BRB Nos. 97-0733
and 97-0733A

DAVID DOUGHERTY	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
INDEPENDENT PIER COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Frank C. Bender (Deasey, Mahony & Bender, Ltd.), Philadelphia, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (95-LHC-1726) of Administrative Law Judge Ralph A. Romano awarding benefits 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).

Claimant, on May 2, 1990, sustained injuries to his neck, lower back, right shoulder,

and left ankle when he was struck by a forklift. Claimant returned to work in January 1991. In May 1991, however, claimant left work as a result of neck and lower back pain, which he alleged were caused by his May 1990 work injury. Employer voluntarily paid claimant temporary total disability benefits from the date of injury to January 1, 1991, and from May 19, 1991, to December 3, 1994. Employer also paid benefits for permanent partial disability from December 4, 1994, to February 25, 1995. 33 U.S.C. §908(c)(21). At the October 20, 1995, formal hearing, claimant sought continuing permanent total disability benefits. *See* 33 U.S.C. §908(a).

In his Decision and Order, the administrative law judge determined that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's medical conditions were work-related and found that claimant is unable to return to his usual longshore employment. Next, the administrative law judge determined that employer established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits through May 26, 1992, which the parties stipulated as the date of maximum medical improvement, permanent total disability benefits through November 20, 1995, and permanent partial disability benefits from November 21, 1995, based on a residual wage-earning capacity of $210 per week. Finally, employer was awarded Section 8(f) relief. 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in determining that it failed to present evidence sufficient to rebut the Section 20(a) presumption and that substantial evidence does not support the administrative law judge's ultimate finding that claimant's conditions are work-related. Employer also challenges the administrative law judge's finding regarding the extent of claimant's disability. In his cross-appeal, claimant asserts that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Alternatively, claimant alleges that the administrative law judge erred in failing to find that he diligently attempted to secure work but was unable to do so.

We first address employer's assertion that the administrative law judge erred in concluding that claimant's present neck and back symptomatology are related to his May 2, 1990, work injury. In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a) presumption which applies to the issue of whether an injury is causally related to his employment activities. *Perry v. Carolina Shipping Co.,* 20 BRBS 90 (1987). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.,* 23 BRBS 270 (1990).

In the instant case, employer alleges that the testimony of Drs. Eckbold and Manzione, as well as the medical reports of Drs. Eckbold, Manzione, Gross and Valentine, constitute evidence sufficient to establish rebuttal of the Section 20(a) presumption. We need not address this specific contention because, assuming, *arguendo,* that the testimony

of these physicians is sufficient to rebut the Section 20(a) presumption, the administrative law judge's finding that causation is established based on the record as a whole is rational and supported by substantial evidence. Specifically, the administrative law judge considered all of the medical evidence and credited the opinions of Drs. Kaplan, Winokur and Lee, who he found had commenced treatment of claimant much earlier and closer to the time of claimant's injury than the physicians relied upon by employer. The administrative law judge could properly rely on these opinions in concluding that claimant's May 2, 1990, work accident caused or aggravated claimant's present medical conditions. *See* Decision and Order at 10-11; *see also Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's decision to credit the opinions of Drs. Kaplan, Winokur, and Lee is neither inherently incredible nor patently unreasonable. Accordingly, we affirm the administrative law judge's determination that claimant's present physical problems are related to his employment with employer. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Employer next challenges the administrative law judge's determination regarding the extent of claimant's disability; specifically, employer avers that claimant was capable of returning to his usual employment duties with employer as of the stipulated date of maximum medical improvement, May 26, 1992. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to return to his regular or usual employment due to his work-related injury. *See Blake v. Bethlehem Steel Corp.* 21 BRBS 49 (1988). In finding that claimant met his burden, the administrative law judge, citing the opinions of Drs. Lee, Winokur, Manzione, and Kaplan, stated, "[N]early all physicians in this case agree that claimant is unable to return to work as a longshoreman." *See* Decision and Order at 11. In this regard, a review of the record reveals that Drs. Lee, Winokur and Kaplan are of the opinion that claimant is incapable of resuming his usual employment duties, while Dr. Manzione opined that claimant is limited to light work. *See* CX-BB at 20; CX-CC at 19; CX-N; EX-11 at 33. Accordingly, as the administrative law judge's finding that claimant is unable to return to his usual job is supported by substantial evidence in the record, it is hereby affirmed. *See generally Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989).

We now address the issues raised by claimant in his cross-appeal. Claimant initially argues that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. We disagree. Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of specific jobs within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing, and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). If employer establishes the availability of suitable alternate employment, claimant may still establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In the instant case, the administrative law judge credited the testimony of employer's vocational consultant, Mr. Caldwell, in concluding that employer established the availability of suitable alternate employment. Specifically, the administrative law judge found that two cashier positions identified by Mr. Caldwell are within the light-duty work restrictions placed upon claimant by Drs. Lee, Winokur and Manzione.[1] Contrary to claimant's contention, the inadequacy of the job notices he received from employer regarding these two positions do not render those positions insufficient to meet employer's burden, since employer has no obligation to notify claimant of the positions it identifies as establishing suitable alternate employment. *See Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290, 292 (1990). Moreover, employer's labor market survey sets forth the terms and physical requirements of the positions identified. *See* EXS-12, 14. Thus, based upon the record before us, the administrative law judge's finding that claimant is capable of performing the identified jobs is supported by substantial evidence and is consistent with law. *See Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment.

Claimant additionally contends that the administrative law judge erred in failing to find that he diligently, but unsuccessfully, sought employment post-injury. Although the administrative law judge credited claimant's testimony that he unsuccessfully tried to obtain

[1]In contrast, the administrative law judge found that the remaining positions identified by Mr. Caldwell, as well as the positions identified by Ms. Bingham, were either unavailable to claimant when he sought the positions or were not within claimant's work restrictions.

some of the jobs identified by Ms. Bingham and Mr. Caldwell, he did not subsequently consider whether claimant's actions established due diligence in attempting to secure suitable alternate employment. The administrative law judge's failure to address this issue requires that we remand this case for the administrative law judge to consider all the evidence and testimony regarding claimant's attempts to secure post-injury employment. *See Roger's Terminal,* 784 F.2d at 687, 18 BRBS at 79 (CRT); *Hooe,* 21 BRBS at 258.

Finally, claimant's counsel seeks an attorney's fee of $1,050, representing 6 hours of services rendered at a rate of $175 per hour, for work performed before the Board. Claimant's counsel is entitled to an attorney's fee payable by employer since he successfully defended employer's appeal. *See Lewis v. Todd Pacific Shipyards Corp.,* 30 BRBS 154 (1996). Having reviewed counsel's fee petition, we find the requested fee reasonably commensurate with the necessary work performed. *See Canty v. S.E.L. Maduro,* 26 BRBS 147 (1992). We accordingly award counsel a fee of $1,050, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §§802.203, 802.409.

Accordingly, the case is remanded for consideration of whether claimant diligently sought post-injury employment consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed. Claimant's counsel is awarded a fee of $1,050 for work performed before the Board, payable directly to counsel by employer.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge