BRB No. 06-0817

MATTIE N. CAMPBELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADM/GROWMARK RIVER SYSTEM, INCORPORATED	)	DATE ISSUED: 06/29/2007
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

Joseph J. Lowenthal, Jr. and Christopher S. Mann (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2003-LHC-1529) of Administrative Law Judge Patrick M. Rosenow 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 has come before the Board.

Claimant, a laborer, sustained injuries to her shoulder and neck on August 15, 1995. She returned to her usual job duties in November 2005 but her condition deteriorated rendering her unable to perform her duties as a laborer. She accepted

employer's offer of employment as an evening-shift security guard on October 28, 1996, and reassignment as a day-shift guard in November 1996. Following decompression surgery on March 13, 2002, claimant returned to work in October 2002, where she was assigned a position with fewer duties and no overtime. Claimant was terminated on April 30, 2004, for reasons unrelated to her injury or her job performance and has not been employed since that time.

In his first Decision and Order, the administrative law judge awarded claimant total disability compensation from October 28, 1996, to November 24, 1996, and ongoing permanent partial disability compensation from November 25, 1996, at various wage-earning capacities. Claimant appealed to the Board, contending that she was permanently totally disabled, or alternatively that the administrative law judge erred in computing her wage-earning capacity. The Board affirmed the administrative law judge's findings that the job at employer's facility constituted suitable alternate employment and that her actual wages established her wage-earning capacity at that time but remanded the case for the administrative law judge to make an inflation adjustment by determining the wages the post-injury job paid at the time of claimant's injury. *Campbell v. ADM/Growmark River System, Inc.*, BRB No. 05-0422 (Nov. 30, 2005)(unpub.). Further, the administrative law judge was to address the availability of suitable alternate employment after the date of claimant's termination. *Id.*

On remand, the administrative law judge adjusted for inflation claimant's post-injury wages as a security guard, using the method set out in *Richardson v. General Dynamics Corp.*, 23 BRBS 237 (1990), and determined that her post-injury wage-earning capacity was $7.91 per hour or $435.05 per week from August 1995 until November 1996, the date of her second surgery.[1] The administrative law judge found that claimant's wage-earning capacity thereafter and until her discharge to be $316.40, a decrease due to her inability to work overtime. The administrative law judge further concluded that employer failed to establish the availability of suitable alternate employment following claimant's termination and thus found claimant entitled to compensation for permanent total disability from May 1, 2004.[2]

[1] Prior to her second surgery, claimant worked ten hours of overtime per week. The administrative law judge, therefore, calculated claimant's wage-earning capacity wage by adding 40 hours per week at $7.91 per hour and ten hours per week at $11.87 per hour for time and a half.

[2] Claimant sought reconsideration to modify findings in the administrative law judge's first Decision and Order addressing various periods of disability between November 25, 1996, and April 30, 2004. Claimant had not appealed these findings when the case was originally before the Board and they had been affirmed. The administrative

On appeal, employer contends the administrative law judge erred in determining claimant's adjusted post-injury wage-earning capacity and in finding that it did not establish the availability of suitable alternate employment following claimant's termination. Claimant responds, urging affirmance.

On remand, the administrative law judge was instructed to determine claimant's post-injury wage-earning capacity by determining what the security guard position would have paid at the time of claimant's injury in August 1995 rather than at the time she accepted the job in October 1996, fifteen months later. The administrative law judge found that employer failed to establish determinatively what this position, created specifically for claimant and combining both security guard and administrative duties, would have paid at the time of injury. Therefore, he adjusted the 1996 hourly wage, $8.34, by using the percentage change in the National Average Weekly Wage (NAWW), to $7.91. Employer argues that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity by adjusting for inflation based upon the NAWW as the record contains sufficient evidence to establish that claimant's wage in 1996 was the same as it would have been in 1995. We reject this contention.

An award for permanent partial disability compensation is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). Section 8(c)(21), (h) requires that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury to insure that a claimant's wage-earning capacity is considered on an equal footing with the determination under Section 10, 33 U.S.C. §910, of average weekly wage at the time of the injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir. 1996); *Bethard v. Sun Shipbuilding & Dry Dock Co*., 12 BRBS 691 (1980). The Board held in *Richardson*, 23 BRBS 327, that when the record is devoid of evidence of the wages paid at the time of injury, the administrative law judge should use the percentage change in the NAWW to adjust the post-injury wages for inflation. *See also Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Quan v. Marine Power & Equipment Co.* 30 BRBS 124 (1996).

In this case, the administrative law judge concluded that employer failed to present conclusive evidence of the amount which the post-injury position would have paid at the

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law judge found that these findings were not before him on remand and he had no jurisdiction to address them. Accordingly, claimant's motion for reconsideration was denied.

time of injury, due in part to the fact that the position was a hybrid which did not exist at the time of injury and was not identical to any of the general guard positions to which employer's vocational expert testified. Employer's vocational expert, Ms. Favaloro, testified as to general rates of pay to security guards between 1995 and 1998, ranging from $6.00 to $9.00 per hour. RX 19 at 12-17. Although she stated that $8.34 per hour was reasonable, she also noted that a general median wage would be $7.25 in 1995. *Id.* at 21. The administrative law judge found that since specific evidence establishing the appropriate wage for the job at that time was lacking and since the position did not match exactly any of the generally referenced positions, the most appropriate method of determining claimant's wage-earning capacity was to use the percentage change in the NAWW and adjust the wages downward. Decision and Order on Remand at 3-4.

We affirm the administrative law judge's calculation of claimant's adjusted post-injury wage-earning capacity. Contrary to employer's contention, the administrative law judge was not required to rely on Ms. Favaloro's testimony, in view of his rational finding that claimant's job was not identical to any of the identified positions and Ms. Favaloro's statement that the range of wages depended on duties, experience, training and setting. RX 19 at 12-17. In the absence of specific evidence concerning the wages paid in the post-injury job at the time of injury, the administrative law judge properly used the percentage increase in the NAWW to make the inflation calculation as it more accurately reflects the increase in wages over time. *Quan*, 30 BRBS 124. Therefore, we affirm the administrative law judge's calculation of claimant's wage-earning capacity as $7.91 per hour.

Employer also contends the administrative law judge erred in finding that employer did not establish the availability of suitable alternate employment after claimant's termination. Where, as in the instant case, it is undisputed that claimant is unable to perform her usual job duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of job opportunities within the geographic area where claimant resides which claimant, by virtue of her age, education, work experience, and physical restrictions is capable of performing and for which she 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 Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (5th Cir. 1986), *cert. denied*, 497 U.S. 826 (1986).

Employer contends that the testimony of Ms. Favaloro establishes the availability of suitable employment in May 2004. As noted by the administrative law judge, Ms. Favaloro stated that her primary function was to determine the wages of security guards in the time period around 1995 and 1996. RX 19 at 7. Ms. Favaloro opined that similar suitable jobs were probably available in 2004, *id.* at 31, and claimant's vocational

counselor, Patty Knight, stated that claimant would be an attractive job candidate due to her experience. CX 5 at 32. The administrative law judge found that the experts gave only generalized and speculative opinions concerning the availability of such positions in 2004 and did not provide sufficient evidence from which he could determine whether claimant was physically qualified to obtain them. As the administrative law judge rationally found that there was insufficient evidence from which he could determine the availability and suitability of alternate employment, we affirm the administrative law judge's finding that employer did not establish suitable alternate employment and the consequent finding that claimant is totally disabled as of May 1, 2004. *See Ceres Marines Terminal v. Hinton,* 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.,* 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *P&M Crane v. Hayes,* 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991).

Claimant's counsel has filed a petition for an attorney's fee for services performed before the Board in connection with claimant's appeal to the Board in BRB No. 05-0422. Counsel seeks a fee of $5,089.50 for 22.62 hours of attorney services at $225 per hour. Employer objects to the fee request, contending that the fee should be reduced by 50 percent due to claimant's lack of success on all the issues presented to the Board. Employer also contends that an appropriate hourly rate is $175 and that the time spent, .75 hour, on the fee petition and supporting statement should be disallowed as office overhead. We reject employer's contentions.

With regard to employer's argument regarding limited success, claimant's ongoing award of permanent total disability, which we have affirmed on appeal, is significant enough to overcome the lack of success on the other issues. As claimant obtained "excellent results," we find that reduction due to limited success is not warranted. *Hensley v. Eckerhart,* 461 U.S. 424 (1983). Moreover, the hourly rate of $225 is reasonable for the New Orleans area, 20 C.F.R. §802.203(d)(4), and reasonable work associated with a fee petition is compensable. *Hill v. Avondale Industries, Inc.,* 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). As counsel was successful on appeal and as the number of hours is reasonably commensurate with the necessary work performed, we grant counsel the requested fee. *See Lewis v. Todd Shipyards Corp.,* 30 BRBS 154, 159 (1996); *Smith v. Alter Barge Line, Inc.,* 30 BRBS 87, 89 (1996); 33 U.S.C.§928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. Claimant's counsel is entitled to an attorney's fee of $5,089.50 for services rendered in BRB No. 05-0422, payable directly to counsel by employer.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge