BRB No. 99-0999

ROBERT T. GIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SWIFTSHIPS, INCORPORATED	)	DATE ISSUED:_____
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Aubrey E. Denton (Porter, Denton & Guidry), Lafayette, Louisiana, for claimant.

Laura Briggs Young (Adams and Reese), New Orleans, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-LHC-2070) 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 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 may be set aside only if shown by the challenging party 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 received an electrical shock on August 23, 1994, during the course of his employment as a welder for employer. Claimant unsuccessfully attempted to return to work

the following day; he has not worked since that time. Employer voluntarily paid claimant temporary total disability benefits from August 26, 1994 through October 2, 1997, and permanent partial disability benefits thereafter. 33 U.S.C. §908(b), (c)(21).

In his Decision and Order, the administrative law judge initially found that the position of security guard offered to claimant by employer did not constitute suitable alternate employment. Next, the administrative law judge determined that the labor market surveys prepared by employer's vocational experts were insufficient to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for the period of August 26, 1994 to April 9, 1996, the date on which the parties stipulated that claimant reached maximum medical improvement, and permanent total disability compensation from April 10, 1996, and continuing. Lastly, the administrative law judge allowed claimant's counsel thirty days in which to file an application for an attorney's fee.

On appeal, employer challenges the administrative law judge's decision to reject the jobs that it identified as being suitable for claimant, specifically the position of security guard it offered claimant and the other jobs identified by Ms. Moffett, its vocational expert. Finally, employer challenges the administrative law judge's decision to consider a fee request by claimant's counsel prior to the conclusion of the appellate process. Claimant responds, urging affirmance of the administrative law judge's decision.

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). In order to satisfy this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing given his age, education, work experience and physical restrictions and which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In order to meet its burden by offering claimant a job in its facility, employer must demonstrate the availability of work which is necessary and which claimant is capable of performing. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996)*; Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Employer initially avers that the administrative law judge erred by failing to find that the post-injury security guard position offered to claimant constituted suitable alternate

employment.[1] In his decision, the administrative law judge found that the duties to be performed by a security guard at employer's facility exceeded claimant's restrictions and capabilities. Specifically, in rendering this conclusion, the administrative law judge found that Dr. Abben, claimant's cardiologist, opined that claimant would not be able to return to work full-time. As the offered security guard position was a full-time job, the administrative law judge thus concluded that this position did not constitute suitable alternate employment as it was beyond claimant's capabilities. *See* Decision and Order at 34.

Employer's allegation of error has merit. As employer asserts, the record reveals that while Dr. Abben discussed claimant's post-injury work restrictions, he did not opine that claimant was incapable of working full-time. Rather, when questioned in this regard, Dr. Abben declined on two occasions to render an opinion, stating that he was "not sure" whether or not claimant could resume employment on a full-time basis. *See* CX-4 at 23. In contrast, Dr. Cowen, claimant's treating physiatrist, opined that claimant was capable of performing the identified security guard position. *See* CX-3 at 80.

In determining whether an employment position constitutes suitable alternate employment, the administrative law judge must compare the jobs' requirements with the claimant's physical restrictions. *See generally Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). As the administrative law judge's rejection of the offered security guard position as suitable alternate employment is not supported by the medical opinion upon which the administrative law judge relies, that finding cannot stand. We therefore vacate the administrative law judge's finding that the security guard position offered to claimant was insufficient to establish the availability of suitable alternate employment, and we remand the case to the administrative law judge for reconsideration of the evidence of record regarding this issue. *See generally Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

[1]Ms. Singleton, employer's human resources manager, testified that employer's security guards work out of an air-conditioned building, may sit or stand at will, and are responsible for monitoring who enters and leaves employer's facility. *See* Tr. at 284-287.

Employer next argues that the administrative law judge erred in concluding that the positions identified by Ms. Moffett in 1998 did not establish the availability of suitable alternate employment which claimant was capable of performing. Specifically, employer contends that, contrary to the administrative law judge's finding in addressing this evidence, Ms. Moffett's labor market surveys sufficiently establish the nature and terms of the identified employment opportunities available to claimant.[2] We agree. In order for the administrative law judge to address whether employment opportunities are realistic jobs for claimant, employer must submit evidence regarding their nature, terms, and availability. *See Reiche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984). Should the jobs' requirements be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. *See generally P & M Crane Co.*, 930 F.2d at 431, 24 BRBS at 122 (CRT); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985). In the instant case, the administrative law judge rejected the positions identified by Ms. Moffett based upon his determination that Ms. Moffett provided insufficient job descriptions. *See* Decision and Order at 32-33. However, Ms. Moffett testified that she took into consideration both the restrictions placed on claimant post-injury by his treating physicians and claimant's functional capacity evaluation, examined available employment opportunities in light of those restrictions, and thereafter concluded that the positions identified in her three labor market surveys were suitable for claimant.[3] *See* Tr. at 379-400. A review of those three labor market surveys indicates that Ms. Moffett recorded the general duties to be performed in each identified position, as well as the potential for alternatively standing, sitting, and walking. *See* EX-22. Moreover, the positions identified by Ms. Moffett were subsequently approved by Dr. Cowen. *Id.*

[2]Employer on appeal does not challenge the administrative law judge's determination that Mr. Marron's testimony is insufficient to establish the availability of suitable alternate employment; accordingly, that finding is affirmed.

[3]Dr. Cowen restricted claimant from lifting more than 20 pounds, and prohibited prolonged standing or sitting. *See* CX-3; EX-7. Dr. Abben, claimant's cardiologist, similarly opined that claimant should avoid significant physical exertion or exposure to excessive stress. *See* CX-4.

Given the presence of the identified jobs' overall requirements, and the supporting testimony of Ms. Moffett, we hold that employer has submitted sufficient evidence for the administrative law judge to determine if claimant is in fact capable of performing the identified jobs. *See generally P & M Crane Co.*, 930 F.2d at 431, 24 BRBS at 122 (CRT). We therefore vacate the administrative law judge's determination that Ms. Moffett's labor market surveys lack the precision necessary to satisfy employer's burden of establishing the availability of suitable alternate employment. On remand, the administrative law judge must consider the record as a whole in determining whether claimant is physically capable of performing the jobs identified by Ms. Moffett and approved by Dr. Cowen.[4] *See id.; Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985).

Lastly, employer challenges the administrative law judge's decision to allow claimant's counsel the opportunity to file a petition for an attorney's fee; specifically, employer asserts that, since claimant's success cannot be determined until all appeals are exhausted, any award of an attorney's fee at this time would be premature. We disagree. An administrative law judge may enter an attorney's fee award at the time of his initial decision, although the award is not enforceable until all appeals are exhausted, *see, e.g., Wells v. International Great Lakes Shipping Co.*, 693, F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982),

[4]Although employer has submitted evidence of multiple specific employment opportunities that it asserts are suitable for and available to claimant, it further avers that it is not required to present evidence of specific employment openings in order to meet its burden of proof on this issue. *See* Employer's brief at 18. In addressing this issue the United States Courts of Appeals for the Fifth Circuit has stated that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one job opportunity, and the general availability of other suitable positions, where "an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances." *See P & M Crane Co.*, 930 F.2d at 431, 24 BRBS at 121 (CRT). According to the court, such circumstances would exist, for example, where the employee is highly skilled, the job relied upon by employer is specialized and the number of workers with suitable qualifications is small. In *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (Sept. 19, 1994) (5th Cir. 1994)(unpublished), the Fifth Circuit discussed its holding in *P & M Crane*, stating that *P & M Crane* establishes that more must be shown than the mere existence of a single job the claimant can perform; specifically, the court stated that in a case where one specific job has been identified and no general employment opportunities that were suitable alternatives for the claimant had been proffered, employer must establish a reasonable likelihood that claimant could obtain the single job identified. Thus, these cases do not support employer's contention that it can meet its burden without evidence of any specific jobs, as they discuss the circumstances where only one such job can be sufficient to show the reasonable likelihood that claimant can obtain employment.

and it may be amended if subsequent events demonstrate that it is too high or low an amount. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). Thus, the administrative law judge may enter a fee award despite the pendency of any appeals.

Accordingly, the administrative law judge's findings regarding the security guard position offered to claimant and the labor market surveys prepared by Ms. Moffett are vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge