BRB No. 10-0145

ELIZABETH McNALLY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 08/20/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
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.

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

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

PER CURIAM:

Employer appeals the Decision and Order (2009-LDA-0155) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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, a MWR coordinator in Iraq, injured her back on February 2, 2006, when she fell while returning to her living quarters. Claimant continued to perform her job duties until she was terminated, and she returned to the United States in June 2006.[1] HT at 51-60. Upon her return, claimant worked at several positions in various parts of the country. At the time of the hearing, claimant was employed as a home care companion.

In his Decision and Order, the administrative law judge found that claimant's current back condition arose, at least in part, as a result of her fall during the course of her employment. He found claimant's date of maximum medical improvement to be June 13, 2008. The administrative law judge awarded claimant compensation for temporary total disability of $917.33 per week from February 1, 2006, to June 13, 2008; for permanent partial disability of $730.96 per week from February 2009 to May 2009; and for permanent total disability of $917.33 per week from June 13, 2008 through February 2009, and from May 2009 and continuing. Employer appeals, contending that the administrative law judge erred in finding that claimant suffers any impairment that prevents her from returning to her usual job duties and in determining that claimant exercised diligence in looking for suitable alternate employment. Employer also contends that the administrative law judge erred in awarding claimant total disability compensation for the period after her injury during which she continued to work in Iraq and for the period commencing in May 2009 when claimant was employed as a home care companion.[2] Claimant has not responded to this appeal.

Employer contends that the administrative law judge erred in finding that claimant has any residual impairment from her work injury. Employer contends that claimant's condition fully resolved at least by October 31, 2007, when Dr. Freeman released her to return to her usual job duties for employer.

It is claimant's burden to establish that her work injury prevents her return to her usual work. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). The administrative law judge found that, based upon her current physical restrictions, claimant is unable to return

[1] Claimant was terminated because of numerous complaints filed by the soldiers. She alleges that her poor performance and attitude was due, at least in part, to the pain caused by her injury. HT at 50-51.

[2] Employer also argues that it is not responsible for claimant's current condition as she suffered an intervening injury after her return from Iraq. This issue was not raised before the administrative law judge and cannot be raised for the first time on appeal. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009).

to her job duties in Iraq.[3] In contending that claimant's condition had fully resolved, employer relied on Dr. Freeman's opinion of October 31, 2007, that claimant had fully recovered and was malingering and exaggerating her symptoms. EX 15. The administrative law judge, however, gave less weight to the opinion of Dr. Freeman because it was based upon a manual used by psychologists and psychiatrists, a field in which he had no expertise. Decision and Order at 54. The administrative law judge relied on the opinion of Dr. Bricken, a clinical psychologist, who rebutted Dr. Freeman's opinion and found that claimant failed to meet any of the criteria for establishing malingering. CX 7 at 4. The administrative law judge also gave determinative weight to the opinions of Drs. Nash and Brownhill who set restrictions on claimant's physical activities that would preclude her performing her usual job duties. EX 14; EX 17. Dr. Nash was claimant's treating physician, and he opined that claimant is capable of working only at a sedentary level and requires the ability to frequently change positions. EX 14. Dr. Brownhill stated that claimant would benefit from a job without bending or lifting, and that she should at first work only part-time. EX 17.

It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh the evidence. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge's reliance upon the opinions of Drs. Nash and Brownhill is within his discretion as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Moreover, the administrative law judge rationally found that the surveillance videotape does not support employer's contention that claimant's capabilities are greater than she claims. *See generally Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established her inability to return to her usual employment. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Once claimant establishes her inability to return to her usual work, the burden shifts to employer to establish the availability of realistic job opportunities which claimant is capable of performing considering her age, education, work experience and physical restrictions, and which she could secure if she diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS

[3] The administrative law judge found that claimant's job duties in Iraq consisted of mopping floors, washing bleachers, picking up weights and water containers weighing up to fifty pounds, handing out equipment and giving belly dancing lessons. Her work day consisted of twelve hours per day, seven days a week. HT at 25-28.

79(CRT) (5th Cir.), *cert. denied*, 479 U.S, 826 (1986). Employer presented seven positions as suitable alternate employment. Of these, the administrative law judge determined that three of the positions are within claimant's physical restrictions and constituted suitable alternate employment.[4] *See generally Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Once employer meets its burden of demonstrating that suitable jobs are available, claimant may retain entitlement to total disability benefits if she demonstrates that she was unable to secure employment although she diligently tried. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991). The administrative law judge found that claimant applied for and failed to secure employment not only from the jobs listed in employer's vocational report but also in her former fields of employment. The administrative law judge, therefore, found that claimant diligently sought alternate employment and was unable to obtain a position. Accordingly, he awarded claimant compensation for permanent total disability from June 13, 2008 to February 2009, and from May 2009 and continuing.[5]

Employer contends that the administrative law judge erred in finding that claimant diligently sought work. In this regard, employer avers that it appears the administrative law judge relied on a post-hearing affidavit submitted by claimant to which employer did not have the opportunity to respond. We agree with employer that the case must be remanded so that employer can respond to claimant's evidence.

At the hearing, claimant testified as to her general post-injury job search. HT at 92-100. At the close of the hearing, the administrative law judge held the record open for the receipt of doctors' depositions and employer's labor market survey. By Order dated June 26, 2009, the administrative law judge accepted employer's labor market survey into evidence and closed the record. He ordered that post-hearing briefs be filed by July 27, 2009. With her post-hearing brief, claimant offered evidence of her unsuccessful search for the jobs identified in employer's labor market survey. The administrative law judge relied on this evidence, as well as claimant's hearing testimony, to find that claimant diligently, yet unsuccessfully, sought work of the general type shown by employer to be

[4] The administrative law judge found that the positions of companion/caregiver, sales consultant, and inside salesperson constitute suitable alternate employment. EX 25; Decision and Order at 59-61.

[5] The administrative law judge awarded claimant permanent partial disability between February and May 2009 based on difference between her average weekly wages and her wages as a home care companion, a position she found on her own. *See* discussion, *infra.*

suitable and available. *See, e.g., Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Fortier v. Electric Boat Co.*, 38 BRBS 75 (2004).

It was within the administrative law judge's discretion to hold the record open for the receipt of additional evidence. 20 C.F.R. §702.338; *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988). Moreover, claimant is entitled to respond to employer's evidence of suitable alternate employment. *See generally Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). The administrative law judge did not formally accept claimant's job search evidence into the record, *see* Decision and Order at 2, yet he relied on it in finding that claimant's job search was diligent. *Id.* at 61-62. Employer correctly contends that it should have been afforded the opportunity to respond to claimant's job search evidence. *Ion v. Duluth, Missabe & Iron Range Ry.*, 31 BRBS 75 (1997). In *Ion*, the administrative law judge permitted the claimant to engage in a post-hearing job search in response to employer's evidence of suitable alternate employment. The Board affirmed this action as within the administrative law judge's discretion in view of employer's failure to inform claimant of the evidence prior to the hearing. The Board further held, however, that the administrative law judge should have given the employer the opportunity to cross-examine claimant or respond to his post-hearing affidavit regarding the job search. *Ion*, 31 BRBS at 79. As employer was not afforded the opportunity in this case to respond to claimant's job search evidence, we must vacate the administrative law judge's finding that claimant engaged in a diligent job search. On remand, the administrative law judge should formally admit claimant's evidence into the record and afford employer the opportunity to respond to it. The administrative law judge should then address the diligence of claimant's job search in light of all relevant evidence.

We also agree with employer's contention that the administrative law judge did not fully explain the basis for his award of total disability benefits while claimant was working. The administrative law judge found that claimant's job with employer after her injury, through the date of her termination, was not suitable, and he awarded claimant total disability benefits from the date of injury. In addition, the administrative law judge found that claimant was entitled to ongoing total disability benefits as of May 2009, even though claimant had obtained alternate work in February 2009 which was the basis for the administrative law judge's award of partial disability benefits from February through April 2009.[6] Claimant was working at the time of the formal hearing.

[6] At the time of the hearing, claimant was employed as a home care companion to an elderly person, a position which is similar to one identified in the vocational report, EX 25, and which the administrative law judge found to be suitable alternate employment. Decision and Order at 61. Claimant testified that she was able to perform this job. HT at 13-14.

The fact that claimant works after her injury does not preclude a finding of total disability where claimant demonstrates that she is working solely due to the beneficence of the employer or due to extraordinary effort and in spite of excruciating pain. *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 (5th Cir. 1978), *aff'g* 5 BRBS 62 (1976). Such an award, however, is limited to the exceptional case. The fact that claimant worked in some pain or while taking pain medication does not rise to the level required to support a finding of total disability. *Burch v. Superior Oil*, 15 BRBS 423 (1983). Factors such as claimant's pain and the physical limitations may support an award of partial disability benefits for a loss of wage-earning capacity notwithstanding that claimant has no loss in actual wages. *See Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999). In this case, the administrative law judge gave no explanation for his award of total disability compensation to claimant while she was working in Iraq, beyond stating that the job was not suitable. Similarly, he provided no basis for the total disability award while claimant was employed as a home care companion. Decision and Order at 62, 67-68. Therefore, we must remand the case for further findings consistent with law.

Accordingly, the administrative law judge's finding that claimant is unable to perform her usual work is affirmed. The case is remanded for the administrative law judge to address claimant's entitlement to total disability benefits consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge