BRB No. 98-1159

RICKY L. NELSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EMTECH ENVIRONMENTAL	)	DATE ISSUED: May 26, 1999)
and	)	
	)	
INSURANCE COMPANY OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order, Supplemental Decision and Order Denying Attorney's Fees and Order Denying Motion for Reconsideration of C. Richard Avery, United States Department of Labor.

Bradford M. Condit, Corpus Christi, Texas, for claimant.

Nicholas Canaday, III (Canaday Law Firm), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order, Supplemental Decision and Order Denying Attorney's Fees, and Order Denying Motion for Reconsideration (97-LHC-1273) of Administrative Law Judge C. Richard Avery 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).

Claimant sustained a work-related back injury on March 26, 1995, for which employer voluntarily paid claimant temporary total disability benefits and medicals benefits through the time of the hearing.[1] The sole issue presented to the administrative law judge was whether claimant reached claimant reached maximum medical improvement entitling him to permanent disability benefits. The administrative law judge rejected claimant's argument that he had reached maximum medical improvement, and therefore awarded claimant continuing temporary total disability benefits. The administrative law judge, in a supplemental order, and on reconsideration, denied claimant's counsel an attorney's fee based on a lack of successful prosecution.

On appeal, claimant contends that the administrative law judge erred in failing to find him permanently totally disabled, and in denying an attorney's fee. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in finding that his condition is not permanent. A permanent disability is one that has continued for a lengthy time and appears to be of lasting duration, as opposed to one that merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968), *cert. denied,* 349 U.S. 976 (1969). The administrative law judge need not search for a medical opinion that specifically references "maximum medical improvement;" he may rely on an opinion which rates claimant's disability, as that is sufficient evidence of permanency. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc,* 32 BRBS 251 (1998). Where the record contains evidence that claimant's condition was of a lasting and indefinite duration, a prognosis that the employee's condition may improve in the future does not preclude a finding of permanency. *Mills v. Marine Repair Serv.,* 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989).

The administrative law judge found that claimant's condition is still temporary based on the opinions of Drs. Vaughn and Halcomb that claimant had not reached maximum medical improvement. The administrative law judge declined to credit the opinion of Dr. Kennedy that claimant reached maximum medical improvement absent surgery, on the ground that he was not as familiar with claimant's treatment. The administrative law judge also noted that claimant's psychologist is optimistic about his improvement, and that a rehabilitation counselor thinks claimant can be

[1]Employer first paid benefits pursuant to the Texas workers' compensation law, and then pursuant to the Longshore Act.

retrained for other employment.[2]

[2]The administrative law judge stated that it was his hope that claimant "will continue to make an effort to improve his condition, as his medical providers feel he can." Decision and Order at 4. We note that vocational rehabilitation generally is irrelevant to a determination of permanency, as the nature of a claimant's disability concerns only the medical aspects of the condition. *See Price v. Dravo Corp.,* 20 BRBS 94 (1987).

We cannot affirm the administrative law judge's finding that claimant's condition is temporary, as the administrative law judge did not address all the medical evidence in terms of the law on permanency. Although the administrative law judge rationally credited the opinions of the treating physicians, Drs. Halcomb and Vaughn, over that of the examining physician, Dr. Kennedy, *see generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), the administrative law judge did not fully discuss the opinions of Drs. Halcomb and Vaughn. Dr. Halcomb stated on October 17, 1996, that claimant had not reached maximum medical improvement as claimant might require surgery. CX 5 at 16. The administrative law judge may find a claimant's condition temporary when surgery is anticipated. *Kuhn v. Associated Press*, 16 BRBS 46 (1983). The administrative law judge, however, did not fully discuss Dr. Halcomb's later reports. On February 21, 1997, Dr. Halcomb stated that claimant had been given an impairment rating of eight percent,[3] and that claimant's pain was "no where near significant enough to contemplate" surgery. CX 5 at 14. This opinion was repeated on May 23, 1997. *Id.* at 13. Thus, the administrative law judge's reliance on Dr. Halcomb's earlier opinion that claimant had not reached maximum medical improvement because surgery was anticipated must be reexamined in light of the later reports acknowledging claimant's impairment rating and finding surgery unnecessary.

[3]The only impairment rating in the record is that of Dr. Kennedy, who stated on September 11, 1996, that claimant had an eight percent impairment if he elected not to undergo surgery. CX 7 at 38.

Dr. Vaughn, a chiropractor who was actively treating claimant,[4] testified at the hearing. He stated his opinion that claimant is "permanently injured and disabled," although he stated that claimant had not reached "maximum medical improvement" because that implies that no further medical intervention will improve the condition. Tr. at 19-20, 44. Dr. Vaughn testified that therapy was intended to reduce claimant's pain and to improve his ability to do the activities of his daily life. *Id.* at 24. A claimant's condition may be considered permanent even if further improvement is foreseen, if it is of an indefinite duration, *see generally White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980)(table), but a finding that a disability is still temporary is proper if the claimant is undergoing active treatment to improve his condition. *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). On remand, the administrative law judge must reconsider whether claimant's condition, which was some two and one half years post-injury at the time of the hearing, is permanent in light of all relevant evidence of record.[5] *See generally McKnight*, 32 BRBS at 71; *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *see generally Mills,* 21 BRBS at 117.

We next address claimant's contention that the administrative law judge erred in finding he is not entitled to an attorney's fee. Section 28(b) of the Act, 33 U.S.C. §928(b), applies when a controversy develops over additional compensation where employer has tendered compensation or is voluntarily paying compensation, and claimant successfully obtains more than employer was paying. *See Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150 (CRT) (5th Cir. 1997). Claimant contends that he obtained greater benefits than employer was paying, as employer refused to stipulate to certain issues until the morning of trial which required a hearing for claimant to obtain an award of continuing benefits. In denying a fee, the administrative law judge found that as a result of the hearing, claimant did

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[4]Dr. Halcomb's records indicate that as of November 22, 1996, he was seeing claimant only every two to three months.

[5]The evidence regarding claimant's need for psychological treatment is relevant to this finding. *See generally Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985).

not obtain greater benefits than that which employer voluntarily paid, as claimant did not prevail on his sole contention of permanent disability.

We reject claimant's contention that the administrative law judge erred in denying him an attorney's fee. The record reflects that shortly after the informal conference, employer began paying claimant compensation of $220 per week based on an average weekly wage of $360 per week.[6] The administrative law judge also found that employer voluntarily paid medical benefits which were not an issue at the hearing. Decision and Order at 1. The administrative law judge ordered employer to continue paying $240 per week, less its credit. The administrative law judge also rejected claimant's contention that he was entitled to permanent total disability benefits and ordered employer to continue paying temporary total disability benefits. Thus, the administrative law judge properly concluded that claimant did not obtain greater compensation than employer was paying, and he properly found that claimant is not entitled to an attorney's fee pursuant to Section 28(b) of the Act. *See Wilkerson,* 125 F.3d at 904, 31 BRBS at 150 (CRT); *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986). Contrary to claimant's contention, employer did not refuse to stipulate to certain issues until the morning of the hearing, as the only contested issue was the issue of permanency. *See generally Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). Consequently, we affirm the administrative law judge's denial of an attorney's fee as it is in accordance with law. *See* 33 U.S.C. §928(b). On remand, the administrative law judge must reconsider claimant's entitlement to an attorney's fee if claimant is awarded benefits for a permanent disability.

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 consistent with this opinion.

SO ORDERED.

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[6]The district director's January 17, 1997, Memorandum of Informal Conference recommends an average weekly wage of $360 per week, with a compensation rate of $240 per week less a recoupment of $20 per week for employer's overpayment. Employer's letter dated March 18, 1997, after the case was referred for a formal hearing, reflects a willingness to continue paying weekly compensation to claimant in accordance with the agreement reached. The administrative law judge noted that claimant's counsel did not request a fee for any work performed prior to the time that employer reinstituted its payments.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge