BRB No. 99-0582

JOHN NETTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: _____
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

John G. McDonnell, Biloxi, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees (98-LHC-1026, 1027) 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.* (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). 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, an electric cable puller, sustained a work-related injury to his right elbow on March 9, 1993, and again on August 16, 1995. The administrative law judge found that claimant could not return to his usual work following the second injury, and thus awarded claimant temporary total disability benefits from August 16, 1995, to

November, 15, 1996, the date he found claimant's condition became permanent, and permanent total disability from November 16, 1996, until July 30, 1998, the date the administrative law judge found employer established the availability of suitable alternate employment. The administrative law judge found further that claimant sustained a 28 percent impairment to his upper right extremity, 18 percent of which is caused by his August 16, 1995 accident. The administrative law judge therefore awarded claimant permanent partial disability benefits under the schedule set forth at 33 U.S.C. §908(c)(1). The administrative law judge thereafter awarded claimant's counsel an attorney's fee of $4,925.

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment until July 31, 1998. Employer also contends the administrative law judge erroneously awarded claimant's counsel an attorney's fee without considering its objections to the fee petition. Claimant responds, urging affirmance.

Employer contends that the administrative law judge erred in finding that it did not establish suitable alternate employment in February 1997. Employer alleges that the administrative law judge erred in finding that claimant's doctor did not approve the identified work until July 1998, contending further that such approval is not required before a job may be found suitable. Once, as here, the claimant establishes his inability to return to his usual work, it is employer's burden to demonstrate the availability of realistic jobs, within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P&M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986)*, cert. denied*, 479 U.S. 826 (1986).

Based on Dr. Crotwell's opinion, the administrative law judge found that claimant has the following work restrictions: no repetitive right arm work, no lifting more than 10 pounds frequently or 15 pounds infrequently with the right arm, no work at or above shoulder level, and no climbing ladders. Decision and Order at 14-15; Emp. Ex. 6. The administrative law judge then stated that these restrictions did not preclude claimant's performance of the three security guard jobs identified as available in employer's labor market survey of February 1997. The administrative law judge found, nonetheless, that inasmuch as Dr. Crotwell "expressed a degree of reservation as to the guard work described to him," employer did not establish suitable alternate employment at this time. Decision and Order at 15. The

administrative law judge found that Dr. Crotwell did not unequivocally conclude claimant could perform guard work until July 16, 1998, and the administrative law judge found that such positions were available to claimant as of July 31, 1998.[1]

We vacate the administrative law judge's finding that employer did not establish suitable alternate employment until July 31, 1998, and we remand this case for further consideration. Employer correctly asserts that a treating physician need not be asked whether specific employment opportunities are indeed suitable for claimant, but the administrative law judge also acts within his discretion in finding positions suitable or unsuitable based on the opinion of a credited physician. *See generally Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996). Nonetheless, the fundamental issue, which the administrative law judge is required to resolve, is whether the alternate positions identified by employer are within the restrictions on claimant's employability, as determined by the administrative law judge based on the evidence of record. *See, e.g., Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1988). On the facts of the instant case, employer is correct that it is contradictory for the administrative law judge to state that claimant's restrictions did not preclude his performance of the security guard work identified as available in February 1997, yet to find that suitable alternate employment was not established due to Dr. Crotwell's "reservations" about this job. Dr. Crotwell stated in a chart note dated April 28, 1997, that "Guard duty is a possibility as long as they fall within the restrictions that have been outlined." Emp. Ex. 6 at 27. On May 22, 1997, Dr. Crotwell wrote that he "okayed [a job description] for guard duty as long as it fell within [claimant's] restrictions." *Id.* at 28. As the only reservation expressed by Dr. Crotwell was that the jobs must be within claimant's physical restrictions, and as it is the administrative law judge's responsibility to determine whether identified jobs are indeed appropriate

[1]In denying employer's motion for reconsideration, the administrative law judge denied that his initial decision stood for the proposition that the attending physician must approve positions before suitable alternate employment can be found. The administrative law judge stated that he was simply indicating that Dr. Crotwell's assessment was the most probative in the record, and he therefore denied employer's motion for reconsideration.

given the claimant's physical restrictions, as well as his other vocational factors, we hold that the administrative law judge erred in determining that suitable alternate employment was not established on the basis of Dr. Crotwell's "reservation." Consequently, we vacate the administrative law judge's finding that employer established suitable alternate employment only as of July 31, 1998, and we remand the case to the administrative law judge to consider whether positions found by employer's vocational consultant prior to July 30, 1998, are suitable given claimant's physical restrictions and other vocational factors.

Remand is also required because employer correctly contends that the administrative law judge erred in failing to consider its timely filed objections to claimant's counsel's fee petition. In the instant case, counsel filed his original fee petition on February 2, 1999, and employer objected that counsel failed to list the dates on which he performed work. Employer reserved its right to file further objections if the petition was resubmitted with the required dates. The administrative law judge issued a Show Cause Order on February 18, 1999, providing counsel fifteen days to provide the appropriate information. Counsel submitted his amended fee petition to the administrative law judge on February 19, 1999, with service on employer. In his Supplemental Order dated March 18, 1999, the administrative law judge awarded claimant's counsel the requested fee of $4,925, representing 39.4 hours at $125 per hour, stating that employer had voiced no further objections. Nonetheless, as employer contends, the administrative file contains objections dated March 2, 1999, and date stamped March 5, 1999, which employer timely submitted to the administrative law judge in response to the amended fee petition.[2] *See* 20 C.F.R. §702.132. Upon receiving employer's motion for reconsideration of the attorney's fee issue, along with another copy of its objections, the administrative law judge stamped "Denied" on the document. Inasmuch as it is an abuse of discretion to not consider timely filed objections, *see generally Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998), we vacate the administrative law judge's attorney's fee award, and remand so that he may consider employer's objections prior to entering a fee award.

[2]As the administrative law judge gave claimant's attorney 15 days to correct his fee petition, it cannot be said that employer's objections, dated 11 days after the date counsel mailed his amended fee petition, were untimely filed.

Accordingly, we vacate the administrative law judge's finding that employer established suitable alternate employment on July 31, 1998, and the administrative law judge's award of attorney's fees. The case is remanded to the administrative law judge for reconsideration of these issues consistent with this decision. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge