BRB No. 98-0939

ELNORA FERGUSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE	)	DATE ISSUED:
	)	
and	)	
	)	
GATES, McDONALD AND COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Carl H. Jacobson (Uricchio, Howe, Krell, Jacobson, Toporek & Theos), Charleston, South Carolina, for claimant.

Mark K. Eckels and Benford L. Samuels (Boyd & Jenerette, PA), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-LHC-2873) of Administrative Law Judge Vivian Schreter-Murray 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 which 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). This is the second time this case is before the Board.

Claimant, a worker on a hot dog cart, suffered an injury to her back on February 7,

1993, when she fell from a milk crate while trying to close a window on her cart. Claimant sought compensation for total disability, as well as for medical benefits for treatment provided by Dr. Sheldon.

In her first decision, the administrative law judge denied claimant's claim for temporary total disability compensation based upon her findings that claimant sustained a work-related soft tissue injury as a result of her fall, reached maximum medial improvement on May 28, 1993, and was thereafter capable of performing any light and sedentary jobs offered to her by employer. She also concluded that employer was not liable for the medical treatment provided by Dr. Sheldon beyond his initial evaluation in November 1993, as claimant had been referred to him only for evaluation and not for treatment. Claimant appealed this decision to the Board.

On appeal, the Board held that the administrative law judge committed no error in concluding that claimant suffered only a soft tissue injury as a result of her work accident,[1] and modified the date of maximum medical improvement to June 3, 1993. The Board vacated the administrative law judge's findings regarding the extent of claimant's disability related to the work injury and employer's liability for the medical treatment of Dr. Sheldon. *Ferguson v. Navy Exchange*, BRB No. 96-1482 (June 20, 1997)(unpublished). On remand, the administrative law judge was to determine if claimant was capable of performing her regular employment duties and, if not, whether the light duty positions offered by employer constitute suitable alternate employment. Further, the administrative law judge was to reconsider the evidence of record as to whether claimant is entitled to reimbursement for Dr. Sheldon's services pursuant to Section 7 of the Act, 33 U.S.C. §907.

On remand, the administrative law judge found that claimant is capable of performing her pre-injury job as well as two additional light duty jobs in employer's facility. She further found that employer is not responsible for Dr. Sheldon's treatment as claimant was referred to him for an evaluation only and as any treatment he provided was neither appropriate nor necessary for the work injury.

---

[1]In so holding, the Board affirmed that administrative law judge's conclusion that claimant suffered a soft tissue injury as a result of her fall and that her ankylosing spondylitis and/or fibromyalgia, if any, were unrelated to the work incident.

Claimant again appeals to the Board, contending that the administrative law judge erred in finding her capable of performing her usual job or the proffered light duty jobs, and in denying reimbursement of Dr. Sheldon's treatment. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in finding that she is not totally disabled, first by concluding she is capable of performing her pre-injury job duties as a hot dog vendor, and second by determining that employer established the availability of suitable alternate employment within its facility. The burden of establishing the nature and extent of disability is on claimant. *Anderson v. Todd Shipyard Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). Once claimant has established that she is unable to perform her usual employment because of a work-related injury, however, the burden shifts to employer to prove the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 21 BRBS 10 (CRT)(4th Cir. 1988). Employer may meet this burden by offering claimant a job in its facility which is tailored to the employee's physical limitations so long as the job is necessary and claimant is capable of performing it. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that she is unable to return to her usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Claimant must establish that her medical restrictions preclude the performance of her former work duties. *Carroll v. Hanover Bridge Marina,* 17 BRBS 176 (1985). In the instant case, the administrative law judge found that claimant's usual employment duties as a hot dog vendor were within the restrictions imposed by Dr. Warren. In so concluding, the administrative law judge reasonably inferred that claimant's duties were the same as those of any other hot dog vendor,[2] *see generally Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11 (CRT) (1st Cir. 1982), and that none of the duties was shown to exceed the light duty category. Although Dr. Warren opined that claimant could return to modified duty status, CX B, with restrictions on stooping, bending, and moderate to heavy lifting, Dep. at 11, the administrative law judge found no credible evidence that claimant's pre-injury job duties exceeded these restrictions, inasmuch as the administrative law judge discredited claimant's testimony as she found it to be unreliable

[2]The administrative law judge concluded that claimant's pre-injury duties as a hot dog vendor involved taking orders, placing a hot dog on a roll with or without condiments, handing it to a customer and taking payment. At the end of the day, claimant closed the stand. Decision on Remand at 2.

and exaggerated. Moreover, claimant concedes that there is no direct evidence that the job at the hot dog stand required bending and/or heavy lifting. Reply Brief at 1.

It is well established that in arriving at her decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 402 (2d Cir. 1961). In the instant case, we hold that the administrative law judge's finding that claimant did not meet her burden of establishing that she is unable to perform her pre-injury employment duties is rational and supported by substantial evidence. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Accordingly, the administrative law judge's conclusion that claimant did not establish her *prima facie* case of total disability is affirmed.

Claimant also argues that the administrative law judge erred in concluding that employer established the availability of suitable alternate employment. Although it is not necessary to address the administrative law judge's determinations in this regard given the above disposition, we hold that the administrative law judge committed no error in finding that employer established the availability of two suitable positions within its own facility.

Employer proffered three positions within its own facility: deli sandwich maker, cashier, and secretary/receptionist. These three positions were approved by Dr. Warren based upon the recommendation of claimant's physical therapist who visited the work sites and found the physical requirements to be within claimant's restrictions.[3] EX 1. The administrative law judge relied on the opinions of Dr. Warren and claimant's physical therapist, discrediting claimant's assertion that she could not perform these positions. Inasmuch as the administrative law judge's findings are rational and are supported by substantial evidence, we affirm the administrative law judge's determination that employer established the availability of work within claimant's restrictions and her consequent finding that claimant is not disabled. *See Peele*, 20 BRBS at 136.

Next, claimant contends that the administrative law judge erred in finding that employer is not liable for the medical treatment provided by Dr. Sheldon. Section 7 of the Act generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services and the Secretary's duty to over see them. *See Anderson*, 22 BRBS at 20. In

[3]In reaching her conclusions, the administrative law judge did not rely on the secretarial position which, while being approved by Dr. Warren as within claimant's physical restrictions, may have been beyond her vocational skills. Decision on Remand at 3.

order for a medical expense to be assessed against employer, however, the expense must be both reasonable and necessary, and it must be related to the injury at hand. *See Pardee v. Army & Air Force Exchange Service,* 13 BRBS 1120 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

A review of the record supports the administrative law judge's conclusion that claimant was referred to Dr. Sheldon only for an evaluation, not treatment. This conclusion is supported not only by the fact that claimant returned to Dr. Warren following the evaluation for further treatment, CX A: Dep. at 19-20, but also by Dr. Sheldon's own admission that claimant was initially referred for evaluation purposes only, HT at 79-80, and did not return for treatment until five months later. HT at 79.

Moreover, the record further supports that administrative law judge's conclusion that any treatment provided by Dr. Sheldon was either unnecessary or unrelated to claimant's work injury. Dr. Warren opined, upon claimant's return following her evaluation by Dr. Sheldon, that the therapy recommended by Dr. Sheldon had already been tried without success. CX A: Dep. at 20. Thus, Dr. Sheldon's proposed treatment was duplicative of that previously administered by Dr. Warren.

Claimant's further argument that Dr. Sheldon was a specialist to whose care she was entitled, *see* 20 C.F.R. §702.406(a), is without merit as the record reflects that Dr. Sheldon is a specialist in rheumatology, HT at 77, and therefore specially qualified to treat anklyosing spondylitis. The administrative law judge, however, determined that claimant's ankylosing spondylitis, a form of spinal arthritis, is unrelated to claimant's work accident, Decision at 9-10, a finding previously affirmed by the Board. Thus, any treatment Dr. Sheldon may have provided for this condition would be unrelated to claimant's work injury. It was therefore within the administrative law judge's discretion as factfinder to reject Dr. Sheldon's testimony regarding the necessity of his treatment for claimant's work injury and to rely instead on the contrary opinion of Dr. Warren that all treatment necessary and reasonable to the treatment of claimant's work injury had been rendered. *See generally Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U..S. 911 (1979).

Thus, the administrative law judge's conclusion that claimant was not referred to Dr. Sheldon for treatment and that any treatment rendered by him was either unnecessary or unrelated to the work injury is supported by the record. Therefore, we affirm the administrative law judge's conclusion that employer is not liable for the cost of Dr. Sheldon's medical treatment.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge