BRB No. 05-0453

DIANE BERUBE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 02/15/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Denying Remand and the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Topsham, Maine, for claimant.

John H. King and C. Lindsey Morrill (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order Denying Remand and the Decision and Order (04-LHC-1217) of Administrative Law Judge Jeffrey Tureck 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). 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).

On December 10, 2002, claimant, a shipfitter, twisted her right knee while climbing down a ladder at work. CX 12. Claimant subsequently developed left hip pain. On August 23, 2003, claimant first missed work due to her injuries. Dr. Booth stated on September 12 and October 6, 2003, that claimant had no work capacity, and he took her off work after claimant unsuccessfully attempted to return to her employment duties with restrictions. EX 11 at 15. Claimant was released to work without restrictions on

December 11, 2003. Nonetheless, claimant did not return to work for employer, because employer had terminated her on October 31, 2003. *See* discussion, *infra.* Employer voluntarily paid claimant temporary total disability benefits from August 21, 2003 through December 12, 2003. Tr. at 4; JX 1. After her termination and release to full-duty work, claimant worked part-time for various non-maritime employers.

After the claim was referred to the Office of Administrative Law Judges, claimant moved to remand the case to the district director until her grievance against employer concerning her termination was resolved. In addition, claimant contended that remand was necessary because her condition had been determined to be permanent after the case's referral. The administrative law judge denied the motion. He found that the outcome of claimant's grievance would have no effect on the resolution of her compensation claim. In addition, the administrative law judge found that claimant's pre-hearing form LS-18 raised the issue of permanency and that counsel had corrected the district director's transmittal letter stating that permanency was not at issue.

At the formal hearing, claimant contended that she is entitled to permanent partial disability benefits as of December 11, 2003, based on two-thirds of the difference between her average weekly wage for employer, $605.44, and her weekly wage at VIP, an auto parts store, of $247.[1] 33 U.S.C. §908(c)(21). Employer responded that claimant is not entitled to any additional disability benefits because she no longer has any physical impairment.

In his Decision and Order, the administrative law judge found that claimant's right knee and left hip injuries reached maximum medical improvement on December 11, 2003. The administrative law judge further found that, as of that date, claimant did not establish that she has any physical impairment precluding her return to work, based on the records of claimant's treating physicians, Drs. Booth and Cain. Therefore, the administrative law judge denied permanent partial disability benefits.

On appeal, claimant challenges the administrative law judge's denial of her motion to remand the case to the district director. Claimant also contends the administrative law judge failed to address her testimony concerning the pain she has from her work injuries

[1] Claimant worked at VIP for only six weeks. She testified she worked at several places after she was released to return to work. At the time of the hearing, she was working in a restaurant, though she was off work because of surgery for a condition unrelated to the work injuries. She stated her intention was to return to her work at Bachelder's Tavern. Tr. at 19.

which supports her claim for disability benefits. In addition, claimant contends that she has made her *prima facie* case of total disability due to the unavailability of her usual job. Employer responds, urging affirmance of the administrative law judge's denial of claimant's motion to remand and of the denial of benefits.

We reject claimant's contention that the administrative law judge abused his discretion in denying her motion to remand the case to the district director to address the issue of permanency and to await the resolution of her grievance. It is immaterial to claimant whether or not permanency was raised before the district director, as the issue was properly raised and addressed before the administrative law judge. *See* 20 C.F.R. §702.336; *see generally Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). Moreover, the administrative law judge found claimant's condition reached maximum medical improvement on the date she alleged. With respect to her grievance, the administrative law judge had no authority to rule on the validity of claimant's firing, *see* discussion, *infra*, and he rationally found that the compensation claim should be adjudicated in a timely fashion. Claimant has not established on the facts of this case that the administrative law judge abused his discretion in denying claimant's motion to remand. Therefore, we affirm his June 29, 2004 Order Denying Remand.

Claimant also contends the administrative law judge erred in denying her disability claim. Claimant contends the administrative law judge failed to account for her complaints of pain related to her injury and to address the unavailability of her usual job.

In the event of an injury to a scheduled member, recovery for claimant's permanent partial disability is confined to the schedule at Section 8(c)(1)-(20) of the Act, and claimant is compensated based on the degree of her physical impairment. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Claimant does not allege that the administrative law judge should have awarded her benefits pursuant to the schedule for any impairment to her knee. Thus, claimant's contention concerning her entitlement to partial disability benefits must be addressed solely with reference to claimant's hip condition, as claimant may not receive an award of partial disability benefits for a loss in wage-earning capacity due to her knee condition, if any. *See generally Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

In this regard, we affirm the administrative law judge's finding that claimant does not have a physical impairment to her hip that precludes her return to work. Dr. Cain opined on December 8, 2003 that claimant's knee had healed and that she could return to full-duty work. EX 14 at 134. On December 11, 2003, Dr. Booth noted Dr. Cain's opinion, and stated that claimant had no symptoms from her hip injury either, had an "excellent and normal gait," and that claimant "unequivocally" can return to work. EX 14 at 132. Neither doctor scheduled any follow-up appointments or related any

impairment ratings. Therefore, as the administrative law judge rationally credited the opinions of Drs. Booth and Cain that claimant does not have a residual physical impairment from her work injury, we affirm his finding as it is supported by substantial evidence. *See generally Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

Nonetheless, we cannot affirm the denial of benefits, as the denial is premised solely on a finding that claimant has no medical restrictions that preclude her return to work without consideration of the economic consequences of her injury. As "disability" involves both physical and economic components, this finding does not end the inquiry. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Claimant asserts that she continues to suffer from pain related to her injury, noting that on March 4, 2004, Dr. Eriksson gave her an injection of "Xylocaine and a steroid solution" to relieve her pain. CX 5 at 51.[2] Dr. Eriksson stated claimant has work-related hip bursitis and would be treated on an as-needed basis. *Id.* at 52. It is well settled that pain can form the physical foundation of a disability claim. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Moreover, claimant asserts that as her usual work is no longer available to her, the holding in *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988), is directly on point and supports an award of benefits. Claimant avers that as she cannot return to her former job, she is entitled to permanent partial disability benefits based on wages she earned in alternate employment that she found on her own. In *McBride*, the claimant injured his neck at work. After recuperating from surgery, the administrative law judge found the claimant continued to suffer from some physical limitations and pain, although the extent of these restrictions was disputed. Employer, located in Washington, D.C., did not offer claimant his prior job, but instead offered him a training program in Rochester with the understanding that a job would be available for him there upon completion of the training. Claimant declined on the grounds that he thought the program physically unsuitable and because he did not wish to move to Rochester. The administrative law judge found that claimant was physically able to return to his pre-injury job and therefore was not disabled. The Board affirmed the denial of benefits.

The United States Court of Appeals for the District of Columbia Circuit reversed the denial of benefits. The court cited the proposition that "disability" within the meaning of the Act has an economic as well as a medical component, and that the administrative law judge and Board failed to account for the unavailability of claimant's usual job due to his injury. *McBride*, 844 F.2d at 798, 21 BRBS at 47(CRT), citing *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984) and

[2] The administrative law judge did not discuss this treatment by Dr. Eriksson.

American Mutual Ins. Co. of Boston v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). The court found the evidence uncontradicted that prior to claimant's injury, employer anticipated that claimant would undergo training in Rochester and then return to his job in Washington. After the injury, however, employer's managers advised claimant that no positions in Washington were available to him. The court stated, "Although circumstantial, this evidence clearly indicates that McBride's injury *was* the precipitating factor that rendered his former job unavailable." *McBride,* 844 F.2d at 799, 21 BRBS at 49(CRT) (emphasis in original). The court further stated the administrative law judge and Board erred in concluding that the inquiry concerning disability was over if claimant could physically return to his usual job, because the economic factor of "disability" was not taken into account. *Id.*, 844 F.2d at 800, 21 BRBS at 49(CRT). The court held that claimant established his *prima facie* case of total disability and remanded the case for the administrative law judge to address whether employer established suitable alternate employment.

As in *McBride,* claimant herein also had no restrictions precluding her return to work despite episodes of pain, but her job is no longer available to her. Claimant initially was terminated from her job on May 15, 2003, for stealing from employer. She was rehired on June 2, 2003, under a "last chance" agreement. This agreement states,

> The undersigned agree that the existence of a violation of this agreement is determined at the sole discretion of BIW. A conclusion that a violation has occurred will result in the termination of Diane M. Berube's employment for just cause, with the recourse limited to an informal review by the Director of Employee and Labor Relations or Craft Administration, or designee, without recourse to the grievance procedure.

EX 8. During the time claimant alleged she was unable to work due to her injury, employer obtained surveillance videotapes of claimant. Employer alleged that these tapes showed claimant engaging in activities beyond the restrictions assessed by her physicians. On October 31, 2003, employer terminated claimant for misrepresenting her physical condition to her physicians in order to receive disability benefits. The stated reason employer gave, pursuant to the terms of the last chance agreement, was "fraud, misrepresentation of facts." Tr. at 35. Claimant was pursuing review of this termination at the time of the formal hearing before the administrative law judge. The administrative law judge's only comment with regard to claimant's termination and the videotapes was "although [claimant] does not use a cane in those videos, they fail to show her engaging in strenuous labor." Decision and Order at 3.

We must remand this case to the administrative law judge for further findings, as he erred in ending his analysis because claimant no longer has physical restrictions due to her injury. The United States Court of Appeals for the First Circuit, within whose

jurisdiction this case arises, has acknowledged the concept that "disability" under the Act has both a medical and an economic component. *See Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *see also Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979). The applicability of *McBride* turns on the basis for the admitted unavailability of claimant's job with employer. If claimant's job is unavailable "due to her injury," then she is entitled to partial disability benefits for any loss in wage-earning capacity. *McBride*, 844 F.2d at 800, 21 BRBS at 49(CRT); *see also Manship v. Norfolk & Western Ry.*, 30 BRBS 175 (1996). If, however, claimant's former job is unavailable due to her own misconduct, claimant is not entitled to benefits for any disability caused by the loss of the job. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). The administrative law judge's inquiry in this regard is not limited by employer's alleged authority to terminate claimant pursuant to the "last chance" agreement, as employer may not evade its responsibilities under the Act by recourse to this agreement. Rather, the administrative law judge must ascertain whether the termination actually was due to claimant's injury irrespective of the validity of a termination under the agreement. If the unavailability of claimant's job is due to her injury, then claimant has made out her *prima facie* case of inability to return to her usual employment.[3] *McBride*, 844 F.2d at 800, 21 BRBS at 49(CRT). The administrative law judge then must address claimant's contention that her loss of wage-earning capacity should be measured by the wages she earned at VIP, or whether they are more accurately measured by other suitable jobs she has held or employer has identified.[4] *See generally Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). Therefore, we vacate the denial of disability benefits, and we remand the case for findings consistent with *McBride* and this decision.

[3] By the time claimant reached maximum medical improvement on December 11, 2003, and was released to return to her job from a physical standpoint, claimant had already been terminated from her position.

[4] In contrast to a successful claim of retaliation made under Section 49, employer in this case would not be obligated by any provision of the Act to reinstate claimant even if the administrative law judge finds that the termination was due to claimant's injury. 33 U.S.C. §948a; *see Monta v. Navy Exch. Serv. Command*, BRBS , No. 05-0298 (Nov. 30, 2005). The administrative law judge has no authority to rule on the legality of the firing under the "last chance" agreement, *see generally Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978), but the agreement does not absolve employer of liability otherwise imposed by the Act.

Accordingly, we affirm the administrative law judge's June 29, 2004 Order Denying Remand. We vacate the Decision and Order denying benefits and remand the case for further findings consistent with this decision.

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