BRB No. 01-699

BRENDA K. HEARN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HALTER MARINE GROUP, INCORPORATED	)	DATE ISSUED: May 28, 2002
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Denying Attorney Fees of Larry W. Price, Administrative Law Judge, United States Department of Labor.

D.A. Bass-Frazier (Huey, Leon & Bass-Frazier), Mobile, Alabama, for claimant.

Karl R. Steinberger and Gina Bardwell Tompkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Denying Attorney Fees (1999-LHC-1899) of Administrative Law Judge Larry W. Price 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3);

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant began working as a welder for employer on July 20, 1998. Emp. Ex. 2. On August 21, 1998, while proceeding from one deck of a ship to another, she slipped on a welding lead, fell, and injured her back. Claimant continued working until August 27, 1998, when she sought medical treatment. Dr. Vokac diagnosed traumatic sacroiliitis with lumbar spasms and released claimant to return to light duty work on August 28, 1998. Claimant returned to work, restricted from carrying more than 20 pounds. Co-workers assisted claimant by carrying her equipment and tools. Cl. Ex. 3; Tr. at 27-29. On September 8, 9, and 10, claimant was suspended for poor attendance, having been tardy or absent eight days since her start date, and only one of those days, August 27, was for medical reasons. Despite repeated warnings and counseling sessions following her suspension, claimant was tardy or absent 16 times prior to her January 14, 1999, termination for excessive absenteeism.[1] Emp. Ex. 2. After her dismissal, claimant continued to treat with Dr. Vokac, and he modified her diagnosis to myofascial low back pain and muscle spasms. Dr. Vokac determined claimant's condition reached maximum medical improvement on June 30, 1999, and he restricted her from lifting over 30 pounds. Cl. Ex. 3. Claimant sought alternate work and eventually found a cashier position at a book store. Claimant filed a claim for benefits, arguing she is entitled to permanent and temporary total disability benefits.

The administrative law judge found that the only issue to be resolved was the nature and extent of claimant's disability. He found that the parties agreed claimant sustained a work-related injury, and he found that claimant's injury reached maximum medical improvement on June 30, 1999. Decision and Order at 7. Further, based on the opinions of Drs. Vokac and Reed, the administrative law judge determined claimant cannot return to her usual work and, thus, that she established a *prima facie* case of total disability. Decision and Order at 8. Shifting the burden to employer, the administrative law judge determined employer established the availability of suitable alternate employment, as it provided claimant with light-duty, non-sheltered, work until the date of her termination. Decision and Order at 9. He then found that claimant had an attendance problem and was terminated for reasons unassociated with her injury. Because claimant's hours of work and rate of pay in

[1]According to the record, five incidents were unexcused and four were due to transportation problems. During her entire six-month tenure with employer, the evidence demonstrates claimant was tardy 11 times and absent 13 times, excluding the suspension. Emp. Ex. 2.

her modified position were the same as in her pre-injury position, the administrative law judge found that claimant "suffered no economic loss as a result of her on the job injury[,]" and he denied benefits. Decision and Order at 9.

Following the issuance of the administrative law judge's decision, claimant's counsel filed a petition for an attorney's fee and expenses totaling $20,822.83. Employer filed objections, challenging counsel's entitlement to a fee and making other specific objections. The administrative law judge denied the fee request in its entirety, finding that the case was not successfully prosecuted. Supp. Decision and Order. Claimant appeals both decisions, and employer responds, urging affirmance.

Suitable Alternate Employment

Claimant first contends the post-injury job at employer's facility was not suitable alternate employment. She argues that the job was not comparable to welding jobs on the open market and that there is no evidence the position would have been available to her after the date of maximum medical improvement, as employer closed its facility. Employer responds, arguing not only that the job was suitable, but that claimant performed the job until her termination for reasons unrelated to her injury and that, in this case, it is not necessary to establish that the position would have been available to claimant after the date her condition reached maximum medical improvement.

Once a claimant establishes her inability to return to her usual work, as here, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether the job is realistically available and suitable for the claimant. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). A job in the employer's facility within the claimant's restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In this case, employer provided claimant with a modified welding job and claimant performed that work until her termination in January 1999. The administrative law judge found that claimant could perform this work, it was within her light duty restrictions, and it was necessary and thus not sheltered employment. Decision and Order at 9. These findings are supported by substantial evidence of record. Cl. Ex. 3; Emp. Ex. 2; Tr. at 145-146. Moreover, the administrative law judge found that employer discharged claimant for reasons

unrelated to her work injury, namely an attendance problem due to non-medical reasons. Decision and Order at 9. This finding is also supported by substantial evidence. Specifically, the record of claimant's attendance shows that claimant had no excuse for being tardy on at least eight occasions and that she was either absent or tardy at least eight other times due to transportation problems. Emp. Ex. 2. After numerous warnings, including a three-day suspension in September 1998, employer terminated claimant's employment in January 1999, due to claimant's unreliability and absenteeism. Thus, the record supports the administrative law judge's conclusion that claimant's termination was not due to her work injury.[2] Emp. Ex. 2. Because employer satisfied its burden by providing claimant with light duty work at its facility, it was unnecessary for it to establish evidence of suitable jobs on the open market.[3] *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980); *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979). Moreover, claimant's discharge from suitable modified work, due to her own misfeasance, does not renew employer's burden of establishing the availability of suitable alternate employment following the discharge. As employer established the availability of suitable alternate employment, claimant is not entitled to total disability benefits. *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), *aff'g Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

[2]The administrative law judge compared the dates claimant was tardy or absent with the dates of her medical treatment and found that "most of her unexcused absences do not coincide with medical treatment." Decision and Order at 4, 9. He also noted that claimant had attendance problems even before her injury. *Id.*

[3]Employer also presented evidence of jobs on the open market located by a vocational rehabilitation counselor, Ms. Lehman, which it submitted as being suitable for claimant. Emp. Ex. 5; Tr. at 163, *et seq.* The administrative law judge mentioned employer's hiring of Ms. Lehman, but he did not address the specifics of her labor market research or results. Decision and Order at 6.

Claimant also contends the administrative law judge erred in finding the modified position suitable because it was available to claimant only prior to the date her condition reached maximum medical improvement which the administrative law judge found occurred on June 30, 1999. That is, claimant asserts that once her condition became permanent, with permanent restrictions preventing her from returning to her usual work, employer bore a renewed burden of presenting additional evidence of available suitable alternate employment at that time. Claimant avers that, as employer's facility closed in July 1999, the modified position was no longer available at this critical time. We reject claimant's argument.

It is well established that the nature and the extent of a claimant's disability are distinct inquiries. Specifically, evidence of the availability of suitable alternate employment establishes that a claimant's condition is partial not total, whereas evidence of maximum medical improvement establishes that a claimant's condition is permanent not temporary. The changes from temporary to permanent and total to partial need not occur simultaneously. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on recon.). Further, in order to demonstrate that a claimant's condition is partial, an employer need only establish the availability of suitable alternate employment during the "critical periods" when the claimant is able to seek work. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). The "critical period" is any time after the claimant is medically cleared to perform a job. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366 n.1 (1990).

Claimant was released to perform light duty work immediately after her injury, and it is at that time when the "critical period" began. *Martiniano*, 23 BRBS at 366 n.1. As employer provided suitable light duty work which claimant could and did perform upon her release to return to light duty work, employer established there was available suitable work during the "critical period" when claimant could seek work. *See generally Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988) (failure to show suitable alternate employment entitles claimant to temporary total disability benefits); *compare with Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992) (evidence of suitable alternate employment must be shown after date of maximum medical improvement when claimant was released to work). Claimant was not restricted from work at any time between her release to light duty work and the date on which her condition reached maximum medical improvement, nor were more restrictive limitations placed on her ability to work. Consequently, the fact that claimant reached maximum medical improvement on June 30, 1999, does not result in employer's bearing a renewed burden of showing the availability of additional suitable alternate employment as of that date. Therefore, we affirm the administrative law judge's denial of

total disability benefits.

Wage-earning Capacity

Claimant next asserts that the administrative law judge failed to conduct a proper analysis of her post-injury wage-earning capacity. Specifically, although she earned her previous wages working in the modified position, she argues that the administrative law judge erred by presuming those wages represented her earning capacity following her injury. In this regard, the administrative law judge stated only:

> I also find that Claimant suffered no economic loss as a result of her on the job injury. I find that she worked the same hours in this position as in her pre-injury position. Accordingly, I find that Claimant's claim for compensation is denied.

Decision and Order at 9. An administrative law judge may use a claimant's actual post-injury wages to calculate the claimant's wage-earning capacity only if those wages fairly and reasonably represent the claimant's wage-earning capacity. *Darby*, 99 F.3d at 689, 30 BRBS at 95(CRT). The fact that a claimant earns pre-injury wages in a post-injury job does not mandate a conclusion that she has no loss in her wage-earning capacity, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), although the actual earnings in a suitable job lost by a claimant's misconduct, as well as the earnings from any other suitable job a claimant may hold post-injury, should be considered when determining a claimant's post-injury wage-earning capacity. *Mangaliman*, 30 BRBS at 42. Failure to make a finding as to a claimant's wage-earning capacity constitutes error warranting remand. *Darby*, 99 F.3d at 689, 30 BRBS at 95(CRT); *Mangaliman*, 30 BRBS at 43.

In light of the administrative law judge's brevity and lack of findings on this issue, we vacate the denial of partial disability benefits and remand the case for him to ascertain claimant's post-injury wage-earning capacity to determine whether she is entitled to compensation for partial disability. On remand, the administrative law judge must evaluate all relevant factors, *see* 33 U.S.C. §908(h), and evidence – including, but not limited to, the job offered by employer, the wages the job paid, its unavailability after July 1999, the vocational evidence presented by employer, and claimant's restrictions and background – to determine a dollar figure which reasonably represents claimant's post-injury wage-earning capacity. *Rambo I*, 515 U.S. 291, 30 BRBS 1; *Mangaliman*, 30 BRBS at 43-44. If the administrative law judge determines claimant has sustained a loss in her current capacity to earn wages, then claimant is entitled to partial disability benefits.

Nominal Award

Claimant also contends she is entitled to a nominal award as it has been established that she cannot return to her usual work. She seeks remand for the administrative law judge to consider this issue in light of her injured status, her lack of a high school diploma, her history of working in heavy labor, and other relevant factors. Employer argues that claimant cannot now raise the issue of a nominal award because it was not raised before the administrative law judge. We reject employer's argument in this regard, as a claim for total disability includes claims for lesser awards. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Buckland*, 32 BRBS at 101 n.2. Therefore, as claimant sought total disability benefits, a claim for partial disability as well as a nominal award is included.

Nominal awards are appropriate under the Act where a claimant's work injury has not decreased her current earning capacity, but there is evidence of a significant possibility that the injury will cause future economic harm. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). In this case, claimant has been found to have a three percent permanent impairment to her back, and she is unable to return to her usual work. However, the administrative law judge's statements do not sufficiently address the issue of claimant's potential future wage-earning capacity as is necessary to determine whether she is entitled to a nominal award. Therefore, on remand, in the event the administrative law judge finds claimant has no current loss of wage-earning capacity, he must consider whether there is a significant possibility claimant will suffer a loss of wage-earning capacity in the future as a result of her work injury. *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT). If so, then claimant is entitled to a nominal award. *Id.*

Attorney's Fee

Finally, claimant contends the administrative law judge erred in denying her an attorney's fee. She argues that the administrative law judge made no independent review of the fee petition, as is evidenced by his adoption of employer's conclusion that the lack of a monetary award justified the denial of a fee. Further, although employer had not paid any disability benefits and the administrative law judge did not award any disability benefits, claimant argues there were other disputed issues, particularly medical benefits and average weekly wage, to which employer finally stipulated at the hearing, thereby making her claim at least partially successful. Employer responds, arguing that the only issue litigated was the nature and extent of claimant's disability and, on that, claimant was wholly unsuccessful.

This case was transferred to the Office of Administrative Law Judges (OALJ) on May 21, 1999.[4] Supp. Decision and Order at 2. After several continuances, the hearing was held

[4]Claimant's pre-hearing statement, dated April 19, 1999, included medical benefits as

on November 14, 2000. Although employer asserts that only the nature and extent of claimant's disability was at issue before the administrative law judge, the record contains evidence of other issues which were disputed while the case was before the OALJ. Specifically, as of January 10, 2000, average weekly wage, maximum medical improvement, suitable alternate employment, intervening cause, nature/extent, medical benefits, attorney's fee, interest, and a penalty were identified as disputed issues. During the course of the proceedings before the administrative law judge, the parties reached agreements on various issues, including employer's liability for medical benefits, Tr. at 8-11, and by October 30, 2000, the parties agreed to an average weekly wage of $510 and to remove intervening cause from the list of issues, and employer agreed to pay all medical benefits pursuant to Section 7, leaving the nature and extent of claimant's disability as the only remaining disputed issue. Jt. Ex. 1; Exhs. 8-9 to Emp. Obj. to Fee.

In his decision, the administrative law judge accepted the parties' stipulations. With regard to the issue of maximum medical improvement, he found in favor of claimant, noting there was no evidence to the contrary. Further, although the administrative law judge denied all disability benefits, he ordered payment of medical expenses. Even though a majority of the issues raised were resolved prior to the hearing, the fact that they were disputed, and resolved, at some time while the case was pending before the OALJ establishes that claimant achieved some level of success while the case was before the OALJ. *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989) (establishing right to medical benefits via stipulation warrants a fee); *Vanison v. Greyhound Lines, Inc.*, 17 BRBS 179 (1985)(where parties agree on average weekly wage at the hearing, claimant is entitled to a fee for work necessary to achieve this agreement). Accordingly, claimant's attorney is entitled to a fee payable by employer commensurate with the degree of success. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Therefore, we vacate the denial of the attorney's fee, and we remand the case for consideration of counsel's fee petition and employer's objections thereto in light of claimant's success before the administrative law judge. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., concurring in pertinent part). In the event the administrative law judge awards either partial disability or nominal benefits on remand, that award should also be considered in awarding a fee.

---

a disputed issue.

Accordingly, the administrative law judge's denial of partial disability benefits and his denial of an attorney's fee are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge