BRB No. 92-0690

EFREN DIOSDADO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JOHN BLUDWORTH MARINE, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
HARTFORD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order - Denying Attorney's Fee of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Kim J. Fletcher (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges

Claimant appeals the Decision and Order and the Supplemental Decision and Order Denying Attorney's Fees[1](90-LHC-1355 and 90-LHC-1356) of Administrative Law Judge Donald W. Mosser 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Roach v. New York Protective*

[1]The administrative law judge's decision is miscaptioned as a "Supplemental Decision and Order - Granting Attorney's Fee."

Covering Co., 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a shipyard welder for employer, sustained a back injury on August 10, 1987, while removing air hoses from a vessel. After undergoing surgery, claimant returned to work for employer on February 17, 1988, but injured his back again that same day when he fell from a catwalk. Claimant has not worked since the last accident. Employer voluntarily paid claimant temporary total disability compensation from August 12, 1987, until February 16, 1988, based on an average weekly wage of $319.31, and from February 17, 1988, and continuing based upon an average weekly wage of $390.20. Claimant filed a claim under the Act for his two back injuries, seeking temporary total disability compensation from August 10, 1987 through August 14, 1989, and permanent total disability compensation thereafter.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from August 10, 1987, until February 14, 1988, based upon an average weekly wage of $319.31, temporary total disability compensation from February 17, 1988, until August 13, 1989, based upon an average weekly wage of $390, and permanent partial disability compensation thereafter. The administrative law judge also awarded claimant medical expenses and determined that employer was entitled to relief pursuant to Section 8(f), of the Act, 33 U.S.C. §908(f).

Claimant's attorney subsequently filed a fee petition for work performed before the administrative law judge, requesting $11,356.25 for 54.25 hours of attorney's services at $200 per hour and 6.75 hours of legal assistant services at $75 per hour, plus $1,134.44 in costs. Thereafter, employer filed objections to the petition. In his Supplemental Decision and Order, the administrative law judge denied the fee request in its entirety, finding that claimant's counsel's efforts had not resulted in claimant's obtaining additional compensation within the meaning of Section 28(b) of the Act, 33 U.S.C. §928(b).

On appeal, claimant initially challenges the administrative law judge's finding that he was not permanently totally disabled. Claimant contends that because Intracorp, the vocational placement firm hired by employer, failed to conduct testing of any kind, failed to inform prospective employer's of claimant's limitations, failed to notify claimant of the available job opportunities until 5 days prior to the hearing, and failed to clear the alternate jobs with his treating physician, Dr. Cameron, the administrative law judge erred in finding that employer had succeeded in establishing the availability of suitable alternate employment. Claimant further asserts that the administrative law judge erred in finding suitable alternate employment based on one job opportunity available at Igloo. In the alternative, claimant contends that the administrative law judge erred in commencing the award of permanent partial disability compensation as of the date claimant reached maximum medical improvement rather than November 9, 1990, the date that the alleged suitable alternate employment was shown to be available. Employer responds, agreeing with claimant that the administrative law judge erred in commencing the permanent partial disability award on August 14, 1989, but otherwise urges that the decision of the administrative law judge be affirmed.

Claimant also filed a supplemental appeal of the denial of the attorney's fee, arguing that inasmuch as employer contested the fact that claimant sustained any loss in his wage-earning capacity in its pre-hearing statement and claimant was successful in obtaining a formal order

awarding permanent disability compensation, he is entitled to an attorney's fee payable by employer. Employer responds that the administrative law judge's denial of an attorney's fee should be affirmed, but that if a fee is awarded, the hourly rates claimed should be reduced from $75 to $50 for the paralegal services of Catherine B. Eakin, and from $200 to $100 for the attorney services of Stephen M. Vaughan.

The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has set forth the standard for demonstrating suitable alternate employment applicable in this case. Once a claimant has established that he is physically unable to return to his pre-injury employment, the burden shifts to his employer to demonstrate the availability of suitable alternate employment that he is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The Fifth Circuit elaborated on its holding in *Turner* in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430, 24 BRBS 116, 120 (CRT) (5th Cir. 1991), *rev'g in part* 23 BRBS 322 and 23 BRBS 389 (1990). In *P & M Crane*, the court held that in establishing suitable alternate employment under the Act, the employer is not required to demonstrate that specific jobs are available for its injured employee in the local community. Rather, employers are only required to demonstrate that general job openings exist in the local community that claimant is qualified to fill and has a reasonable opportunity to secure. *Id.*, 930 F.2d at 430 n.10, 24 BRBS at 121 n.10 (CRT). Further, the employer need not present such job vacancies directly to its employee, as the job openings must be presented to the court to satisfy its burden of proof on the alternate employment issue, and not to the employee so as to facilitate his job search. *Id.*, 930 F.2d at 429 n.9, 24 BRBS at 120 n.9 (CRT). The *P & M Crane* court also held that the demonstration by an employer of even one employment opportunity in the local community may be sufficient to carry employer's burden, if the employee has a reasonable likelihood of obtaining that one opening. *Id.*, 930 F.2d at 431, 24 BRBS at 121 (CRT).

In concluding that employer met its burden of establishing the availability of suitable alternate employment in this case, the administrative law judge credited the testimony of employer's vocational expert, Mary Anderson, who testified at the hearing regarding the vocational efforts of Carmen Jasine, an employee whom she supervised at Intracorp. After evaluating claimant and meeting with his treating physician, Dr. Cameron, Ms. Jasine conducted a telephonic job survey on November 9, 1990 and identified four entry level jobs which she believed were suitable for claimant. The four jobs included an assembly worker position at Igloo, a sacker position at Fiesta No.2, and two dishwasher positions at Poncho's Mexican Buffet and Two Peso store. Although the administrative law judge found the evidence insufficient to establish that the sacker and dishwasher positions were within claimant's physical restrictions, he found that the job available at Igloo was suitable for claimant. In so concluding, the administrative law judge noted that this job required upper extremity assembly line work, that in some areas workers could alternate sitting and standing, that workers were given regular breaks to allow them to walk around, and that although some lifting was required, it was generally limited to less than 20 pounds. The administrative law judge also found inasmuch as claimant spoke only Spanish, this job was suitable in that the ability to speak English was not required.

We reject claimant's challenge to the administrative law judge's suitable alternate employment determination. Contrary to claimant's assertions, the fact that employer's vocational expert did not conduct achievement, intelligence, or physical testing does not invalidate her opinion regarding the availability of suitable alternate employment. An administrative law judge may credit a vocational expert's opinion even if the expert did not examine the employee where, as here, the expert was aware of the employee's age, education, industrial history and physical limitations in assessing alternate job opportunities. *See Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290 (1990). Claimant's contention that employer has not succeeded in establishing the availability of suitable alternate employment because he was not notified of the jobs identified in the November 1990 survey until 5 days prior to the hearing and accordingly was not afforded an adequate opportunity to apply for the jobs is also without merit, as under *P & M Crane*, employer need not present job vacancies directly to the employee. *Id.*

The fact that the alternate job opportunity at Igloo was not cleared with claimant's treating physician is also of no consequence, as the Act does not require that claimant's treating physician approve the alternate work identified. In any event, the record reflects that the physical requirements of this job were within the physical limitations imposed by Dr. Cameron. Although, as claimant maintains, Ms. Anderson testified at the hearing that she was unaware that Dr. Cameron had imposed some new restrictions in his November 12, 1990 deposition, this fact also does not invalidate her opinion as the job that she identified at Igloo was consistent with these limitations, which provided for no lifting over 50 pounds, twisting, prolonged bending, or stooping. Moreover, the fact that employer did not notify prospective employers of claimant's limitations is immaterial inasmuch as the Act does not require that the vocational expert contact employer directly. *See Hogan*, 23 BRBS at 292.

We also reject claimant's assertion that the administrative law judge erred in finding that employer met is burden of establishing suitable alternate employment based on the one employment opportunity identified at Igloo. In *P & M Crane*, the Fifth Circuit specifically found that the identification by employer of even one suitable alternate employment position could suffice to satisfy employer's suitable alternate employment obligation if there was a reasonable likelihood of claimant obtaining the particular job identified. *P & M Crane*, 930 F.2d at 431, 24 BRBS at 121 (CRT). Contrary to claimant's assertions, the *P & M Crane* court did not indicate that one job would only suffice to establish suitable alternate employment where the employee is highly skilled, the job found by employer is specialized, and the number of workers with suitable qualifications in the local economy is small. Rather, the court cited the aforementioned circumstances as one example of appropriate circumstances when an employee may have a reasonable likelihood of obtaining a single employment opportunity. The court, however, also indicated that the question of whether the one job identified by the employer's expert was realistically available would be a factual determination in the particular case. In the present case, as claimant has failed to establish that the administrative law judge erred in finding that there was a reasonable likelihood that claimant could obtain the one job identified at Igloo, we affirm his finding that suitable alternate employment was established based on the testimony of employer's vocational expert, Mary Anderson.

We also affirm the administrative law judge's finding that claimant failed to establish diligence in seeking suitable alternate employment. Once employer shows suitable alternate employment exists, claimant can still prevail if he demonstrates that he diligently tried and was unable to secure such employment. *See Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In the present case, the administrative law judge found that claimant had not exercised reasonable diligence in seeking alternate employment based on his unsuccessful employment efforts at Hercules Offshore Drilling, H & H Burglar Bars and Fence Company and Fiesta Store No.2 and his failure to file an application for employment with the Texas Employment Commission with regard to a job at Marias Industries. Since the administrative law judge found the evidence of record insufficient to establish that these jobs were suitable for claimant, he concluded that claimant failed to establish due diligence in seeking employment which was suitable.

Claimant asserts that the administrative law judge's rationale is insufficient to support his conclusion that claimant lacked diligence. Claimant's argument may have some merit, in that if he has diligently sought employment, he should not be penalized because the jobs are later determined to be unsuitable. Claimant, however, bears the burden of demonstrating diligence in seeking alternate employment. Claimant conceded at the hearing that he had not sought any work on his own during the 15 months between the time he reached maximum medical improvement and the time of the formal hearing. *See* Tr. at 88-89. We hold that claimant failed to meet his burden on this record of showing an exercise due diligence as a matter of law. *See Roger's Terminal*, 781 F.2d at 689, 18 BRBS at 83 (CRT). We thus affirm the administrative law judge's finding that claimant is not permanently totally disabled.

We agree with the parties, however, that the administrative law judge's finding regarding the commencement date of claimant's permanent partial disability award cannot be affirmed. A showing of suitable alternate employment may not be applied retroactively to the date the injured employee reached maximum medical improvement; rather, the injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1992); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). In this case, it is undisputed that suitable alternate employment was not established until November 9, 1990. Consistent with *Bethlehem Steel* and *Rinaldi*, we vacate the administrative law judge's finding that claimant's permanent partial disability commenced as of August 14, 1989 and modify the Decision and Order to reflect that claimant is entitled to permanent total disability compensation from August 14, 1989, until November 9, 1990, and permanent partial disability compensation thereafter.

We also reject claimant's final argument that he is entitled to recover attorney's fees and costs from employer because he was successful in obtaining an enforceable award of permanent partial disability compensation. An attorney's fee can only be assessed against employer if the requirements of Section 28(a) or (b) are met; in other cases where claimant obtains an award, a fee may be a lien on his compensation. 33 U.S.C. §928(a), (b), (c). Since voluntary payments were made, Section 28(a) does not apply, and employer is liable under Section 28(b) only if it controverted some aspect

of the claim and claimant thereafter successfully obtained an award which employer contested. *See National Steel and Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 883, 11 BRBS 68, 74 (9th Cir. 1979). In this case, although the nature and extent of disability were listed as contested issues on employer's pre-hearing statement, employer voluntarily paid claimant temporary total disability compensation at all times prior to the hearing and before the administrative law judge did not dispute that claimant was at least permanently partially disabled. Inasmuch as employer voluntarily paid claimant compensation through the time of the November 14, 1990, hearing in an amount equal to or greater than what was actually owed, the administrative law judge properly found that employer is not liable as claimant did not obtain greater compensation than that which employer had voluntarily paid. *See Flowers v. Marine Concrete Systems*, 19 BRBS 162, 164 (1986). As claimant has not established any error in the administrative law judge's refusal to assess an attorney's fee against employer, his fee order is affirmed to the extent it holds a fee may not be assessed against employee under Section 28(b).

While employer is liable for a fee only if the requirements of Section 28(a) or (b) are met, as claimant's counsel was successful here in obtaining an award of benefits, a fee may be awarded to be assessed against claimant. *See* 33 U.S.C. §928(c). The fee award will be a lien on claimant's compensation, and, in such cases, the regulations require consideration of claimant's financial circumstances. 20 C.F.R. §702.132(a). As the administrative law judge did not consider assessment of a fee against claimant, the case is remanded for him to award a reasonable fee under Section 28(c), after consideration of applicable factors.

Accordingly, the administrative law judge's Decision and Order is modified to reflect that claimant is entitled to permanent total disability compensation from August 14, 1989 until November 8, 1990, and permanent partial disability benefits thereafter. In all other

respects, the administrative law judge's Decision and Order awarding benefits is affirmed. The Supplemental Decision and Order Denying Attorney's Fees assessed against employer is affirmed, and the case is remanded for consideration of a fee payable by claimant.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge