BRB No. 02-0730

ADELHEID REINHARDT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY	)	DATE ISSUED: JUN 25, 2003
	)	
and	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order (01-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.

Claimant, a waitress in a bar located at Fort Bliss, slipped and fell on a wet floor on August 4, 1999. She broke her kneecap in this fall. Claimant was released to return to full duty on November 8, 1999, and she returned to her usual job on December 2, 1999. Employer paid claimant benefits for temporary total disability from August 5 through November 7, 1999, as well as permanent partial disability benefits for a 10 percent impairment to the leg. 33 U.S.C. §908(b), (c)(1). Claimant continued to work until October 18, 2001, when she suffered another fall in which she broke her left wrist.

[1] Claimant sought additional treatment for her knee from Dr. Neustein who was treating her wrist injury. He rated her knee impairment at 18 percent. Although he released claimant to return to work in February 2002 from the perspective of both the knee and wrist injuries, claimant was deemed unfit to return to her usual work. Claimant has not worked since the date of her second fall, and sought additional compensation under the Act.

In his decision, the administrative law judge accepted the parties' stipulated date of maximum medical improvement of August 18, 2000, and determined that employer established the availability of suitable alternate employment. Accordingly, the administrative law judge found that claimant is limited to an award under the schedule, and he awarded benefits for an 18 percent impairment to the leg. 33 U.S.C. §908(c)(1).

On appeal, claimant contests the administrative law judge's failure to award her additional compensation. Employer responds, urging affirmance of the administrative law judge's decision.

The administrative law judge first determined that claimant's knee condition reached maximum medical improvement as of August 18, 2000, the date stipulated to by the parties. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A claimant has reached maximum medical improvement following her injury when she is no longer undergoing treatment with a view toward improving her condition. *See*

[1]The claim for this injury was not before the administrative law judge. Employer paid claimant temporary total disability benefits for the period between October 19, 2001 and February 27, 2002.

Louisiana Ins. Guaranty Ass'n v. Abbott, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). In this case, Dr. King stated claimant reached maximum medical improvement following her knee injury as of August 2000. At that time, claimant had returned to her usual job as a waitress and was undergoing no further treatment. Although Dr. King later recommended an arthroscopic evaluation of claimant's knee and Dr. Urrea recommended an MRI, claimant refused to undergo these procedures and stated that she eschews further medical intervention. HT at 36-38. Moreover, the administrative law judge rationally rejected Dr. Neustein's February 28, 2002, date of maximum medical improvement on the ground that he used the same date for both the knee and wrist injuries. The administrative law judge's decision to rely upon the opinion of Dr. King, therefore, is rational. Accordingly, we affirm the administrative law judge's finding on this issue as it is supported by substantial evidence. *See McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000).

We cannot, however, affirm the administrative law judge's finding that claimant is limited to an award under the schedule, as his analysis of this issue is incomplete. If claimant is able to perform her usual work, or if employer establishes the availability of suitable alternate employment, claimant is limited to an award under the schedule for the physical impairment to her knee. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000). To establish a *prima facie* case of total disability, claimant bears the burden of establishing that she is unable to perform the duties of her prior employment due to her employment injury.

[2] *See Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). In the instant case, the administrative law judge determined that claimant was able to perform her usual job duties upon her return to work in December 1999. Although the administrative law judge stated that "perhaps" due to both the knee and wrist injuries claimant is unable to work as a waitress, he did not fully address claimant's ability to return to her usual work after February 13, 2002. A functional capacity evaluation administered by a physical therapist indicated that, as of February 13, 2002, claimant's former position was unsuitable, EX 3. Moreover, Claimant resigned her position with employer, effective February 13, 2002; she testified she felt that she could no longer

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[2]Contrary to claimant's contention, however, she is not entitled to benefits for general health problems, but only for those related to her work injury. In this regard, the administrative law judge noted claimant's complaints of hip pain related to the fall at work, Decision and Order at 7 n. 4, but found that although such subjective complaints were noted in Dr. King's records, no other physician noted them and there is no medical evidence supporting a hip impairment. Thus, claimant is not entitled to benefits for this condition.

perform the job. EX 1; Tr. at 33. If claimant's work injury renders her unable to perform her usual work, she is entitled to total disability benefits unless employer establishes the availability of suitable alternate employment. *PEPCO*, 449 U.S. at 277 n.17, 14 BRBS at 366 n.17; *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 199 (1984). Thus, on remand, the administrative law judge must fully address the threshold issue of claimant's ability to return to her usual work.

Moreover, the administrative law judge found that claimant "is employable" and that employer established the availability of suitable alternate employment. Decision and Order at 9. If claimant is unable to return to her usual work, the burden shifts to employer to demonstrate the availability of jobs within claimant's community that claimant is capable of performing based upon her age, education, work experience and physical restrictions. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). If employer establishes the availability of suitable alternate employment, claimant in this case is limited to an award under the schedule. *PEPCO*, 449 U.S. 268, 14 BRBS 363. The fact that claimant is employable is insufficient to establish the availability of suitable alternate employment or to mitigate employer's liability to partial disability. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Rather, employer must identify job openings that are suitable for claimant. *Id.* In this regard, the administrative law judge summarily stated that jobs were identified in El Paso within claimant's capabilities, but he did not specifically discuss employer's labor market survey. Josh Engler, employer's vocational rehabilitation counselor, prepared a labor market survey in which he identified six jobs as within claimant's light duty restrictions based on both her hand and knee impairments.[3] EX 6. The administrative law judge did not discuss the suitability of these positions in light of claimant's physical restrictions, vocational history, age, and education. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Diosdado*, 31 BRBS 70. Thus, we must remand this case to the administrative law judge for further findings of fact. *Id.* If, on remand, the administrative law judge finds that employer established the availability of suitable alternate employment, claimant is limited to the permanent partial disability benefits awarded by the administrative law judge.[4] *PEPCO*, 449 U.S. 268, 14 BRBS

[3]The jobs identified are: customer service representative, telemarketer, cashier, data-entry operator, and marketing representative. EX 6.

[4]At the hearing, claimant conceded that she had not applied for any of the positions located by employer's vocational consultant. Tr. at 29-32. Thus, if the positions are suitable for claimant, she did not demonstrate a diligent job search and is limited to partial disability benefits. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

363. As the administrative law judge awarded claimant permanent partial disability benefits for the highest impairment rating of record, the award of benefits for an 18 percent impairment to claimant's leg is affirmed.

Accordingly, the administrative law judge's Decision and Order limiting claimant to a permanent partial disability award under Section 8(c)(1) is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge