BRB No. 98-1372

CHARLOTTE M. MARSHALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED: June 25, 1999
	)	
and	)	
	)	
THOMAS HOWELL GROUP	)	
	)	
Self-Insured Employer/Administrator-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Charlotte M. Marshall, Dallas, Texas, *pro se*.

Matthew R. Lavery, (HQ Army & Air Force Exchange Service), Dallas, Texas, for employer/administrator.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Benefits (97-LHC-160) of Administrative Law Judge James W. Kerr, 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant began working for employer as an accounting technician on March 29, 1993. Claimant's job required her to take phone calls, at an average of eight an hour, from Deferred Payment Plan customers about their Army & Air Force Exchange Service accounts. During these calls, she would look up their accounts on a computer, answer any questions, and then type a one to four line entry into a customer's account record to denote the inquiry. Claimant alleged that as a result of the repetitive motions on the computer keyboard, she injured her hands, wrists, shoulder, shoulder blade and neck on or about April 24, 1994. Over the course of the next several years, claimant received varying treatments for carpel tunnel syndrome from a series of physicians.[1] Of particular importance, Drs. Webb and Sandzen each opined that claimant could not return to her pre-injury employment, Drs. Ogunro and Rodriguez opined that claimant reached maximum medical improvement with regard to her right hand on January 14, 1997, and Drs. Sandzen, Leavens, Webb, Handal, and Rodriguez all released claimant to work with restrictions.

Claimant returned to work for employer on two separate occasions after her initial period of total disability, *i.e.*, July 28, 1994 through August 5, 1994, and then again on November 8, 1994 through March 24, 1995, but each time had to stop because of continued pain. Employer voluntarily paid temporary total disability benefits from April 28, 1994, to July 28, 1994, from August 5, 1994, to November 8, 1994, and again from March 24, 1995, to June 18, 1996, as well as permanent partial disability benefits for an 18 percent impairment to the right hand and an 11 percent impairment to the left hand. In addition, employer paid all authorized medical benefits.

In his decision, the administrative law judge initially determined that claimant had not yet reached maximum medical improvement with regard to her injuries. The administrative law judge then determined that claimant could not return to her pre-injury position as an accounting technician, but that employer established the availability of suitable alternate employment. In addition, the administrative law judge found that claimant did not exercise reasonable diligence in attempting to secure alternate employment, and thus found claimant entitled to temporary partial

[1]Specifically, between May 15, 1994, and September, 1997, claimant received treatment from Drs. Motgi, Tuen, Sandzen, Ostrow, Muckleroy, Connally, Leavens, Boulas, Ippolito, Webb, Jr., Handal, Rodriguez, Hopson, Ogunro, Tompkins, and Cruz.

disability benefits, based on the difference between her average weekly wage of $343.49, and her post-injury wage-earning capacity of $280 per week. The administrative law judge also determined that claimant is entitled to all reasonable and authorized medical benefits.

NATURE AND EXTENT OF DISABILITY

In his decision, the administrative law judge initially determined that claimant had not yet reached maximum medical improvement with regard to her injuries. The administrative law judge recognized that Drs. Ogunro and Rodriguez opined that claimant reached maximum medical improvement with regard to her right hand as of January 14, 1997, and that she received impairment ratings for both of her hands, but nonetheless concluded that she had not reached maximum medical improvement because she has not received the maximum benefit of medical treatment which has been recommended for improvement of her condition. Specifically, the administrative law judge relied upon the recommendations of Drs. Sandzen, Rodriguez, and Tompkins that claimant undergo either a work hardening or pain management program and the fact that claimant has never received this treatment. The administrative law judge's finding that claimant's condition remains temporary therefore is affirmed, as it is supported by substantial evidence. *See generally Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

The administrative law judge next rationally determined that claimant could not return to her usual employment as an accounting technician due to her work-related injuries based on his examination of the duties of said position, in conjunction with the medical opinions of Drs. Webb and Sandzen, who both opined that claimant's work-related injuries preclude her from returning to her pre-injury employment, and the post-injury work restrictions placed upon claimant by Drs. Handal, Rodriguez and Ippolito. *See generally Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Where, as in the instant case, claimant is unable to perform her usual employment, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where claimant resides which claimant, by virtue of her age, education, work experience, and physical restrictions, is realistically able to secure and perform. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). An employer can establish suitable alternate employment by offering an injured employee a light duty job at its facility which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of

performing it. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

With regard to this issue, the administrative law judge first determined that the mail room position with employer, which claimant worked post-injury for a brief time, was insufficient to meet its burden as it involved duties beyond her physical restrictions.[2] The administrative law judge determined, however, that employer established the availability of suitable alternate employment with the testimony of a vocational counselor, Mr. Kirksey. The administrative law judge found that using the restrictions set out by Dr. Sandzen on February 6, 1996, Mr. Kirksey identified four positions that claimant is capable of performing post-injury.[3] We hold that the administrative law judge's determination that employer established the availability of suitable alternate employment as of April 28, 1996, the date that Mr. Kirksey identified the four positions, is supported by substantial evidence, *e.g.*, Drs. Sandzen

[2]In particular, the administrative law judge found that the post-injury mail room position required claimant, on occasion, to open envelopes and take mail out of the envelopes, tasks which Dr. Sandzen opined were beyond claimant's physical restrictions. In addition, the administrative law judge credited claimant's testimony, supported in part by the testimony of employer's supervisory operating accountant, Marsha Ward, that she was having problems pulling the statements out of the envelopes, that she complained of pain caused by her duties in the mail room position, and that she missed a considerable amount of time in this position due to her work-related injuries.

[3]The four positions identified by Mr. Kirksey are as follows: a retail sales position in a women's apparel shop; a cosmetics consultant with a department store; and two separate telemarketing positions.

and Rodriguez approved the positions, and therefore is affirmed. *Guidry,* 967 F.2d at 1039, 26 BRBS at 30 (CRT); *Turner*, 661 F.2d at 1031, 14 BRBS at 156 (CRT).

Claimant may nevertheless defeat employer's showing of suitable alternate employment by establishing that despite the exercise of reasonable diligence in attempting to secure some type of suitable alternate employment, she nonetheless was unsuccessful in securing such work. *Turner*, 661 F.2d at 1031, 14 BRBS at 156. If claimant establishes diligence in pursuing alternate employment, employer's showing of suitable alternate employment is rebutted, and claimant is entitled to total disability benefits. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). The administrative law judge found that claimant did not establish diligence in pursuing alternate employment as he rationally concluded that claimant did not put forth a reasonable effort in attempting to secure any post-injury employment. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989)(Lawrence, J. dissenting). In rendering this finding, the administrative law judge first noted claimant's testimony that she wore wrist splint braces when she went to apply for a job at each of the four positions identified by Mr. Kirksey, even though there is no medical opinion of record which states that claimant's condition requires her to wear wrist splints at all times. In addition, the administrative law judge relied on Mr. Kirksey's testimony that claimant did not file an application with either of the first two employers he identified and that during one interview, claimant discussed various surgeries regarding her injuries, and according to her prospective employer, did not seem interested in the position at all. The administrative law judge also questioned the veracity of claimant's testimony that the unemployment office could do nothing for her until after the doctors released her to return to work since at the time of her visit to that office she had already been released to return to work with restrictions by Drs. Sandzen, Leavens, Webb, Handal, and Rodriguez. Consequently, we affirm the administrative law judge's findings on this issue, and his subsequent conclusion that claimant is entitled to temporary partial, rather than temporary total, disability benefits.

WAGE-EARNING CAPACITY

An award for temporary partial disability compensation is determined based on the difference between claimant's pre-injury average weekly wage and her wage-earning capacity thereafter. 33 U.S.C. §908(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). In determining claimant's benefits for her temporary partial disability, the administrative law judge rationally calculated claimant's post-injury wage-earning capacity by using the average hourly

wages of the four suitable jobs identified by Mr. Kirksey. *Avondale Industries, Inc. v. Pulliam,* 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998). Consequently, his finding that claimant has a residual wage-earning capacity of $7.00 per hour, and thus $280 per week, is affirmed.

MEDICAL EXPENSES

In the instant case, the administrative law judge determined that employer is liable for all reasonable medical expenses resulting from claimant's work-related injury with the exception of expenses related to the unauthorized treatment rendered by Drs. Tompkins and Cruz. Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request her employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). In the instant case, the administrative law judge determined that claimant never sought nor received authorization for the treatment of Dr. Tompkins, who subsequently referred her to Dr. Cruz for treatment of her neck and shoulder pain. In addition, the administrative law judge determined that employer did not refuse treatment for claimant's neck and shoulder pain as claimant did not give Dr. Ogunro, a Board-certified orthopedic surgeon, the opportunity to provide said treatment, even though the authorized physician, Dr. Rodriguez, on January 30, 1997, advised her to return to Dr. Ogunro for treatment of those particular complaints. The administrative law judge found that claimant instead sought treatment for her neck and shoulder from Dr. Tompkins, a physician in orthopedic surgery, over four months after Dr. Rodriguez's referral to Dr. Ogunro, without first seeking employer's authorization. *See* Hearing Transcript at 59-60; Employer's Exhibit 29. Consequently, as there is no evidence in the record which shows that claimant sought employer's authorization prior to her visits with Drs. Tompkins and Cruz, we hold that the administrative law judge rationally concluded that employer is not liable for claimant's medical treatment with either of these physicians, and accordingly, affirm his denial of medical benefits for the treatment rendered by Drs. Tompkins and Cruz. 33 U.S.C. §907(d); *see generally Ezell v. Direct Labor, Inc.,* 33 BRBS 19, 28 (1999); *Maguir*e, 25 BRBS at 299.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge