BRB No. 03-0770

EZELL TOOMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:Aug. 12, 2004
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand, Attorney Fee Order, and Order Modifying Attorney's Fees of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand, Attorney Fee Order, and Order Modifying Attorney's Fees (2000-LHC-2999, 2000-LHC-3000 and 2000-LHC-3001) of Administrative Law Judge Richard K. Malamphy awarding benefits on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for a second time. Relevant to the issues currently before the Board, the administrative law judge, in his initial Decision and Order, accepted the parties' stipulations that claimant sustained work-related bilateral carpal tunnel syndrome in 1975, found that claimant could not return to his usual work as a result of his work-related back injury, and found that employer did not establish the availability of suitable alternate employment. Employer was thus ordered to pay temporary total disability benefits from February 26, 1999 through May 26, 2000, and permanent total disability benefits from May 27, 2000, and continuing. Both employer and claimant appealed the administrative law judge's Decision and Order.

In considering the merits of the appeals, the Board affirmed the administrative law judge's finding that claimant's 1997 back injury resulted in permanent work restrictions. *Toomer v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 02-0486A and 02-0514 (Mar. 25, 2003)(unpub.), slip op. at 5-7. The Board, however, vacated the administrative law judge's determination that employer did not establish the availability of suitable alternate employment, holding that the administrative law judge did not consider the entirety of the relevant evidence of record. *Toomer*, slip op. at 7-8. Thus, the Board vacated the award of total disability benefits and remanded the case for further consideration of the availability of suitable alternate employment, and, if necessary, for consideration as to whether claimant diligently sought alternate work post-injury. *Toomer*, slip op. at 7-9.

On remand, the administrative law judge found, based on the opinions of Drs. Stiles, Baddar, and Byrd, the opinions of the vocational experts, Mr. Kay and Mr. Hanbury, and the labor market survey, that employer established the existence of suitable alternate jobs but claimant undertook a diligent job search and thus that employer did not show the *availability* of suitable alternate employment. Accordingly, the administrative law judge again awarded claimant temporary and permanent total disability benefits.

Subsequent to the issuance of the initial Decision and Order in this case, claimant's counsel filed an attorney's fee petition seeking fees in the amount of $11,803.00, plus costs in the amount of $2,947.92. On March 13, 2003, claimant's counsel submitted a supplemental fee petition for an additional fee of $2,525.75. Employer filed numerous objections to claimant's counsel's fee request.[1] In his initial fee order, the administrative law judge awarded claimant $15,659.20 in fees and costs. In response to employer's motion for reconsideration, the administrative law judge modified this order to award claimant $15,119.20 in fees and expenses.

[1] In response to employer's objections, claimant's counsel sought an additional $1,000.25 in fees.

On appeal, employer challenges the administrative law judge's findings that it did not establish the availability of suitable alternate employment and the award of an attorney's fee. Claimant responds, urging affirmance of the administrative law judge's Decision and Order on Remand, as well as the attorney's fee award.

Where, as in the instant case, it is undisputed that claimant is incapable of resuming his usual employment duties with employer, he has established a *prima facie* case of total disability. The burden thus shifts to employer to establish the availability of suitable alternate employment. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). In order to meet its burden, employer must establish the availability of a range of job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Id.; see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). When, as here, employer lays claimant off from a suitable position at its facility, employer is liable for total disability benefits unless it shows the availability of other suitable alternate employment. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

On remand, the administrative law judge found that the alternate jobs of parking lot cashier and unarmed security guard are suitable for claimant. Claimant testified, however, that he contacted all of the potential employers two months before the hearing and that none of them were hiring. Thus, the administrative law judge concluded that claimant demonstrated a diligent job search and that employer therefore did not establish the availability of suitable alternate employment.

Employer first asserts that the administrative law judge erred in failing to consider that claimant worked post-injury for employer between 1997 and 1999 in determining the suitability of the employment opportunities employer identified on the open market. In this regard, employer asserts that the administrative law judge understated claimant's physical capabilities as the physicians of record agree that claimant has the functional capacity to lift at least 20 pounds and that employer's labor market survey indicated that the employers were willing to make lifting accommodations if needed. Employer thus argues that all of the jobs it identified in its labor market survey are suitable for claimant.[2] Lastly, employer argues that administrative law judge erred in concluding that claimant

[2] These positions are: donation attendant at Goodwill Industries; greeter at two different Wal-Marts; cashier at Alright Parking; and three different unarmed security guard positions offered through James York Security and Security Services of America. Emp. Ex. 23.

exercised diligence in seeking employment, as the record shows that claimant only applied for the positions identified by employer shortly before the hearing, and not that claimant made a diligent continuous effort to seek suitable employment.

We reject employer's assertion that claimant's post-injury employment in a position provided by employer until February 23, 1999, constitutes evidence of claimant's physical capacities with regard to the suitability of the jobs employer identified on the open market. While this evidence may be relevant in some cases, in this case, the administrative law judge observed that claimant was found to be totally disabled by Dr. Stiles from August 1999, through May 27, 2000, subsequent to claimant's post-injury work with employer. Cl. Ex. 18. Thus, we hold that the administrative law judge properly considered only claimant's work restrictions after May 2000 in assessing the suitability of the jobs employer identified. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988) (inquiry is whether employer identified suitable jobs during the critical period when claimant was able to work).

We further reject employer's assertion that the administrative law judge was required to find that claimant is capable of employment requiring the lifting of 20 pounds. Dr Byrd assigned a five to ten pound lifting restriction in August 2001. Emp. Ex. 28. In examining claimant in April 2001, Dr. Baddar opined that claimant was capable of performing sedentary to light work, but that it was difficult to gauge the "exact level" claimant could perform. Emp. Ex. 20. While these physicians also stated claimant may be capable of lifting greater weights, the administrative law judge did not err in relying on their more definitive statements regarding claimant's capabilities and in concluding that claimant had a five to ten pound lifting restrictions. *See Perini v. Heyde,* 306 F.Supp.1321 (D.R.I. 1969). Thus, the administrative law judge rationally rejected the attendant position at Goodwill Industries because Mr. Hanbury, claimant's vocational consultant, stated that this job requires the lifting of 20 pounds and that Goodwill would not accommodate an individual with a five-pound lifting restriction. Tr. at 83, 99-100; *see Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). Moreover, the administrative law judge rationally rejected the greeter position at Wal-Mart because Dr. Stiles did not approve it for claimant. *See Todd Shipyards Corp. v Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge nonetheless found suitable the positions as a parking lot attendant and security guard, and this finding is affirmed as it is unchallenged on appeal. Decision and Order on Remand at 5.

With regard to the availability of the positions, the administrative law judge found that William Kay, employer's vocational consultant, found "very few possible job positions," and that moreover claimant engaged in a diligent, yet unsuccessful, job search by contacting the employers identified in the labor market survey. *Id.* The administrative

law judge's conclusion from these findings, that employer did not establish the availability of suitable alternate employment, cannot be affirmed. The inquiry into the diligence of claimant's job search does not arise until after employer first demonstrates the availability of suitable alternate employment. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied,* 479 U.S. 826 (1986). Mr. Kay identified one actual parking lot attendant position and three actual security guard positions in his labor market survey conducted in August 2000. Emp. Ex. 22. He further testified that such positions were routinely available during the period between February 26, 1999, and the time of the hearing on May 8, 2001. Tr. at 52-55. In conjunction with the administrative law judge's findings that these jobs are suitable, Mr. Kay's testimony establishes the existence of a range of jobs available to claimant in the critical period after claimant was able to work beginning in May 2000. *See Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *Tann,* 841 F.2d 540, 21 BRBS 10(CRT). Thus, we hold that employer established the availability of suitable alternate employment. *See generally Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

Employer also contends that the administrative law judge erred in finding that claimant engaged in a diligent job search. We agree that the administrative law judge's findings regarding claimant's search for employment cannot be affirmed; thus we vacate the finding that claimant is permanently totally disabled. A claimant may retain eligibility for total disability benefits, after employer establishes the availability of suitable alternate employment, if claimant demonstrates that he diligently, yet unsuccessfully, sought alternate work of the type shown by employer to be suitable and available. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). The claimant must establish that he was reasonably diligent in attempting to secure a job of the type shown to be reasonably "attainable and available," and the administrative law judge must make specific findings regarding the nature and sufficiency of claimant's efforts in seeking employment. *Palombo*, 937 F.2d at 75, 25 BRBS at 9(CRT).

On remand, the administrative law judge found only that claimant testified he contacted all of the potential employers listed in the labor market survey two months before the hearing, and was told that the employers were not hiring. The administrative law judge found that as "[t]he hearing was held some two months after the job search…it seems reasonable that [claimant] would not recontact these firms within a short period of time." Decision and Order on Remand at 5. The administrative law judge further found that claimant delayed seeking employment as claimant testified that Dr. Stiles told him not to work. Tr. at 22. The administrative law judge, however, did not assess the claimant's credibility in this regard in light of the absence of medical evidence that Dr. Stiles placed such a restriction on claimant after May 2000. Emp. Ex. 19.

On remand, the administrative law judge must, therefore, make specific findings regarding the "nature and sufficiency" of claimant's job search. *See Palumbo*, 937 F.2d at 75, 25 BRBS at 9(CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). In addition to assessing claimant's credibility concerning the reason for his delayed search, the administrative law judge may find it relevant to inquire as to when claimant was apprised of the jobs in employer's labor market survey. *See generally Ion v. Duluth Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997). The administrative law judge also should consider employer's argument that claimant did not seek work earlier due to his quest for Social Security benefits. *See* Emp. Ex. 23. If, on remand, the administrative law judge determines that claimant's job search was not diligent, he must then determine claimant's entitlement to permanent partial disability benefits. 33 U.S.C. §908(c)(21), (h).

Employer next argues that given the lack of a final decision on the merits, it was premature for the administrative law judge to award claimant an attorney's fee. Employer also avers that the fee petition is deficient as it lacks the requisite specificity, and improper as it includes fees for services not compensable under the Act, *i.e.*, contains fees for an independent contractor and fees associated with responses to objections, as well as an excessive hourly rate for all services rendered in this case.

While we remand this case for further consideration of the issue of claimant's diligence in seeking employment, in the interest of judicial efficiency, we will address the assertions raised by employer regarding the award of an attorney's fee. The fee award, however, is not enforceable until all appeals are exhausted, and thus we reject employer's assertion that the fee award is premature. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *see also Story v. Navy Exch. Serv. Center*, 33 BRBS 111 (1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

We reject employer's assertion that the Board should reduce the fees awarded to the independent contractor, Ms. Leeth, for her services in preparing claimant's brief. The administrative law judge reduced both the number of hours billed for Ms. Leeth's services and the hourly rate charged. *See* Attorney Fee Order at 9. His findings in this regard are thorough, and employer has failed to allege any basis for the Board to further reduce or exclude any fee awarded to Ms. Leeth. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Moreover, we reject employer's assertion that the administrative law judge erred in failing to require greater specificity in claimant's counsel's fee petition, as counsel herein provided specific dates, a summary of the tasks and the hours performed on each date, and the initials of the person performing the task. *See Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988); 20 C.F.R. §702.132. We further reject employer's

contention that the awarded hourly rates of $200 and $160 hour are excessive, as the evidence presented by counsel of fees awarded in comparable cases is sufficient to demonstrate the prevailing market rates in the community. *See Newport News Shipbuilding & Dry Dock Co. v. Brown*, _____F.3d_____, 2004 WL 1595673 (4th Cir). Lastly, we hold that the administrative law judge properly found that counsel is entitled to a fee for preparation of the attorney's fee petition as well as for time to respond to an objections to that petition. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

We therefore reject employer's contentions regarding its appeal of the award of an attorney's fee and affirm the administrative law judge's fee award on the present award of total disability benefits. If, on remand, the administrative law judge modifies the award of benefits to claimant, he must then reconsider the amount of the fee to which claimant is entitled in light of the degree of success achieved in this case. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

On August 19, 2003, counsel for claimant submitted an attorney's fee petition to the Board for work performed in the prior appeals. 20 C.F.R. §802.203; *Toomer v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 02-0486/A, 02-0514. Counsel seeks a fee totaling $4,501 for 23.86 hours of work. Employer filed objections to the fee request to which claimant replied.

Employer argues that as this case has not been finally adjudicated, the Board should not award a fee at this time. Employer further asserts the hourly rates claimed are excessive, that the fee petition lacks appropriate specificity, and that the fee request is inflated by counsel's assigning the case to an associate, thereby requiring the work of two attorneys rather than one. Lastly, employer argues that claimant's counsel should not be compensated for the time spent sought by counsel for preparation of a motion to dismiss which was ultimately rejected by the Board.

At present, we cannot award claimant an attorney's fee for work performed in the prior appeals because the fee petition is not specific as to the work performed in each of the three appeals. Claimant was successful in his cross-appeal in BRB No. 02-0486A and unsuccessful in having employer's appeal in BRB No. 02-0486 dismissed and his appeal in BRB No. 02-0514 reinstated. *See* 20 C.F.R. §802.203(b). Moreover, because we are again remanding this case, the full extent of claimant's entitlement to benefits, and thus his success in defending employer's appeal in BRB No. 02-0486, is unknown. Upon completion of the proceedings on remand, claimant may refile his fee petition. 20 C.F.R. §802.203(c). To the extent feasible, counsel should specifically delineate in which appeal each service was rendered so that the Board may access the compensability of the service. 20 C.F.R. §802.203(d).

Accordingly, the administrative law judge's finding that claimant undertook a diligent post-injury job search is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order on Remand is affirmed. The administrative law judge's Attorney Fee Order and Order Modifying Attorney's Fees are affirmed on the present facts, although it is subject to modification following the administrative law judge's consideration of the merits on remand. Claimant's petition for an attorney's fee for work in the prior appeals is denied at this time. Counsel may re-file a more specific fee petition upon completion of the proceedings on remand.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge