BRB No. 04-0889

MELVIN L. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 07/25/2005
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-LHC-0982) of Administrative Law Judge Richard K. Malamphy 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 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).

This is the third time that this case is before the Board. To summarize the facts and procedural history, claimant injured his back on March 11, 1987, while working for

employer as a rigger. Claimant subsequently returned to light-duty work but was terminated on May 8, 1989. A compensation order, based on the parties' stipulations, was issued by the district director on October 24, 1990, awarding claimant various periods of temporary total and partial disability benefits. On June 23, 1995, employer sought modification of this order, asserting that claimant's 1987 injury had resolved by October 24, 1990. *See* 33 U.S.C. §922. In his initial decision, the administrative law judge modified the 1990 compensation order to reflect claimant's reaching maximum medical improvement as of November 10, 1989, and employer's establishing suitable alternate employment on November 17, 1993; accordingly, the administrative law judge awarded claimant permanent total disability benefits from November 10, 1989, to November 16, 1993, and permanent partial disability benefits thereafter.

Employer appealed this decision to the Board, which affirmed the administrative law judge's finding that employer failed to establish a change in claimant's physical condition but vacated his summary finding that employer established the availability of suitable alternate employment only as of November 17, 1993; the Board therefore remanded the case for the administrative law judge to discuss and weigh the evidence supporting employer's contention that it established the availability of suitable alternate employment for claimant in 1990. *Davis v. Newport News Shipbuilding & Dry Dock Co. [Davis I]*, BRB No. 01-0549 (Mar. 15, 2002)(unpub.).

On remand, the administrative law judge weighed the evidence of record and found that employer failed to meet its burden of establishing the availability of suitable alternate employment prior to November 1993; accordingly, the administrative law judge reaffirmed his previous award of benefits to claimant.

On appeal, the Board affirmed the administrative law judge's rejection of the labor market surveys prepared by Ms. Williams and Ms. Whitfield. The Board determined, however, that it could not affirm the administrative law judge's rejection of the jobs identified by Mr. Klein since, contrary to the administrative law judge's statement, Mr. Klein identified the wage rates for two positions available in 1990; moreover, the Board noted that Mr. Klein identified several other employers who were likely hiring in 1990. Accordingly, the Board once again vacated the administrative law judge's finding that employer did not establish the availability of suitable alternate employment in 1990, and it remanded the case for the administrative law judge to ascertain if employer established the existence of a range of suitable jobs available in 1990. The Board instructed the administrative law judge to compare the specific requirements of the jobs identified with claimant's physical restrictions and to determine if the jobs are educationally and vocationally suitable for claimant. *Davis v. Newport News Shipbuilding & Dry Dock Co. [Davis II]*, BRB No. 03-0184 (Oct. 30, 2003)(unpub.).

After receiving briefs from the parties following the Board's remand, the administrative law judge addressed claimant's restrictions and abilities and, applying these restrictions to the vocational evidence submitted by employer, concluded that employer failed to establish the availability of suitable alternate employment prior to November 17, 1993. Accordingly, the administrative law judge awarded claimant permanent total disability compensation for the period between July 1990 and November 17, 1993.

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment as of October 24, 1990. Claimant responds, urging the Board to affirm the administrative law judge's decision on remand in its entirety.

Where, as in the present case, claimant has established that he is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Employer may rely on a retrospective labor market survey if the jobs identified were available during the "critical period" during which claimant was able to work. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Claimant's entitlement to total disability benefits ends as of the date suitable alternate employment is established. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). In the instant case, the issue presented for adjudication before the administrative law judge on remand from the Board involved employer's contention that it established the availability of suitable alternate employment as of October 24, 1990, rather than November 17, 1993.

Employer avers that the administrative law judge provided no reason or rationale for discarding the opinions of its three vocational experts. Employer initially asserts that while the administrative law judge previously determined that the labor market reports of Ms. Williams and Ms. Whitfield standing alone were insufficient to establish the availability of specific employment opportunities for employer, the reports corroborate the labor market survey of Mr. Klein and therefore should be considered in order to lend that later report greater credence. Employer's brief, however, is essentially identical to that which it submitted to the administrative law judge following the Board's remand of this case. This brief thus raises no allegations of error specific to the administrative law judge's decision on remand from the Board regarding these two reports.[1] The issue with

[1] Moreover, the Board has held that a one-sentence argument does not constitute adequate briefing of an issue raised on appeal. *See Plappert v. Marine Corps Exch.*, 31

regard to the administrative law judge's consideration of the reports of Ms. Williams and Ms. Whitfield was raised by employer in its prior appeal, was thoroughly considered and addressed by the Board in its prior decision, and its determinations on this issue constitutes the law of the case.[2] *See Lewis v. Sunnen Crane Serv., Inc.*, 34 BRBS 57 (2000); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). Accordingly, we reject employer's summary contention that the administrative law judge erred in his consideration of the labor market reports of Ms. Williams and Ms. Whitfield.

We next consider employer's contention that the administrative law judge provided no reason or rationale in concluding that employer did not establish the availability of suitable alternate employment prior to November 17, 1993. Contrary to employer's argument, the administrative law judge considered claimant's restrictions and abilities, as well as the positions identified by Mr. Klein, and concluded that employer had not demonstrated the availability of suitable alternate employment during the disputed period of time. Specifically, in light of the vocational testing of claimant which revealed a reading level of 2-3, a spelling level of 1.5, and a math level of 2.5, as well as Mr. DeMark's opinion that claimant was illiterate, the administrative law judge agreed with Mr. DeMark's testimony that claimant would be incapable of performing the identified positions of cashier, dispatcher, customer service representative, scheduler or order taker.[3] Lastly, the administrative law judge found that the position of donation center attendant may not have been available during the period of time in dispute. Thus, the administrative law judge concluded that the evidence offered by Mr. Klein was insufficient to meet employer's burden of establishing the availability of suitable alternate employment as of October 24, 1990.

BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); 20 C.F.R. §802.211(b).

[2] As the Board held in its previous decision, the administrative law judge's decision to reject the labor market surveys prepared by Ms. Williams and Ms. Whitfield is rational, supported by substantial evidence, and in accordance with law. *See Davis I*, slip op. at 3-4. Specifically, Ms. Williams did not identify any actual jobs, but only categories of allegedly suitable work, and her report thus did not establish the existence of a "range of jobs" which are reasonably available and which claimant could realistically secure and perform. Additionally, the Board concluded that the administrative law judge committed no error in rejecting positions identified by Ms. Whitfield due to a lack of information regarding those positions including the jobs' requirements.

[3] At the request of claimant's counsel, Mr. DeMark performed a vocational evaluation of claimant on July 8, 1999. After testing claimant's reading, spelling and mathematical skills, and taking into consideration claimant's advanced age, illiteracy and physical restrictions, Mr. DeMark opined that claimant would not be able to compete in the local labor market for available positions. *See* CXs 1, 10.

The administrative law judge fully considered claimant's ability to return to gainful employment in light of claimant's physical, educational and vocational limitations, he addressed each of the positions identified by Mr. Klein, and employer has failed to establish reversible error in his determinations.[4] Accordingly, as the administrative law judge's findings are rational and supported by substantial evidence, we affirm the administrative law judge's determination that employer did not establish the availability of suitable alternate employment prior to November 17, 1993, and his consequent award of permanent total disability benefits to claimant from July 1990 to November 17, 1993.5 *O'Keeffe*, 380 U.S. 359.

Claimant's counsel has filed a fee petition with the Board seeking an attorney's fee of $3,386.90, representing 7.93 hours of services performed by senior counsel at a rate of $225 per hour, 8.25 hours of services performed by associate counsel at an hourly rate of $175, and .88 hours of paralegal services performed at an hourly rate of $80, while this case was before the Board for the second time. BRB No. 03-0184. In response to this fee request, employer contends that claimant did not successfully prosecute his claim before the Board, that the billing rate and ultimate fee requested by counsel are excessive, and that counsel's fee petition lacks specificity. Claimant has filed a reply to employer's objections, and seeks an additional fee for one hour of time defending his fee petition.

We note employer's objections but conclude the hourly rate and fee are reasonable except in the following respects. Counsel's initial fee petition documents 8.31 hours of services undertaken by senior counsel on behalf of claimant. However, .77 hours of the time requested by senior counsel, and .13 hours of time requested by counsel's paralegal,

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[4] We note that the record indicates that the position of donation center attendant with Goodwill may, in fact, have been available in July 1990. *See* EX 42. However, the United States Court of Appeals for the Fourth Circuit, the court with review authority over this case, held in *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), that once the burden has shifted to employer to demonstrate the availability of suitable alternate employment, employer must present evidence that a range of jobs exists which are reasonably available and which the disabled employee is realistically able to secure and perform. Therefore, evidence of a single job opening is not sufficient. *Lentz*, 852 F.2d at 131, 21 BRBS at 112-113(CRT).

[5] Because we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment during the disputed period of time, we need not address employer's contention that claimant did not diligently seek work prior to November 17, 1993. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

involve services not performed in furtherance of claimant's defense of employer's appeal to the Board; we therefore decline to award a fee for these services.[6] As claimant's counsel was ultimately successful in defending claimant's award against employer's appeal, and as the remaining hours and hourly rates requested are reasonable, we award counsel a fee of $3,425.25, to be paid directly to counsel by employer, for services performed while this case was pending before the Board in BRB No. 03-0184. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. Claimant's counsel is awarded a fee of $3,425.25 for work performed before the Board in BRB No. 03-0184, payable directly to counsel by employer.

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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BETTY JEAN HALL
Administrative Appeals Judge

[6] Specifically, claimant's counsel has documented .26 hours for communications with the OWCP, .26 hours for the receipt of forms from employer that will be filed with OWCP, and .25 hours for the preparation of interrogatories, and counsel's paralegal has documented .13 hours for a letter to OWCP.