

BRB Nos. 93-1056
and 93-1165

ROBERT BOMBARD)
)
 Claimant-Respondent)
)
 v.)
)
 INTERNATIONAL TERMINAL) DATE ISSUED:
 OPERATING COMPANY,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor, and the Compensation Order - Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Thomas C. Erwin, Albany, New York, for claimant.

Cornelius V. Gallagher (Linden, Gallagher & Field), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (92-LHC-1275) of Administrative Law Judge Ainsworth H. Brown and the Compensation Order - Award of Attorney's Fees (Case No. 2-96239) of District Director Richard V. Robilotti 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C.

¹By Order dated May 30, 1993, the Board consolidated for purposes of decision employer's appeal of the administrative law judge's Decision and Order, BRB No. 93-1056, and its appeal of the district director's award of attorney's fees, BRB No. 93-1165. *See* 20 C.F.R. §802.104.

§921(b)(3). 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., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a mechanic, sustained a work-related crush injury to his left hand in which his index and long fingers were partially severed and his ring finger was lacerated. Claimant underwent surgical reattachment of the index and long fingers, but infection necessitated further surgery in which the index finger was partially amputated. Claimant has not returned to work since the date of his injury, and employer does not dispute that claimant's injury precludes his return to his regular employment duties as a mechanic.

In his Decision and Order filed on February 1, 1993, the administrative law judge found that claimant could not perform any alternate work activity and, thus, awarded claimant permanent total disability compensation. 33 U.S.C. §908(a). On February 8, 1993, claimant filed an attorney's fee petition with the district director,² requesting a fee for 15.6 hours of work performed before the district director at an hourly rate of \$250. The district director awarded the requested fee of \$3,900 in a Compensation Order - Award of Attorney's Fees filed on February 10, 1993.

In its appeal of the administrative law judge's Decision and Order, employer assigns error to the administrative law judge's finding of permanent total disability. Claimant responds, urging affirmance. Employer also appeals the district director's attorney's fee award, contending that the district director's failure to allow employer a reasonable time to respond to the fee petition constitutes a denial of due process. Claimant has not responded to this appeal.

I. Permanent Total Disability, BRB No. 93-1056.

Where, as in the instant case, it is undisputed that the claimant is unable to perform his usual employment duties and, therefore, has established a *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the availability of realistic job opportunities which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See New Orleans (Gulfwide) Stevedore, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

²The title "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

In the instant case, the administrative law judge relied on the opinions of claimant's attending plastic surgeon, Dr. Colman, and psychologist, Dr. Grand, who opined that claimant could do no work, over the opinions of employer's medical witness, Dr. Belmonte, and vocational consultant, Ms. Kaluski, that claimant could perform alternate work as an automobile parts salesperson, in concluding that claimant is incapable physically and psychologically of performing any employment. Our review of the evidence reveals that Dr. Colman opined that claimant is totally disabled from any type of work due to the loss of his fingertips and sympathetic dystrophy resulting from his work injury, adding that claimant would be unable to manipulate parts as would be required in an automobile parts sales position. *See* Cl. Exs. 1, 4. Similarly, Dr. Grand opined that claimant is incapable of doing any work because of both psychological and pain factors; he stated that, because of defects in claimant's impulse control, tolerance for frustration and stress, and interpersonal judgment, claimant could not meet the demands of an automobile parts sales job. *See* Cl. Exs. 3, 5. In contrast, Dr. Belmonte, while accepting claimant's complaints of pain, stated that, notwithstanding this pain, claimant could perform, with some restrictions, the automobile parts sales jobs identified by Ms. Kaluski. *See* Emp. Exs. 10, 11, 24; *see also* Emp. Exs. 3-9, 12, 18-23; Hearing. Tr. at 105-124. In rendering his credibility determination concerning employer's medical witness Dr. Belmonte, the administrative law judge noted that Dr. Belmonte's opinion did not take into account claimant's psychological condition.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, we affirm the administrative law judge's decision to give determinative weight to the opinions of Drs. Colman and Grand, as that determination is neither inherently incredible nor patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, as we affirm the administrative law judge's finding that claimant cannot perform any employment, it follows that employer has not established the availability of suitable alternate employment. *See Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Accordingly, we affirm the administrative law judge's conclusion that claimant is permanently totally disabled.

II. Attorney's Fee Award, BRB No. 93-1165.

Employer contends that the district director's failure to allow it a reasonable time to respond to claimant's fee petition deprived employer of due process. We agree. It is well established that due process requires that employer be given a reasonable time to respond to a fee request. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Harbour v. C & M Metal Works, Inc.*, 10 BRBS 732 (1978). In the instant case, it is undisputed that claimant's counsel's fee petition was filed on February 8, 1993, was received by employer on February 9, 1993, and that a fee was awarded by the district director on February 10, 1993. As employer was not afforded a reasonable opportunity to respond to the fee request, we vacate the district director's attorney's fee award, and remand for the district director to reconsider the fee after allowing employer a reasonable time to file a response to counsel's fee petition.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed. BRB No. 93-1056. The Compensation Order - Award of Attorney's Fees of the district director is vacated, and the case is remanded to the district director for proceedings consistent with this opinion. BRB No. 93-1165.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge