BRB No. 96-1234A

MABEL P. RICKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
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 - Granting Benefits and Order Denying Reconsideration of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna), Norfolk, Virginia, for claimant.

Stephanie Burks Paine (Mason & Mason, P.C.), Newport News, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Granting Benefits and Order Denying Reconsideration (94-LHC-2383) of Administrative Law Judge John C. Holmes 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).[1] 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,*

[1]The appeal of the Director, Office of Workers' Compensation Programs, BRB No. 96-1234, was dismissed as abandoned by Board Order dated October 30, 1996.

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, working as a chipper, sustained employment-related injuries to her back, neck and shoulders when, on September 17, 1990, she fell approximately fifteen to eighteen feet into an open hold. Claimant was subsequently treated for her injuries in succession by Dr. Cabinum, Jr., Dr. McNair and Dr. Holm. In addition, claimant underwent physical therapy, which according to her, did little to help her pain.

At the suggestion of Dr. Holm, claimant received a psychiatric examination by Dr. Pile on March 22, 1993, who diagnosed claimant's condition as somatoform pain disorder and commented that somatoform pain disorder typically incapacitates an individual such that they have to quit working. In his medical report dated December 13, 1993, Dr. Holm, upon review of claimant's medical records including Dr. Pile's psychiatric evaluation, opined that while claimant has no ratable injury to her upper extremities, she is nevertheless totally disabled due to her somatoform pain disorder which is most likely related to her injury. Accordingly, Dr. Holm released claimant from further orthopedic care as of December 13, 1993.

In the meantime, claimant attempted to return to work with employer in a modified fire watch position in May 1993. Claimant, however, testified that she could not perform this employment because of her inability to lift the fire extinguisher assigned to her by employer. Hearing Transcript (HT) at 25-26. Since that time, claimant has not worked in any capacity.

Claimant, as a result of Dr. Holm's opinion dated December 13, 1993, filed the instant claim seeking an award of permanent total disability benefits.[2] In response, employer asserted that claimant had no lasting physical impairment as a result of her work-related injury. Alternatively, employer argued that claimant's disability was partial rather than total. Lastly, employer averred that if claimant was found to be permanently disabled, either total or partial, it is entitled to Section 8(f) relief, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from September 17, 1990, through October 20, 1994, and permanent total disability benefits thereafter. In addition, the administrative law judge determined that employer is entitled to Section 8(f) relief after the requisite 104 week period from October 20, 1994. Employer subsequently filed a Motion for Reconsideration with the administrative law judge, arguing that he did not clearly articulate the basis for his finding of

[2] As set forth in the stipulations filed with the administrative law judge, employer paid claimant temporary total disability benefits during all relevant time periods and continuing up to the time of the formal hearing.

permanent total disability, and that he erred in his finding as to the date of maximum medical improvement. In her response, claimant agreed with employer's contention regarding the date of maximum medical improvement, but urged rejection of employer's other arguments. In his Order dated May 9, 1996, the administrative law judge denied employer's Motion for Reconsideration, as well as the parties' request that the date of maximum medical improvement be modified.

On appeal, employer challenges the administrative law judge's determination that claimant is permanently and totally disabled, argues that the administrative law judge's Decision and Order does not comply with the requirements of the Administrative Procedure Act (APA), and asserts that the administrative law judge's finding as to the date of claimant's maximum medical improvement is erroneous. In her response brief, claimant urges affirmance of the administrative law judge's award of benefits and requests that the administrative law judge's determination as to the date of maximum medical improvement be modified from October 20, 1994, to December 13, 1993.

Employer initially argues that the evidence is insufficient to support the administrative law judge's determination that claimant is totally disabled. Employer maintains that the opinions of Drs. Cabinum and McNair establish that claimant suffers no permanent disability as a result of her work-related injury. Additionally, employer asserts that the opinion of Dr. Holm, upon which the administrative law judge has apparently relied, is flawed since it is based on incorrect information and because Dr. Holm's opinion on claimant's psychiatric condition goes beyond the scope of his medical expertise as an orthopedist. Employer further avers that the record clearly establishes that it has met its burden of establishing suitable alternate employment through its proffer of the medical opinion of Dr. Wagner and the testimony of its Risk Coordinator, Chris Hoyer.

To establish a *prima facie* case of total disability, claimant must show that she cannot return to her regular or usual employment due to a work-related injury. A psychological impairment which is work-related and which prevents claimant from returning to her regular or usual employment is sufficient to establish a *prima facie* case of total disability. *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989).

In the instant case, the administrative law judge rationally determined that claimant's somatoform pain disorder, which he determined is related to her work injury, prevents her from returning to her usual employment. Specifically, the administrative law judge found that each of the three examining physicians who specifically address claimant's mental condition, Drs. Degala, Pile and Holm, arrive at conclusions which support a finding that claimant cannot do her usual employment because of her somatoform pain disorder.[3] *See*

[3]Dr. Degala stated claimant is severely impaired by her many psychiatric disorders, including her somatoform pain disorder. Claimant's ability to reason, concentrate and perform routine repetitive tasks is impaired, as is her ability to make personal, social and occupational adjustments. CX 12. Dr. Pile stated that somatoform pain disorder typically incapitates a person and that claimant's prognosis is poor. CX. 22. He specifically stated

generally Parent v. Duluth, Missabe & Iron Range Railway Co., 7 BRBS 41 (1977). As the administrative law judge's determination that claimant is unable to perform her usual work is based entirely upon claimant's psychological injury, claimant's physical condition is not at issue. Thus, contrary to employer's contentions, inasmuch as the medical opinions of Drs. Cabinum, McNair and Wagner do not address claimant's somatoform pain disorder, they are not relevant to a consideration of whether this disorder prevents claimant from returning to her usual employment.

In addition, employer's contentions regarding the validity of Dr. Holm's opinion are likewise meritless. First, there is no indication that claimant's allegedly inaccurate statements regarding unsuccessful attempts to return to work had any bearing on Dr. Holm's conclusion that claimant's work-related somatoform pain disorder is totally disabling. According to Dr. Pile, upon whom Dr. Holm relies, the diagnosis of somatoform pain disorder is premised in large part on the fact that claimant's subjective complaints of pain grossly exceed what would be expected from her physical findings, and as such do not necessarily relate to her alleged misrepresentations regarding her ability to perform work. Secondly, Dr. Holm's diagnosis of somatoform pain disorder does not go beyond the scope of his expertise. Dr. Holm clearly applied the psychiatric evaluation and recommendation of Dr. Pile to his own observations and records regarding claimant's condition in drawing his conclusion that claimant is totally disabled by somatoform pain disorder.[4] In fact, Dr. Holm's diagnosis of somatoform pain disorder does not occur until after the initial evaluation and diagnosis by Dr. Pile on March 22, 1993. Consequently, the administrative law judge's determination that claimant's somatoform pain disorder prevents her from performing her usual job as a chipper is affirmed as it is supported by substantial evidence. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

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claimant was not malingering. *Id*. Dr. Holm stated claimant is totally disabled from her somatoform pain disorder. CX 13.

[4]The record establishes that Dr. Holm recommended that claimant proceed with a psychological evaluation only after he had repeatedly found a significant difference between claimant's subjective complaints and her actual physical function.

Moreover, the administrative law judge's finding, premised on the opinions of Drs. Holm, Pile and Degala, that claimant's psychiatric condition renders her totally unable to perform any employment is supported by substantial evidence. *See* n.3, *supra; Lostaunau v. Campbell Industries, Inc.,* 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (1982), *cert. denied,* 459 U.S. 1104 (1983); *see generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). The record contains no psychological evidence to the contrary and all of employer's contentions regarding its efforts to show the availability of suitable alternate employment focus entirely on claimant's physical ability to perform other employment. Therefore, employer's contention that it has established the existence of suitable alternate employment is without merit. Accordingly, we affirm the administrative law judge's determination that claimant is totally disabled.[5] *Id.*

Employer next contends that inasmuch as claimant only sought an award of permanent total disability benefits from December 13, 1993, it was improper for the administrative law judge to award claimant temporary total disability benefits from the date of injury, September 17, 1990, through October 20, 1994.

In her Pre-Hearing Statement, Form LS-18, and her post-hearing brief, claimant specifically states that she is seeking permanent total disability from December 13, 1993, as a result of her September 17, 1990, work-related injuries. In addition, the Memorandum of Informal Conference submitted into evidence in this case by claimant clearly articulates that the present claim is for "permanent total disability from December 13, 1993 to the present and continuing based on Dr. Holm's report of that date." Moreover, the parties stipulated that as a result of claimant's injury she was paid temporary total disability benefits for the majority of the period spanning the date of her injury to the time of the hearing. *See* note 2, *supr*a. Inasmuch as claimant has already received temporary total disability compensation through employer's voluntary payment of benefits, and since claimant repeatedly stated that she is seeking benefits from December 13, 1993, we hold that claimant is not entitled to additional temporary total disability benefits prior to that date.

Employer lastly argues that the administrative law judge erred in finding that claimant's date of maximum medical improvement is October 20, 1994. In support of its contention, employer cites the opinions of Drs. Cabinum, Hall, and Holm, whom, employer alleges, each set the date for claimant's maximum medical improvement sometime prior to October 20, 1994. Employer specifically maintains that Dr. Cabinum's determination that claimant reached maximum medical improvement by November 16, 1992, establishes that claimant's condition became permanent on or before that date. Employer also notes that the Director, in his summary post-hearing brief in this case, also referred to Dr. Cabinum's

[5]Moreover, inasmuch as the administrative law judge's determination that claimant is unable to perform any employment due to her somatoform pain disorder and thus, is totally disabled, is rational and supported by substantial evidence, we hold that the administrative law judge's Decision and Order conforms to the requirements of the APA.

determination that claimant reached maximum medical improvement by November 16, 1992, and that the Director did not contend at any time that another date be used. Claimant, in her response brief, agrees that the administrative law judge erred in determining that maximum medical improvement occurred on October 20, 1994. Claimant argues that Dr. Holm's opinion clearly establishes that she reached maximum medical improvement on December 13, 1993, and thus, the administrative law judge's finding should be modified to reflect that corrected date.

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. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968) *cert. denied*, 394 U.S. 976 (1969). Moreover, a condition may be considered to be permanent if the employee is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

The administrative law judge found that Dr. Pile's reevaluation report of October 20, 1994, establishes the date of maximum medical improvement "since prior to that time most, if not all of the physicians who commented on this matter felt that claimant could return to work." The administrative law judge's statement, however, is neither supported by the evidence of record nor consistent with his finding of total disability. In addressing the issue as to the extent of disability, the administrative law judge primarily relied upon the medical opinion of Dr. Holm dated December 13, 1993, in which Dr. Holm concluded that claimant is totally disabled due to somatoform pain disorder which is related to her work injury. In that same opinion, Dr. Holm released claimant from his orthopedic care with the recommendation that she seek psychiatric care. *See generally Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). Consequently, Dr. Holm was of the opinion that claimant was not able to return to work and thus was totally disabled by her somatoform pain disorder as of December 13, 1993. Dr. Holm's conclusion is confirmed by the later psychiatric evaluations of Drs. Pile and Degala, who both commented that claimant's prognosis is poor. *See generally Abbott*, 40 F.3d at 122, 29 BRBS at 22 (CRT). These opinions are not inconsistent with an earlier date of permanency as they indicate a long lasting condition. *See generally Walsh v. Vappi Construction Co.*, 13 BRBS 442 (1981). We therefore modify the administrative law judge's finding that claimant's condition became permanent as to her psychiatric condition to December 13, 1993, in light of Dr. Holm's opinion of that date.[6] *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988),

[6]Employer's contention that Dr. Calbinum's opinion dated November 16, 1992 should be used to establish the date that claimant reached maximum medical improvement is rejected, since as has been previously noted, Dr. Calbinum has not address claimant's

aff'd, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*).

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disabling psychiatric condition in any capacity.

Accordingly, the administrative law judge's award of temporary total disability benefits prior to December 13, 1993, is vacated. His finding that claimant's psychiatric condition became permanent on July 20, 1994, is modified to December 13, 1993; the decision is thus modified to reflect the Special Fund's liability after 104 weeks from this date. In all other respects the administrative law judge's Decision and Order - Granting Benefits and Order Denying Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge