BRB Nos. 96-1267
and 96-1267A

WESLEY J. GRAVES)
)
Claimant-Respondent)
Cross-Petitioner)
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v.)
)
HELENA MARINE SERVICE) DATE ISSUED:_________
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and)
)
ROCKWOOD INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents) DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

John H. Cox, III, Greenville, Mississippi, for claimant.

Scott G. Lauck (Howell, Trice & Hope, P.A.), Little Rock, Arkansas, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (93-LHC-3337) of Administrative Law Judge Quentin P. McColgin 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party 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 was employed by employer as a sandblaster/painter in Helena, Arkansas. On April 15, 1989, claimant fell approximately 20-25 feet while he was shoveling sand that had accumulated on barge covers, injuring his head and breaking both arms. Claimant filed for benefits under the Act, and employer paid claimant's medical costs. This claim was referred to the administrative law judge when the parties could not agree on the issue of the nature and extent of claimant's disability.

The administrative law judge awarded claimant permanent total disability benefits, finding that claimant's injuries to his arms precluded him from returning to his former work as a painter/sandblaster, and that employer failed to carry its burden of demonstrating the availability of suitable alternate employment.[1] The administrative law judge also awarded claimant's counsel $6,030 in attorney's fees, plus $148.97 for expenses. Employer appeals both the compensation award and the administrative law judge's attorney's fee award. Claimant has filed a protective cross-appeal urging affirmance of the administrative law judge's decisions.

Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of his work-related injury, *see Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290, 292 (1994); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1985), and must establish a *prima facie* case of total disability by demonstrating that he is unable to return to his usual employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1, 5 (CRT)(2d Cir. 1991); *see Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986). In this case the administrative law judge found that claimant was precluded from returning to his former longshore employment, based on Dr. Jobe's restrictions, *see* CX-5, and the testimony of Dr. Stevens that claimant's usual employment as a sandblaster/painter is "heavy work."

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[1]Dr. Thomas W. Arnold concluded that claimant's head injury resulted in a 5 percent whole-man disability due to the mild loss in cognitive functioning. *See* CX-2. This aspect of claimant's overall disability was not found to preclude employment. The parties stipulated that claimant has a 36 percent permanent impairment to his left upper extremity and a 14 percent permanent impairment to the right as assessed by Dr. Mark Jobe. *See* Decision and Order at 3; CX-5.

Decision and Order at 6; *see* Tr. (2/27/95) at 64-65..

With this finding, the burden shifts to employer to prove that the claimant is only partially disabled by establishing the availability of other jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041, 14 BRBS 156, 163 (5th Cir. 1981); *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122, 123 (1996). For the alternate employment opportunities to be considered realistic, the employer must establish their precise nature, terms and availability. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 12 (1995). The identification of jobs purported to meet employer's burden must be sufficiently detailed so as to permit the trier-of-fact to assess whether these jobs are suitable alternate employment given claimant's "age, education and work experience." *See generally Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 102 (1985)(Ramsey, C.J. dissenting on other grounds), *recon. denied*, 17 BRBS 160 (1985)(Ramsey, C.J., concurring and dissenting).

We disagree with employer that the administrative law judge erred in finding that employer failed to discharge its burden of establishing that claimant was not totally disabled. Employer argues that it satisfied its burden of demonstrating the availability of suitable alternate employment with the testimony of Dr. Douglas Stevens, a clinical psychologist and vocational rehabilitation expert. Dr. Stevens testified that there were numerous security guard type jobs available in Eastern Arkansas and Western Mississippi, and stated that there existed an abundance of truck driving, security guard and casino jobs available in the Helena, Arkansas area where claimant resides. Tr. (2/27/95) at 51-52. On cross-examination, Dr. Stevens conceded that he had not performed either a job identification or job placement survey, that he was testifying based on assumptions as opposed to market analysis, *id.* at 61-63, and that he was not aware of any actual available jobs in the Helena area based on a personal job identification survey. *Id.* at 67.

The administrative law judge rationally found that the evidence of suitable alternate employment offered by Dr. Stevens is not sufficiently "precise [as to the] nature, terms, and availability of the alternate positions identified," *see Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989)(evidence consisting primarily of classified advertisements inadequate), and that Dr. Stevens' opinions were generally "based on assumptions and his past experience in that market." Decision and Order at 8. While alluding to general employment opportunities that may exist in the general area of claimant's residence because of the nature of the industry that exists there, Dr. Stevens conceded that he did not perform job identification studies. *See* Tr. (2/27/95) at 62. The administrative law judge cited the scope of Dr. Stevens' efforts to decide that the testimony of this expert did not adequately show the availability of security guard positions. [2] Decision and Order at 8-9;

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[2]The administrative law judge found that claimant probably could perform security jobs with his residual head and arm impairments, Decision and Order at 7, but that no such work was identified. *Id.* at 8-9. He also found that claimant could not perform motor vehicle operator jobs because this work would be unsafe and beyond claimant's physical

see Tr. (2/27/95) at 51-53. Because the administrative law judge properly determined that the vocational testimony was not persuasive in the absence of specific job opportunities, *see Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987), we affirm the administrative law judge's finding that employer failed to demonstrate the existence of suitable alternate employment, and that claimant is therefore totally disabled.[3]

We next address employer's supplemental appeal challenging the administrative law judge's award of attorney's fees, and find that employer's objection to the fee award lacks merit. The administrative law judge awarded fees in the amount of $6,030, plus $148.97 for expenses, setting forth his reasoning, addressing employer's specific objections and reducing some of the time claimed. In this instance, employer has failed to demonstrate how the administrative law judge abused his discretion in awarding attorney's fees. *See Ross v. Ingalls Shipbuilding, Inc.,* 29 BRBS 42, 44 (1995). Moreover, the administrative law judge properly rejected employer's challenge to counsel's request for fees for work on the parties' unsuccessful settlement attempt. The hours spent on this aspect of the claim were rationally found to be "reasonably expended on the litigation." *See generally Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *Cabral v. General Dynamics Corp.,* 13 BRBS 97 (1981). We therefore affirm the award of attorney's fees in this case.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees are affirmed in all respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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capabilities. *Id*. Moreover, the administrative law judge also determined that employer "failed to show the availability of specific job openings in the field of light commercial truck driving." *Id*.

[3]Employer suggests that claimant was not diligent in seeking employment. Claimant's willingness to seek alternate employment does not become an issue until employer has established that suitable alternate employment is available. *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429 n. 8, 24 BRBS 116, 119 n. 8 (CRT), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991).

NANCY S. DOLDER
Administrative Appeals Judge