BRB No. 96-0754

DOROTHEA P. LLOYD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DEPARTMENT OF ARMY/NAF FORT JACKSON, SOUTH CAROLINA	)	DATE ISSUED:
	)	
and	)	
	)	
ALEXIS, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Granting Temporary Total Disability Benefits of Julius A. Johnson, Administrative Law Judge, United States Department of Labor.

C. Ansel Gantt, Jr. (Allen, Gantt & Best), Columbia, South Carolina, for claimant.

Elisa Roberts (Smith and Associates), Atlanta, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Granting Temporary Total Disability Benefits (94-LHC-2613) of Administrative Appeals Judge Julius A. Johnson rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, 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 if they 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).

On March 18, 1992, claimant slipped and fell on her left knee, fracturing her patella. Dr. Faulk subsequently removed the patella and repaired a tendon. On January 4, 1993, Dr. Faulk rated claimant's knee as having sustained a 15 percent permanent partial impairment due to the work injury. Employer voluntarily paid claimant temporary total disability compensation from March 19, 1992 to January 2, 1993, 33 U.S.C. §908(b), and permanent partial disability compensation for a 15 percent impairment to claimant's knee thereafter. 33 U.S.C. §908(c)(2). Claimant continued to treat with Dr. Faulk who, on the last day of his treatment of claimant, February 23, 1994, once again

opined that claimant had reached maximum medical improvement. Claimant filed a claim seeking additional temporary total disability compensation. At the formal hearing, employer requested that any award be limited to temporary total disability in order to preserve its option of raising its entitlement to Section 8(f) relief, 33 U.S.C. §908(f), at a later date. The administrative law judge granted employer's motion in a Notice to Parties Limiting Issue to Temporary Total Disability.

In his Decision and Order, the administrative law judge credited the medical opinions of Drs. Faulk, Kochanski and Weston in finding that claimant sustained a 15 percent permanent impairment of her left leg. Next, the administrative law judge credited the last report of claimant's treating physician, Dr. Faulk, in concluding that claimant reached maximum medical improvement on February 23, 1994, which is the last time Dr. Faulk treated claimant. The administrative law judge next found that claimant cannot return to her usual employment a cook, which required her to stand for virtually the entire work day. Lastly, the administrative law judge determined that employer failed to establish the availability of suitable alternate employment, and thus awarded claimant temporary total disability compensation commencing February 23, 1994.

On appeal, employer challenges the administrative law judge's finding regarding the date upon which claimant's condition reached maximum medical improvement, as well as the administrative law judge's determination that employer failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on February 23, 1994, rather than on January 4, 1993. We disagree. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). In his decision, the administrative law judge relied upon the testimony of Dr. Faulk in determining the date upon which claimant's condition reached maximum medical improvement. Dr. Faulk initially rated claimant's knee impairment on January 4, 1993; claimant, however, continued to have problems with her knee and Dr. Faulk continued to treat claimant. On February 23, 1994, Dr. Faulk, after taking into consideration the fact that claimant's knee had given way since January 4, 1993, once again opined that claimant's condition had reached maximum medical improvement. In rendering his determination on this issue, the administrative law judge specifically considered the totality of Dr. Faulk's testimony, and thereafter concluded that claimant reached maximum medical improvement on February 23, 1994. As the administrative law judge's finding that claimant reached maximum medical improvement on February 23, 1994, is supported by substantial evidence, the administrative law judge's finding on this issue is affirmed. *See generally Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

Employer next challenges the administrative law judge finding that its June 1995 labor market survey failed to establish the availability of suitable alternate employment. Where, as in the instant case, claimant is unable to perform her usual employment duties with employer, the burden

shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). In order for employment opportunities to be considered realistic, employer must establish their nature, terms, and availability. *See Reiche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984).

Based upon the testimony of claimant, as well as his observation of claimant at the formal hearing, claimant's age, limited education, and the fact that she has worked her entire adult life as a cook, the administrative law judge in the instant case concluded that claimant does not have the experience or skills necessary in order to compete for the positions listed in employer's June 1995 labor market survey. Moreover, the administrative law judge noted that employer offered no evidence of other skills claimant may have or of her rehabilitative potential. Based upon the foregoing, as well a finding that some of the positions identified were not actually available, the administrative law judge concluded that the jobs identified in employer's labor market survey are insufficient to establish the availability of suitable alternate employment which was realistically available to claimant. *See Canty v. S.E.L. Maduro*, 26 BRBS 147, 150-152 (1992).

Contrary to employer's contention, six of the fourteen position descriptions set forth in employer's labor market survey state that prior experience is preferable. *See* EX 14 at 3-5. The administrative law judge could thus properly reject these positions based on claimant's lack of experience. Moreover, of the eight remaining positions identified by employer, three are not within the administrative law judge's unchallenged assessment of claimant's physical restrictions, two other positions are with temporary agencies that did not state the precise nature and terms of the employment, and the remaining three positions did not have current openings and there is no evidence openings existed after claimant's knee reached maximum medical improvement. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). As the administrative law judge's findings are rational and in accordance with law, we therefore affirm the administrative law judge's determination that the positions identified by employer in its June 1995 labor market survey are insufficient to establish the availability of suitable alternate employment, and his consequent award of temporary total disability compensation commencing February 23, 1994.[1] *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Accordingly, the administrative law judge's Decision and Order - Granting Temporary Total Disability Benefits is affirmed.

[1]Although the administrative law judge's finding of maximum medical improvement as of this date supports an award of permanent total disability, rather than temporary total disability, the administrative law judge declined to enter such an award in view of the absence of a proper claim by claimant and the opportunity for employer to raise all possible defenses. No party challenges this aspect of the award.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge