BRB No. 04-0340

JESSICA OPIOPIO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNTIED STATES MARINE CORPS	)	DATE ISSUED: 12/7/04
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES, INCORPORATED	)	
	)	
	)	
Employer/Administrator-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Employer's Petition for Reconsideration of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

Kitty K. Kamaka, Honolulu, Hawaii, for employer/administrator.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Denying Employer's Petition for Reconsideration (2002-LHC-2483, 2484, 2485) of Administrative Law Judge Anne Beytin Torkington 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 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 sustained three injuries during the course of her employment for employer as a cashier/clerk. On October 13, 2000, claimant sprained her lower back when she lifted two gallons of liquor. Claimant received treatment from Dr. Kaan, and employer voluntarily paid claimant compensation under the Act until she returned to work. On January 8, 2001, claimant slipped and fell at work and injured her right knee. Claimant had previously injured her right knee in 1995, which required surgery in 1996, 1999, and 2000. Dr. Vernoy diagnosed the January 2001 injury as a dislocated right patella. Claimant initially returned to work, but she was taken off work on February 1, 2001; claimant returned to light duty with limited hours on March 22, 2001. Claimant was reexamined by Dr. Kaan on May 17, 2001, for back and knee pain. Claimant subsequently alleged that she sustained a work injury from cumulative trauma to both knees and her back following her return to work on March 22, 2001. Claimant stopped working on May 31, 2001. Dr. Vernoy performed a right knee arthroscopy on June 15, 2001, and right knee surgery on August 17, 2001, to reconstruct the anterior cruciate ligament. After recuperating from her August 17, 2001, surgery, claimant returned to work for employer.

In her decision, the administrative law judge found that claimant's knee and back injuries are work-related. The administrative law judge determined that claimant's back condition in relation to her October 13, 2000, work injury reached maximum medical improvement on October 18, 2001. The administrative law judge found that claimant's right knee condition in relation to her January 8, 2001, work injury reached maximum medical improvement on August 16, 2001. The administrative law judge found that neither claimant's back or right knee condition from work-related cumulative trauma is at maximum medical improvement.

The administrative law judge accepted the parties' stipulation that claimant's average weekly wage is $117.07 per week, which entitles her to receive compensation under the Act at that rate. *See* 33 U.S.C. §906(b). Employer was ordered to pay claimant compensation for disputed periods of temporary total disability, 33 U.S.C. §908(b), from October 31 to December 31, 2000, for January 10, 2001, from March 20 to 25, 2001, July 3 to 31, 2002, August 13 to 20, 2002, and December 15 to 25, 2002. The administrative law judge ordered employer to provide claimant with a job per Dr. Hager's restrictions or else to provide claimant vocational rehabilitation services if employer is unable to modify claimant's job duties to comply with these work restrictions. The administrative law judge determined that claimant's request to change her treating physician for her right knee condition is not ripe for decision, since claimant has not requested a change from either employer or the district director. The administrative law judge denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f), since claimant's back and right knee conditions from her cumulative trauma injury have not reached maximum medical improvement and employer has not paid claimant permanent disability compensation for 104 weeks for her right knee condition.

In her decision on reconsideration, the administrative law judge rejected employer's contentions that the average weekly wage stipulation of the parties is not applicable to the cumulative trauma injury, and that she should have credited the opinion of Dr. Vernoy to find that claimant's August 17, 2001, right knee surgery is not related to this injury. The administrative law judge also rejected employer's contention that it is unable to monitor claimant's employment to ensure that she maintains compliance with her work restrictions. Accordingly, employer's motion for reconsideration was denied.

On appeal, employer contends that the administrative law judge erred by failing to address the timeliness of claimant's notice to employer of her cumulative trauma injury, and the filing of her claim for this injury. Employer also contends that the administrative law judge erred by rejecting the contentions raised in its motion for reconsideration. Claimant responds, urging affirmance.

Employer first argues that the administrative law judge erred by not addressing the timeliness of claimant's notice to employer of her May 28, 2001, injury and the filing of her claim for this injury, inasmuch as employer asserts that it raised these issues in its pre-hearing statement. *See* 33 U.S.C. §§912, 913. In her decision, the administrative law judge stated that, while employer did not stipulate to the timeliness of the notice of injury and the claim for the cumulative trauma injury, employer did not raise these issues at the hearing or in its closing brief; therefore, the administrative law judge stated that she would not address any timeliness issues. Decision and Order at 3 n.7.

Claimant's failure to give employer timely notice of her injury pursuant to Section 12(a) of the Act is excused if employer had knowledge of the injury or if employer was not prejudiced by the failure to give proper notice. 33 U.S.C. §912(d)(1), (2). Section 13(a) of the Act provides a claimant with one year after she becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between her traumatic injury and her employment within which she may file a claim for compensation for the injury. 33 U.S.C. §913(a).

Assuming, *arguendo*, that the administrative law judge erred by not addressing employer's contention of untimely notice and filing, any error is harmless.[1] In the

[1] The administrative file in this case does not contain a pre-hearing statement from employer. The administrative file includes the July 30, 2002, letter from the district director transmitting the file to the Office of Administrative Law Judges, in which the district director states that employer had not filed its pre-hearing statement. The file also includes a December 17, 2002, facsimile from an assistant to employer's attorney to the administrative law judge requesting information as to the deadline for filing a pre-hearing statement. Finally, on February 3, 2003, employer filed a pre-trial statement. ALJX 2. This statement is on a form the administrative law judge provided employer, pursuant to

absence of substantial evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the notice of injury and the filing of the claim were timely. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Thus, it is employer's burden under Section 12(d) to show that it did not have knowledge of the injury and that it was prejudiced by the lack of proper notice. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997). In this case, employer did not present any evidence or argument to establish that it had no actual knowledge of claimant's cumulative trauma injury, and that it was prejudiced by the lack of notice. *See generally Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). Thus, in the absence of any evidence or argument, employer cannot rebut the Section 20(b) presumption that claimant provided timely notice to employer. Employer also did not submit any evidence or argument in support of its contention that the claim was not timely filed. The record establishes that claimant filed three separate claims for all of her alleged injuries on August 20, 2001. CX J. Inasmuch as the record evidence is uncontradicted that claimant filed a claim for the cumulative trauma injury on August 20, 2001, which is within one year of the date of the injury, we hold, as a matter of law, that her claim was timely filed. *See* 33 U.S.C. §913(a).

Employer next contends that the administrative law judge erred by crediting the parties' stipulation that claimant's average weekly wage is $117.07. Employer argues that this stipulation applied only to claimant's January 8, 2001, right knee injury and that the average weekly wage for the cumulative trauma injury is no more than $90.22. In her decision, the administrative law judge accepted the parties' stipulations. Decision and Order at 3. On reconsideration, the administrative law judge rejected employer's contention, reasoning that employer voluntarily entered into the stipulation. Order on Recon. at 2-3.

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her Pre-Trial Order to the parties dated October 9, 2002. In her Order, the administrative law judge stated that, absent good cause, the parties are not permitted to, *inter alia*, litigate issues not disclosed in the pre-trial statement.

The administrative law judge's Pre-Trial Order specifically directed the parties to contend or concede by checking the appropriate box as to whether claimant provided timely notice and timely filed her claim. Employer did not check either box with respect to notice of injury, and it checked the box representing that the claim was timely filed. *Id*. at 1. Attached to employer's pre-trial statement as Exhibit A, however, employer listed as an issue whether the claim was timely filed. *Id*. at 3. The administrative law judge indicated at the hearing that, pursuant to a pre-trial conference with the parties, the parties disputed whether claimant gave timely notice of injury and timely filed her claim for the cumulative trauma injury. Tr. at 4, 7. The administrative law judge correctly found that employer did not argue the timeliness of either the notice of injury or the filing of the claim at the formal hearing or in its closing brief.

The record shows that on April 4, 2003, after the formal hearing was held, the parties submitted a stipulation that claimant's average weekly wage was $117.07. JX 1. This letter specifically refers to the case and OWCP numbers for each of the three claimed dates of injury. Thus, contrary to employer's contention on appeal, on its face, the average weekly wage stipulation employer submitted to the administrative law judge applies to claimant's cumulative trauma injury. Moreover, the administrative law judge noted that employer did not allege in its post-hearing brief that the stipulation was in error. Order on Recon. at 2. The parties generally are bound by stipulations into which they freely enter. *See, e.g., Richardson v. Director, OWCP,* 94 F.3d 164 (4th Cir. 1996). Accordingly, we hold that the administrative law judge acted within her discretion in denying employer's motion on reconsideration to vacate the parties' average weekly wage stipulation of $117.07 with respect to claimant's cumulative trauma injury. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120, 127-128 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP,* 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Employer challenges the administrative law judge's finding that claimant's August 17, 2001, right knee surgery is related to claimant's cumulative trauma injury to her right knee and back. In her decision, the administrative law judge found that the surgery was related to this injury and that she need not address whether the surgery was also related to claimant's January 8, 2001, right knee injury. Decision and Order at 16. On reconsideration, the administrative law judge rejected employer's contention that she should credit Dr. Vernoy's opinion that the August 17, 2001, surgery was not work-related and reject Dr. Hager's opinion that the surgery was related to claimant's cumulative trauma injury. Order on Recon. at 3. The administrative law judge found that Dr. Vernoy's opinion was stated in response to written questions from employer's counsel regarding the January 2001 injury and does not address whether claimant's August 17, 2001, surgery was related to the subsequent cumulative trauma at work. *See* EX 6. Employer also did not depose Dr. Vernoy to specifically inquire whether the surgery was related to claimant's cumulative trauma injury to her right knee and back. The administrative law judge therefore credited Dr. Hager's testimony that claimant's August 17, 2001, surgery was related to claimant's cumulative trauma injury.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . ., for such period as the nature of the injury or the process of recovery may require." *See also* 20 C.F.R. §702.401. In order for a medical expense to be awarded, it must be related to the work injury at issue. *See, e.g., Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402.

In this case, the administrative law judge rationally found that Dr. Vernoy's opinion was incomplete in that he was not asked whether claimant's August 17, 2001,

surgery was related to the cumulative trauma claimant sustained between March and May 2001. The administrative law judge therefore rationally credited the opinion of Dr. Hager as to the effect of claimant's job duties on her right knee condition to find that claimant's August 17, 2001, right knee surgery is related to her cumulative trauma injury to her right knee. *See* Tr. at 136-139, 143-144. Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer is liable to claimant for her August 17, 2001, right knee surgery, pursuant to Section 7(a). *See generally Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988).

Employer next challenges that administrative law judge finding that employer must enforce claimant's work restrictions due to her work-related injuries. In her decision, the administrative law judge credited Dr. Hager's work restrictions. Decision and Order at 15. Dr. Hager opined that claimant could perform sedentary work up to four hours a day, with no significant lifting, stair climbing, squatting, kneeling, or standing other than necessary for her to get to and from work. CX K at 3; Tr. at 148. The administrative law judge also relied on Dr. Hager's statement that employer should institute practices at work so claimant does not have to ask a co-worker for assistance in order for claimant to comply with her work restrictions. Decision and Order at 15. The administrative law judge directed employer to provide claimant a job within these restrictions and to "enforce" them. *Id*. On reconsideration, the administrative law judge rejected employer's contention that it is unable to enforce claimant's work restrictions. Order on Recon. at 3. The administrative law judge referred employer to the specific restrictions enumerated in her decision. She stated that employer may consider placing claimant in vocational rehabilitation if it is unable to provide claimant with suitable work within her restrictions.

Employer contends that the administrative law judge imposed an equitable remedy that is not within its control inasmuch as employer is unable to monitor all the work claimant performs. Employer also contends that claimant's current cashier job already falls within her work restrictions.[2] In its post-hearing brief, employer contended that claimant is able work as a cashier with the accommodations it currently provides. ALJX 4 at 10-11. Claimant contended that she should be awarded compensation for total disability unless employer can accommodate Dr. Hager's work restrictions. ALJX 3 at 11-12. The administrative law judge credited Dr. Hager's work restrictions, and she found that, "[I]t is thus imperative that Employer take immediate action to appropriately limit Claimant's work activities to avoid further damage to her right knee and back." Decision and Order at 13.

[2]Claimant's supervisor, John Hasegawa, testified, however, that he believed claimant's only work restriction is no lifting over 30 pounds. Tr. at 173-174.

Once a claimant establishes that she cannot return to her usual work, the burden shifts to her employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must show the availability of job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). Employer can meet its burden by offering claimant a suitable job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Employer, however, is not required to act as an employment agency for its employee. Thus, employer is not required to rehire claimant or place her in suitable alternate employment. *See generally Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). However, if employer does not establish the availability of suitable alternate employment, it is liable for total disability benefits. *Hurston*, 849 F.2d 1194, 21 BRBS 122(CRT); *see also Ceres Marine Terminals v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

We hold that the administrative law judge exceeded her authority by ordering employer to provide claimant with a job that complies with Dr. Hager's work restrictions and to enforce the restrictions. *Turner*, 661 F.3d at 1043, 14 BRBS at 164-165. Employer's burden to establish suitable alternate employment is an evidentiary burden that does not require employer to extend an actual employment offer to claimant. *Id.* Claimant, however, was working for employer as a cashier at the date of the hearing. *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT). Thus, it was incumbent on the administrative law judge to assess the suitability of this position in light of the relevant evidence. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). As the administrative law judge did not do so, we must remand the case for findings in this regard and the resultant extent of claimant's disability.[3]

[3] An award of total disability while a claimant is working is limited to those circumstances where claimant works in spite of extraordinary pain, through extreme effort or by reason of employer's beneficence. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). If these factors are not present, and claimant is working beyond her restrictions, an award of partial disability benefits may be appropriate if it establishes a reduction in her wage-earning capacity. *See Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

We also hold that, contrary to the administrative law judge's suggestion that employer provide claimant with vocational rehabilitation assistance if it is unable to provide a suitable light duty position, employer is not obligated under the Act to offer claimant vocational rehabilitation. Section 39(c)(1), (2) of the Act, 33 U.S.C. §939(c)(1), (2), and its implementing regulations, 20 C.F.R. §702.501 *et seq.*, authorize the Secretary of Labor to provide for the vocational rehabilitation of permanently disabled employees in certain circumstances. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003). Because Section 39(c)(2) grants the authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, an administrative law judge is not authorized to order an employer to provide vocational rehabilitation. *See generally Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003). We therefore vacate the administrative law judge's alternative order that employer is to provide vocational rehabilitation services.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, and Order Denying Employer's Petition for Reconsideration are vacated insofar as employer was ordered to provide claimant with suitable employment at its facility within Dr. Hager's work restrictions or vocational rehabilitation. The case is remanded for the administrative law judge to assess the suitability of the job held by claimant post-injury. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge