, employer agreed to allow claimant to change treating physicians and agreed that Dr. Eugene Diabezies would be acceptable. As Dr. Diabezies was unavailable, however, his associate, Dr. Charles Murphy, became claimant's treating physician in January 1988. After undergoing physical therapy and a work-hardening program, claimant allegedly made several unsuccessful attempts to return to alternate work.

On April 14, 1988, claimant sought modification of the administrative law judge's June 9, 1987 Decision and Order pursuant to Section 22 of the Act, 33 U.S.C. §922.[1] In a Decision and Order Denying Modification, the administrative law judge reaffirmed his prior March 20, 1986 determination that claimant reached maximum medical improvement on March 20, 1986. Moreover, the administrative law judge rejected claimant's assertion that he has continued to be permanently totally disabled since reaching maximum medical improvement, finding that claimant's permanent disability continued from March 20, 1986, until he was admitted to the hospital on November 9, 1987 for surgery. The administrative law judge further determined, however, that following his November 10, 1987, surgery, claimant was rendered incapable of performing any kind of gainful employment until July 12, 1988, when his treating physician, Dr. Charles Murphy, concluded that his condition had again reached a plateau and rated him as having a 22 percent whole person impairment. Thus, he found claimant entitled to temporary total disability compensation from November 9, 1987 through July 12, 1988. In addition, although the administrative law judge noted that Dr. Murphy reassessed claimant's permanent physical impairment on January 29, 1989, as a 25 percent permanent whole person impairment, he found that claimant's impairment had not increased since his prior decision. Claimant's request for medical expenses for the treatment

[1]Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. §922.

provided by Dr. Chisesi and his associates at Mercy Hospital in August 1987 was denied on the ground that claimant failed to obtain prior authorization as is required pursuant to Section 7(d), 33 U.S.C. §907(d).

Claimant appeals the Decision and Order Denying Modification. Claimant asserts error in the administrative law judge's findings regarding the date of maximum medical improvement, extent of disability and medical expenses for Dr. Chisesi's treatment. Claimant contends he was temporarily totally disabled from the date of injury and continuing or, alternatively, if the Board finds maximum medical improvement on either March 20, 1986 or July 12, 1988, he has been permanently totally disabled from those dates onward. Employer responds, urging affirmance.

Claimant's initial contention is that the administrative law judge committed reversible error in reaffirming his prior March 20, 1986 maximum medical improvement determination on modification. As this finding is based on Dr. Hamsa's March 12, 1986 permanency assessment, claimant's argument is rejected. Claimant maintains that his testimony and that of Ms. Ricou, his girlfriend, as well as the contemporaneous medical reports of Drs. Landry, Chisesi, Albright, and Kline establish that a worsening of claimant's condition occurred subsequent to March 20, 1986 and that this result is more consistent with a finding of continuous temporary total disability than a finding that his condition had stabilized. Contrary to claimant's assertions, however, neither any subsequent deterioration of his condition, or the fact that additional back surgery was ultimately required negates the administrative law judge's finding that claimant was permanently partially disabled during the period prior to surgery after March 12, 1986 based on Dr. Hamsa's permanency assessment. Where, as here, claimant is adjudged to have reached a state of permanent disability, the fact that he subsequently suffers a temporary exacerbation of his underlying condition does not alter that finding. *Leech v. Service Engineering Co.*, 15 BRBS 18, 22 (1982). Inasmuch as Dr. Hamsa's March 12, 1986, permanency assessment provides substantial evidence sufficient to support the administrative law judge's maximum medical improvement finding, we affirm this determination. Claimant's assertion that he is entitled to temporary total disability benefits from March 19, 1986 to the date of his surgery is accordingly rejected.

Claimant's alternate assertion that he has remained temporarily totally disabled since his November 1987 surgery similarly must fail as the administrative law judge reasonably found that claimant reached maximum medical improvement following the November 10, 1987 surgery based on Dr. Murphy's July 12, 1988 permanency assessment. Claimant contends that maximum medical improvement had not been reached inasmuch as the April 1989 medical opinions of Drs. Murphy and Braud, claimant's treating orthopedist and psychologist, indicate that claimant is still undergoing medical treatment and vocational rehabilitation with a view towards improving his condition.[2] We disagree. The fact that claimant is continuing to undergo treatment does not preclude

[2]Dr. Braud stated that claimant's mental state will deteriorate under stress and recommended medicine, psychometric testing and psychotherapy. CX 56. Dr. Murphy recommended that claimant undergo vocational rehabilitation and that claimant "can probably still" attain some improvement with physical therapy and will need medical treatment on an intermittent basis

a finding of permanency where, as here, a doctor has assessed claimant with a disability rating sufficient to support a finding of permanency. *Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). Moreover, since the permanency of claimant's condition is not an economic question, the possibility of vocational rehabilitation does not affect this determination. *See Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Inasmuch as the administrative law judge rationally found that claimant reached maximum medical improvement following the November 10, 1987 surgery on July 12, 1988, based on Dr Murphy's permanency assessment of that date, his denial of temporary total disability compensation thereafter is also affirmed.

Claimant, however, also contends that if he reached maximum medical improvement, he is entitled to permanent total disability thereafter as employer has failed to establish the availability of suitable alternate employment. Claimant maintains that the sales jobs which employer's vocational consultant, Cindy Harris, identified as suitable at the initial hearing are not realistically available to him in light of his current physical and psychological limitations.

The standard for determining disability is the same during Section 22 modification proceedings as it is during the initial adjudicatory proceedings under the Act. Specifically, once the party seeking modification demonstrates that he has sustained a change in condition which precludes him from performing work previously found by the administrative law judge to constitute suitable alternate employment and the claimant establishes his continuing inability to perform his pre-injury work,[3] the burden shifts to employer to establish the availability of other suitable alternate employment. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 , 431 (1990). *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1992). In the present case, the administrative law judge summarily concluded that claimant had not established a change in his physical condition because his permanent impairment rating of 25 percent from March 20, 1986 to November 9, 1987 was unchanged following his recovery from his November 10, 1987 surgery. The administrative law judge erred in reaching this conclusion. In the initial Decision and Order, the administrative law judge actually found claimant's permanent physical impairment to be 16 percent of the whole person based on Dr. Hamsa's March 12, 1986 permanency assessment. Following the surgery, Dr. Murphy rated claimant's impairment at 22 percent in July 1988 and 25 percent in January 1989. Thus, contrary to the administrative law judge's statement, claimant's rating of medical impairment did increase.

Moreover, modification under Section 22, may also be granted based on a change in claimant's economic condition. *See Ramirez v. Southern Stevedores*, 25 BRBS 260, 264-265 (1992). The record in this case indicates that even if claimant's permanent physical impairment did not change between March 20, 1986 and July 1988, his physical and psychological restrictions changed significantly. Whereas on March 21, 1986, Dr. Hamsa opined that claimant could work a full 8 hour

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probably for the rest of his life. CX 52, 58, 60, 63-64; CX 49.

[3]It is undisputed that claimant is unable to perform his usual work in this case.

day with "no lifting over 50 pounds (on occasion)," on October 13, 1987, Dr. Hamsa opined that claimant was employable at a very reduced level of physical activity. On February 13, 1987, Dr. Nutik opined that claimant cannot perform activities requiring prolonged sitting or standing, climbing, repetitive bending and heavy lifting. CX 7.7. After claimant's recovery from the November 10, 1987 surgery, Dr. Murphy indicated that claimant should avoid prolonged standing in one place for greater than one hour and intermittent standing for greater than 4 hours a day. Moreover, Dr. Murphy indicated that claimant must be able to get up and walk around and occasionally lie down. He also limited claimant to driving a half hour and to lifting ten to twenty pounds. CX 52, pp. 66-67. Finally, an April 25, 1989 report written by claimant's treating psychologist, Dr. Braud, indicated that claimant harbors an underlying rage as a result of his post-Viet Nam stress disorder which could be triggered and discharged as a psychotic outburst under stress and that his mental status will deteriorate under stress.

The administrative law judge in the present case did not weigh the conflicting medical evidence on modification and specifically identify claimant's physical and psychological restrictions after he reached permanency in 1988 to determine whether the alternate jobs previously found suitable for claimant in the initial Decision and Order remained compatible with claimant's limitations. We therefore vacate his finding that claimant has failed to establish a change in condition and remand the case to the administrative law judge to reconsider whether claimant sustained a change in his condition based on all of the relevant evidence of record consistent with the Administrative Procedure Act, 5 U.S.C. §557(c). On remand, the administrative law judge should specifically describe the physical requirements of the sales jobs previously identified by the vocational consultant, Cindy Harris, at the initial hearing and determine whether they remain compatible with claimant's physical and psychological restrictions following permanency.

Claimant's final argument is that the administrative law judge erred in denying him medical expenses for the treatment provided by Dr. Chisesi and his associates at Mercy Hospital in August 1987 based on his failure to obtain employer's prior authorization. Claimant maintains that he was relieved of the obligation of the prior authorization requirement of Section 7(d) because of the emergency nature of the treatment provided.

Claimant's assertion that he was relieved of the obligation of obtaining employer's prior authorization for Dr. Chisesi's treatment is rejected. In the present case, Ms. Ricou, claimant's girlfriend, testified that the medical unit which responded when claimant fainted at the restaurant on August 15, 1987, told her that they would like to take claimant to the hospital, but that she could also take him home and watch him, and if he got better, she could take him to his own doctors in the morning. Tr. at 47. Ms. Ricou further testified that the next day she took claimant to her friend Dr. Chisesi because claimant was dissatisfied with Dr. Hampton's care. When questioned by claimant's counsel at his deposition as to whether he regarded his care of claimant in August 1987 as emergency treatment, Dr. Chisesi answered, "it wasn't an emergency, it was urgent, more urgency than emergency." Dr. Chisesi's Depo. at 6. Because the testimony of claimant, his girlfriend, and Dr. Chisesi, reasonably supports a finding that no emergency existed at the time that the treatment in question was rendered on the day after the fainting incident at the restaurant, we affirm the

administrative law judge's finding that claimant's failure to obtain employer's prior authorization for this treatment precludes his recovery of these expenses. *See Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 308 (1989); 33 U.S.C. §907(d).

Accordingly, the administrative law judge's finding in the Decision and Order Denying Modification that claimant has failed to establish a change in condition is vacated, and the case is remanded for reconsideration of this issue consistent with this opinion. The administrative law judge's Decision and Order on Modification is affirmed in all other respects.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge