

BRB Nos. 06-0353
and 06-0515

SHEREE L. ORTEGA)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING, INCORPORATED)	DATE ISSUED: 12/14/2006
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits, the Decision and Order Denying Employer's Motion for Reconsideration and Corrected Order, and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Olsen, Walker & Hill, P.C.), Mobile, Alabama, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, the Decision and Order Denying Employer's Motion for Reconsideration and Corrected Order, and the Supplemental Decision and Order Awarding Attorney Fees (2003-LHC-2753) of Administrative Law Judge Richard D. Mills and the Compensation Order Award of Attorney's Fees (Case No. 07-157750) of District Director David A. Duhon 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.* (the 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).

Claimant commenced her employment with employer on May 8, 1974. In 1995 or 1996, claimant began to experience elbow pain. Claimant sought medical attention and, following therapy and a nerve block, she underwent carpal tunnel releases on both of her hands. Claimant continued to experience hand symptoms and returned to work with restrictions. Following an increase in those restrictions, employer could not accommodate claimant, and she has not been gainfully employed since August 22, 2002. Employer voluntarily paid claimant temporary total disability compensation from March 7, 2000 through June 18, 2000, and from August 28, 2000 through October 29, 2000, and permanent partial disability compensation thereafter for a five-percent impairment to each arm. *See* 33 U.S.C. §908(b), (c)(1).

In his Decision and Order, the administrative law judge found that employer did not contest that claimant has a work-related permanent partial disability that prevents her from returning to her previous position as a storekeeper. Next, the administrative law judge found that while the full-time employment positions identified by employer’s vocational expert were unsuitable for claimant in light of restrictions limiting her to four to five hours of work per day, employer established the availability of suitable alternate employment when it identified two part-time employment opportunities within claimant’s physical restrictions. The administrative law judge then concluded that claimant diligently but unsuccessfully sought employment post-injury. Accordingly, the administrative law judge awarded claimant temporary total disability benefits for the periods of March 7, 2000 through June 18, 2000, and August 23, 2000 through October 29, 2000, and permanent total disability benefits from August 23, 2002 and continuing. 33 U.S.C. §908(a), (b). On reconsideration, the administrative law judge amended his award of benefits to reflect claimant’s entitlement to temporary total disability benefits for the periods of August 28, 2000 through October 29, 2000, and March 7, 2001 through June 18, 2001, and permanent total disability benefits from August 23, 2002, and continuing. 33 U.S.C. §908(a), (b).

In a Supplemental Decision and Order, the administrative law judge awarded claimant’s attorney a fee of \$15,701.88, plus costs of \$2,076.33. In a Compensation Order dated March 21, 2006, the district director awarded claimant’s counsel a fee in the amount of \$4,878.13, plus costs of \$2,025.38.

Employer appealed the administrative law judge’s award of ongoing permanent total disability benefits to claimant and the attorney’s fee awarded to claimant’s counsel. BRB No. 06-0353. Employer subsequently appealed the district director’s award of an attorney’s fee to claimant’s counsel. BRB No. 06-0515. In an Order issued April 5, 2006, the Board

consolidated these appeals for purposes of decision. Claimant responds to employer's appeals, urging the Board to reject employer's contentions of error.

Employer initially avers that once, as in this case, it has established the availability of suitable alternate employment for claimant, claimant's unsuccessful quest for post-injury employment is irrelevant and claimant is limited to the schedule for her work-injuries.¹ See Employer's Brief at 15-17. This argument is without merit, as it is contrary to longstanding case precedent. It is well-established that where, as in the instant case, claimant is unable to perform her usual employment duties with employer, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to establish the availability of suitable alternate employment within the geographic 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); *Diosdado v. Newport Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). The Fifth Circuit further held in *Turner* that if employer meets its burden and establishes the availability of suitable alternate employment, claimant then bears a complementary burden of demonstrating diligence in attempting to secure some type of alternate employment. Since *Turner* was decided, other appellate courts have followed this analysis, holding that where employer demonstrates suitable alternate employment, claimant nevertheless can prevail in her quest to establish total disability if she demonstrates that she diligently tried and was unable to secure such employment. See *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2nd Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); see also *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). Accordingly, two inquiries are required in cases where claimant has established a *prima facie* case of total disability: first, did employer establish the availability of suitable alternate employment and, if the answer is in the affirmative, did claimant demonstrate due diligence in seeking such employment?

In the instant case, as claimant does not challenge the administrative law judge's finding that employer established the availability of suitable, part-time employment opportunities that were available within the geographic area where she resides, that finding is affirmed. Having thus found that suitable alternate employment was established, the administrative law judge properly addressed whether claimant demonstrated that she

¹ Permanent partial disability for an arm injury arising under the Act must be compensated pursuant to the schedule at Section 8(c)(1), 33 U.S.C. §908(c)(1). See *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

diligently tried and was unable to secure such employment. *See Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Hooe*, 21 BRBS 258.

Employer, however, contends that as it established the availability of suitable alternate part-time employment, and claimant did not apply for the specific jobs identified by employer, employer has satisfied its burden and claimant is limited to an award for permanent partial disability under the Act's schedule, 33 U.S.C. §908(c)(1). Employer's argument must be rejected. We have affirmed the finding that employer established suitable alternate employment, but claimant can prevail nonetheless in obtaining permanent total disability benefits if she establishes that she diligently pursued employment opportunities. The Fifth Circuit has described claimant's burden in this regard as one of "establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. . . . Job availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person *genuinely* seeking work with his determined capabilities." *Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (emphasis in original); *see Palombo*, 937 F.2d at 74, 25 BRBS at 7(CRT). Contrary to employer's contention, there is no requirement that claimant apply for the specific employment opportunities identified by employer; rather, it is dependent upon the administrative law judge to discuss the jobs relied upon by claimant and to consider both the nature and sufficiency of claimant's efforts in determining whether claimant was genuinely seeking alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. *See Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT). We therefore reject employer's argument that claimant's unsuccessful quest for post-injury employment is rendered irrelevant by her

failure to apply for the two specific employment opportunities relied upon by the administrative law judge in finding employer established the availability of suitable alternate employment.²

Employer next contends that the administrative law judge's finding that claimant diligently sought employment post-injury is not supported by substantial evidence. Specifically, employer avers that claimant's post-injury employment efforts were not aimed at actually finding a job. We reject this argument, as the administrative law judge's finding that claimant met her burden of demonstrating diligence and a willingness to work post-injury is supported by substantial evidence. The administrative law judge rationally relied upon claimant's testimony and her employment-search log in finding that claimant unsuccessfully applied for employment post-injury with one hundred and forty employers, including those jobs identified by employer's vocational expert and forwarded to her attorney. *See* Decision and Order at 12; CX 12. The administrative law judge also found that claimant applied for between one and four jobs almost every week during her period of unemployment, and he thus concluded that claimant demonstrated that she was diligent, yet unsuccessful, in her quest to secure employment post-injury. Decision and Order at 12.

The administrative law judge considered both the nature and sufficiency of claimant's efforts to obtain employment post-injury in determining whether claimant genuinely sought post-injury employment, as required by the Fifth Circuit, and his findings support a conclusion that claimant sought to obtain employment within the compass of the employment opportunities identified by employer's vocational expert. *See Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). Therefore, as the administrative law judge's finding that claimant diligently yet unsuccessfully sought employment post-injury with multiple employers is rational and supported by the record, *see generally DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998), we affirm the administrative law judge's determination that, although employer established the availability of suitable alternate employment, claimant diligently tried and was unable to secure employment post-injury, thus entitling her to an award of continuing permanent total disability benefits. *See generally Roger's Terminal*, 784 F.2d 687, 18 BRBS

² Employer concedes in its brief that these two part-time positions were identified by its expert during his post-hearing deposition. *See* Employer's Brief at 16. While employer need not communicate jobs to claimant in order to meet its burden on suitable alternate employment, employer cannot reasonably attack claimant's showing of diligence by accusing her of failing to apply for jobs which were not disclosed until the eleventh hour. In contrast, claimant's job log, credited by the administrative law judge, *see infra*, "shows that nearly every week from September 2002 until April 2004 [claimant] applied for jobs." Decision and Order at 5.

79(CRT).

In its attorney's fee appeals, employer urges the Board to hold in abeyance the attorney's fees awarded to claimant's counsel by the administrative law judge, BRB No. 06-0353, and the district director, BRB No. 06-0515. The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). In this regard, an attorney's fee must be awarded in accordance with the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In the instant case, claimant's attorney requested a fee of \$21,950, for work performed before the administrative law judge, representing 109.75 hours of services rendered at an hourly rate of \$200, plus costs of \$2,076.33. In his supplemental decision, the administrative law judge awarded claimant's counsel a fee of \$15,701.88, representing 84.875 hours of services rendered at an hourly rate of \$185, plus \$2,076.33 in costs. Claimant's counsel also filed a fee petition with the district director requesting a fee of \$5,900, representing 29.5 hours of services rendered before that official at an hourly rate of \$200, plus costs of \$205.38. The district director, after reducing the requested hourly rate to \$175 and the number of hours requested to 27.875, awarded counsel a fee of \$4,878.13, plus \$2,025.38 in costs.

As employer avers on appeal, it is well-established that fee awards do not become effective, and thus are not enforceable, until all appeals have been exhausted. *See Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *Thompson v. Potashnik Constr. Co.*, 21 BRBS 59, *on recon.*, 21 BRBS 63 (1988); *see also Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Williams v. Halter Marine Serv., Inc.* 19 BRBS 248 (1987). An administrative law judge or district director is not precluded, however, from entering a fee award while an appeal is pending. Accordingly, as employer does not challenge either its liability for, or the amount of, the attorney's fees awarded by the administrative law judge and the district director in this case, those fees are affirmed and will be enforceable upon the exhaustion of employer's appeals.

Accordingly, the administrative law judge's the Decision and Order Awarding Benefits, the Decision and Order Denying Employer's Motion for Reconsideration and Corrected Order, and the Supplemental Decision and Order Awarding Attorney Fees and the district director's Compensation Order Award of Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge