BRB No. 06-0942

A.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY	)	DATE ISSUED: 07/26/2007
	)	
and	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

A.R., El Paso, Texas, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Second Decision and Order on Remand (2001-LHC-02988) 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 *et seq*. (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. Employer has not responded to this appeal.

This case is before the Board for the third time. Claimant, a waitress, suffered a work-related slip and fall on August 4, 1999, injuring her right knee. Dr. King performed surgery on her right knee on August 4, 1999, and he released claimant to full-duty work on November 8, 1999. Claimant returned to her usual employment with employer on December 2, 1999. Dr. King subsequently rated claimant with a 10 percent impairment to the leg. Employer voluntarily paid claimant medical benefits and temporary total disability benefits from August 5 through November 7, 1999, as well as permanent partial disability benefits under the schedule for a ten percent impairment to the leg.

Claimant continued to work in her position with employer until October 18, 2001, when she suffered another fall in which she broke her wrist.[1] While claimant was treating with Dr. Neustein for her wrist injury, she also sought additional treatment for her right knee condition. Dr. Neustein stated claimant has an 18 percent leg impairment. Although Dr. Neustein released claimant to return to work in February 2002 from the perspective of both the knee and wrist injuries, claimant subsequently underwent a functional capacity evaluation (FCE) on February 13, 2002, resulting in the conclusion that claimant could not return to her former position. Claimant filed a claim for additional compensation. Claimant testified that she resigned her position with employer effective February 13, 2002, because she could no longer perform her job.

In his first decision, the administrative law judge found that claimant's condition reached maximum medical improvement on February 28, 2002, and he credited the opinion of Dr. Neustein that claimant has an 18 percent leg impairment. Thereafter, the administrative law judge found that claimant was not entitled to additional total disability benefits because claimant returned to work for approximately two years after her 1999 fall and that, in any event, employer established the availability of suitable alternate employment.

Claimant appealed to the Board. The Board remanded the case to the administrative law judge to consider the evidence relevant to whether claimant was entitled to additional disability benefits for her 1999 injury to her right knee. Specifically, the administrative law judge was instructed to address claimant's ability to return to her usual job duties from the perspective of her knee injury after February 13, 2002. The Board acknowledged that the administrative law judge found that claimant was able to perform her usual job duties upon her return to work in 1999. Nonetheless, the administrative law judge stated that, after February 13, 2002, claimant "perhaps" was unable to perform her usual work due to *both* the knee and wrist injuries. The Board noted that the FCE administered by a physical therapist indicated that, as of February 13,

[1] This injury was not the subject of the proceedings before the administrative law judge.

2002, claimant's former position was unsuitable. EX 3. Since claimant's credible complaints of pain alone may be enough to establish her inability to perform her usual work, the Board also directed the administrative law judge to address claimant's testimony that she resigned her position with employer, effective February 13, 2002, because she felt that she could no longer perform the job. *[A.R.] v. Dep't of the Army*, BRB No. 02-0730 (June 25, 2003) (unpub.). Consequently, 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 the case 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.

On remand, the administrative law judge reaffirmed his original decision and stated that the Board apparently had mistakenly asked him to consider whether the combination of injuries from the 1999 and 2001 accidents left claimant unable to perform her usual employment and entitled her to additional benefits. The administrative law judge again concluded that claimant did not establish that she is totally disabled due to the knee injury as she was able to work prior to the wrist injury, and thus, is limited to a permanent partial disability award of 18 percent under the schedule.

Claimant again appealed to the Board. The Board again remanded the case to the administrative law judge to consider whether claimant could perform her usual employment after February 13, 2002, noting that the administrative law judge had not discussed the evidence regarding claimant's knee condition which post-dated the wrist injury. *[A.R.] v. Dep't of the Army*, BRB No. 05-0625 (March 29, 2006)(unpub.).

In his second Decision and Order on Remand, the administrative law judge found that following her return to work on December 2, 1999 after her knee surgery, "Claimant continued to work uneventfully and regularly as a waitress" until her wrist injury.[2] He found that the 2002 FCE did not specify whether claimant's disability was due to the wrist injury, the knee injury, or both. Given claimant's ability to work before the wrist injury, the administrative law judge inferred that it was the wrist injury that disabled claimant.

[2] The administrative law judge also stated that on February 20, 2000, claimant underwent an independent medical examination by Dr. Urrea, who like Dr. King, thought further diagnostic testing of claimant's knee was indicated, but, also like Dr. King, believed claimant to be capable of continuing her work as a waitress. Decision and Order at 3, n.2.

To establish a *prima facie* case of total disability, the employee must show that she cannot return to her 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 Shipping & Constr. Co.*, 17 BRBS 56 (1985). In this case, the administrative law judge rationally found that the medical evidence does not establish that claimant's knee injury prevented her return to her usual work. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Thus, we affirm the administrative law judge's finding that claimant is limited to a schedule award on this basis.

Moreover, the administrative law judge found that even if claimant was unable to perform her usual employment because of her 1999 knee injury, employer established the availability of suitable alternate employment. Decision and Order at 4. The administrative law judge stated that following an interview, testing, and review of all medical records, including the FCE, employer's vocational rehabilitation counselor prepared a labor market survey wherein he identified six available jobs within the light-duty restrictions placed upon claimant by the 2002 FCE. EX 6. These jobs included customer service representative, telemarketer, cashier, data entry operator, and marketing representative. *Id.* The administrative law judge found all of the jobs suitable as they allow claimant to alternate between sitting and standing, are consistent with her vocational skills, and claimant testified she could perform duties within the restrictions set out by the FCE as to lifting, sitting and standing. Tr. at 39-40. As the administrative law judge's finding that employer established the availability of suitable alternate employment is rational and supported by substantial evidence, we affirm the finding that claimant is limited to a schedule award on this basis as well. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *see McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *see also Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Therefore, we affirm the denial of total disability benefits.

Accordingly, we affirm the administrative law judge's Second Decision and Order on Remand denying total disability benefits.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge