

BRB No. 91-106

|                            |   |                    |
|----------------------------|---|--------------------|
| BRADY KING                 | ) |                    |
|                            | ) |                    |
| Claimant-Respondent        | ) |                    |
|                            | ) |                    |
| v.                         | ) |                    |
|                            | ) |                    |
| DELAWARE OPERATING COMPANY | ) | DATE ISSUED:       |
|                            | ) |                    |
| Self-Insured               | ) |                    |
| Employer-Petitioner        | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Francis X. Scanlan and Ricardo A. Byron (Scanlan & Scanlan, P.C.), Philadelphia, Pennsylvania, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (89-LHC-3360) of Administrative Law Judge Robert D. Kaplan rendered on a claim 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).

Claimant sustained a torn rotator cuff injury to his right shoulder as the result of slipping and falling on ice in the course of his employment on February 11, 1986. Surgery to repair the shoulder was terminated because claimant suffered cardiac arrest on the operating table and required resuscitation. Claimant has not worked since the accident. Based on an average weekly wage of \$415.31, employer voluntarily paid temporary total disability benefits from February 12, 1986 to July 13, 1988, and temporary partial disability benefits of \$211.03 per week from July 13, 1988 and continuing. Claimant filed a claim for permanent total disability benefits under the Act, maintaining that his inability to return to work is related to the injury he sustained on February 11, 1986.

The parties stipulated that claimant reached maximum medical improvement on August 26, 1986. In his Decision and Order, the administrative law judge noted that employer concedes that claimant is unable to return to his usual employment as a longshoreman. He found that employer

did not meet its burden of establishing the availability of suitable alternate employment, and therefore found that he was not required to reach the issue of whether claimant was diligent in seeking alternate work. The administrative law judge thus awarded claimant permanent total disability benefits. 33 U.S.C. §908(a).

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Employer further contends that the administrative law judge erred in failing to weigh the medical evidence in accordance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Claimant responds, urging affirmance.

Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. See *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); see also *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides that he is capable of performing based upon his age, education, work experience and physical restrictions, and which he could realistically secure if he diligently tried. *Id.*; see *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Employer must establish realistic, not theoretical, job opportunities. See *Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting on other grounds). For the job opportunities to be realistic, employer must establish their precise nature, terms, and availability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Employer contends that the administrative law judge erred in requiring it to obtain a job for claimant and to contact potential employers to inquire as to whether they would hire someone of claimant's background. Employer alleges that in order to meet its burden of proof it need only establish that suitable alternate employment is reasonably available and that it satisfied this standard through the report and testimony of its vocational expert, Dr. Walker.

We reject employer's contentions. Employer submitted into evidence the testimony of Dr. Walker, who set forth several types of employment positions which he stated were appropriate for claimant. Dr. Walker identified five categories of employment from the Dictionary of Occupational Titles,<sup>1</sup> and he stated that these types of jobs are readily available to claimant in the Philadelphia area and pay an average of \$5.00 per hour. Tr. at 27-28. Contrary to the administrative law judge's statement, employer need not contact prospective employers about the injured claimant. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Nonetheless, in finding Dr. Walker's testimony inadequate to establish suitable alternate employment, the administrative law judge properly noted

---

<sup>1</sup>These positions are gate tender, security guard, usher, ticket taker, and locker room attendant. Emp. Ex. 2.

that the identification of general job categories is insufficient because there is no information regarding the precise nature and terms of realistic job opportunities available to claimant. Given the absence of job requirements, the administrative law judge is unable to determine if claimant is capable of performing the jobs given his age, education and physical restrictions. *See, e.g., Manigault*, 22 BRBS at 334 (classified advertisements insufficient); *Price v. Dravo Corp.*, 20 BRBS 94 (1987) (availability of jobs based solely on state statistics insufficient). We therefore affirm the administrative law judge's determination that Dr. Walker's report of October 1988, and his testimony, are insufficient to establish the availability of suitable alternate employment.<sup>2</sup>

Moreover, we reject employer's contention that the decision fails to comply with the APA because the administrative law judge did not discuss all the medical evidence of record. The APA requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). In the instant case, employer conceded that claimant's shoulder impairment prevents his return to his usual employment as a longshoreman. *See* Emp. post-hearing brief at 5. Given the administrative law judge's finding that employer failed to identify specific alternate job opportunities, there was no need, on the facts of this case, to discuss the medical evidence in detail and the administrative law judge's decision does not violate the provisions of the APA.

Claimant's counsel has filed a fee petition for work performed before the Board. Counsel seeks a fee of \$675, representing 4.5 hours at \$150 per hour. Employer has not objected to the fee request.

---

<sup>2</sup>Because we affirm the administrative law judge's finding that employer failed to carry its burden of proof in establishing the availability of suitable alternate employment, we need not address employer's contention that claimant did not diligently seek work. *See Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Manigault*, 22 BRBS at 334.

Claimant is entitled to an attorney's fee for work performed before the Board for the successful defense of his award of permanent total disability benefits. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Inasmuch as the requested fee is reasonable, we award claimant's counsel a fee of \$675 to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. Claimant's counsel is awarded a fee of \$675 for work performed before the Board.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge