BRB No. 98-0732

J. B. MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	)
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	) DECISION and ORDER

Appeals of the Decision and Order on Remand of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Dorsey Redland, San Francisco, California, for claimant.

Judith A. Leichtnam (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (90-LHC-863) of Administrative Law Judge Alfred Lindeman 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 if they 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).

This is the second time this case is before the Board. Claimant injured his

back, left elbow and left shoulder while working for employer as a general laborer on December 18, 1987. Claimant has not worked since that date. Employer voluntarily paid claimant temporary total disability benefits at a weekly rate of $616.96 from December 19, 1987, through April 20, 1988, and from July 5, 1988 through April 28, 1989. In the first Decision and Order in the instant case, Administrative Law Judge James J. Butler found that the December 1987 injury aggravated claimant's underlying back condition and that claimant reached maximum medical improvement on December 28, 1990. Relevant to the instant case, Judge Butler also found that claimant could perform two cashier jobs identified by employer's vocational consultant, Sylvia Oberti, in her March 30, 1990 report, and therefore, that employer established the availability of suitable alternate employment. Thus, Judge Butler awarded claimant temporary partial disability benefits from March 30, 1990 through December 27, 1990, and permanent partial disability benefits from December 28, 1990, and continuing. 33 U.S.C. §908(c)(21), (e). Judge Butler further found that claimant had not met his burden of establishing entitlement to past medical expenses, but awarded claimant future medical expenses pursuant to 33 U.S.C. §907.

On appeal, the Board, *inter alia*, vacated Judge Butler's finding that employer established suitable alternate employment, as he did not consider whether the commuting distance to the cashier jobs affected the suitability of these jobs. The Board instructed that if, on remand, it is found that claimant can perform the cashier jobs, the issue of whether claimant exercised due diligence in pursuing alternate work must be addressed. With regard to the issue of medical expenses, the Board vacated Judge Butler's finding that the two medical bills for which claimant sought reimbursement, those of Drs. Sclamberg and Blackwell, were insufficiently specific to support an order of payment, noting that each bill listed a date of a service, a brief description of the service, and the fee for each service. The Board ordered reconsideration of the issue of employer's liability for past medical expenses, instructing that, on remand, the record may be reopened to obtain additional information to make specific calculations. *Martin v. Marine Terminals Corp.*, BRB Nos. 92-1893/A (Sept. 26, 1995)(unpublished).

Due to Judge Butler's retirement, the instant case was assigned to Administrative Law Judge Alfred Lindeman (the administrative law judge), who, pursuant to the agreement of the parties, decided the issues on remand on the existing record and the briefs on remand. In his Decision and Order on Remand, the administrative law judge found that claimant is capable of driving the commuting distances to the service station cashier positions, as the administrative law judge found that both distances could reasonably be driven in less than one hour and claimant indicated to employer's vocational counselor, Ms. Oberti, that he can drive

for up to one hour at a time. Thus, the administrative law judge found that employer established suitable alternate employment. Thereafter, the administrative law judge determined that claimant was reasonably diligent in his attempt to secure a job, and therefore found that claimant established entitlement to permanent total disability under the Act. 33 U.S.C. §908(a). Lastly, the administrative law judge found that the medical bills of Drs. Sclamberg and Blackwell were sufficiently specific to support an award of past medical expenses, and found employer liable for $2,210.44 in medical expenses for treatment provided by Dr. Blackwell, and $1,461.93 for treatment by Dr. Sclamberg, as well as interest on the payments due to these physicians.

On appeal, employer challenges the administrative law judge's award of permanent total disability compensation to claimant. Specifically, employer contends that the administrative law judge erred in determining that claimant diligently sought employment post-injury. In addition, employer asserts that the administrative law judge improperly awarded medical expenses and interest for the services of Drs. Sclamberg and Blackwell, as it alleges it paid the medical bills to these physicians in 1989 and 1991. Claimant responds, urging affirmance of the administrative law judge's decision.

We first consider employer's contention that the administrative law judge erred in awarding claimant permanent total disability compensation. Where, as in the instant case, claimant is incapable of resuming his usual employment duties with employer, claimant has established a *prima facie* case of total disability; the burden then shifts to employer to establish the availability of suitable alternate employment within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). On remand, the administrative law judge found that the driving distances from claimant's residence to the two service station cashier jobs identified by Ms. Oberti were 23.3 miles and 17.3 miles respectively. Having determined that claimant is capable of driving these commuting distances, the administrative law judge found that employer met its burden of establishing suitable alternate employment. *See* Decision and Order on Remand at 4. As this finding is not challenged on appeal, it is affirmed.

Where an employer shows the availability of suitable alternate employment, claimant can nevertheless establish entitlement to total disability benefits if he demonstrates that he diligently tried and was unable to secure such employment. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Palombo v. Director,*

OWCP, 937 F.2d 70, 73, 25 BRBS 1, 5-8 (CRT)(2d Cir. 1991); *Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366 (1990). Claimant does not have to seek the exact jobs identified by employer to establish due diligence. *See Palombo*, 937 F.2d at 74, 25 BRBS at 8 (CRT).

Contrary to employer's contention, there is substantial evidence in support of the administrative law judge's conclusion that claimant diligently, though unsuccessfully, attempted to secure employment post-injury. Specifically, in addressing this issue, the administrative law judge relied on claimant's testimony that he unsuccessfully applied for work with 24 prospective employers from April 16 to October 18, 1990, in job areas such as security guard, parking attendant, gas station attendant, restaurant helper and light janitorial work. Cl. Ex. 25. The administrative law judge acknowledged claimant's testimony that he sent resumes and job applications, made follow-up phone calls, and that he searched for a job so he could support his family, though his efforts were unsuccessful. Tr. at 80, 82-83, 136. Finding that the jobs claimant inquired about were within the purview of his employment opportunities identified by employer, the administrative law judge thus concluded that claimant demonstrated that he had been diligent in his attempt to secure available employment, and as his attempts were unsuccessful, that claimant is entitled to permanent total disability benefits.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses; additionally, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's specific findings that claimant unsuccessfully sought employment post-injury in employment categories identified by employer, and that he additionally attempted to secure a position available with other multiple employers, are rational and supported by the record. Accordingly, we affirm the administrative law judge's determination that claimant diligently tried and was unable to secure employment post-injury, and his consequent award of continuing permanent total disability benefits to claimant. *See generally Edwards*, 999 F.2d at 1374, 1376 n.2, 27 BRBS at 81, 84 n.2 (CRT).

Lastly, we consider employer's contention with respect to its liability for past medical expenses. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." In its initial decision, the Board vacated Judge Butler's denial of reimbursement for past medical expenses, holding that the medical bills of Drs. Sclamberg and Blackwell were sufficiently specific to permit an award of medical expenses. The Board instructed the administrative law judge to reconsider employer's liability for these medical bills on remand, specifically noting that the administrative law judge may reopen the record to obtain additional information in order to calculate the amount of employer's liability. *See Martin*, slip. op. at 6; 20 C.F.R. §702.338. In his

Decision and Order on Remand, the administrative law judge acknowledged that counsel for the parties agreed that his decision would be based on the existing record and their respective briefs. *See* Decision and Order on Remand at 3. Thereafter, the administrative law judge found that the medical bills of Drs. Blackwell and Sclamberg were sufficiently specific to support an award of past medical expenses, noting that each itemized statement included dates, costs and descriptions of the medical procedures provided. *Id.* at 5; Cl. Exs. 21-22. Thus, the administrative law judge determined that employer was liable for the treatment provided by Drs. Blackwell and Sclamberg, as well as interest on the unpaid medical expenses, pursuant to *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993).

On appeal, employer challenges the administrative law judge's award of past medical expenses and interest. Specifically, employer contends that in its brief before the administrative law judge on remand, it pointed out that the medical bills of Drs. Blackwell and Sclamberg had been paid in 1989 and 1991, and therefore, the issue of liability for past medical expenses was moot. Moreover, employer maintains that as it paid these medical expenses, an award of interest is inappropriate.

In its initial decision, the Board instructed the administrative law judge to reconsider employer's liability for past medical expenses, and the administrative law judge complied with this instruction. While employer had a full and fair opportunity on remand to submit evidence with respect to the payment of the medical bills of Drs. Blackwell and Sclamberg, it consented to having the administrative law judge decide the issues on remand based on the existing record. Without additional evidence in the record, there was nothing on which the administrative law judge could base a finding that the issue of past medical expenses was moot. A mere assertion in employer's brief to the administrative law judge, pointed out in a footnote, *see* Employer's Brief to the Administrative Law Judge on Remand at 3 n.1, is insufficient for the administrative law judge to make such a finding. As the administrative law judge discussed and analyzed all the relevant evidence of record with respect the employer's liability for past medical expenses, and as his decision is rational and comports with applicable law, we affirm the administrative law judge's finding that employer is liable for the medical treatment provided by Drs. Blackwell and Sclamberg, as well as interest on the unpaid bills.[1] *See Hunt*, 999 F.2d at 418,

[1]If payment of the medical bills of Drs. Blackwell and Sclamberg is pursued,

27 BRBS at 84; *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 30 BRBS 75 (1997).

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and the evidence establishes that employer has in fact paid these bills, it could not be ordered to provide payment a second time, and employer's liability for interest with respect to these expenses would end at the time of payment.

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge