BRB No. 00-0647

MELVIN L. BLACKEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 23, 2001
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-LHC-1538, 1539) of Administrative Law Judge Richard K. Malamphy 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 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).

This case is on appeal to the Board for the second time. Claimant, a welder, injured

his neck in 1984 and both knees in 1991, and permanent restrictions were imposed due to these work injuries. Claimant returned to work after these injuries and was working in a light duty position for employer when he was laid off on December 6, 1996. Subsequently, claimant retired on January 1, 1997, because he met age and years in service criteria and could maintain his health insurance, which otherwise would have terminated due to the lay off. But for his retirement, claimant would have been recalled to a light duty position in employer's facility on March 17, 1997, due to his seniority. However, the terms of employer's collective bargaining agreement precluded retired employees, including claimant, from being recalled. Employer voluntarily paid claimant temporary total disability benefits from the date of his layoff on December 6, 1996, to the date of his retirement on January 1, 1997. Claimant sought permanent total disability benefits. In his initial decision, the administrative law judge denied benefits, finding that claimant voluntarily retired. Claimant appealed the administrative law judge's denial of benefits.

In *Blacken v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 98-1505 (Aug. 17, 1999)(unpublished), the Board vacated the administrative law judge's denial of benefits. The Board stated that a claimant's status as a voluntary retiree is significant only in the context of an occupational disease. In a case involving a traumatic injury, the inquiry involves claimant's ability to return to his usual work, irrespective of his retirement. *Blacken*, slip op. at 3, citing *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). In the instant case, it is undisputed that claimant is unable to perform his usual work due to his injuries. The Board therefore remanded the case for the administrative law judge to consider whether employer established the availability of suitable alternate employment in accordance with the Board's holding in *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). In *Mendez*, the Board held that an employer must establish the availability of suitable alternate employment on the open market in order to avoid liability for total disability benefits when it lays off an employee performing light duty work at its facility because of a work injury. *See also Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999) (same; issued after the Board's initial decision in the case).

In his decision on remand, the administrative law judge awarded claimant total disability benefits, finding that employer failed to establish the availability of suitable alternate employment either in its facility or on the open market. The administrative law judge alternatively held that even if employer established the availability of suitable alternate employment, claimant established he diligently, yet unsuccessfully, sought employment from approximately 150 prospective employers. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In the present appeal, employer appeals the administrative law judge's award of total disability benefits on remand. Claimant responds in support of the administrative law

judge's award.

Employer contends that the administrative law judge erred in awarding claimant total disability benefits after his January 1, 1997 retirement from his light duty job, as employer's collective bargaining agreement, and not claimant's work injury, precluded claimant from returning to his light duty job on March 17, 1997. Where, as in the instant case, it is undisputed that claimant is unable to return to his usual employment due to work-related injuries, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). Employer may meet this burden by offering claimant a light duty position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996). If employer provides claimant with suitable alternate employment in its facility which it then withdraws from claimant for reasons unrelated to any misfeasance on claimant's part, employer bears the renewed burden of establishing the availability of suitable alternate employment on the open market if it wishes to avoid liability for total disability benefits.[1] *See Hord*, 193 F.3d 797, 33 BRBS 170 (CRT); *Mendez*, 21 BRBS 22. In order to defeat employer's showing of the availability of suitable alternate employment and retain total disability benefits, claimant must establish that he diligently pursued alternate employment opportunities but was unable to secure a position. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991).

In the instant case, the administrative law judge awarded claimant total disability benefits from the date of claimant's layoff from his light duty job in December 1996. In doing so, the administrative law judge found that employer did not establish the availability

[1]The holdings in the cases of *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980), *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980), and *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979), cited in employer's brief, thus are distinguishable from the holdings in *Hord* and *Mendez* as, in the former cases, claimant were discharged from their light duty jobs in their employers' facilities due to misfeasance on their part. *See* Emp. Br. at 9-10.

of suitable alternate employment, and that, alternatively, even if it did, claimant diligently pursued alternate employment but was unable to secure a position. We affirm the administrative law judge's alternative finding that claimant diligently pursued alternate employment. Employer does not challenge this finding on appeal, and it is supported by substantial evidence in that the administrative law judge found that claimant applied to approximately 150 prospective employers but was not offered a single job. *See DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998); *Palombo*, 937 F.2d 70, 25 BRBS 1 (CRT); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 201-202, 16 BRBS 74, 76 (CRT)(4th Cir. 1984); Decision and Order on Remand at 4; Cl. Ex. 1; Tr. at 20-22, 27. Based on our affirmance of the finding that claimant diligently, yet unsuccessfully, sought alternate work, we need not address the administrative law judge's finding that employer did not establish the availability of suitable alternate employment, as any error in this finding is harmless. *See generally Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989)(Board does not address employer's argument concerning whether claimant established diligence in seeking alternate work after affirming the administrative law judge's finding that employer did not establish the availability of suitable alternate employment). Even if employer established the availability of suitable work, claimant met his complementary burden of proving he diligently sought employment. Consequently, we affirm the administrative law judge's award of total disability benefits.

Claimant's counsel has filed a petition for an attorney's fee of $1,525.50, for work performed before the Board in BRB No. 98-1505.[2] Employer has not objected to the fee petition. In light of counsel's ultimate success on remand in obtaining total disability benefits, we award counsel the requested fee $1,525.50, as it is reasonably commensurate with the necessary work performed before the Board. 20 C.F.R. §802.203.

[2]Correcting the mathematical errors in the fee petition, the requested sum is for 4.53 hours at $200 per hour, 6 hours at $100 per hour, and .26 hours at $75 per hour, totalling $1,525.25.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. BRB No. 00-0647. Claimant's counsel is awarded an attorney's fee of $1,525.50 for work performed before the Board in BRB No. 98-1505, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge