BRB No. 99-0278

WILLIAM BOLGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICE, INCORPORATED	)	DATE ISSUED: Nov. 26, 1999
	)	
	)	
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 and Order on Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Order on Reconsideration (97-LHC-2418) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Claimant a refrigeration maintenance mechanic, sustained a work-related injury on August 2, 1996, as he pushed a large scaffold up a ramp. Claimant thereafter suffered from various physical and psychiatric ailments. Employer voluntarily paid claimant temporary total disability benefits from August 3 to September 30, 1996. Claimant sought continuing total disability compensation. The administrative law judge found that claimant is unable to return to his usual work, that employer did not establish the availability of suitable alternate employment, and that claimant's condition became permanent on June 4, 1998, based on the opinion of claimant's treating psychiatrist, Dr. Lizardo. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from August 3, 1996 to June 4, 1998, and continuing permanent total disability benefits thereafter.[1] The administrative law judge summarily denied employer's motion for reconsideration.

Employer's sole contention on appeal is that the administrative law judge erred in finding that claimant's condition became permanent in 1998, rather than in 1996. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to this appeal.

Employer contends that, inasmuch as claimant's cervical condition reached maximum medical improvement on October 8, 1996, based on the opinion of claimant's treating orthopedist, Dr. Hutter, and as Dr. Lizardo stated that the permanence of claimant's psychiatric disability is due to the permanence of his physical disability, the administrative law judge erred in failing to find that the totality of claimant's disabilities was permanent in 1996. We reject this contention, as the administrative law judge properly considered the permanency of claimant's physical and psychological conditions separately in this case, rejecting earlier dates of maximum medical improvement as based only on claimant's physiological condition. Moreover, claimant did not seek treatment for his psychiatric difficulties until March 1997. *See Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985).

Furthermore, the administrative law judge's finding is supported by substantial evidence. The administration law judge noted that Dr. Lizardo was still treating claimant for his psychiatric problems, and that she first stated claimant's condition was permanent at her deposition on June 4, 1998. Decision and Order at 13; CX 18 at 27. The record reflects that Dr. Lizardo was asked at her deposition if claimant was permanent at that time, and she replied, "Yes." *Id*. The administrative law therefore concluded that since Dr. Lizardo's opinion of that date constituted the first

[1]The administrative law judge granted employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

evidence of permanence considering the entirety of claimant's disabling conditions, this is the date that claimant reached maximum medical improvement. *See Jenkins*, 17 BRBS at 183. Consequently, as this finding is supported by substantial evidence, rational, and in accordance with law, it is affirmed. *See generally Mason v. Baltimore Stevedoring Co.,* 22 BRBS 413 (1989); *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge