BRB No. 01-0934

WOODIE WEST	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREENVILLE SHIPBUILDING CORPORATION	)	DATE ISSUED: August 28, 2002
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and Supplemental Decision and Order Awarding Attorney's Fees on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Robert J. Young, III and Timothy J. Young (Young, Richaud & Myers), New Orleans, Louisiana, for claimant.

Ronald T. Russell (Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Supplemental Decision and Order Awarding Attorney's Fees on Remand (98-LHC-2562) of Administrative Law Judge C. Richard Avery 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 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).

This case is before the Board for the second time. Claimant, a fitter/welder, injured his back and neck, and perforated his left ear drum at work on January 2, 1997, after falling off a boat and landing on a metal dock. As a result of the work injury, the administrative law judge found that claimant additionally suffers from a binaural hearing loss and benign positional vertigo. Employer voluntarily paid claimant compensation for various periods. It is uncontested that claimant cannot return to his usual work. Claimant returned to work in a light duty capacity in employer's tool room from February 1997 through June 6, 1997, but quit because he was in pain. Dr. Collipp subsequently restricted claimant from working from July 3 through November 10, 1997, when he released him to return to light duty employment.

In a Decision and Order issued on April 30, 1999, the administrative law judge awarded claimant temporary total disability benefits from July 3, 1997, through November 10, 1997. The administrative law judge denied claimant benefits from February 1997, through July 2, 1997, finding that employer established the availability of suitable alternate employment by providing claimant light duty work in its tool room until June 6, 1997, and that no medical evidence supported claimant's unemployment from June 6, 1997, through July 2, 1997. The administrative law judge also denied benefits subsequent to November 10, 1997, finding that claimant could have returned to light duty work in employer's tool room on November 11, 1997, at his pre-injury wages. In a Supplemental Decision and Order, the administrative law judge awarded an attorney's fee of $16,217.50 and expenses in the amount of $1,830.24.

Claimant appealed, challenging the administrative law judge's denial of benefits and employer appealed the attorney's fee award. The Board affirmed the administrative law judge's finding that the opinions of Drs. Collipp and Frothingham establish, from an orthopedic standpoint, that claimant is capable of performing the light duty job in employer's facility. *West v. Greenville Shipbuilding Corp.*, BRB Nos. 99-0947/A (June 2, 2000) (unpublished). The Board vacated, however, the administrative law judge's finding that employer established the availability of suitable alternate employment based on the light duty job, as the administrative law judge did not discuss whether the job employer offered claimant is suitable given his vertigo. The Board also remanded the case for the administrative law judge to consider the amount of the attorney's fee in terms of claimant's degree of success pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In a Decision and Order on Remand, the administrative law judge again found that claimant was capable of performing the light duty work in the tool room. In a Supplemental

Decision and Order on Remand, the administrative law judge reduced the requested fee by 25 percent and awarded claimant's counsel an attorney's fee of $12,163.13, plus $1,830.24 in expenses.

In the present appeal, claimant again challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. Claimant also appeals the attorney's fee award, requesting that the Board reinstate the administrative law judge's original award of $16,217.50.[1]

Claimant challenges the administrative law judge's finding that the light duty job in employer's tool room is suitable in light of the additional evidence he submitted on remand of "abnormal" findings on vertigo testing done at the University of Mississippi Medical Center and Dr. Wright's June 7, 2000, opinion that his vertigo is brought on by movement. EX 3 (on remand). Claimant asserts that the evidence employer submitted on remand, the reports of Dr. House and Dr. Cathey, does not contradict claimant's complaints of dizziness. EXs 1, 2 (on remand).

Where, as in the instant case, claimant is unable to perform his usual employment duties, he 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 Avondale Shipyards. Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 36(CRT)(5th Cir. 1992); *P & M Crane Co. v. Hayes,* 930 F. 2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). One way that employer can meet this burden is by providing claimant with a suitable light duty job within its facility. *See Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996).

[1]Employer filed a cross-appeal of the administrative law judge's award of an attorney's fee. By Order issued on June 18, 2002, the Board, citing employer's failure to either file a brief in support of its appeal or a response to the Board's show cause order, dismissed employer's appeal.

In finding the tool room position suitable, the administrative law judge found that Dr. House's February 26, 2001, report in which he stated that claimant's alleged inability to perform work due to vertigo was subjective and rested on claimant's word, contained the most accurate conclusion with regard to claimant's condition. EX 1 (on remand). The medical records from the University of Mississippi Medical Center, which claimant submitted on remand, contain a neurological examination performed by Dr. King, who reported the results of claimant's inner ear evaluation as borderline abnormal. CX 1 (on remand). The administrative law judge noted that Dr. King's specialty was not provided and that Dr. House, a specialist in Otology and Neurotology, reviewed the tests and found them inconclusive, because no measured reported responses from the test were done and the tests had been performed after claimant had taken medication. EX 1 (on remand). The administrative law judge did not accept claimant's testimony that he could not perform the job because of dizziness because it was unsupported by objective medical evidence and because claimant quit his light duty job allegedly due to back pain, not due to vertigo.[2] *See* Tr. at 78. The administrative law judge noted that Dr. Wright admitted that he had performed no objective tests and would not give an opinion as to whether claimant can perform the job. CX 23. The administrative law judge further cited the opinion of Dr. Collipp, who testified that he had no knowledge of complaints of vertigo that would prevent claimant from returning to work. EXs 7, 9; CX 6. It is well-established that an administrative law judge is entitled to weigh the evidence and to evaluate the credibility of all witnesses, and may draw his own conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the Board may not reweigh the evidence, and as substantial evidence supports the administrative law judge's finding, we affirm his determination that despite claimant's vertigo, claimant is capable of performing the tool room job in employer's facility.

We must nevertheless again remand this case. In order for its offer of a light duty job

[2]In the first Decision and Order, in rejecting claimant's assertion that he could not perform any gainful employment, the administrative law judge found that "Claimant's credibility was damaged by his less than full effort on the functional capacity evaluation," whose result "showed self-limiting behavior, inconsistencies, significant pain magnification, and inappropriate pain behavior." Decision and Order 1 at 19.

to be suitable, the job must be accessible to the claimant given the restrictions on his ability to drive. *See Diamond M. Drilling Co. v. Marshall [Kilsby]*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978); *Sampson v. FMC Corp.*, 10 BRBS 929 (1979). If employer establishes the availability of suitable alternate employment, claimant can rebut that showing and retain entitlement to total disability benefits by demonstrating that, despite a diligent effort, he was unable to secure suitable employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In remanding the case previously, the Board directed that "the administrative law judge should reconsider whether employer's offer of light duty employment located 30 miles away from claimant's home is suitable in light of Dr. Wright's opinion [that he would not release claimant to drive due to claimant's permanent vertigo problems]."

On remand, the administrative law judge found that claimant's driving restrictions are not a deterrent to the suitability of the job. The administrative law judge essentially found, based on claimant's past work history, that claimant could carpool to the light duty job. The administrative law judge reasoned that claimant has worked for employer off and on since 1982 and that he testified that when he first got the job he knew getting to and from work was his obligation even if he had to carpool. In fact, claimant did carpool for several months after his accident. June 1, 2001 Tr. at 26. The administrative law judge observed that claimant has not made any effort to obtain rides to work, and that even if claimant's dizziness is a cause of concern as far as his driving to work, claimant has exercised no diligence obtaining transportation that would eliminate the need for him to drive his personal vehicle. Contrary to the administrative law judge's analysis, however, employer bears the burden of showing that the alternate job is suitable and available, which necessarily includes showing that claimant is realistically able to get to work. Thus, employer must show that claimant is capable of making the 30 mile commute, factoring in claimant's vertigo, and claimant is not required to show diligence until employer meets its burden. *See Guidry*, 967 F.2d 1039, 26 BRBS 36(CRT); *P & M Crane*, 930 F. 2d 424, 24 BRBS 116(CRT). The administrative law judge thus erred here in relying on claimant's diligence in seeking alternate transportation rather than on whether employer proved the job was realistically available to him given an inability to drive.

Claimant testified that since his accident he has not driven to work, although during the three months he worked in the tool room after the accident, he "rode with another fellow." June 1, 2001 Tr. at 18. Claimant testified that there were two or three men from Eudora, Arkansas, where he lives, with whom he rode, and that at least one is still employed with the shipyard. *Id.* at 19. Claimant explained that he has known the man with whom he rode to work for 10 years, but that since he stopped working in June 1997, he has not asked whether he could get a ride with him. *Id.* at 25. As the physical ability to perform a job is not the sole factor in determining whether it constitutes suitable alternate employment, *see, e.g., Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 905, 32 BRBS 212, 214-215(CRT)(5th

Cir. 1998), we must vacate the administrative law judge's determination that the job in the toolroom is suitable and available. We remand the case for the administrative law judge to explicitly consider Dr. Wright's opinion regarding his prohibition of claimant's driving and whether, in light of this and other relevant evidence, employer has shown that the job in its tool room is realistically available to claimant.[3]

Following the issuance of the administrative law judge's initial Decision and Order, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of $24,920, representing 178 hours of attorney services at $140 per hour and $2,372.79 in expenses. In a Supplemental Decision and Order, after disallowing 33.8 hours and expenses requested prior to July 22, 1998, the date the case was referred to the Office of Administrative Law Judges, the administrative law judge awarded an attorney's fee of $16,217.50, and expenses in the amount of $1,830.24. Employer appealed the administrative law judge's award of an attorney's fee, contending that the administrative law judge's award of a fee in excess of $16,000 is unreasonable in light of the amount of benefits awarded. The Board remanded the case for the administrative law judge to consider the amount of the attorney's fee in terms of claimant's degree of success pursuant to *Hensley*, 461 U.S. 424.

[3]The administrative law judge stated that Dr. House's opinion is the "most accurate" concerning claimant's ability to work. Decision and Order on Remand at 5. Dr. House stated he did not know what was causing claimant's vertigo, and that claimant's ability to work rested on claimant's word as to how dizzy he was and as to what kind of physical activities he could participate in with his "balance dysfunction." EX 1 (on remand).

In a Supplemental Decision and Order on Remand, the administrative law judge found that as a result of the first decision, claimant was awarded compensation for a 45 percent hearing impairment[4] and temporary total disability benefits for about four months and that claimant did not prevail on his claim for additional disability benefits. The administrative law judge, taking into account claimant's limited success, pursuant to *Hensley*, reduced the fee by 25 percent. He therefore awarded a fee of $12,163.13, plus $1,830.24 in expenses. On appeal, claimant requests that the Board reinstate the administrative law judge's original award of $16,217.50. In view of our decision to remand this case for reconsideration of suitable alternate employment, claimant's request is denied. Should claimant prevail on this issue on remand, the administrative law judge may reinstate the original award.

[4]As a result of claimant's binaural hearing impairment, the administrative law judge awarded claimant scheduled permanent partial disability benefits under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). This award resulted in benefits of $10,131.84.

Accordingly, the administrative law judge's determination that the light duty job in the tool room is suitable is vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed. The administrative law judge may reconsider the fee award in a manner consistent with his decision on remand.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge