BRB No. 92-0463

LAURA ELSTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE	)	DATE ISSUED:
	)	
and	)	
	)	
GATES McDONALD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Order Denying Petition for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Laura Elston, San Diego, California, *pro se*.

Eugene L. Chrzanowski (Littler, Mendelson, Fastiff & Tichy), Long Beach, California, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order - Awarding Benefits and the Order Denying Petition for Reconsideration (90-LHC-2107) of Administrative Law Judge Alfred Lindeman 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.* (the Act). In an appeal by a *pro se* claimant, the Board will review the administrative law judge's Decision and Order under its statutory standard of review, which requires that the Board 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

On November 8, 1984, while working as a janitor for employer, claimant slipped and fell in some water while lifting a bag of trash, injuring her back and right knee. Claimant had previously sustained a work-related back injury in 1979 which resulted in her missing four years of work. After initially receiving treatment at the base dispensary and Naval hospital, claimant subsequently came under the care of Dr. Bowman, an orthopedic surgeon, on November 16, 1984. Dr. Bowman diagnosed claimant's condition as lumbosacral sprain with sciatica, and prescribed medication, physical therapy and bed rest. Claimant continued under the care of Dr. Bowman. In a report dated June 20, 1985, Dr. Bowman indicated that he was unable to explain claimant's continued complaints and that he saw no reason why she should not be able to return to her previous employment unless a CT scan of the spine revealed an abnormality that would indicate further evaluation and treatment. A CT scan subsequently performed on July 31, 1985, revealed a degenerative facet at the L4-5 level. On November 6, 1985, Dr. Bowman performed L-4 to sacrum fusion surgery in the hope of alleviating claimant's symptoms to allow her to return to work. Claimant was also evaluated by Dr. Freeman, a neurosurgeon, and by various other specialists including Drs. London and Murphy, orthopedic surgeons, and Dr. Uda, a chiropractor. After the 1984 work accident, claimant was involved in two automobile accidents in April 1985 and November 1986. Claimant also underwent an appendectomy on May 9, 1985. Employer voluntarily paid claimant temporary total disability compensation from November 9, 1984 until March 28, 1989, at which time it ceased its payments because claimant stopped attending an electrical assembler training program sponsored by employer three days before its scheduled completion. Claimant filed a claim under the Act, seeking temporary total disability compensation from November 9, 1984 until February 24, 1987, and permanent total disability compensation thereafter.

The administrative law judge awarded claimant temporary total disability compensation from November 9, 1984 until June 2, 1985, permanent total disability compensation from June 3, 1985 until February 9, 1989, and permanent partial disability compensation thereafter. The administrative law judge also awarded employer relief under Section 8(f), 33 U.S.C. §908(f), and awarded claimant's former counsel attorney's fees. The administrative law judge, however, denied claimant future medical benefits, finding that claimant's need for ongoing future medical care for her back is not related to the effects of the November 1984 work injury. The administrative law judge denied claimant's petition for reconsideration on October 23, 1991. Claimant, appearing *pro se*, appeals, and employer responds, urging affirmance.

Once claimant establishes that she is unable to do her usual work, she has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment which claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In order to meet this burden, employer must show the availability of specific available job opportunities within the geographical area where claimant resides, which she could perform based upon her age, education, work experience and physical restrictions, which she could secure if she diligently tried. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

After review of the record, we affirm the administrative law judge's determination that claimant was permanently partially disabled rather than permanently totally disabled subsequent to February 10, 1989 because it is rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. at 362. In the present case, as it was undisputed that claimant is unable to perform her usual work as a janitor, the burden shifted to employer to establish the availability of suitable alternate employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). In finding that employer met this burden, the administrative law judge credited employer's vocational evidence, which included evaluations by Shoreline Assessment & Rehabilitation Service and Crawford Health and Rehabilitation. The administrative law judge noted that employer had undertaken vocational rehabilitation efforts that would have led to appropriate suitable employment upon claimant's completion of the electronic assembler program in early February 1989. The administrative law judge further noted that such employment and other jobs subsequently identified by employer would have paid approximately the equivalent of minimum wage at the time of claimant's 1984 injury.[1] The administrative law judge thus found that as of February 10, 1989, claimant had a post-injury wage-earning capacity of $134 per week, 33 U.S.C. §908(h), and accordingly was entitled to permanent partial compensation at the rate of $15.20 per week based upon claimant's average weekly wage of $156.80. 33 U.S.C. §908(c)(21).

The record reflects that claimant's treating physician, Dr. Bowman, specifically approved the mechanical assembler position as well as the cashier and lobby ambassador positions which employer's vocational experts identified as consistent with claimant's limitation to light duty work. The record also reflects that employer's vocational experts fully considered claimant's age, education and physical restrictions and were able to identify a significant number of specific available employment opportunities. Accordingly, because the administrative law judge's finding that suitable alternate employment was established is rational and supported by the record, it is affirmed. *See generally Merrill*, 25 BRBS at 145-146.

Once employer shows that suitable alternate employment is available, claimant can still prevail if she demonstrates that she diligently tried and was unable to secure such employment. *See generally Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). Although the administrative law judge failed to make a specific finding with regard to claimant's diligence, the record reflects that with the exception of a brief attempt at running a day-care center on her own, and phone calls regarding a service station attendant and security guard position identified by employer's vocational experts, claimant made no other effort to obtain alternate work. As these facts indicate that claimant did not demonstrate diligence in seeking alternate employment, the administrative law judge's award of permanent partial disability compensation subsequent to February 10, 1989 is affirmed.

[1]The administrative law judge is apparently referring to the results of a labor market survey conducted by Shoreline Assessment & Rehabilitation Services in May 1990. Emp. Ex. 37. In this survey, several cashier and lobby ambassador jobs were identified as suitable for claimant which paid $3.25 per hour in 1984, at the time of claimant's injury.

The administrative law judge's denial of future medical benefits cannot be affirmed, however, because it is inconsistent with his finding of continuing permanent partial disability resulting from the subject work injury. Section 7 of the Act, 33 U.S.C. §907(a), entitles claimant to medical benefits for reasonable and necessary treatment of a work-related injury. *See Brooks v. Newport News Shipbuilding and Dry Dock Co.,* 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

In denying claimant future medical benefits in this case, the administrative law judge credited the opinion of Dr. London, an orthopedic surgeon, who examined claimant on December 27, 1990, at employer's request, and the opinion of Dr. Freeman, a neurosurgeon who examined claimant on March 19, 1985 and June 3, 1985. Both of these doctors found that claimant had fully recovered from the effects of the work injury by June 1985. Dr. London also opined that claimant's continuing symptoms were due to the progression of her pre-existing degenerative disease and scoliosis. In awarding claimant permanent partial disability compensation commencing June 3, 1985, however, the administrative law judge found the November 1984 work injury was the "final straw" precluding claimant's resumption of her old janitor job, *i.e.*, that claimant's work injury aggravated or combined with her pre-existing degenerative condition, scoliosis, and the residual effects of the prior 1979 work injury to result in disability. Where, as here, a work-related injury aggravates, accelerates or combines with a pre-existing condition, the entire resultant condition is compensable. Under such circumstances, claimant is entitled to reasonable and necessary medical treatment related to the aggravation of the pre-existing condition or the combination of the pre-existing condition(s) and the work injury. *Kelly v. Bureau of National Affairs*, 20 BRBS 169, 172 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255 (1984)(Ramsey, C.J., dissenting on other grounds). *See generally Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). Accordingly, we reverse the administrative law judge's denial of future medical benefits and hold that claimant is entitled to reasonable and necessary future medical expenses resulting from the aggravating effects of the work injury.

Accordingly, the administrative law judge's denial of future medical benefits related to the work injury is reversed. The Decision and Order - Awarding Benefits and the Order Denying Petition for Reconsideration are, in all other respects, affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge