BRB No. 09-0283

K.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	DATE ISSUED: 09/09/2009
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John Schouest and Limor Ben-Maier (Wilson, Elser, Moskowitz, Edelman, & Dicker LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LDA-00258) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 was diagnosed with a Grade 3 open left femur fracture caused by a gunshot wound he received on April 8, 2004, while working in Iraq for employer. As a result, claimant underwent several surgical procedures to his left leg. Dr. Cooke stated that claimant's left leg injury reached maximum medical improvement on May 6, 2005, and that claimant was most likely ready to return to work, but probably not to heavy work. Functional Capacity Evaluations performed on March 28, 2005, and on September 9, 2005, demonstrated that claimant was unable to return to his previous employment. Claimant continued to experience chronic left knee pain, and on July 23, 2008, Dr. Cooke recommended that claimant undergo a left knee arthroscopy with abrasion chondroplasty of the patello-femoral joint.

Meanwhile, claimant stated that he began experiencing severe depression, anxiety attacks, panic attacks, flashbacks and nightmares. On May 10, 2005, Dr. Brinkman, a clinical neuropsychologist, diagnosed post-traumatic stress disorder (PTSD), and recommended that claimant begin taking anti-depressants. Dr. Brinkman subsequently opined that claimant reached maximum medical improvement with regard to his psychological condition as of November 8, 2005, and assessed claimant with a psychological impairment rating of 12 percent. Dr. Brinkman, however, resumed treating claimant in February 2006, and continued to see him occasionally over the course of the next few years.

Claimant stated that because employer ceased payment of both compensation and medical benefits in October 2007, by February 2008, the need to support his family compelled him to take a job against his doctor's orders, with Nuasis Power Equipment Company (Nuasis) as a truck driver hauling heavy equipment, near his home in Abilene, Texas. Claimant testified that his physical and emotional problems and large doses of prescription medication made performing this work difficult. Nonetheless, claimant stated that he has been working approximately 42 hours of work per week in this position.

Employer voluntarily paid claimant temporary total disability benefits for the period between April 9, 2004, and September 2, 2005, as well as permanent partial disability benefits pursuant to the schedule, based on claimant's 26 percent impairment to his left lower extremity. 33 U.S.C. §908(b), (c)(2). When employer ceased paying claimant compensation, it also ceased paying claimant's medical bills for treatment of his leg injury and PTSD. Claimant thereafter filed a claim seeking additional benefits under the Act.

The administrative law judge found that claimant established invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his PTSD, and that employer did not establish rebuttal thereof.[1] The administrative law judge also found that the evidence as a whole establishes that claimant's PTSD is related to his April 8, 2004, work injury. The administrative law judge next found that claimant has not reached maximum medical improvement with regard to either his left leg injury or his psychological condition. The administrative law judge further found that claimant's current work for Nuasis does not constitute suitable alternate employment, and he therefore concluded, since employer did not put forth any other evidence as to the availability of suitable alternate employment, that claimant is entitled to an ongoing award of temporary total disability benefits from April 8, 2004.[2]

On appeal, employer challenges the administrative law judge's findings that claimant has not reached maximum medical improvement and that claimant's current work is not suitable alternate employment. Additionally, employer argues that the administrative law judge erred by not finding it entitled to a credit for claimant's earnings with his new employer.

Employer contends that the administrative law judge erred in finding that claimant has not reached maximum medical improvement with regard to his injuries. Employer argues that this issue was not raised before the administrative law judge and that, moreover, the record establishes that claimant has been at maximum medical improvement with regard to his left knee injury since at least May 2005, and with regard to his psychological condition since October 3, 2005. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Beumer v. Navy Personnel Command/MWR,* 39 BRBS 98 (2005); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). The administrative law judge may find that a claimant has reached maximum medical improvement when he is no longer undergoing treatment with a view toward improving his condition. *See Gulf Best Electric, Inc. v. Methe,* 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

[1] The parties stipulated that claimant's left leg injury was work-related.

[2] The administrative law judge also awarded medical benefits relating to both injuries. He found employer entitled to a credit for all advanced payments of compensation made to claimant and liable for payment of interest on all of the sums determined to be in arrears.

We reject employer's assertion that the issue of permanency was not raised before the administrative law judge. The parties and the administrative law judge identified the nature of claimant's disability as an issue in the dispute. *See* Decision and Order at 2; Joint Exhibit 1. Moreover, substantial evidence supports the administrative law judge's finding that claimant's condition remains temporary. The administrative law judge found that despite initial maximum medical improvement determinations by Drs. Cooke and Singleton with regard to claimant's left knee, and by Dr. Brinkman with regard to claimant's psychological condition, the record establishes that claimant's orthopedic and psychiatric conditions required further treatment. The administrative law judge found that on July 23, 2008, Dr. Cooke recommended claimant undergo another surgery for his left knee condition, and that on June 12, 2006, Dr. Hubbard opined that claimant would continue to need psychological counseling and medical intervention to address his PTSD.

Dr. Cooke's initial finding that claimant's left knee condition had reached maximum medical improvement as of May 6, 2005, included a cautionary statement that further treatment might still be needed in the future. In 2008, Dr. Cooke's most recent reports state his belief that claimant requires more surgery to relieve increased symptoms of pain. Employer's Exhibit (EX) 12. Similarly, the record reflects that Dr. Hubbard stated on June 12, 2006, that claimant's treatment of his PTSD would continue for an "indefinite" period of time and that claimant's condition "requires continuing psychological counseling and medical intervention." EX 5. Additionally, while claimant's treating neuropsychologist, Dr. Brinkman, stated on October 3, 2005, that treatment of claimant's psychological condition was "terminated," the record shows that claimant continued to see Dr. Brinkman for treatment relating to certain aspects of his PTSD, *i.e.*, flashbacks and an inability to sleep.[3] Based on this evidence of continued treatment, we affirm the administrative law judge's finding that claimant has not reached maximum medical improvement with regard to his left knee injury and psychological condition, as it is rational, supported by substantial evidence, and in accordance with law. *Methe*, 396 F.3d 601, 38 BRBS 99(CRT); *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

Employer next argues that the administrative law judge erred in finding claimant to be totally disabled because claimant had been successfully performing his job with Nuasis for at least five months prior to the formal hearing without having missed a day

[3] Specifically, claimant sought treatment from Dr. Brinkman on February 27, 2006, March 7, 2006, May 30, 2007, March 12, 2008, at which time Dr. Brinkman informed claimant "that [he] hoped the primary symptoms of [claimant's] PTSD would eventually clear up," adding that "re-establishing functional capability" is presently "the primary treatment goal." EX 12. Claimant saw Dr. Brinkman again on April 10 and 23, 2008.

due to his work-related injuries. Employer also asserts that claimant's admission that he is capable of working at least eight hours a day, five days per week, establishes that claimant's work with Nuasis is suitable alternate employment. Employer thus asserts that claimant is entitled only to an award of partial disability benefits from the date he began this job.

The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain, although an award of total disability while working is the exception, rather than the rule. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006). In this case, the administrative law judge found that both doctors treating claimant for his PTSD, *i.e.*, Drs. Brinkman and Hubbard, opined that claimant would be unable to return to work for eight hours a day, and that he was unable to return to his usual employment. EX 12. The administrative law judge next found that despite these physicians' admonitions against returning to full-time work, claimant, having had his disability and medical benefits terminated by employer,[4] obtained a job as a truck driver hauling heavy equipment in order to make money to support his family. HT at 24.

In addressing claimant's ability to perform this work, the administrative law judge credited claimant's testimony that the medications he takes for his PTSD adversely affect his job performance by making him drowsy so that he has to pull over several times a day to take naps, which claimant recognizes makes it unsafe for him to work as a truck driver.[5] HT at 25. Additionally, the administrative law judge credited claimant's testimony that his left leg has "been giving [him] a lot of trouble since [he] went back to work," and that the "chronic knee pain and pain in [his] leg" led him to return to Dr. Cooke for treatment on March 5, 2008, almost two years after his last visit to that physician, and only several weeks into this employment. HT at 20; CX 13. The administrative law judge relied on claimant's description of his pain as "constant and severe" and his statement that his condition would worsen during the day to the point that he was unable to do very much afterward. Decision and Order at 26. The administrative

[4] The record indicates employer terminated its voluntary payment of disability and medical benefits as of October 26, 2007. EX 9. Claimant began working for Nuasis in February 2008.

[5] Claimant added that "if I got caught doing that [taking a nap while working with Nuasis], I probably wouldn't have the job very long." HT at 25.

law judge further found that in July 2008, Dr. Cooke recommended further surgery to address his knee pain.

We affirm the administrative law judge's finding that claimant is totally disabled as it is supported by substantial evidence and consistent with law. Initially, the opinions of Drs. Hubbard and Brinkman regarding claimant's work capability with his PTSD and related medication, which the administrative law judge credited, support the conclusion that the job with Nuasis is not within his work-related restrictions. Thus on its face, this job would not meet employer's burden to demonstrate alternate employment which is suitable for claimant. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1981). Moreover, the administrative law judge's findings establish that claimant took this unsuitable job only because he had no other source of income after employer terminated benefits, and he continued to work despite severe pain in his knee, for which additional surgery is recommended. Under these circumstances, there is ample evidence supporting the administrative law judge's conclusion that this case falls within the rare circumstance where claimant is totally disabled despite having some post-injury employment. *See Lewis*, 572 F.2d at 451, 7 BRBS at 850. Therefore, as the opinions of Drs. Hudson and Brinkman regarding claimant's limited ability to work due to his PTSD, in conjunction with claimant's testimony regarding his difficulties in performing his work based on his pain medications and his increased pain due to his left leg injury and the fact that claimant took the job due to financial necessity, provide substantial evidence in support of the administrative law judge's finding that claimant performed his job at Nuasis only through extraordinary effort and in spite of considerable pain, it is affirmed. *See Reposky*, 40 BRBS 65; *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999). Accordingly, as employer has not presented any other evidence of suitable alternate employment, we affirm the administrative law judge's award of continuing temporary total disability benefits.

Lastly, employer argues that it is entitled to a credit for any earnings claimant received in his employment with Nuasis. The Act contains specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. *See* 33 U.S.C. §§903(e), 914(j), 933(f). In *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999), the administrative law judge awarded claimant temporary partial disability benefits from the date that he was laid off from his post-injury employment by employer, but also awarded employer a credit for income claimant earned from other employers subsequent to that date. On appeal, the Board addressed the very argument now raised by employer and held that the Act contains no provision which entitles an employer to a credit for income a claimant has earned from other employers in post-injury employment. *Cooper*, 33 BRBS 46. Based on this holding, we reject employer's assertion that it is entitled to a credit for the wages earned by claimant in his work with Nuasis. *Id.*

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge