BRB No. 05-0625

ADELHEID REINHARDT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY	)	DATE ISSUED: 03/29/2006
	)	
and	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	
	)	
Employer/Carrier-Respondent	)	DECISION and ORDER

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

Adelheid Reinhardt, El Paso, Texas, *pro se*.

Cynthia A. Galvan (Brown Sims, P.C.), Houston, Texas, for employer/ carrier.

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

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order on Remand (2001-LHC-2988) 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 (the Act). In an appeal by claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational supported by substantial evidence and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

This case is before the Board for a second time. On August 4, 1999, claimant was employed as a waitress in a "café" located at Fort Bliss when she slipped on a wet floor and fell on her right knee. She broke her kneecap in the fall, and underwent surgery on August 4, 1999. Employer voluntarily paid temporary total disability benefits from August 5 through November 7, 1999, as well as permanent partial disability benefits for a 10 percent impairment to the leg. Claimant was released to return to full duty on November 8, 1999, and she returned to her usual job on December 2, 1999. She continued to work until October 18, 2001, when she suffered another fall in which she broke her wrist. Claimant sought additional treatment for her knee from the physician who was treating her wrist injury, Dr. Neustein. Dr. Neustein rated claimant's knee impairment at 18 percent. He released her to return to work in February 2002 from the perspective of both the knee and wrist injuries, but claimant was deemed unfit to return to her former work in a functional capacity evaluation performed on February 13, 2002. Claimant sought additional benefits under the Act.

In his original decision, the administrative law judge accepted the parties' stipulation that claimant's right knee injury reached maximum medical improvement on August 18, 2000. He found that claimant returned to her usual work in December 1999 and determined that employer established the availability of suitable alternate employment after claimant's wrist injury.[1] Thus, the administrative law judge found that claimant is limited to an award under the schedule for an 18 percent impairment to the leg. 33 U.S.C. §908(c)(2). Claimant appealed this decision, and the Board affirmed the administrative law judge's finding regarding the date of maximum medical improvement and the administrative law judge's finding that claimant suffered an 18 percent impairment to her leg. *Reinhardt v. Dep't of the Army*, BRB No. 02-0730 (June 25, 2003). However, the Board vacated the administrative law judge's finding regarding the extent of claimant's disability as a result of the knee injury and remanded for the administrative law judge to discuss claimant's ability to return to her usual work after February 13, 2002, and, if necessary the suitability of the alternate jobs identified by employer's vocational rehabilitation counselor.[2] *Id.*

[1] It cannot be ascertained from the record whether claimant filed a claim for the wrist injury suffered in the fall on October 18, 2001. However, it appears that employer paid claimant temporary total disability benefits for the period between October 19, 2001 and February 27, 2002. Cl. Ex. II. As the administrative law judge correctly stated, a claim for the wrist injury, if any was filed, was not before him in the instant case.

[2] The Board denied claimant's motion for reconsideration. Claimant appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, which dismissed the appeal for failure to timely file a statement of the issues.

On remand, the administrative law judge found that claimant was able to perform her usual work after recovering from her knee injury and was doing so when she suffered the second fall. Moreover, the administrative law judge found that any claim for the wrist injury claimant suffered in the second fall, which "might have caused a greater disability," was not before him, and he thus denied further benefits.[3] Claimant appeals this decision without legal representation. Employer responds, urging affirmance of the administrative law judge's decision on remand.

To establish a *prima facie* case of total disability, the employee must show that she cannot return to her regular or usual employment due to her work-related injury. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In order to determine whether claimant has met her burden, the administrative law judge must compare her medical restrictions with the specific physical requirements of her usual employment. *Carroll v. Hanover Bridge Marina* , 17 BRBS 176 (1985).

The administrative law judge found on remand that claimant recovered from the 1999 injury and had returned to her usual work for almost two years at the time she sustained her wrist injury. The administrative law judge also stated that it appears the Board mistakenly included the sequelae of claimant's wrist injury for consideration as to the extent of claimant's disability. Although it is not disputed that claimant did return to work following her recovery from her 1999 knee injury, claimant submitted evidence dated after the wrist injury addressing additional complaints in her right knee. Specifically, following the wrist injury, claimant began treatment with Dr. Neustein. Emp. Ex. 5; Cl. Ex. 2. On January 18, 2002, Dr. Neustein diagnosed claimant as suffering from "internal derangement of the right knee," and projected that claimant would be able to return to full work on February 28, 2002. However, on February 15, 2002, Dr. Neustein diagnosed post-traumatic chondromalacia of the right knee and stated that in order to determine whether claimant could return to her former duties, a functional capacity evaluation would need to be performed. Cl. Ex. 2. This evaluation was performed on February 13, 2002 by Monty Barry, LPT. Emp. Ex. 3; Cl. Ex. 2. He reported that claimant had undergone knee surgery in 1999, as well as having sustained a wrist injury and ankle injury, but that her chief complaint was left wrist and thumb pain. Mr. Barry concluded that claimant is not fit to return to her job as a waitress. He did not specifically state which injury is the cause of this inability to return to work, but he did

[3] The administrative law judge stated that perhaps he should not have originally addressed the issue of suitable alternate employment as that pertains to claimant's capacity to work after the wrist injury, which is not before him. Decision and Order at 3 n. 1.

report that claimant was found to be unable to stand for more than one hour in a day and that she would require a light level job with more sitting than standing. Emp. Ex. 3.

In addition, claimant's credible complaints of pain alone may be enough to establish her inability to perform her usual work. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Although claimant did return to her job as a waitress following the 1999 injury, and worked without a loss in hours until her 2001 wrist injury, she resigned her position with employer effective February 13, 2002, stating that her "main problem really is my knee" and that she felt she could no longer perform the job. H. Tr. at 33. While the administrative law judge correctly found that the wrist injury is not before him, the knee injury, and any resulting disability, is before him and he must address the evidence relevant to that issue.[4] If claimant's disability is due, even in part, to the knee injury, claimant may be entitled to further compensation. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). On remand, the administrative law judge did not address the relevant evidence of record relating to claimant's ability to perform her former duties as of 2002 from the perspective of her 1999 knee injury. Therefore, we remand the case to the administrative law judge for further findings on this issue. *See generally Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). In addition, if the administrative law judge finds that claimant's knee injury prevents her return to her usual work, the administrative law judge also must consider the suitability of the alternate positions identified by employer in the labor market survey from the perspective of claimant's knee injury.[5] *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

[4] Although claimant returned to work for a period of time and sustained a new injury prior to the administrative law judge's consideration of claimant's claim, his review of the evidence was the initial adjudication of the knee injury claim. All aspects of the claim and periods of disability remained open and pending for the administrative law judge's resolution. *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1979).

[5] If, on remand, claimant is found to be able to perform her usual work from the perspective of her knee injury, or if the administrative law judge finds that suitable alternate employment is established, claimant is limited to the award of permanent partial disability benefits for an 18 percent impairment of her leg. 33 U.S.C. §908(c)(2); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Accordingly, the Decision and Order on Remand of the administrative law judge denying further benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

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