BRB No. 97-675

DONNA BUCKLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY/NAF/CPO	)	DATE ISSUED: Dec. 23, 1997
	)	
and	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Denial of Motion for Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Patrick M. Quinn (Smith, Sovik, Kendrick & Sugnet, P.C.), Syracuse, New York, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Denial of Motion for Reconsideration (95-LHC-564) of Administrative Law Judge Ainsworth H. Brown 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). We must 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured her lower back lifting laundry out of a commercial laundry basket while working as a laundry worker for employer on March 9, 1994. Previously, claimant

had suffered two work-related injuries in December 1992 and on October 1, 1993. As a result of the injuries she sustained in 1993, claimant had been working in a light duty laundry worker position for employer from January 17, 1994, through March 9, 1994, the time of the re-injury. In addition to her work-related injuries, claimant suffered a fractured pelvis and blood clot after she was involved in an automobile accident on April 7, 1995. Employer paid claimant temporary total disability benefits from March 10, 1994, through June 17, 1994, and medical benefits through May 24, 1995. Although the administrative law judge found that claimant established her *prima facie* case of total disability, he also found that employer established suitable alternate employment by offering claimant the same light duty position as a laundry worker she held at the time of the March 1994 injury, at the same wages. The administrative law judge thus concluded that claimant is not entitled to any additional compensation after June 14, 1994, the date she refused to return to the light duty position offered by employer. The administrative law judge subsequently denied claimant's motion for reconsideration in which claimant challenged the administrative law judge's finding that employer established suitable alternate employment and requested a *de minimis* award and entitlement to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, claimant challenges the administrative law judge's finding that employer established suitable alternate employment and his denial of a *de minimis* award. Claimant also asserts that the administrative law judge erred in failing to determine whether claimant is entitled to medical benefits. Employer responds in support of the administrative law judge's decision.

Claimant initially contends that the administrative law judge erred in finding that employer established suitable alternate employment and asserts that employer's job offer to her was sheltered employment. Once claimant establishes that she is unable to perform her usual work, the burden shifts to employer to demonstrate the availability of realistic 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. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). The Board has affirmed a finding of suitable alternate employment where employer offers claimant a job tailored to her specific restrictions so long as the work is necessary. *Larsen v. Golten Marine* Co., 19 BRBS 54 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Sheltered employment, on the other hand, is a job for which claimant is paid even if she cannot do the work and which is unnecessary; such employment is insufficient to constitute suitable alternate employment. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

The administrative law judge's determination that employer established suitable alternate employment is rational and supported by substantial evidence. The administrative law judge found that Drs. Shuman, Elstein and Heap all agreed that the written description of the light duty laundry worker position is within claimant's physical capabilities and that

none of the medical evidence indicates that the written job description, requiring claimant to sort and fold laundry while seated and allowing stretch breaks as required, is beyond claimant's capabilities. Decision and Order at 7; Cl. Exs. 2, 5; Emp. Exs. 2-5; Tr. at 110, 184, 189, 200. Because claimant and Ms. Hunter, claimant's third line supervisor, testified that both parties intended for the light duty position to entail even fewer duties than outlined in the written description, the administrative law judge found that claimant is capable of returning to the light duty position as outlined in the written job description as well as the less strenuous duties contemplated by both parties. Decision and Order at 7; Tr. at 58-65, 219. Although claimant was working beyond the bounds of her light duty position on March 9, 1994, at the time of her re-injury, the administrative law judge rationally found that claimant's voluntary performance of additional, more physical duties beyond the required duties, on her own initiative, without the request, knowledge or acquiescence of employer, did not defeat employer's attempt to tailor claimant's employment to her physical limitations. *See Darby*, 99 F.3d at 685, 30 BRBS at 93 (CRT); Decision and Order at 7-8; Tr. at 67. Moreover, the administrative law judge acted within his discretion in finding most significant the fact that despite Dr. Shuman's statement that claimant cannot return to whatever duties she actually performed from January 17, 1994, through March 9, 1994, the physician admitted that he too would have approved claimant's return to the position as described in the written document. Decision and Order at 8; Tr. at 121, 138, 149.

The administrative law judge also rationally determined that the light duty position offered by employer did not constitute sheltered employment after finding that folding laundry was necessary work and that employer did not attempt or offer to pay claimant even if she could not do the work. Decision and Order at 8. Despite claimant's contention to the contrary, the administrative law judge applied the correct legal standard in this determination. *See Darden*, 18 BRBS at 224*; Harrod*, 12 BRBS at 10; Decision and Order at 8. Moreover, the fact that the light duty laundry worker position was created especially for claimant and would not be filled if she left does not necessarily establish that the position was sheltered employment. *See Darby*, 99 F.3d at 685, 30 BRBS at 93 (CRT). Although claimant asserts that the light duty position was not profitable for employer because it would end up paying two persons to perform the work of one person, this assertion is not supported by the evidence as Ms. Hunter testified that someone already employed by employer would bring the laundry to claimant so she could fold it.[1] Tr. at 226-227. Consequently, we affirm the administrative law judge's finding that employer established suitable alternate employment at the same wages claimant earned before the injury.

We next address claimant's challenge to the administrative law judge's failure to determine whether claimant is entitled to a *de minimis* award. *De minimis* awards are appropriate where claimant has not established a present loss in wage-earning capacity

[1]Despite claimant's assertion that the administrative law judge erred by precluding claimant from developing the record through questioning of Ms. Hunter with respect to the necessity and profitability of the light duty job, the record shows that claimant's counsel did not make an offer of proof on this issue. 29 C.F.R. §18.103; Tr. at 230-231.

under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), but has established that there is a significant possibility of future economic harm as a result of the injury. *Metropolitan Stevedore Co. v. Rambo*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989). The administrative law judge did not discuss the issue of a *de minimis* award in his decision, but upon claimant's motion for reconsideration asserting that she was entitled to a *de minimis* award, denied the request.[2] The administrative law judge's denial of a *de minimis* award is supported by substantial evidence based on Ms. Hunter's testimony. Ms. Hunter testified that claimant would have been able to keep her job as a light duty laundry worker for the foreseeable future with no time limitation and as long as she could have folded the laundry, employer would not have had a problem with her doing light duty laundry work. Tr. at 228-229. Thus, the medical evidence that claimant can perform the light duty job offered and that the job was of an unlimited duration belie claimant's contention that she has established a significant possibility of future economic harm. Consequently, we affirm the administrative law judge's denial of a *de minimis* award. *Burkhardt v. Bethlehem Steel Corp.,* 23 BRBS 273 (1990).

[2]Although the administrative law judge noted that this issue was first raised by claimant in her motion for reconsideration, we note that a claim for total disability benefits includes a claim for any lesser award. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27 (CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997).

Claimant further contends that the administrative law judge erred in failing to determine whether she is entitled to ongoing medical benefits. Claimant is entitled to medical benefits for a work-related injury even if that injury is not economically disabling if the treatment is necessary for her work-related injury. *Romeike v. Kaiser Shipyards,* 22 BRBS 57 (1989). The administrative law judge stated on reconsideration that inasmuch as claimant presented no bills for payment, there was no issue regarding medical benefits for him to decide. However, in his opening statement, claimant's counsel asserted that employer is responsible for medical benefits due to claimant's back injury after ceasing all benefits on May 24, 1995, because of her April 7, 1995, automobile accident, Tr. at 6, and the administrative law judge therefore should have addressed this issue. 20 C.F.R. §702.336(a). Moreover, in a letter to the administrative law judge dated May 16, 1996, three months before the hearing, claimant's counsel outlined the status of the case in detail, noting that employer had denied all medical benefits on May 24, 1995, due to claimant's intervening automobile accident on April 7, 1995, and that the no-fault carrier of claimant's automobile insurance policy provided medical benefits from May 24, 1995, through October 1995, when it determined that claimant had reached her pre-accident status. Although claimant continues to require medical treatment, claimant's counsel noted before the hearing that employer had not resumed medical benefits. Consequently, the case is remanded to the administrative law judge for consideration of whether claimant is entitled to medical benefits for her work injury, since there is evidence that may be sufficient to establish that she is undergoing treatment necessary for her work-related injury.[3] *See Romeike,* 22 BRBS at 57.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed. The administrative law judge's Denial of Motion for Reconsideration is affirmed with respect to his finding that employer established suitable alternate employment and his denial of a *de minimis* award, but vacated with respect to his denial of medical benefits. The case is remanded to the administrative law judge for consideration of whether claimant is entitled to medical benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[3]Dr. Shuman testified at the hearing that claimant's current treatment through the pain clinic with medications and injections as needed is medically necessary and appropriate due to her work-related injury. Tr. at 126-127. He also testified that an appropriate step would be to send her to a psychiatrist or psychologist. Tr. at 150. Dr. Elstein agreed with the recommendation to have claimant seen by a psychologist or psychiatrist. Tr. at 189.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge