BRB No. 07-0266

L.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHELL OIL CORPORATION	)	DATE ISSUED: 11/30/2007
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Modification and Awarding Benefits and the Supplemental Decision and Order Denying Attorney Fees of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Kurt A. Gronau, Alexandria, Virginia, for claimant.

Gilbert A. Garcia (Veatch Carlson), Los Angeles, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Granting Modification and Awarding Benefits and the Supplemental Decision and Order Denying Attorney Fees (2004-LHC-0293) of Administrative Law Judge Stephen L. Purcell 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).

This case has been before the Board previously. Claimant sustained a work-related back injury while working for employer on February 26, 1981. Claimant did not return to this employment but resigned shortly thereafter for personal reasons and secured a non-maritime job performing heavy manual labor as a maintenance worker for the City of Ventura, California, on October 6, 1981. On February 18, 1984, claimant suffered a work accident in this job. Contending she had not been gainfully employed since that incident, claimant filed a claim for benefits under the Act.

Administrative Law Judge Henry B. Lasky found that claimant was entitled to temporary total disability benefits from February 27, 1981, through October 6, 1981, the date on which she began her employment with the City of Ventura. Judge Lasky then found that claimant's wages with the City of Ventura did not fairly and accurately represent her post-injury wage-earning capacity, because it was not suitable given her restrictions from the work injury with employer. He thus found claimant entitled to an ongoing award of permanent partial disability benefits from October 6, 1981, based on his finding that claimant suffered a 50 percent loss of wage-earning capacity. Judge Lasky also awarded claimant future medical benefits, *see* 33 U.S.C. §907, and furthermore found employer entitled to Section 8(f) relief, 33 U.S.C. §908(f).

In 2003, claimant sought to modify Judge Lasky's 1985 award of permanent partial disability benefits to permanent total disability benefits, based on a mistake of fact or a change of condition. *See* 33 U.S.C. §922. Claimant also sought reimbursement of medical expenses, as well as continuing medical care. Administrative Law Judge Stephen L. Purcell (the administrative law judge) denied claimant's modification request, finding that claimant had not established a mistake in fact in Judge Lasky's 1985 decision or a change in either her physical or economic condition. Moreover, the administrative law judge denied claimant's request for medical benefits as he found that claimant did not establish that the medical treatment in question was for the 1981 injury, or that the costs of such treatment were incurred after authorization was requested and withheld by employer.

Claimant appealed, and in its decision, the Board vacated the administrative law judge's finding that claimant did not establish a mistake in fact in Judge Lasky's decision, as well as his denial of future medical benefits.[1] [*L.V.*] *v. Shell Oil Co.*, BRB

[1] The Board, however, affirmed the administrative law judge's findings that claimant did not establish a change in her physical or economic condition, as well as his denial of reimbursement for medical expenses incurred prior to 2003.

No. 04-0938 (Sept. 15, 2005) (unpub.). The Board instructed the administrative law judge that he must consider the extent of claimant's disability as of 1984,[2] in order to discern whether claimant met her burden of proof to show that Judge Lasky's ongoing permanent partial disability award was based on a mistake of fact. The Board also instructed the administrative law judge that he must address, in accordance with Section 20(a), 33 U.S.C. §920(a), whether claimant's current condition is related to her 1981 injury, and thus, determine whether claimant is entitled to any resulting medical benefits.

On remand, the administrative law judge granted claimant's request for modification, finding that Judge's Lasky's award of permanent partial disability benefits from October 6, 1981, was based on a mistake in fact, since after finding claimant unable to return to her usual work and that the City of Ventura job was not suitable, Judge Lasky did not address employer's burden to establish the availability of suitable alternate employment. The administrative law judge found that employer had established the availability of suitable alternate employment as of August 1, 1985, that claimant had not undertaken a diligent post-injury job search, and thus, that she was entitled to an award of temporary total disability benefits up until August 1, 1985, and of permanent partial disability benefits thereafter based on a 30 percent loss in wage-earning capacity.[3] He thus modified Judge Lasky's award of benefits to reflect claimant's entitlement to an additional period of temporary total disability benefits between February 18, 1984, and August 1, 1985, and to a continuing award of permanent partial disability benefits thereafter. The administrative law judge further found employer liable for reimbursement of $793.19 in medical expenses incurred by claimant for the treatment of her work-related back injury, and for any medical expenses associated with the future treatment of that condition.

Claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge in the amount of $21,215.56, representing 80.80 hours at an hourly rate of $250, plus $1,035.56 in expenses. Employer filed objections to the fee petition. The administrative law judge denied an attorney's fee in this case because

[2] The Board noted that Judge Lasky found that the City of Ventura job was "totally unsuited" to claimant's capabilities because of her physical condition due to her work injury. [*L.V.*], slip op. at 5. The Board further noted that claimant's post-injury work restrictions, as again considered by the administrative law judge on modification, established the continued unsuitability of both claimant's usual work with employer and the Ventura job. *Id.*

[3] The administrative law judge relied on Dr. Murphy's August 1, 1985, opinion that claimant's condition was "at a permanent and stationary level" to find that claimant reached maximum medical improvement as of that date.

claimant prevailed only in obtaining reimbursement of outstanding medical expenses for an amount "significantly lower than the $7,500.00 offered by employer to settle this case." Supplemental Decision and Order at 5.

On appeal, claimant challenges the administrative law judge's findings that employer established suitable alternate employment, that claimant incurred a 30 percent loss in wage-earning capacity, and that claimant's counsel is not entitled to an attorney's fee. Employer responds only to claimant's appeal of the fee award, contending that the fee was properly denied.

Claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment. Claimant maintains that the computer programmer trainee position relied upon by the administrative law judge is too vague to satisfy employer's burden regarding suitable alternate employment. Where, as in the instant case, it is uncontroverted that claimant is unable to return to her usual employment duties with employer as a result of her work-injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). 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 she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

The administrative law judge found that employer established the availability of suitable alternate employment as of August 1, 1985, based on Dr. Murphy's statement that claimant "has been offered a job as a computer programmer trainee" which the physician felt was "appropriate for her." Decision and Order on Remand at 9-10; EX 6. While Dr. Murphy's statement may be, as the administrative law judge found, sufficient to establish that claimant is physically capable of performing this work, there is nothing further in the record describing the nature and terms of the job. Thus, there is insufficient information to enable the administrative law judge to discern whether this job may have otherwise been suitable and available for claimant or to establish a wage-earning capacity in the job. *See Bumble Bee*, 629 F.2d at 1329, 12 BRBS at 662; *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988). Due to this lack of evidence describing the position identified by Dr. Murphy as a computer programmer trainee, it is legally insufficient to constitute suitable alternate employment. We thus must vacate the administrative law judge's finding that employer established suitable alternate employment as of August 1, 1985.

Consequently, we hold that claimant's entitlement to the additional total disability benefits found by the administrative law judge continues from August 1, 1985, until such time as the evidence establishes the availability of suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990).

As the administrative law judge observed, claimant worked in a variety of income-producing activities beginning in 1987,[4] including working as a pet groomer, decorating donuts and waiting on customers, working for friends in a bakery and deli, and starting her own business as a pet groomer.[5] Decision and Order on Remand at 13. Claimant testified that she retained these positions until they became too physically demanding, no longer available, or she relocated. HT at 29-36. Drs. Mandell, Fern and Murphy each opined that claimant is capable of performing light-duty work, EXs 3, 5, 6, and the administrative law judge found, albeit in discussing claimant's diligence in seeking post-injury employment, that claimant's post-injury work was not beyond her restrictions against heavy lifting, repeated bending, or stooping.[6] Decision and Order on Remand at 11. Thus, it is clear from the administrative law judge's decision that claimant left each of her 1987 jobs for reasons other than those attributable to her work-related injury. This evidence is therefore sufficient to establish suitable alternate employment in this case such that we reject claimant's assertion that she is entitled to ongoing total disability benefits. *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT). As claimant left these positions for reasons unrelated to her work injury, employer does not bear a renewed burden of establishing suitable alternate employment.[7] *Id.* We must, however, remand this case for the administrative law judge to determine the date upon which claimant first started in suitable alternate work, as that establishes the date upon which claimant's disability changed from total to partial. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT).

---

[4] Claimant testified that she was unable to perform any work during the 1985-1987 time period due to her work-related symptoms. HT at 27.

[5] Claimant worked as a dog groomer between May 22, 1987, and June 20, 1987, between March and August of 1988, and was a co-owner of a pet grooming facility between 1989 and 1993. HT at 28-31, 67-71; Claimant's Exhibits 5-11.

[6] Claimant likewise indicated that her position with Ventura was "the last physical laboring type of job" which she had. HT at 53.

[7] As the Board stated in its prior decision, employer meets its burden regarding the availability of suitable alternate employment if it can be shown that "claimant obtained suitable, steady work on her own and left these positions for reasons other than her 1981 work injury or voluntarily removed herself from the workforce." [*L.V.*], slip op. at 5.

Claimant also argues that the administrative law judge's calculation of her loss in wage-earning capacity does not accurately represent the extent of her permanent partial disability as the record establishes that she has not returned to regular work since the City of Ventura job. Claimant maintains that the odd jobs she held subsequent to her work at Ventura do not equate to a loss of only thirty percent in wage-earning capacity under Section 8(h) of the Act. 33 U.S.C. §908(h).

Section 8(h) provides that claimant's wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her wage-earning capacity. *See, e.g., Long v. Director, OWCP*, 767 F.2d 1578, 1582, 17 BRBS 149, 153(CRT) (9th Cir. 1985). The party contending that the employee's actual earnings are not representative of her wage-earning capacity bears the burden of establishing an alternative reasonable wage-earning capacity. *Id.*; *see also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). If such earnings do not fairly and reasonably represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's post-injury wage-earning capacity. *See Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988).

The Board instructed the administrative law judge that he should address claimant's wage-earning capacity pursuant to Section 8(h), 33 U.S.C. §908(h), *see Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). In particular, the Board noted that "[e]vidence regarding jobs claimant held in the intervening years may be relevant to claimant's wage-earning capacity." [*L.V.*], slip. op. at 5. Nonetheless, the administrative law judge concluded that claimant's wage-earning capacity is "70% of her pre-injury average weekly wage while working for [employer], *i.e.*, $312.20," Decision and Order on Remand at 13-14, based, presumably, on Dr. Murphy's assessment that claimant's work-related back condition was permanent and stationary as of August 1, 1985, with a 30 percent disability.

The Board has held that a finding of a loss of wage-earning capacity corresponding to claimant's permanent impairment rating is not proper. *Jennings v. Sea-Land Serv.*, 23 BRBS 312, 315 (1990); *Butler v. Washington Metropolitan Transit Authority*, 14 BRBS 321, 322 n.2 (1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F.2d 1267, 9 BRBS 457 (4th Cir. 1978). In particular, the Board has observed that where the administrative law judge expresses lost wage-earning capacity as a percentage of the claimant's pre-injury average weekly wage, there is a strong implication that he did not fully consider all of the relevant factors pursuant to Section 8(h), particularly if the percentage is identical to the percentage of physical impairment established by the medical testimony. *Bouchard v. General Dynamics Corp.*, 14 BRBS 839, 841 (1982). Thus, the administrative law judge's finding that claimant's

wage-earning capacity is 70 percent of her pre-injury average weekly wage is vacated. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Warren v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 149 (1988).

On remand, the administrative law judge must reconsider claimant's loss in wage-earning capacity from the date upon which suitable alternate employment is established based on the relevant factors.[8] *Devillier*, 10 BRBS 649; *see also generally Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Container Stevedoring Co.*, 935 F.2d 1544, 24 BRBS 213(CRT). The record in this case contains evidence regarding claimant's post-injury earnings consisting of several Report of Earnings forms, CX 3-13, and claimant's Social Security Administration earnings record. CX 19. The administrative law judge, on remand, must first discern whether these earnings fairly and reasonably represent her wage-earning capacity, and if not, he must then calculate a dollar amount which reasonably represents claimant's post-injury wage-earning capacity. *Container Stevedoring, Co.*, 935 F.2d 1544, 24 BRBS 213(CRT).

Claimant contends that the administrative law judge's denial of counsel's request for an attorney's fee payable by employer is erroneous. In particular, claimant argues that there is no evidence in the record for the administrative law judge to make a determination that the settlement offer upon which he relied was sufficient to meet the requirements of Section 28(b), 33 U.S.C. §928(b).

The administrative law judge determined that while claimant prevailed in obtaining additional medical benefits, claimant was not entitled to an attorney's fee payable by employer because the amount of those medical benefits, $793.19, plus interest, was far less than the $7,500 offered by employer to settle this case. As we vacate the administrative law judge's findings regarding the extent of disability, claimant's ultimate degree of success is presently unknown.[9] Consequently, the

[8] In determining what amount reasonably represents the claimant's wage-earning capacity, the court may look to a variety of factors, including the claimant's age, physical condition and education, the availability of employment and continuity and stability of claimant's post-injury work. 33 U.S.C. §908(h); *Cook*, 21 BRBS 4; *Devillier*, 10 BRBS 649.

[9] Examining the record before us, we note that the evidence regarding employer's alleged settlement offer is limited to one entry in claimant's attorney's fee petition. Specifically, the entry, dated July 20, 2006, denotes a "Call from Garcia [employer's attorney] re $7.5K offer." Claimant's Counsel's Attorney's Fee Petition. Absent additional information regarding this alleged settlement offer, it cannot be ascertained as to whether this represents a valid tender in terms of Section 28(b). *Richardson v.*

administrative law judge should reconsider the fee petition and objections in light of any award made on remand. *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (*en banc*); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). In this regard, we note that Section 28(b) of the Act, 33 U.S.C. §928(b), requires, *inter alia*, that claimant obtain greater compensation than employer paid or tendered. *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003).

Claimant's counsel has again submitted a fee petition for work performed before the Board in her prior appeal, BRB No. 04-0938, requesting a fee totaling $6,057.55, representing 24.2 hours at an hourly rate of $250, plus $7.55 in expenses. Employer has filed objections to the fee petition. In [*L.V.*] *v. Shell Oil Co.*, BRB No. 04-0938 (Apr. 24, 2006) (unpub. Order), the Board stated that although claimant was successful in that appeal, the extent of her success is not yet ascertained. Consequently, the Board denied counsel's fee petition, and informed him that he may resubmit it once the remaining issues have been resolved and the extent of success has been determined. *Id.* We again deny the fee petition on this basis, and instruct claimant's counsel that he may resubmit the attorney's fee petition after the administrative law judge has made his findings on remand. *See* 20 C.F.R. §802.203(c).

Continental Grain Co., 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Thus, based on the present record, we must hold that the administrative law judge's rationale for denying an attorney's fee based on the settlement offer is not supported by substantial evidence. In any event, we note that claimant's entitlement to additional total disability benefits from August 1, 1985, until such time as the administrative law judge determines which of claimant's post-1987 work first constitutes suitable alternate employment, increases claimant's degree of success and thus is relevant to the administrative law judge's reconsideration of the attorney's fee petition on remand.

Accordingly, the administrative law judge's finding that employer established suitable alternate employment as of August 1, 1985, is reversed, his calculation of claimant's post-injury wage-earning capacity and denial of an attorney's fee are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge