BRB No. 99-0380

ROSEMARY MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANDOLPH AIR FORCE BASE	)	DATE ISSUED: Dec. 23, 1999
	)	
and	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

William Dale Gilliam, Universal City, Texas, for claimant.

Charles L. Brower (Air Force Services Agency, Office of Legal Counsel), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2840) of Administrative Law Judge James W. Kerr, Jr., awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, 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 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, while employed as a food service worker at employer's Non-Commissioned Officers' (NCO) Club on October 11, 1988, sustained injuries to the back of her head, neck, low back, left leg and left arm when she slipped on a liquid substance and fell down some stairs. Dr. Holmes, who treated claimant from October 21, 1988, through January 12, 1989, diagnosed at first a lumbar strain/sprain and then a herniated disc at L4-5, prescribed continued physical therapy and epidural steroid injections, ostensibly placed claimant on ||no duty= status,[1] and ultimately referred her to Dr. Pontius. Dr. Pontius diagnosed a herniated disc at L4-5, placed claimant on ||non-duty= status as of January 12, 1989, and subsequently performed a laminectomy and discectomy, bilateral with

[1]Dr. Holmes made various statements over the course of his treatment regarding claimant's ability to work. On October 21, 1988, he put claimant on ||no duty= status; on November 7, 1988, he opined that claimant should not work more than five hours a day upon her return to work and that in three weeks he would increase her hours; on November 11, 1988, he disallowed claimant to return to work; on November 22, 1988, he stated that claimant should not return to work for four weeks; on December 2, 1988, he ordered no duty; on December 9, 1988, he opined that claimant could resume limited work, specifying folding napkins at short intervals, effective December 12, 1988; on December 20, 1988, he stated that claimant remains on light duty, and on January 12, 1989, he recommended no light duty for another month.

posterior fusion at L4-5 on August 29, 1989. He cleared claimant to return to her old job, modified to light duty, effective June 1, 1990. He saw claimant again in 1994, and reiterated that she should be kept on light duty status.[2]

Employer voluntarily paid temporary total disability benefits during the periods of October 21, 1988 through December 11, 1988, January 12, 1989 through April 16, 1992, October 21, 1993 through January 17, 1996, and from April 25, 1997, and continuing. Claimant filed a claim seeking benefits for the periods not paid by employer, as well as for ongoing permanent total disability and additional work-related medical expenses.

[2]Claimant also received treatment at various times from Drs. Garcia, Growney, Hardy, Swan, Harsha, Zanetti, Snook, and Wilk, as well as a chiropractor, Dr. Edwards.

In his decision, the administrative law judge determined that claimant is entitled to temporary total disability benefits from October 11, 1988, until March 30, 1997,[3] permanent total disability benefits continuing from March 31, 1997, and all future reasonable medical expenses incurred due to the October 11, 1988, work-related injury. Employer appeals the administrative law judge's award of benefits. Claimant responds, urging affirmance.

Suitable Alternate Employment

On appeal, employer initially asserts that the administrative law judge erred in finding that claimant was totally disabled for the period from December 12, 1988, through January 11, 1989, since claimant was in light duty status during that period of time. Employer maintains that the medical reports of Dr. Holmes dated December 9 and 20, 1988, and of Dr. Pontius dated January 12, 1989, as well as the testimony of claimant and a co-worker, Ms. Torres, affirmatively establish that claimant was performing light duty work folding napkins during the time period in question.

In addressing the issue of claimant's work status between December 12, 1988, through January 11, 1989, the administrative law judge noted that Dr. Holmes was the only treating physician at that time and therefore limited his discussion to Dr. Holmes's statements. The administrative law judge found that Dr. Holmes's letter dated December 9, 1988, wherein he opined that claimant is able to resume limited work as of December 12, 1988, is inconsistent with his other medical reports. First, the administrative law judge noted that in his December 9, 1988, report, Dr. Holmes erroneously listed the last day of treatment as November 25, 1988, when in fact, he last saw claimant on December 2, 1988. Additionally, the administrative law judge noted that on December 2, 1988, Dr. Holmes explicitly stated that claimant ||is to stay off duty,= which he found was further supported by his notes on January 12, 1989, that claimant ||has been unable to work 2 hours a day due to sitting,= and which is consistent with Dr. Holmes's statement as of November 22, 1988, that claimant should not return to work for four weeks. CX 19. The administrative law judge determined that Dr. Holmes' report dated December 2, 1988, is dispositive on the issue of claimant's work status for the period in question, and therefore

[3]The administrative law judge determined, based upon the opinions of Drs. Harsha, Pontius, and Garcia, that claimant's condition reached maximum medical improvement as of March 31, 1997.

discredited the December 9, 1988, report as it was based on inaccurate data.[4] *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71, 73 (1996); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

[4]As the administrative law judge discussed and resolved the discrepancy in Dr. Holmes's opinions regarding claimant's work status, and as it is within his discretion to accord greatest weight to Dr. Holmes's opinion dated December 2, 1988, his failure to specifically address the notation made by Dr. Holmes in his December 20, 1988, that claimant remains in light duty status, is harmless error. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969)

Absent from the administrative law judge's analysis is any discussion of claimant's testimony that she briefly returned to sedentary work folding napkins, which is corroborated by the testimony of Ms. Torres, or of the medical report of Dr. Pontius dated January 12, 1989. However, neither claimant's nor Ms. Torres's testimony establishes a specific date for this employment or that this light duty continued over the particular time period in question,[5] and Dr. Pontius's statement on January 12, 1989, that "if [claimant] continues to get better, we can try her again at light duty . . . ," CX 20, is not sufficient to establish that claimant did, in fact, work in a light duty capacity during the disputed period. Consequently, this evidence is insufficient to establish that claimant was not entitled to total disability benefits between December 12, 1988, and January 11, 1989. This is particularly true, in light of definitive medical opinion stating "no duty" rendered by Dr. Holmes on December 2, 1988, which was credited by the administrative law judge. We therefore affirm the administrative law judge's finding that claimant was temporarily totally disabled for the period in dispute, *i.e.*, December 12, 1988, to January 11, 1989.

Employer next argues that the administrative law judge's finding that claimant has been totally disabled continuously since October 11, 1988, is erroneous because employer provided suitable alternate employment by offering claimant a light duty job, which was approved by her primary treating physician, Dr. Pontius, effective June 1, 1990. Additionally, employer asserts that claimant failed to respond to its offer, and therefore exhibited a complete unwillingness to work.

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[5]The record contains employer's supplementary report of accident dated December 13, 1988, wherein it lists the date claimant returned to work as December 12, 1988; however, there are no other records in evidence, *e.g.*, payroll stubs, to confirm this. Also, at her deposition dated January 16, 1988, claimant stated that she did come back to work in December 1988, and that she worked "off and on," but she could not give any additional details as to how long she did this light duty work. EX at 52-3.

In discussing the issue of suitable alternate employment, the administrative law judge focused on, and found unsuitable, the sedentary light duty position checking identifications and folding napkins (checker and folder) offered by employer as of December 12, 1988, and the seven positions identified in a labor market survey dated July 3, 1990.[6] Although the administrative law judge did not explicitly consider the position offered by employer at its NCO club effective June 1, 1990, the record as a whole supports the administrative law judge's determination that claimant is totally disabled and therefore is not capable of performing that work. Specifically, Dr. Pontius's opinion dated April 11, 1990, wherein he stated that claimant should be able to go back to the light duty position of checker and folder probably in June 1990, is, at best, speculative regarding the issue of whether claimant was actually capable of the light duty employment as of June 1, 1990, particularly, given his office note dated January 31, 1990, in which he explicitly stated, with regard to claimant's work status, "no duty for six months," CX 20, and Dr. Swan's opinion, following his examination of claimant on July 13, 1990, that claimant is unemployable.[7] Accordingly, we reject employer's contention that it established suitable alternate employment from June 1, 1990, and thus, that claimant is not entitled to total disability benefits from that time forward.[8]

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[6]Employer does not challenge the administrative law judge's finding as to the unsuitability of the positions identified in the labor market survey.

[7]Additionally, we note that the record establishes that claimant moved from San Antonio, Texas, to Oklahoma City, Oklahoma, in 1989, and remained there until moving to Corpus Christi, Texas in 1991, EX 37, and the light duty job offered claimant in employer's NCO club in San Antonio therefore may not meet employer's burden of offering suitable alternate employment within the geographical area where the employee resides. *See generally Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43 (CRT)(1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

[8]Employer further argues that the administrative law judge erred in crediting claimant's testimony regarding her physical condition over that provided by her former co-worker, Ms. Torres. In addressing employer's contention, the administrative law judge found that the testimony offered by Ms. Torres of four alleged encounters with claimant was at best vague and therefore did not rebut claimant's contention that she was not able to do the light duty work offered. The

Section 7(d)(4)

Employer argues that the administrative law judge's rejection of its argument that claimant is not entitled to benefits because she unreasonably refused to follow the advice of her doctors to lose weight and to exercise is contrary to law. Specifically, employer avers that since July 26, 1989, and continuing, claimant has unreasonably refused to submit to the medical treatment recommended by every doctor who has treated her, *i.e.*, to lose weight, and thus, that by operation of Section 7(d)(4), 33 U.S.C. §907(d)(4), employer could and should have suspended compensation payments continuing into the present.

Section 7(d)(4) sets forth a dual test for determining whether benefits may be suspended as a result of a claimant's failure to undergo medical or surgical treatment. *See Malone v. International Terminal Operating Co., Inc.*, 29 BRBS 109

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administrative law judge specifically noted that Ms. Torres could not ascribe dates to the alleged encounters with claimant, but "felt" they were after claimant's accident. The administrative law judge therefore acted within his discretion by not giving great weight to the testimony of Ms. Torres. *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996). In addition, contrary to employer's contention, the administrative law judge rationally found that claimant's complaints of pain are credible as there is a wealth of medical testing over the ten-year period that demonstrates the physiological genesis of her pain and disability. Moreover, as employer did not establish the availability of suitable alternate employment in this case, the claimant's lack of willingness to secure post-injury employment is not at issue and therefore the credibility of her testimony regarding her post-injury job search is moot.

(1995); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979). In *Hrycyk*, the Board held that employer must make an initial showing that the claimant's refusal to undergo medical or surgical treatment is unreasonable; the reasonableness of a claimant's actions must be appraised in objective terms. *Hrycyk*, 11 BRBS at 238. If employer meets this burden, the burden shifts to claimant to show that the circumstances justify her refusal; appraisal of the justification of the claimant's actions is a subjective inquiry. *Id.*, 11 BRBS at 241-243.

In rejecting employer's contention, the administrative law judge found that, as noted by her original treating physician, Dr. Holmes, claimant was "corpulent" at the time of injury and thus the administrative law judge concluded that it would be "unreasonable to expect her to maintain a regimen that she did not embrace prior to her injury." Decision and Order at 19. Although the administrative law judge's decision lacks a specific discussion of Section 7(d)(4), his finding nevertheless falls within the relevant dual test, *i.e.*, if not the objective factor then most certainly the subjective factor, discussed in *Hrycyk*. We therefore affirm the administrative law judge's finding that claimant was unable to lose weight is reasonable given her background, particularly since, as the administrative law judge observed, claimant testified that she tried without success such diet programs as Jenny Craig, Slim Fast, and a banana diet, and the record further reflects that she unsuccessfully participated in an 18 week Weight Watchers program, post-hearing. *Hrycyk*, 11 BRBS at 238.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge