BRB Nos. 89-3007
and 90-1700

EUGENE HARTWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order, Supplemental Order Awarding Attorney Fees and Costs, Decision on Motion for Reconsideration of Attorney Fee Award and Decision on Motion for Reconsideration of Attorney Fees of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor and the Compensation Order Award of Attorney Fee of Karen P. Goodwin, District Director, United States Department of Labor.

Eugene Hartwell, Seattle, Washington, *pro se*.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order, Supplemental Order Awarding Attorney Fees and Costs, Decision on Motion for Reconsideration of Attorney Fee Award and Decision on Motion for Reconsideration of Attorney Fees (88-LHC-1022) of Administrative Law Judge Vivian Schreter-Murray and the Compensation Order Award of Attorney Fee (Case No. 14-76130) of District Director Karen P. Goodwin 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).[1] In reviewing this *pro se* appeal, the Board will review the administrative law judge's findings of fact and conclusions of law under its statutory standard of review to determine whether 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant sustained an injury to his back during the course of his employment on October 15, 1983, but continued to perform his usual job duties. On October 27, 1983, claimant sustained a second injury which exacerbated a prior disc derangement. Surgery was performed on January 6, 1984, for an extradural defect at the L4-5 level on the right; claimant has not returned to work since the date of the second work-related incident. Employer voluntarily commenced payments of benefits for total disability to claimant as of October 28, 1983, based upon an average weekly wage of $790.88.

In her Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on July 24, 1985, that employer established the availability of suitable alternate employment paying $640 per week, and that claimant is thus entitled to permanent partial disability compensation commencing July 24, 1985, based upon the difference between claimant's stipulated average weekly wage and his post-injury wage-earning capacity. Lastly, the administrative law judge found that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Claimant's counsel subsequently sought an attorney's fee for work performed before both the administrative law judge and the district director. Both the administrative law judge and the district director initially awarded claimant's counsel a fee which was assessed as a lien on claimant's award. However, on reconsideration, the administrative law judge denied counsel's application for a fee.

On appeal, claimant, without the assistance of counsel, challenges the administrative law judge's award of permanent partial disability compensation and the attorney's fee awards.[2]

[1] By Order, dated November 6, 1990, the Board consolidated for purposes of decision claimant's appeal of the administrative law judge's multiple decisions, BRB No. 89-3007, with claimant's appeal of the district director's award of an attorney's fee, BRB No. 90-1700.

[2]We note that claimant's attorney withdrew as claimant's representative on March 7, 1990;

Employer responds, urging affirmance.

Disability

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Where, as in the instant case, it is uncontroverted that claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). Employer must establish realistic, not theoretical, job opportunities; for the job opportunities to be considered realistic, employer must establish their precise nature, terms, and availability. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of showing suitable alternate employment. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In considering whether employer has established the availability of suitable alternate employment, the administrative law judge must determine whether claimant is physically capable of performing the positions identified by employer. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 (1984). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, has stated that a claimant's diligent, yet unsuccessful, job search may be used to rebut an employer's evidence of the availability of suitable alternate work. *See Edwards v. Director, OWCP*, 999 F. 2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2. (CRT)(9th Cir. 1993).

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however, he subsequently filed notices of appeal and a brief with the Board, addressing only the fee awards rendered by the district director and the administrative law judge. By Order dated June 16, 1992, the Board found these documents to have been untimely filed and, accordingly, determined that these documents would not be considered when reviewing the case.

In the instant case, the administrative law judge concluded that employer established the availability of suitable alternate employment as of July 24, 1985, based upon the testimony of Ms. Larson, a vocational consultant, and Dr. Green. Dr. Green, after noting that claimant had demonstrated full use of his back on a voluntary basis when pursuing desired activities, opined that claimant could carry out gainful employment on a reasonably continuous basis at occupations where he was not required to repetitively lift, bend or stoop. *See* EX 113. Ms. Larson, taking into account claimant's work experience and the restrictions placed upon claimant by Dr. Green, identified, *inter alia*, the positions of service writer manager, automotive salesman, and automotive equipment sales representative, which she determined to be within claimant's physical, intellectual and emotional capabilities. *See* Tr. at 148-153. Ms. Larson noted that she contacted each of the listed employers. *See* EX 83. It is well-established that fact-finding functions reside with the administrative law judge, who is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Anderson*, 22 BRBS at 20. Based upon the record before us, the administrative law judge's decision to credit the vocational testimony of Ms. Larson, as supported by the medical opinion of Dr. Green, is neither inherently incredible nor patently unreasonable. We therefore affirm the administrative law judge's determination that employer met its burden of establishing the availability of suitable alternate employment based upon the vocational testimony and medical opinions of record, as that determination is rational and supported by evidence of record. *See, e.g., Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989)(Brown, J., dissenting on other grounds).

Claimant testified that he diligently attempted without success to obtain employment post-injury. The administrative law judge concluded, based in part upon claimant's non-specific testimony regarding both the dates on which he sought employment and the employers whom he visited, that the minimal efforts expended by claimant failed to establish that he diligently sought work. We affirm the administrative law judge's finding in this regard as it is rational, and her consequent award of permanent partial disability compensation. *See generally Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

Next, after concluding that employer established the availability of suitable alternate employment, the administrative law judge determined that those jobs paid an average of $33,280 per annum, and that claimant thus suffered a weekly loss of wage-earning capacity of $150.88. The administrative law judge calculated this figure by taking claimant's stipulated average weekly wage at the time of his injury, $790.88, and subtracting claimant's post-injury wage-earning capacity of $640 per week ($33,280/52 weeks). We affirm this calculation, as it is rational and in accordance with law. *See Cook v. Seattle Stevedoring Co*, 21 BRBS 4 (1988).

The administrative law judge in the instant case commenced claimant's permanent partial disability award on July 24, 1985, the day claimant reached maximum medical improvement.[3] An award of permanent partial, rather than total, disability benefits commences on the date employer

[3]We note that claimant, in his post-hearing brief, conceded that maximum medical improvement had been reached on July 24, 1985.

establishes the availability of suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), *vacating on recon.* BRB No. 88-1721 (January 29, 1991)(unpublished). In the instant case, the administrative law judge rationally determined that employer established the availability of suitable alternate employment based upon the specific employment opportunities set forth in the June 19, 1986, vocational report prepared by Ms. Larson. We therefore modify the administrative law judge's decision to reflect claimant's entitlement to permanent total disability from July 24, 1985, to June 19, 1986, and to permanent partial disability compensation commencing June 19, 1986, the earliest date upon which employer established the availability of suitable alternate employment.

Attorney's Fee Awards[4]

Lastly, we address the attorney's fee determination rendered by the district director. 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 Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director,[5] and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by employer. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). If employer is found not to be liable for an attorney fee under Section 28(a) or (b), the attorney's fee may be assessed against claimant and may be made a lien on claimant's compensation pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). *See Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977).

Claimant's counsel submitted a fee petition to the district director, requesting an attorney's fee of $4,250, including costs. The district director initially determined that employer could not be held liable for counsel's fee pursuant to either Section 28(a) or (b) of the Act. Next, the district director awarded counsel the fee requested and, without discussion, determined that the awarded fee was to be assessed against claimant as a lien on future compensation. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provide that any attorney's fee approved shall be reasonably commensurate

[4]We need not address the administrative law judge's decision to deny claimant's counsel a fee, as that determination is not adverse to claimant.

[5]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director"' has replaced the term "deputy commissioner" used in the statute.

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). Section 702.132, 20 C.F.R. §702.132, states that "when the fee is to be assessed against the claimant, [the awarded fee] shall also take into account the financial circumstances of the claimant." In the instant case, the district director's summary award of counsel's fee as a lien on claimant's compensation makes it impossible for the Board to apply its standard of review. *See generally Roach*, 16 BRBS at 115. Accordingly, we vacate the district director's attorney's fee award and remand the case to the district director. On remand, the district director must consider the applicability of Section 28(c) and the requirements of Section 702.132 in assessing counsel's fee against claimant.

Accordingly, the administrative law judge's award of benefits is modified to reflect claimant's entitlement to permanent total disability benefits from July 24, 1985, to June 19, 1986, and to permanent partial disability compensation as of June 19, 1986; in all other respects, the administrative law judge's Decision and Order is affirmed. BRB No. 89-3007. The district director's Compensation Order awarding an attorney's fee is vacated and the case remanded to the district director for further consideration consistent with this opinion. BRB No. 90-1700.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge