

BRB Nos. 00-0174
and 00-0226

DEWEY LITTLE)
)
Claimant-Respondent)
)
v.)
)
NEWPORT STEEL) DATE ISSUED: 08/17/2000
)
and)
)
CNA INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits, Amended Decision and Order-Awarding Benefits, Order on Motion to Stay and Motion to Clarify, and Supplemental Decision and Order Granting Attorney's Fees of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of Thomas C. Hunter, District Director, United States Department of Labor.

Steven C. Schletker (Schletker, Hornbeck & Moore), Covington, Kentucky, for claimant.

Thomas J. Smith and Kevin A. Marks (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits, Amended Decision and Order-Awarding Benefits, Order on Motion to Stay and Motion to Clarify, and Supplemental Decision and Order Granting Attorney's Fees (97-LHC-0629) of Administrative Law Judge Thomas F. Phalen, Jr., and the Compensation Order Award of Attorney's Fees (Case No. 6-168287) of District Director Thomas C. Hunter 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. *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 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).

On February 12, 1995, claimant commenced working for employer as a laborer. Claimant had previously injured his back in 1979 during the course of his employment with Conrail. He did not disclose this prior injury on his job application with employer. On November 16, 1995, claimant slipped and fell, injuring his back during the course of his employment with employer. On January 5, 1996, claimant returned to light-duty employment at the truck scale house. After his release to work without restrictions by Dr. Holladay in February 1996, claimant returned to the regular duty labor pool; however, on February 29, 1996, claimant fell off a railcar ladder and re-injured his back. He returned to various light-duty work for employer on April 1, 1996. Claimant was released for regular duty, pursuant to the opinions of Drs. Chilero and Sheridan, and assigned by employer to the brick gang on August 25, 1996. However, claimant was physically unable to perform his assigned duties on the brick gang and he was ordered by his foreman to stop working at lunchtime on his first day. Claimant never returned to work for employer. On January 22, 1997, employer terminated claimant for falsifying his February 1995 job application with employer regarding the prior back injury at Conrail. Subsequently, claimant obtained employment cleaning apartments. He was next employed by Allied Security, where he worked three days per week as a security guard earning \$6.50 per hour. Claimant earned approximately \$10,000 in 1998 as a courier, and he was occasionally employed as a construction worker, earning \$6.50 per hour. Claimant sought benefits under the Act for temporary total disability, 33 U.S.C. §908(b), from December 1 to December 18, 1995, and from March 1 through April 1, 1996, for permanent total disability, 33 U.S.C. §908(a), from October 7, 1996, through February 23, 1997, and for permanent partial disability based on a loss of wage-earning capacity from February 24, 1997, and continuing. 33 U.S.C. §908(c)(21), (h).

The administrative law judge credited the opinions of claimant's treating physician,

Dr. Pagani, and a consulting physician, Dr. West, to conclude that claimant cannot return to his usual work with employer. He found that claimant has a residual wage-earning capacity of \$260 per week after he reached maximum medical improvement on August 25, 1996. Claimant was awarded compensation for various periods of temporary total disability, 33 U.S.C. §908(b), from November 16, 1995, to August 25, 1996, and for permanent partial disability, 33 U.S.C. §908(c)(21), from August 26, 1996, and continuing based on post-injury wage-earning capacity of \$260. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge denied claimant's discrimination claim pursuant to Section 49 of the Act, 33 U.S.C. §948a.

In his Supplemental Decision and Order Granting Attorney's Fees, the administrative law judge awarded claimant's attorneys, Mr. Schletker and Ms. Ray, their requested fee totaling \$41,016.59, representing 246.5 hours at an hourly rate of \$150 for Mr. Schletker and \$125 for Ms. Ray, and expenses of \$6,266.59. In his Compensation Order Award of Attorney's Fees, District Director Thomas C. Hunter awarded Mr. Schletker and Ms. Ray their requested fee of \$17,457.19, representing 116.25 hours at their respective hourly rates of \$150 and \$125, and expenses of \$232.19.

On appeal, employer challenges the administrative law judge's findings that claimant cannot return to his usual work and that the work injuries resulted in a loss of wage-earning capacity. Employer also challenges the administrative law judge's fee award, in the event the Board finds its contentions on appeal to be meritorious. BRB No. 00-0174. Employer also appeals the district director's fee award. BRB No. 00-0226. Claimant responds, urging affirmance of the administrative law judge's decisions awarding benefits and the administrative law judge's and district director's fee awards.¹

Employer contends that, based on the absence of objective evidence of physical impairment, the opinions of Drs. Sheridan and Holliday, the circumstances associated with claimant's prior injury at Conrail, and a videotape showing claimant working as a roofer, the administrative law judge erred in finding that claimant is unable to return to his usual employment as a laborer. Alternatively, employer contends that as salvage inspector positions at its facility which claimant could physically perform were available to him but for his termination for falsifying his pre-employment application, claimant has no loss in

¹By Order issued December 9, 1999, the Board granted employer's motion to consolidate its appeals of the administrative law judge's award of benefits and an attorney's fee with its appeal of the district director's fee award.

wage-earning capacity.

In order to demonstrate a *prima facie* case of total disability, claimant must establish that he is unable to return to his usual work due to his work injury. *See Harmon v. Sea-Land Service*, 31 BRBS 45 (1997). Once claimant establishes that he is unable to return to his usual employment as a laborer, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical or psychological restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Darby v. Ingalls Shipbuilding, Inc.*, 99 F.2d 430, 24 BRBS 202 (CRT)(5th Cir. 1996). A job in employer's facility must be actually available to claimant in order to meet employer's burden of establishing the availability of suitable alternate employment. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *see generally Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

In the instant case, the administrative law judge credited the work restrictions placed by claimant's treating physician, Dr. Pagani, as supported by the opinion of Dr. West, over the opinions of Drs. Sheridan and Holliday, in concluding that claimant is not capable of returning to his usual employment as a laborer. Decision and Order at 29. In this regard, both Dr. Pagani and Dr. West opined that claimant cannot return to heavy duty work for employer but is restricted to light duty with a 25 pound lifting restriction. CX M at 14-17; CX Y at 48-50. Moreover, the administrative law judge found that while the x-rays and MRI's of record revealed no orthopedic or neurologic deficiencies, all the treating physicians and physical therapists acknowledged claimant's pain by limiting him to light-duty work. *Id.* at 26. The administrative law judge further found claimant's work restrictions supported by his second fall from the railroad car and employer's supervisor's observation of claimant's inability to work with the brick gang. *Id.* at 28. The administrative law judge found the videotape evidence of claimant's working on his roof did not demonstrate claimant's ability to perform his usual employment, but rather supported the disability opinion of Dr. Pagani and the vocational opinion of Janice Pearson that claimant can perform only modified light and sedentary work. The administrative law judge observed that claimant was unable to work at a meaningful pace, was unable to lift the shingle packages, was required to sit while nailing the shingles to the roof, and that he took frequent breaks. *Id.* at 29.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*,

948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991). In the instant case, the administrative law judge's decision to credit the opinions of Drs. Pagani and West, as well as the testimony of Ms. Pearson which is consistent with these restrictions, is rational. *See O'Keeffe*, 380 U.S. at 359; *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir.1978), *cert. denied*, 440 U.S. 911 (1979). As his decision is thus supported by substantial evidence, we affirm the administrative law judge's finding that claimant is unable to return to his usual employment as a laborer.

We also reject employer's assertion that it established the availability of suitable alternate employment by virtue of the medical and vocational evidence, including the deposition testimony of Dr. Pagani, that claimant is physically able to perform the duties of a salvage inspector at employer's facility. Employer contends that claimant would have been eligible for such employment but for his justifiable termination for falsifying his employment application. In order for a job at employer's facility to establish the availability of suitable alternate employment, the job must be actually available to claimant. *See Berkstresser*, 16 BRBS at 234. In the instant case, there is no evidence of record that employer at any time actually offered claimant a permanent position as a salvage inspector, or that claimant was offered any other jobs that he was physically capable of performing following his inability to work with the brick gang. Moreover, the administrative law judge properly found that employer failed to establish claimant's post-injury wage-earning capacity based on the salvage inspector and other light-duty positions at employer's facility, as he found that these positions do not represent claimant's earning capacity on the open market.² Specifically, he found the positions are unavailable to the general public, as they are strictly limited to the more senior employees and to those temporarily restricted to light-duty employment, pursuant to the terms of the collective bargaining agreement between employer and claimant's union. Tr. at 37-41, 69-71, 69-71, 134-136, 140-142. Thus, the administrative law judge concluded that the higher wages paid by these jobs are not representative of claimant's wage-earning capacity, and he rationally established claimant's post-injury wage-earning capacity by reference to the wages claimant earned on the open market following his discharge from employer. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). As employer does not otherwise challenge the administrative law judge's finding that claimant has a wage-earning capacity of \$260 per week, it is affirmed. *See Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). Therefore, we affirm the administrative law judge's award of permanent partial disability benefits.

²That claimant was not offered a light-duty position with employer after August 1996 also supports the legal conclusion that the wages paid by these jobs at employer's facility cannot represent claimant's post-injury wage-earning capacity.

Employer's only contention on appeal regarding the fee awards of the administrative law judge and district director is that they should be vacated in the event the Board vacates the administrative law judge's award of benefits. Inasmuch as we have affirmed the award of benefits, we likewise affirm the fee awards. 33 U.S.C. §928.

Finally, claimant's counsel has filed a fee petition for time expended before the Board in which he requests a fee of \$2,700, representing 18 hours at hourly rate of \$150. Claimant is entitled to an attorney's fee payable by employer for successfully defending against employer's appeals. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). We find the hourly rate of \$150 requested by counsel is reasonable in this case. *See Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). Attorney Schletker's fee petition itemizes 18 hours for work performed before the Board. We find this work reasonably commensurate with necessary work performed and we grant the requested fee of \$2,700, payable by employer.

Accordingly, the administrative law judge's award of benefits and an attorney's fee is affirmed. The district director's attorney's fee award also is affirmed. Claimant's counsel is awarded an attorney's fee of \$2,700 for work performed before the Board, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge