BRB No. 09-0550

JONI BARKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 11/25/2009
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/ AMERICAN INTERNATIONAL UNDERWRITERS	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

John Schouest and Limor Ben-Maier (Wilson, Elser, Moskowitz, Edelman & Dicker LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LDA-172) of Administrative Law Judge Lee J. Romero, Jr., 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 Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related injury to her neck and back on July 21, 2007, while working for employer as a warehouseman in Iraq. Claimant subsequently sought medical attention from employer when she began to experience severe headaches. After undergoing an MRI in Kuwait, claimant returned to the United States and she commenced treatment with Dr. Cavanaugh for back pain, neck discomfort, and headaches. On a referral from Dr. Cavanaugh, claimant began treating with Dr. Brewer, a Board-certified pain management specialist. On October 31, 2007, Dr. Brewer released claimant to return to work without restrictions.

In his Decision and Order, the administrative law judge found that claimant sustained work-related injuries to her neck and back with residual headaches, that claimant's condition reached maximum medical improvement on October 31, 2007, that claimant is unable to return to her pre-injury employment with employer, and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from July 21 through October 31, 2007, permanent total disability benefits from November 1, 2007, and continuing, medical expenses and an assessment pursuant to Section 14(e) of the Act. 33 U.S.C. §§908(a), (b); 907; 914(e).

On appeal, employer challenges the administrative law judge's award of permanent total disability and medical benefits subsequent to October 31, 2007. Specifically, employer contends that claimant was released by Dr. Brewer to return to work without restrictions and thus did not establish her *prima facie* case. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must establish that she is unable to perform her usual work due to the injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

In this case, the administrative law judge found that claimant established that she was temporarily totally disabled from July 21 through October 31, 2007, and reached maximum medical improvement on this later date. Decision and Order at 21. The administrative law judge found that while Dr. Brewer released claimant to return to work

without restrictions on October 31, 2007, the doctor did not release claimant to perform her former job with employer in the absence of a Functional Capacity Evaluation (FCE); pursuant to this finding, the administrative law judge determined that claimant demonstrated that she remained totally disabled subsequent to October 31, 2007. *Id.* at 22. The conclusion that claimant established an inability to return to work based solely on the doctor's statement regarding an FCE cannot be affirmed.

Claimant commenced treatment with Dr. Brewer, upon the referral of Dr. Cavanaugh, complaining of back and neck discomfort as well as headaches. On October 8 and 15, 2007, Dr. Brewer performed lumbar spondylosis facet arthropathies, and on October 22, 2007, claimant received a cervical facet injection. *See* EX 7 at 35, 36, 38. On October 31, 2007, claimant reported to Dr. Brewer that she had not experienced a migraine headache since August 20, 2007, and that she felt that her back had returned to "near normal."[1] *See id*. at 39. Based on claimant's statements and normal examination findings, Dr. Brewer issued a note on October 31, 2007, stating that claimant could return to work without restrictions. *See* October 31, 2007, release attached to CX 5. On deposition, Dr. Brewer testified that he released claimant to return to work on October 31, 2007, without restrictions; the doctor also stated that an FCE would be helpful in determining claimant's capacity to resume her employment duties with employer. CX 5 at 13 – 15, 30. This statement that an FCE would be helpful, however, does not lead to the administrative law judge's conclusion that "claimant was not released to perform her former job with Employer in the absence of a functional capacity evaluation." Decision and Order at 22. Rather, Dr. Brewer's October 31, 2007, release and subsequent testimony establish that, based upon his examination of claimant and her statements concerning the improvement she experienced regarding her back and headaches, she was released to return to work without restrictions; the doctor's statement on deposition regarding the helpfulness of a functional capacity evaluation does not alter that opinion. Consequently, as Dr. Brewer's testimony and reports establish that claimant was released to return to work without restrictions on October 31, 2007, we vacate the administrative law judge's award of total disability benefits to claimant as of that date, and remand the case for further consideration of the extent of claimant's disability.

Claimant's physical ability to perform her usual work does not end the inquiry, however, in view of the evidence that her former job was no longer available to her. *See McBride v. Eastman Kodak Co.,* 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir.

[1] Claimant indicated on her October 31, 2007, Follow-up Visit form that her pain had improved 95 percent since her last visit with Dr. Brewer, and that she would like to focus on "going back to work" during this visit. *See* CX 5.

1988);[2] *Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175, 180 (1996); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). Disability is an economic as well as a medical concept. Thus, claimant may demonstrate a *prima facie* case of total disability by showing that she cannot return to her former employment because employer has not made it available to her notwithstanding evidence that claimant is physically capable of performing the duties of that employment.[3] *Id.* In this case, the administrative law judge did not address claimant's testimony that she was in contact with employer after her return to the United States for medical treatment, Tr. at 28-31, that she spoke with a nurse associated with employer, *id.* at 31, that employer subsequently informed her that it would not be paying her medical expenses, *id*. at 33, and that in March or April of 2008 she was informed by employer that she had been

[2] In *McBride*, the administrative law judge found the claimant physically capable of returning to his usual job. The employer, however, did not allow claimant to resume his former job but offered him retraining and placement in a job in another city. On appeal, the United States Court of Appeals for District of Columbia Circuit held that the administrative law judge erred by finding that claimant had not established an inability to perform his original job based solely on medical evidence that he was physically able to do the work, rather than considering economic factors as well. The court held that since claimant's work injury was the precipitating factor that rendered his former job unavailable, claimant fulfilled his burden of showing that he was unable to return to his usual work due to his injury when employer failed to make the job available to him. *McBride*, 844 F.2d at 799-800, 21 BRBS at 48-50(CRT).

[3] Contrary to employer's interpretation, the United States Court of Appeals for the Fifth Circuit's decision in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991), does not address the pertinent issue here, which involves the effect of employer's refusal to return claimant to her usual employment upon her release to return to work on claimant's initial burden of establishing disability. *See* Employer's br. at 9 – 10. Claimant in *Turner* established that he was unable to return to his usual employment duties with his employer as a freight handler; consequently, the issue presented for adjudication regarded the showing required by employer to meet its burden of establishing the availability of *other* jobs that the claimant is capable of performing. The court concluded that while employer's burden of demonstrating that claimant is able to secure employment cannot amount to a requirement that employer either hire claimant or find him a guaranteed job, employer must attempt to establish that at the critical times there were jobs reasonably available within claimant's capabilities and for which claimant was in a position to compete realistically had he diligently tried. *Turner*, 661 F.2d at 1043, 14 BRBS at 165. While employer need not rehire claimant, where it refuses to do so, she may have met her burden of showing an inability to return to her former job.

terminated in October 2007. *Id.* at 40-41; *see also* EX 18 at 68, 73-74, 78-79, 82. Accordingly, on remand, the administrative law judge must initially address the issue of whether claimant's former employment with employer was available to her subsequent to her release to return to work by Dr. Brewer on October 31, 2007.

Should the administrative law judge on remand determine that claimant established her *prima facie* case of total disability, the burden then shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). In order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could realistically secure if she diligently tried. *Turner*, 661 F.2d at 1042 - 1042, 14 BRBS at 164 - 165. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir.), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). A claimant who works after an injury is not entitled to total disability benefits unless the claimant works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006).

In this case, it is undisputed that claimant was employed in the United States during various periods of time subsequent to October 31, 2007. Specifically, claimant testified that she worked as a security guard between March and May 2008, *see* EX 18 at 68 – 69; CX 4, and that since July 2008 she has worked part-time operating equipment which she owns. EX 18 at 69 – 71; CX 4. Moreover, claimant testified that she was physically capable of performing each of these jobs, and that she left the security guard position because she "didn't like it." EX 18 at 68 – 71. In his decision, the administrative law judge summarily found that, in the absence of a functional capacity evaluation, claimant's post-injury work in construction and security does not establish the availability of suitable alternate employment and is insufficient to establish a post-injury wage-earning capacity. *See* Decision and Order at 23. While a functional capacity evaluation is probative evidence regarding a claimant's physical capabilities, the administrative law judge's finding on this issue based solely on the absence of such a report cannot be affirmed. Claimant's testimony that she is working and was fully capable of performing the duties of a security guard and equipment operator subsequent to October 31, 2007, *see* EX 18 at 68 – 71, is relevant to the availability of suitable alternate employment that claimant is capable of performing. *See Turner*, 661 F.2d

1031, 14 BRBS 156. The administrative law judge must address this evidence on remand in light of the relevant law.[4]

Employer summarily challenges the administrative law judge's award of medical benefits to claimant subsequent to October 31, 2007, the date on which it avers that claimant's injury resolved in its entirety. We reject employer's contention of error. 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 Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988). Even if claimant is no longer disabled, employer remains liable for medical treatment for a work injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Medical care must be appropriate for the injury, 20 C.F.R. §702.402, and claimant must establish that the requested services are reasonable and necessary for the treatment of the work injury. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Weikert v. Universal Maritime Serv. Corp*., 36 BRBS 38 (2002). In this case, the administrative law judge found that claimant established that the treatment she sought, as recommended by her treating physician, was reasonable and necessary, and he therefore held employer liable for claimant's past medical care and treatment as well for claimant's future reasonable and necessary care related to her work injury. Decision and Order at 27. As employer has not established error in the administrative law judge's award of medical benefits to claimant, that award is affirmed. 33 U.S.C. §907; *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

[4] Should the administrative law judge determine that claimant's post-injury employment establishes the availability of suitable alternate employment, he must then calculate claimant's post-injury wage-earning capacity, since an award of permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(h); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

Accordingly, the administrative law judge's award of permanent total disability benefits subsequent to October 31, 2007, is vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

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