BRB No. 01-0321

NORA KOVACIC	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED: Nov. 30, 2001
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Edgar R. Jones, Williamsburg, Virginia, for claimant.

R. John Barrett (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Laura Stomski (Howard M. Radzely, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration (99-LHC-1546) of Administrative Law Judge Gerald M. Tierney 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 May 5, 1996, claimant suffered an injury during the course of her employment as a housekeeper with employer, when she fell on a wet laundry room floor, striking her left knee on the floor.[1] Subsequently, claimant underwent two surgeries on her left knee, and was advised that eventually she will need a total knee replacement. Following her work injury, claimant also received treatment for an adjustment disorder with depression and a pain disorder. Employer voluntarily paid claimant temporary total disability compensation from July 3, 1996 to November 16, 1999, but contested claimant's claim for permanent total disability benefits under the Act.

[1]Claimant suffered a previous work-related injury to her left knee in July 1995, after which she returned to light duty work for employer.

In his Decision and Order Awarding Benefits issued July 31, 2000, the administrative law judge accepted the parties' stipulations, *inter alia,* that claimant suffered a work-related injury on May 5, 1996, that she has been totally disabled from July 3, 1996 to the present, and that her average weekly wage is $150.20 for compensation purposes. The administrative law judge also accepted the parties' stipulation that the issue of employer's entitlement to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), would not be briefed by employer and the Solicitor of Labor unless a finding of permanent total disability was made. Next, the administrative law judge determined that claimant reached maximum medical improvement on September 8, 1998. Accordingly, claimant was awarded temporary total disability compensation from the date of injury through September 8, 1998, and permanent total disability from September 9, 1998 to the present and continuing. 33 U.S.C. §908(a), (b). Additionally, the administrative law judge ordered employer to pay claimant interest on any unpaid compensation and a Section 14(e), 33 U.S.C. §914(e), assessment for all compensation unpaid until the controversion of the claim.[2] Thereafter, in an Order Denying Motion for Reconsideration issued November 16, 2000, the administrative law judge denied employer's request that he reconsider his previous Section 14(e) assessment against employer.

[2]The administrative law judge directed the interested parties to brief the issue of Section 8(f) relief, 33 U.S.C. §908(f). Subsequently, in a Decision and Order Granting Section 8(f) Relief issued February 27, 2001, the administrative law judge found employer entitled to Section 8(f) relief from continuing compensation liability.

On appeal, employer challenges the administrative law judge's findings that claimant has reached maximum medical improvement and that she is entitled to a Section 14(e) assessment.[3] The Director, Office of Workers' Compensation Programs (the Director), responds, contending that employer's appeal should be dismissed as interlocutory inasmuch as the issue of employer's entitlement to Section 8(f) relief had not yet been adjudicated at the time employer filed its appeal of the administrative law judge's July 31, 2000 Decision and Order and November 16, 2000 Order Denying Motion for Reconsideration.[4] The Director argues, in the alternative, that the administrative law judge's determination that employer is liable for a Section 14(e) assessment should be affirmed.

We first address employer's assignment of error to the administrative law judge's finding that claimant has reached maximum medical improvement and, thus,

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[3]Employer also asserts that it has paid claimant all the interest to which she is entitled, noting that interest is to be computed on a simple rather than compound basis. Although the administrative law judge did not set out the specific terms of the interest which he ordered employer to pay claimant, we note that employer's position that interest is to be calculated on a simple rather than compound basis is correct. *See Meardry v. International Paper Co.,* 30 BRBS 160, 164 n. 3 (1996); *Santos v. General Dynamics Corp.,* 22 BRBS 226, 228 (1989).

[4]In order to avoid piecemeal review, the Board ordinarily does not accept interlocutory appeals. *See Jackson v. Straus Systems, Inc.,* 21 BRBS 266, 269 n. 2 (1988); *Niazy v. The Capital Hilton Hotel,* 19 BRBS 266, 268-269 (1987). In the instant case, the administrative law judge stated that the parties stipulated that the Section 8(f) entitlement issue would not be briefed by employer and the Solicitor unless a finding of permanent total disability is made. *See* July 31, 2000 Decision and Order at 2, 14. The Director does not aver on appeal that he notified the administrative law judge of an objection to the decision to defer consideration of the merits of Section 8(f) until a finding of permanent total disability was made. We note, moreover, that the administrative law judge's July 31, 2000 Decision and Order includes a compensation order as required by the Act, 33 U.S.C. §921(a); 20 C.F.R. §702.348, addressing all necessary issues with the exception of the Section 8(f) entitlement issue. *Cf. Jackson,* 21 BRBS at 269 n. 2. Under this set of circumstances and inasmuch as briefs have been filed by employer and the Director on the issues presented by employer's appeal of the administrative law judge's July 31, 2000 Decision and Order and November 16, 2000 denial of reconsideration, we conclude that the interest of judicial economy is best served by the Board's present review of employer's appeal. *See generally Jackson,* 21 BRBS at 269 n. 2; *Niazy,* 19 BRBS at 269.

is entitled to permanent total disability benefits. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Thus, the determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.,* 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Leech v. Service Engineering Co.,* 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press,* 16 BRBS 46(1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *McCaskie v. Aalborg Ciserv Norfolk, Inc.,* 34 BRBS 9, 12 (2000); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.,* 617 F.2d 292 (5th Cir. 1982).

In the instant case, employer avers that the administrative law judge erroneously failed to find that claimant could benefit from a total knee replacement and that her psychological condition had recently improved, and that she therefore has not reached maximum medical improvement. We disagree. While the administrative law judge acknowledged the opinion of Dr. Bergfeld, claimant's treating orthopedic surgeon, that claimant has not reached maximum medical improvement because her physical condition would improve if a total knee replacement operation was performed, *see* Decision and Order at 13; EX 32 at 18, he ultimately credited Dr. Bergfeld's deposition testimony that he would not perform such surgery until claimant's psychological condition was more stable and that the timing of such surgery was dependent on receiving an opinion from claimant's treating psychiatrist and psychologist that she had become capable of handling the stress and pain of major surgery.[5] *See* Decision and Order at 13; EX 32 at 17, 41-45. The administrative law judge also credited the hearing testimony of claimant's

[5]The administrative law judge additionally noted Dr. Bergfeld's testimony that, in light of claimant's young age, she should attempt to put off knee replacement surgery as long as possible because knee replacements can wear out, requiring additional surgery which might prove to be less successful. *See* Decision and Order at 9; EX 32 at 28-29.

treating psychologist Anthony DeMarco that claimant is permanently disabled by her condition and that, in light of the fluctuation in the severity of claimant's depression, the primary goal of his treatment has been to prevent her further deterioration.[6] Additionally, the administrative law judge relied upon Mr. DeMarco's testimony that even if medical treatment could reduce claimant's chronic pain, she would continue to suffer from a diagnosable mental health condition. *See* Decision and Order at 13; Hearing Tr. at 32-33, 38-40, 46-51.

Contrary to employer's contentions on appeal, the administrative law judge's credibility assessments and the inferences drawn from the testimony of Dr. Bergfeld

[6]We reject employer's contention on appeal that the administrative law judge erroneously failed to find that claimant's psychological condition is improving on the basis of Mr. DeMarco's statement that the last time claimant's depression had been reduced from severe to moderate was three months prior to the hearing. *See* Hearing Tr. at 49. Mr. DeMarco consistently testified that the severity of claimant's depression had fluctuated between moderate and severe, *see id.* at 32-33, and that his treatment goal eventually focused on preventing further deterioration in her psychological condition. *See id.* at 33, 48. Thus, the portion of Mr. DeMarco's testimony cited by employer, when considered in the context of the entirety of his testimony, does not support a finding that claimant's condition is improving. *See generally McCaskie,* 34 BRBS at 9.

and Mr. DeMarco are reasonable and supported by substantial evidence.[7] *See Norfolk Shipbuilding Drydock Corp. v. Faulk,* 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000). The credited testimony of Dr. Bergfeld and Mr. DeMarco support a finding that claimant's physical and psychological conditions have continued for a lengthy period without consistent improvement and appear to be of lasting or indefinite duration. Additionally, knee replacement surgery is not anticipated nor is its success ensured due to claimant's psychological condition. *See McCaskie,* 34 BRBS at 12-13; *Diosdado v. Newpark Shipbuilding & Repair, Inc.,* 31 BRBS 70, 74 (1997). We therefore affirm the administrative law judge's determination that claimant has reached maximum medical improvement, and his consequent award of permanent total disability compensation to claimant.

[7]We reject employer's assertion on appeal that Mr. DeMarco's opinion should have been accorded relatively little weight because he is neither a medical doctor nor a Ph.D. We note, in this regard, that employer's counsel accepted Mr. DeMarco, who has two master's degrees in clinical psychology and is working on a doctorate and has worked as a licensed psychologist since 1987, as an expert witness in psychology. *See* Hearing Tr. at 25-28.

Next, we consider employer's contention that the administrative law judge erred in finding employer liable for a Section 14(e) assessment.[8] Employer first argues that the additional compensation payment mandated by Section 14(e) is a "penalty" and, thus, cannot be imposed on employer in light of its status as a federal non-appropriated fund instrumentality. We disagree. The precise argument advanced by employer in this regard was rejected by the United States Court of Appeals for the Federal Circuit in *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972 (Fed. Cir. 1997). In considering whether Section 14(e) payments constitute fines or penalties which cannot be imposed on the government, the *Dalton* court specifically found that the Act refers to the payments mandated by Section 14(e) as "additional compensation," in contrast to other sections of the Act that expressly provide for fines and penalties.[9] *Id.* at 977. Moreover, the court, observing that Section 44(c)(3) of the Act, 33 U.S.C. §944(c)(3), provides that all amounts collected as fines and penalties under the Act are paid into a special fund, stated that because Section 14(e) payments are made directly to individual claimants and not into the special fund, Congress did not consider Section 14(e) payments to be fines or penalties. *Id.* at 977-978. Next, the court determined that Section 14(e) payments do not exhibit the characteristics of a penalty, in that the payments are proportional to the harm suffered, they are paid directly to individual claimants, and they are intended, not merely as an incentive for employers to timely pay compensation, but also to compensate claimants for their inconvenience and expense during the period in which compensation was not paid. *Id.* at 974, 978. Lastly, the *Dalton* court declined to attach any significance to references in the case law to Section 14(e) payments as "penalties," noting that use of such terminology was merely a matter of convenience in distinguishing the additional payments imposed by Section 14(e) from the underlying compensation awards. *Id.* at 978-979. Accordingly, as employer's initial contentions of error regarding its liability for a Section 14(e) assessment have been

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[8]Section 14(e) states:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section,...

33 U.S.C. §914(e).

[9]The *Dalton* court specifically noted nine sections of the Act which expressly provide for the imposition of fines or penalties against employers. *See* 33 U.S.C. §§914(g), 915(a), 930(e), 931(c), 937, 938(a), 938(b), 941(f), and 948(a). *Dalton,* 119 F.3d at 977.

specifically addressed and rejected at length by the Federal Circuit in *Dalton,* we reject, for the reasons set forth in *Dalton*, employer's assertion that as a non-appropriated fund instrumentality it cannot be held liable for additional payments under Section 14(e).

Employer next argues, in the alternative, that the administrative law judge erred in finding that employer's liability for a Section 14(e) assessment did not cease until November 1, 1999, the date on which employer corrected the underpayment in the compensation it had been voluntarily paying claimant.[10] In addressing this issue, the administrative law judge found that employer did not file a notice of controversion; therefore, the administrative law judge determined that employer is liable for a Section 14(e) assessment from July 3, 1996 to November 1, 1999, the date on which employer corrected the underpayment in the compensation that it had been voluntarily paying claimant.

[10]It is undisputed that the voluntary payments of compensation made by employer from the date compensation began, July 3, 1996, to November 1, 1999, were based on an erroneous average weekly wage calculation of $123.38, and that the correct average wage is $150.20.

Our review of the record indicates that, on April 27, 1998, claimant notified employer that she disputed the average weekly wage used by employer to make its voluntary payments of compensation. *See* CX 106; *see also* CX 12. Therefore, as of this date, a dispute existed between the parties as to the amount of compensation due claimant from the date of her injury. Once this dispute over the amount of compensation arose, employer was required to file a notice of controversion if it chose not to pay the compensation sought by claimant in order to avoid incurring an assessment pursuant to Section 14(e) of the Act. *See Browder v. Dillingham Ship Repair,* 24 BRBS 216, *aff'd on recon.* 25 BRBS 88 (1991); *Lorenz v. FMC Corp., Marine and Rail Equipment Div.,* 12 BRBS 592 (1980). *See also National Steel & Shipbuilding Co. v. Bonner,* 600 F.2d 1288 (9th Cir. 1979). Where, as here, employer fails to file a notice of controversion, its liability under Section 14(e) ceases as of the date that the Department of Labor knew of the facts that a proper notice of controversion would have revealed; in this regard, it has been recognized that the Department of Labor possesses the requisite knowledge of the relevant facts which a proper controversion would have revealed as of the date on which the parties attend an informal conference. *See Hearndon v. Ingalls Shipbuilding, Inc.,* 26 BRBS 17, 20 (1992); *Browder,* 24 BRBS at 220. In the instant case, an informal conference was held on June 24, 1998, in an attempt to resolve the average weekly wage controversy. Thus, employer's liability under Section 14(e) terminated as of June 24, 1998, when the informal conference was held. *Id.* We therefore modify the administrative law judge's Order Denying Motion for Reconsideration to reflect employer's liability for a Section 14(e) assessment on all additional compensation owed to claimant from July 3, 1996 until the June 24, 1998 informal conference.[11] *See Browder,* 24 BRBS at 220.

Accordingly, the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration are modified to reflect employer's liability for a Section 14(e) payment on all compensation due and unpaid from July 3, 1996 to June 24, 1998. In all other respects, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[11]We note that the administrative law judge properly found that employer's Section 14(e) liability is based solely on the difference between the amount of compensation voluntarily paid by employer and the amount claimant was entitled to receive. *See Hearndon,* 26 BRBS at 21.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge