BRB No. 07-0273

L.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CROFTON DIVING CORPORATION	)	DATE ISSUED: 10/30/2007
	)	
Self-Insured Employer-Respondent	)	
	)	
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 Denying Special Fund Relief Pursuant to 33 U.S.C. §908(f) of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Swartz, Taliaferro, Swartz & Goodove, P.C.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits and Denying Special Fund Relief Pursuant to 33 U.S.C. §908(f) (2006-LHC-0425) of Administrative Law Judge Alan L. Bergstrom rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' 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, a diving supervisor, injured his cervical spine when he tripped and fell at work on May 27, 1999. He continued performing light-duty work for employer until he underwent surgery at C 5/6 on July 26, 2002. The parties agree that claimant cannot return to his pre-injury work. Claimant sought compensation for permanent total disability arising out of the work injury, from April 30, 2003, the date Dr. Spear, his treating physician, found he reached maximum medical improvement.

In his decision, the administrative law judge found that claimant has not yet reached maximum medical improvement and that employer established the availability of suitable alternate employment as of May 17, 2005. Accordingly, he awarded claimant compensation for temporary total disability from April 16, 2003, through May 16, 2005, and for temporary partial disability thereafter based on a loss in wage-earning capacity. 33 U.S.C. §908(b), (e), (h).

Claimant appeals, contending that the administrative law judge erred in finding that his condition is not permanent and that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's award of partial disability benefits.

Claimant first contends that the administrative law judge erred in finding that his condition is not permanent, and thus, in awarding temporary disability benefits.[1] 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 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); *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988). 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. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *White v. Exxon Corp.*, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1982).

Dr. Spear stated that claimant reached maximum medical improvement as of April 16, 2003, following his July 26, 2002, surgery. CX 4 at 9.2. Claimant initially reported improvement following his surgery in 2002 but his condition began to deteriorate by

[1] Employer also contends in its response brief that claimant's condition is permanent under the facts of this case. *See* n. 2, *infra*.

October of that year. CX 3. On December 11, 2002, Dr. Koen stated that further surgery would not benefit claimant, and he referred claimant to Dr. Spear for pain management. *Id.* In July 2003, however, Dr. Koen suggested further surgery, *i.e.*, an anterial cervical discectomy and fusion with plating at C 5/6 and C 6/7, but could not predict the degree of improvement. *Id.* Claimant did not have the surgery as his diabetes was not controlled. Between 2003 and 2006, claimant's MRIs did not change but, despite a series of lidocaine injections administered by Dr. Spear, CX 4, claimant's symptoms worsened. Dr. Gurtner diagnosed claimant as suffering from severe neck pain, numbness and tingling in his fingers, weakness in both hands, poor balance and increased muscle spasms. CX 1. Dr. Gurtner concurred in January 2005 that surgery would benefit claimant. *Id.* On October 6, 2005, however, Dr. Gurtner noted that claimant had stopped taking all of his medications, and that claimant's symptoms were suggestive of depression and the progression of his cervical stenosis. *Id.* Furthermore, Dr. Gurtner opined that surgery, even if claimant were to agree to it, was not possible until claimant's other medical conditions were brought under control. CX 12 at 25. The administrative law judge found that claimant's physical and psychological condition would improve substantially if he underwent the additional surgery suggested by his physicians and if he complied with the prescribed medical regimen for both his physical and psychological conditions. Decision and Order at 39-40. Thus, he concluded that claimant's physical and psychological condition remains temporary.

We cannot affirm the administrative law judge's finding that claimant's condition remains temporary. Claimant's condition has continued for a lengthy time, beyond a normal healing period, and Dr. Gurtner stated that claimant's condition has in fact deteriorated. *See, e.g.*, CX 1; *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979); *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986). Surgery is not anticipated, nor is its success certain, due to claimant's multiple health problems. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). The record establishes that as of October 2005, claimant had stopped taking medications for hypertension and diabetes, and had abandoned psychological treatment, a conclusion recognized by the administrative law judge. *See* Decision and Order at 39-40. Claimant testified that he does not take the recommended pain killers because it only masks his pain and causes stomach upset, HT at 32, and he fears becoming addicted to the medications. HT at 20. He also has refused additional surgery because the first was unsuccessful and he fears additional pain. HT at 26. Moreover, Dr. Gurtner stated that the second surgery could not be performed at that time because of claimant's multiple physical problems, *i.e.*, diabetes, coronary artery disease, anxiety and hypertension, none of which is under control, although claimant resumed taking his medications for these conditions. CX 12 at 25. Claimant is not undergoing treatment with the goal of improving his cervical condition. *See Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). That claimant's condition *might* improve if he

followed his doctors' instructions does not necessarily lead to the conclusion that claimant's condition remains temporary in view of its lasting nature and claimant's deteriorating condition. *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (7th Cir. 2007).

On the facts in this case, therefore, we hold that claimant's condition is permanent as it has continued for a lengthy period and neither surgery nor further improvement is anticipated.[2] *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). We must remand the case for a finding as to the date on which permanency was reached. Dr. Spear, claimant's treating physician at the time, opined that claimant had reached maximum medical improvement as of April 16, 2003 following his first surgery from a physiatric standpoint as further treatment was unlikely to lead to any improvement in claimant's condition. CX 4. Dr. Gurtner assigned permanent work restrictions in January 2004, CX 1 at 1, 7 and she stated that claimant had reached maximum medical improvement in January 2005, if claimant refused further surgery. CX 1 at 6, 7. At her deposition on June 15, 2006, Dr. Gurtner stated that claimant had reached maximum medical improvement if claimant refused additional surgery and that such was no longer anticipated or even recommended. CX 12 at 14-15, 17. We therefore remand the case to the administrative law judge for him to make a determination as to the date on which claimant's condition became permanent.

Claimant also appeals the administrative law judge's findings that employer established the availability of suitable alternate employment. The parties in this case do not dispute that claimant is incapable of returning to his former job duties; he has, therefore, established a *prima facie* case of total disability. The burden thus shifts to employer to demonstrate the availability of suitable alternate employment, which requires that it demonstrate the realistic availability of a range of jobs which claimant is capable of performing given his age, physical restrictions, and educational and vocational background. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

In an attempt to establish suitable alternate employment, employer relied upon the report of Ms. Byers, a vocational consultant, who, using the physical restrictions imposed by Dr. Gurtner in July 2005, identified eleven jobs in 2005. Ms. Byers reduced the number of suitable positions in 2006, after learning of claimant's further physical and

[2] The administrative law judge did not address employer's request for relief under Section 8(f), 33 U.S.C. §908(f), as he found claimant's condition was not yet permanent. As we reverse this finding, the administrative law judge should consider on remand employer's claim for Section 8(f) relief.

educational restrictions.[3] Although Dr. Gurtner approved certain positions as suitable in June 2005, she revoked that approval on October 18, 2005, citing claimant's increased depression and mounting symptoms of cervical stenosis. CX 1 at 10; CX 12 at 28. The administrative law judge rejected Dr. Gurtner's revocation of her approval of the jobs because it was based, in part, on her evaluation of claimant's educational and vocational history, which the administrative law judge found the doctor was not qualified to discuss.[4] The administrative law judge further found that claimant did not initially cooperate with Ms. Byers, in that he refused to meet with her until ordered by the administrative law judge. The administrative law judge found that employer thus was hindered in locating educationally and vocationally appropriate jobs. Relying on Dr. Gurtner's initial approval of some of the jobs Ms. Byers identified in 2005 and 2006, the administrative law judge found that employer established the availability of suitable alternate employment.[5]

The Board generally will not interfere with the administrative law judge's weighing of the evidence or credibility determinations. *See, e.g., Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154 (1993). However, the Board is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner, *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988), and a decision which is not supported by substantial evidence cannot be affirmed. *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968). In addressing suitable alternate employment, the administrative law judge is generally required to determine claimant's medical restrictions, *see, e.g., Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998), and to evaluate the jobs in terms thereof to determine which are suitable. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). In this case, the

[3] Ms. Byers identified jobs such as cashier, museum guide, unarmed security guard, parking lot cashier, toll collector and automobile parking lot attendant. EX 4. She subsequently stated that the jobs of dispatcher, police tele-communicator, contact lens lab technician, small parts assembler, travel counselor, service representative and lot attendant valet were not appropriate for claimant. HT at 52-53.

[4] Dr. Gurtner stated, *inter alia*, that claimant has only an eighth grade education and had worked only as a diver, and that she had been misled about claimant's educational and vocational history. CX 1 at 10.

[5] The administrative law judge found that claimant did not diligently seek alternate employment, noting that he did not look for any work, and citing claimant's abandonment of medical treatment as evidence of claimant's lack of cooperation and diligence.

administrative law judge did not analyze the jobs' requirements in terms of claimant's vocational and medical restrictions. In view of this lack of an analysis and other errors, we cannot affirm the administrative law judge's finding of suitable alternate employment.

The vocational expert's opinion here rests on the medical restrictions of Dr. Gurtner. Despite her initial approval of some of the jobs, Dr. Gurtner concluded by October 2005 that claimant was medically unable to work, CX 1 at 10, a view she continued to hold in June 2006 when she was deposed. CX 12 at 26. Although Dr. Gurtner discussed non-medical factors in reaching this conclusion, she stated on October 18, 2005, that "medically [claimant] is in no condition to carry out the jobs for which I had approved him." CX 1 at 10. Dr. Gurtner also testified that claimant could not return to any employment taking into account his multiple physical and psychological conditions.[6] CX 12 at 26. Dr. Gurtner's opinion that none of the proffered positions is suitable for claimant was thus based primarily on her evaluation of claimant's declining physical and psychological condition and not, as the administrative law judge concluded in discounting Dr. Gurtner's most recent opinion, solely on claimant's limited educational or vocational history. The fact that Dr. Gurtner discussed vocational factors is not a valid basis for wholly rejecting her most recent opinion and her deposition testimony regarding clamant's medical condition and ability to physically perform the proffered jobs. *See Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149 (1988).

[6] Employer suggests that Dr. Gurtner's revised opinion is not determinative because she considered all of claimant's medical conditions, including his diabetes and high blood pressure, asserting that its burden "is to show a range of jobs that claimant can secure and perform given his work injuries and vocational educational background." Employer's Brief at 6. Employer is mistaken in its attempt to eliminate these conditions from consideration of claimant's job capabilities. The Board has held that prior medical limitations must be considered in the same manner as pre-existing vocational or other limitations in evaluating the suitability of alternate employment. *See Fox v. West State, Inc.*, 31 BRBS 118 (1997). Under the aggravation rule, moreover, where an employment injury aggravates, accelerates or combines with a previous infirmity, the entire resulting disability is compensable. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Independent Stevedore Co. v. O'Leary*, 377 F.2d 144 (D.C. Cir. 1967). Thus, employer's argument that claimant's other conditions such as diabetes and high blood pressure are appropriately discounted in determining claimant's ability to perform alternate employment, despite the fact that they form the foundation of its claim for Section 8(f) relief based on "combining with" claimant's work-related restrictions is without merit. A condition which falls under the aggravation rule is considered work-related, and suitable alternate employment must account for such pre-existing conditions as well as conditions such as depression which result from the work injury.

The administrative law judge also erred in relying on the supposition that the proffered positions would be suitable if claimant were to comply with the recommended medical regime regarding his psychological condition. Decision and Order at 46. The administrative law judge must evaluate the suitability of jobs based on a claimant's *actual* medical condition, and not on speculation concerning claimant's condition should he improve.[7] *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). In this regard, moreover, Dr. Gurtner stated at her deposition on June 15, 2006, that claimant's cervical disease was progressing and that claimant remained medically incapable of working. CX 12 at 33. Dr. Gurtner's opinion is the only evidence regarding claimant's capabilities in the 2005-2006 time frame of the labor market survey; there is no contrary medical evidence of record which states that claimant is medically able to work or that the jobs employer identified are suitable given claimant's medical conditions.[8] Thus, the administrative law judge's finding that employer met its burden of establishing suitable alternate employment, at least as of the

[7] Although properly noting that employer did not raise the issue of the suspension of benefits pursuant to Section 7(d)(4), 33 U.S.C. §907(d)(4), the administrative law judge erred in referencing this section in addressing the suitability of the positions. When properly raised, a suspension under Section 7(d)(4) is addressed after necessary findings regarding the elements of the claim, such as causation and disability, have been made and requires application of specific tests to determine whether claimant unreasonably refused treatment. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 245 (1989).

[8] The administrative law judge also relied on claimant's failure to meet with Ms. Byers in April 2005, concluding that as a result she lacked correct vocational information regarding claimant's education. Claimant's initial refusal to meet with Ms. Byers was cured by his meeting with her in May 2006. *Piunti v. I.T.O. Corp. of Baltimore*, 23 BRBS 367 (1990). The expert was able, moreover, to locate employment which was vocationally suitable for claimant at the time of her first survey in May 2005, and thus claimant's failure to meet with her earlier did not affect the survey in any material way. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). In any event, the determining factor here involves claimant's medical condition and physical capabilities, which are not affected by his degree of cooperation with the expert. We note that the administrative law judge also discussed claimant's failure to pursue any of the identified jobs; however, claimant's diligence in seeking alternate employment is not relevant to whether employer has identified employment suitable for claimant, but is appropriately addressed after suitable jobs have been found. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Piunti*, 23 BRBS 367.

date of Dr. Gurtner's October 2005 opinion, is not supported by substantial evidence *See generally Monta,* 39 BRBS at 108. It is possible that that claimant may have been able to perform alternate work during the period between the date of the labor market survey and October 2005. On remand, the administrative law judge must reconsider this issue in accordance with this opinion.

Accordingly, the administrative law judge's findings that claimant's condition remains temporary and that employer established suitable alternate employment are vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge