BRB No. 93-1646

GEANETT A. TYLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order On Remand of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Geanett A. Tyler, Gaithersburg, Maryland, *pro se*,

Amy L. Epstein (Freidlander, Misler, Freidlander, Sloan & Herz), Washington, D. C., for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals *pro se* the Decision and Order on Remand (85-DCW-284) of Administrative Law Judge Robert J. Feldman awarding benefits 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.*(1982)(the Longshore Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501-502 (1973)(the 1928 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).

This case is on appeal before the Board for the second time. On May 23, 1975, claimant, a bus driver for employer, sustained an abdominal contusion when the drive shaft and wheels on the bus she was driving locked, throwing her against the steering wheel. On March 16, 1976, claimant was again injured when mechanical problems developed, forcing her to strain herself to maintain control of the bus. Claimant was jarred from the seat when the bus hit a curb and stopped abruptly. Claimant began to hemorrhage, and a subsequent ultrasonic evaluation revealed that her uterus contained a dead 16 week old fetus, which was removed in April 1976. Claimant received medical treatment for a related infection until May 16, 1976, when she was released to return to work. On her

first day back at work, claimant began to hemorrhage again and was sent home. She has not worked since that time, stating that she continues to have pain originating from her coccyx.. Employer voluntarily paid claimant temporary total disability compensation from March 17, 1976 until November 3, 1976, and permanent partial disability from August 1977 to March 1984. Claimant filed a claim seeking permanent total disability compensation under the Act.

In his initial Decision and Order, the administrative law judge denied the claim, finding that claimant failed to establish the requisite causal connection between her coccydynia and a work-related accident. Appearing *pro se*, claimant appealed the denial of benefits to the Board. In a Decision and Order dated December 30, 1988, the Board affirmed the administrative law judge's denial of benefits, finding that the medical reports of Drs. Gordon and Feffer ruling out the causal connection between claimant's coccydynia and the bus accidents provided substantial evidence to support the administrative law judge's determination that causation had not been established. *Tyler v. Washington Metropolitan Area Transit Authority*, BRB No. 87-288 (December 30, 1988)(unpublished). Although claimant also attempted to introduce new evidence relating to causation, the Board informed claimant that it lacked the authority to consider any evidence which was not part of the record before the administrative law judge on appeal, and informed claimant of her right to seek modification before the administrative law judge pursuant to 33 U.S.C. §922. By Order dated March 16, 1989, the Board denied claimant's motion for reconsideration.

Thereafter, claimant appealed to the United States Court of Appeals for the District of Columbia Circuit. In an unpublished Order issued October 16, 1990, the D.C. Circuit summarily held that the administrative law judge failed to "inquire fully" into relevant evidence regarding causation as is required under 20 C.F.R. §702.338 (1989), and remanded to the United States Department of Labor for further proceedings. The court further noted that, in particular, the administrative law judge failed to ascertain the opinion of claimant's treating physician and to admit into evidence relevant medical documents.

Upon receiving the file on remand, the administrative law judge issued an interim order affording claimant the opportunity to submit an opinion by her treating physician together with any other relevant medical documents. Employer was also provided with an opportunity to respond. Crediting an August 3, 1977 letter written from claimant's treating physician, Dr. Azer, to claimant's counsel which related claimant's traumatic coccydynia to the March 15, 1976 work accident, over the contrary opinion of examining physicians, Drs. Gordon and Feffer, the administrative law judge reversed his prior finding that causation was not established in his Decision and Order on Remand. On remand, the administrative law judge also awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on Dr. Azer's assessment of a 30 percent permanent physical impairment.

Appearing *pro se*, claimant appeals the administrative law judge's denial of permanent total disability compensation, and in addition asserts that she is entitled to past and future medical expenses.[1] Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

Under the Longshore Act, "[o]nce the claimant demonstrates an inability to perform his or her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform." *Crum v. General Adjustment Bureau*, 738 F.2d 474, 479, 16 BRBS 115, 123 (CRT) (D.C. Cir. 1984). Upon a showing of available, suitable employment, the employee's disability is treated as partial rather than total. *See Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989) and 16 BRBS 231 (1984).

In the present case, the administrative law judge found that claimant established a *prima facie* case of total disability, crediting claimant's testimony and the physical restrictions imposed by Dr. Azer,[2] over a July 14, 1976 letter written by Dr. Maurice Sislen, an internist, which indicated that claimant should be able to return to her usual job.[3] The administrative law judge then noted that employer failed to introduce any evidence relating to the availability of suitable alternate work, and that claimant's treating orthopedic surgeon, Dr. Azer, rated claimant as having a permanent partial disability of 30 percent. Based on the absence of medical, vocational, or demonstrative evidence to the contrary, the administrative law judge, believing that he was constrained to adopt Dr. Azer's disability assessment, awarded claimant permanent partial disability compensation benefits of $51.04 per week, representing 30 percent of the applicable compensation rate of $170.11 per week.[4]

[1]Claimant also submitted two medical reports, dated July 27 and in October 8, 1993 which was not admitted before the administrative law judge. The Board may not consider this evidence as it was not part of the record before the administrative law judge. *See Williams v. Hunt Shipyards, Geosource, Inc.*,17 BRBS 32 (1895).

[2] Dr Azer limited claimant's driving to three hours per day and recommended against prolonged sitting.

[3]The administrative law judge determined that this evidence was irrelevant because it antedated the earliest medical reference to claimant's coccyx problem.

[4]Because the parties stipulated that claimant's average weekly wage was $255.17, the applicable compensation rate was two-thirds of this amount, or $170.11.

We agree with claimant that the administrative law judge erred in denying her claim for permanent total disability compensation in this case. Disability compensation under the Act is intended to compensate the injured employee for her loss in wage-earning capacity; accordingly, the extent of the employee's permanent physical impairment is not determinative. *See generally Butler v. Washington Metropolitan Area Transit Authority*, 14 BRBS 321, 323-324 (1981). Where as here, claimant succeeds in establishing a *prima facie* case of total disability and employer fails to meet its burden of establishing suitable alternate employment, claimant's disability is total rather than partial. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183-184 (1991). Accordingly, the administrative law judge's award of permanent partial disability compensation based on Dr. Azer's 30 percent physical impairment rating is vacated. As claimant established a *prima facie* case of total disability and employer offered no evidence regarding the availability of suitable alternate employment, we modify the administrative law judge's Decision and Order on Remand to reflect that claimant is entitled to permanent total disability compensation[5] on the facts presented as a matter of law. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145-146 (1991).[6]

Inasmuch as the administrative law judge determined that claimant's injury was work-related in his Decision and Order on Remand, claimant also correctly asserts that she is entitled to past and future medical benefits. *See generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 7 (1992). 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 .... as the nature of the injury or the process of recovery may require." Because the question of medical benefits was raised below, but never addressed by the administrative law judge, the case is remanded for consideration of this issue.[7]

[5]In light of our determination that claimant is permanently totally disabled, we need not address claimant's alternate argument that if the original award is affirmed she is entitled to 20 percent interest on any compensation not paid within 10 days of the Board's decision.

[6]Although claimant also appears to be asserting that she is entitled to damages for pain and suffering resulting from her work injury, such damages may not be awarded under the Act.

[7]Claimant also requests that she not have to submit to further medical examinations regarding the claim. The authority to actively supervise the medical care of an injured employee, however, falls within the province of the Director, Office of Workers' Compensation Programs, rather than the Board. 20 C.F.R. §702.407.

Accordingly, the administrative law judge's award of permanent partial disability compensation in his Decision and Order on Remand is vacated, and the decision is modified to award claimant permanent total disability compensation. The case is remanded for further consideration of claimant's right to reasonable and necessary medical benefits for her work-related injury consistent with this opinion. In all other respects, the Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge