BRB No. 97-1374

WILFRED BROSSETTE, IV	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order, Decision and Order on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Richard S. Vale (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, Decision and Order on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees (95-LHC-1493 and 95-LHC-2790) of Administrative Law Judge Lee J. Romero, Jr., 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).

Claimant injured his right shoulder and neck on June 21, 1991, and June 27, 1991, while working for employer as a shipfitter. The administrative law judge found that claimant established his *prima facie* case of total disability and that employer established suitable alternate employment. However, the administrative law judge found that claimant attempted to secure employment with reasonable diligence but was unsuccessful, and therefore is entitled to total disability benefits. The administrative law judge found that claimant reached maximum medical improvement with regard to his neck on March 15, 1994. Consequently, the administrative law judge awarded claimant temporary total disability benefits from June 27, 1991, to March 14, 1994, and permanent total disability benefits from March 15, 1994, and continuing. The administrative law judge also held employer liable for an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of $13,657.27, representing 101.165 hours of legal services at $135 per hour, and expenses in the amount of $2,870.50. No objections were filed by employer. In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel a fee of $14,041.13, including the expenses as requested, after disallowing 11.8 hours and reducing the requested hourly rate to $125.

On appeal, employer challenges the administrative law judge's award of benefits. In its supplemental appeal, employer challenges the administrative law judge's award of an attorney's fee. Claimant responds in support of the administrative law judge's award of benefits as well as his award of an attorney's fee.

We first address employer's challenge to the administrative law judge's award of disability benefits. Employer initially contends that the administrative law judge erred in finding that claimant established his *prima facie* case of total disability. To establish his *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Claimant's usual employment is that which he was performing at the time of injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

The administrative law judge's determination that claimant established his *prima facie* case of total disability is supported by the opinions of Drs. Correa, Ochsner, and Russo, who advised claimant not to return to work. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); Decision and Order at 31; Jt. Exs. 2-4; Tr. at 45. Although employer asserts that the administrative law judge could not

have found that claimant established his *prima facie* case of total disability when the evidence establishes that claimant can return to some work, the relevant issue is whether claimant can return to his usual employment as a shipfitter and not whether he can return to any employment. *See Manigault*, 22 BRBS at 332; *Blake*, 21 BRBS at 49. Moreover, although claimant's counsel stated in his opening argument at the hearing that claimant is not totally disabled, the administrative law judge was not bound by this statement as the extent of claimant's disability was clearly at issue in this case, *see* Jt. Ex. 34; Tr. at 16, as evidenced by employer's introduction of evidence regarding suitable alternate employment. Consequently, we affirm the administrative law judge's finding that claimant established his *prima facie* case of total disability.

Employer next contends that the administrative law judge erred in his findings regarding suitable alternate employment. Once claimant establishes that he is unable to perform his usual work, 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 restrictions, is capable of performing. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In determining that employer established suitable alternate employment, the administrative law judge accepted the restrictions imposed by Dr. Murphy that claimant is limited to very light to sedentary work with no above the shoulder work, no heavy lifting with both arms, no carrying with the right arm, and no climbing.[1] Decision and Order at 35; Jt. Exs. 10, 28 at 19-20. Apparently, the administrative law judge gave "sedentary work" the definition set forth in the *Dictionary of Occupational Titles* as he interpreted Dr. Murphy's restriction of no "heavy" lifting as precluding lifting of more than 10 pounds. *See Dictionary of Occupational Titles*, vol. II, p. 1013 (4th ed. 1991); Decision and Order at 35 n. 34. This inference is within his discretion. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge then rationally found that the modified work within employer's facility as described by Mr. Trepagnier, claimant's second line supervisor, Ms. Favaloro, employer's vocational rehabilitation counselor, and Mr. Duhon, employer's workers' compensation manager, did not establish suitable alternate employment as it exceeds claimant's restrictions by requiring lifting up to 25 pounds, overhead lifting of 5-10 pounds, some overhead work, and using a

[1]Dr. Murphy was employed by the Department of Labor to render an independent opinion of this case and saw claimant in October and November 1994.

grinder. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984); Decision and Order at 36; Tr. at 14, 219-220, 257-258, 274-275, 304-305.

The administrative law judge next considered the jobs identified by Ms. Favaloro in a labor market survey. The administrative law judge found that some of the jobs are outside claimant's restrictions, but nevertheless found that employer established suitable alternate employment in that there are jobs identified by Ms. Favaloro which claimant can perform within his restrictions.[2] Decision and Order at 33-36. As the administrative law judge found that claimant can perform some of the jobs identified by Ms. Favaloro, we need not address employer's general contention that the administrative law judge erred in not finding all identified positions to be suitable. We therefore affirm the administrative law judge's finding that employer established suitable alternate employment.

Employer also contends that the administrative law judge erred in finding that claimant diligently sought alternate employment but was unsuccessful. In order to defeat employer's showing of suitable alternate employment, the burden is on claimant to establish reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by employer to be reasonably attainable and available. *Turner*, 661 F.2d at 1031, 14 BRBS at 156. If claimant establishes diligence in searching for alternate employment, employer's showing of suitable alternate employment is rebutted, and claimant is entitled to total disability benefits. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). The administrative law judge rationally found that claimant demonstrated that, with reasonable diligence, he attempted to secure employment with all of the potential employers identified by Ms. Favaloro, even those jobs the administrative law judge found did not constitute suitable alternate employment, along with additional potential employers he sought on his own, based on the testimony of claimant and Ms. Favaloro to that effect. *See 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); Decision and Order at 8-9, 36-37; Tr. at 85-92, 240, 246. As his finding that claimant diligently sought but was unable to obtain alternate employment is supported by

[2]The administrative law judge found claimant capable of performing such job positions as rental agent, photo lab technician, security guard, parking lot cashier, courier, service advisor, and bridge tender. Decision and Order at 35-36; Jt. Ex. 37.

substantial evidence, his award of total disability benefits is affirmed.

Employer further contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on March 15, 1994. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Whether claimant's condition is permanent is primarily a question of fact based on the medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). With regard to claimant's neck injury, the administrative law judge found that claimant reached maximum medical improvement on March 15, 1994, based on the opinion of Dr. Correa that claimant's condition had not changed as of this date, as supported by Dr. Murphy's opinion that claimant reached maximum medical improvement. Decision and Order at 31-32; Jt. Exs. 3, 10. Contrary to employer's contention, the administrative law judge acted within his discretion in not relying on the opinion of Dr. Habig, since Dr. Habig treated claimant for his shoulder injury and not his neck injury.[3] *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); Jt. Ex. 6. Moreover, the administrative law judge rationally found that claimant did not reach maximum medical improvement under Dr. Brent's care inasmuch as Dr. Brent referred claimant to a neurosurgeon, Dr. Correa, for his complaints of neck pain upon returning to work. *See generally Mason*, 22 BRBS at 413; Decision and Order at 23, 31; Jt. Exs. 5, 31 at 18. Consequently, as Dr. Correa stated, on March 15, 1995, that there was no change in claimant's condition and as Dr. Murphy reported that claimant's neck condition has stabilized and claimant reached maximum medical improvement without undergoing surgery, we affirm the administrative law judge's finding as supported by substantial evidence.[4] *See Seidel v. General*

[3]Additionally, employer incorrectly contends that the administrative law judge should have found that claimant reached maximum medical improvement on January 6, 1993, because claimant's restrictions have remained the same since that time. Although Dr. Habig restricted claimant to no overhead lifting of 5-10 pounds in 1993, Dr. Murphy currently restricts claimant to sedentary work with no above the shoulder work, as well as no heavy lifting, no carrying with the right arm, and no climbing. Jt. Exs. 6, 10.

[4]The administrative law judge also found that claimant established a maximum medical improvement date of May 3, 1993, for his shoulder injury. Decision and Order at 32. Logically, a claimant who suffers injuries to two separate parts of the body cannot reach maximum medical improvement until both injuries are stabilized.

Dynamics Corp., 22 BRBS 403 (1989); Decision and Order at 19-20, 26-27, 31-32; Jt. Exs. 3, 10, 28 at 14, 29 at 18.

Hence, the administrative law judge rationally awarded permanent disability benefits from March 15, 1994.

Employer lastly contends that the administrative law judge erred in imposing a Section 14(e) assessment until December 16, 1994. Under Section 14(e), if any installment of compensation is not paid within 14 days after it becomes "due" under Section 14(b), 33 U.S.C. §914(b), a 10 percent assessment is added to such unpaid installment unless employer has filed a notice of controversion under Section 14(d). *See Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on recon.), *aff'd on recon.*, 27 BRBS 218 (1993); 33 U.S.C. §914(e). The administrative law judge awarded claimant a 10 percent assessment for unpaid installments from May 3, 1994, until December 16, 1994, after employer ceased paying claimant temporary total disability benefits and as it did not file a notice of controversion until December 16, 1994. Although employer asserts that it filed a notice of controversion on July 30, 1993, and thus that the Section 14(e) assessment should cease as of this date, there is no evidence of record to support this contention, and it differs from the stipulations reached by the parties.[5] Decision and Order at 2; Jt. Ex. 34; Emp. Br. at 34-35. Consequently, we affirm the administrative law judge's imposition of the Section 14(e) assessment until December 16, 1994.

We next address employer's appeal of the administrative law judge's award of an attorney's fee. Employer requests that the Board stay the award of the attorney's fee pending appeal. Employer's request is denied, as a stay of the attorney's fee award pending appeal is unnecessary as an attorney's fee award is not a compensation order and does not become effective until all appeals are exhausted. *See Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *see also Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987).

Accordingly, the administrative law judge's Decision and Order, Decision and Order on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[5]The parties stipulated that employer controverted the claim on these three dates: July 21, 1992, April 6, 1993, and December 16, 1994. Decision and Order at 2; Jt. Ex. 34.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge