BRB No. 05-0587

EZELL TOOMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 03/27/2006
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2000-LHC-2999, 2000-LHC-3000, 2000-LHC-3001) of Administrative Law Judge Richard K. Malamphy awarding benefits on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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).

This case is before the Board for the third time. Relevant to the issue currently before the Board, in his initial Decision and Order, the administrative law found that claimant could not return to his usual work as a result of his work-related 1997 back injury and that employer did not establish the availability of suitable alternate employment. Employer was ordered to pay temporary total disability benefits from February 26, 1999, through May 26, 2000, and permanent total disability benefits from

May 27, 2000, and continuing. Both employer and claimant appealed the administrative law judge's Decision and Order.

The Board affirmed the administrative law judge's finding that claimant's 1997 back injury resulted in permanent work restrictions. *Toomer v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 02-0486/A, 02-0514 (Mar. 25, 2003) (unpub.), slip op. at 5-7. The Board, however, vacated the administrative law judge's finding that employer did not establish the availability of suitable alternate employment, holding that the administrative law judge did not consider the entirety of the relevant evidence of record. *Id.*, slip op. at 7-8. Thus, the Board vacated the award of total disability benefits and remanded the case for further consideration of the availability of suitable alternate employment, and, if necessary, for consideration as to whether claimant diligently sought alternate work post-injury. *Id.*, slip op. at 7-9.

On remand, the administrative law judge found, based on the opinions of Drs. Stiles, Baddar, and Byrd, the opinions of the vocational experts, Mr. Kay and Mr. Hanbury, and the labor market survey, that employer established the existence of suitable alternate jobs but that claimant undertook a diligent job search and thus that employer did not show the *availability* of suitable alternate employment. Accordingly, the administrative law judge again awarded claimant temporary and permanent total disability benefits.

Employer appealed the administrative law judge's finding that it did not establish the availability of suitable alternate employment. The Board affirmed the administrative law judge's finding, which was unchallenged on appeal, that positions employer identified as a parking lot attendant and security guard are suitable. *Toomer v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0770 (Aug. 12, 2004) (unpub.), slip op. at 4. Consequently, the Board held that employer established the availability of suitable alternate employment. *Id*. at 5. The Board, however, vacated the administrative law judge's finding that claimant engaged in a diligent job search. *Id*. The Board remanded for the administrative law judge to assess the credibility of claimant's testimony that Dr. Stiles told him not to work after he assigned claimant permanent work restrictions in May 26, 2000, in light of the absence of medical evidence that Dr. Stiles restricted claimant from working after this date. *Id*. The Board also noted that, in assessing claimant's credibility on remand, the administrative law judge may find relevant the date when claimant was apprised of the jobs in employer's survey and that the administrative law should consider employer's argument that claimant did not seek work prior to February 2001 because he was seeking Social Security benefits. *Id*. at 6.

On remand, the administrative law judge credited claimant's testimony that he did not apply for any jobs prior to February 2001 per the verbal instructions of Dr. Stiles. Decision and Order on Second Remand at 4. The administrative law judge found that claimant was diligent by contacting in person in February and March 2001 the five employers listed in the labor market survey whose positions were deemed suitable, and

that claimant did not act unreasonably by failing to follow up with these employers prior to the May 8, 2001, hearing because claimant was not encouraged to check back with them. The administrative law judge also found that claimant expressed a willingness to work at the hearing. Accordingly, the administrative law judge concluded that claimant demonstrated a diligent job search that rebutted employer's showing of suitable alternate employment, and he awarded claimant benefits for permanent total disability from May 27, 2000.

On appeal, employer challenges the administrative law judge's finding that claimant conducted a diligent job search. Claimant responds, urging affirmance.[1]

A claimant may retain eligibility for total disability benefits, after employer establishes the availability of suitable alternate employment, if claimant demonstrates that he diligently, yet unsuccessfully, sought alternate work of the type shown by employer to be suitable and available. *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). The claimant must establish that he was reasonably diligent in attempting to secure a job of the type shown to be reasonably "attainable and available," and the administrative law judge must make specific findings regarding the nature and sufficiency of claimant's efforts in seeking employment. *Palombo*, 937 F.2d at 75, 25 BRBS at 9(CRT).

Employer argues that claimant's job search, which was limited to the actual suitable jobs identified in employer's September 29, 2000, labor market survey is insufficient evidence that claimant diligently sought suitable work. We disagree. While claimant is not limited to seeking only the prospective jobs identified by employer, *see Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123, 125 n.7 (1998), the administrative law judge may find that a claimant's job search based on the jobs employer identified was indeed diligent. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT).

Employer also argues that the evidence shows that claimant was physically capable of working after May 26, 2000, and therefore, of seeking suitable employment at that time. In addressing claimant's job search, the administrative law judge found credible claimant's testimony that he was instructed by Dr. Stiles not to apply for any jobs before February 2001, notwithstanding that Dr. Stiles did not record this instruction in his medical records. Tr. at 22, 27. The administrative law judge found claimant's testimony corroborated by his continued complaints of pain and by Dr. Stiles's approval of the jobs in employer's September 29, 2000, labor market survey only as of January 16, 2001. Dr. Stiles's record of claimant's July 25, 2000, office visit notes claimant's complaint of low back pain and that he walks with a cane. Dr. Stiles prescribed Demerol

[1] By Order issued June 27, 2005, the Board granted claimant's motion to dismiss his appeal in BRB No. 05-0587A. 20 C.F.R. §802.401.

and Celebrex for claimant's symptomatology. CX 18 at 1B. Claimant complained of increasing lower back difficulties at a December 6, 2000, office visit. Dr. Stiles noted mild spasm and he prescribed Demerol for pain. *Id*. at 1A. Thus, the administrative law judge's finding that claimant continued to complain of back pain after May 2000 is supported by the record, as is his finding that Dr. Stiles did not approve the jobs described in employer's survey until January 16, 2001. EX 23. The record also documents claimant's testimony that he applied in person for a position with the employers identified in employer's survey as suitable employment, and that they did not suggest that claimant reapply at a later date. Tr. at 22-26; EX 22. The administrative law judge further credited as evidence that claimant is willing to work claimant's testimony that he applied for jobs to see if he could work since his back would sometimes feel better. Tr. at 25.

The administrative law judge's crediting of claimant's testimony that he was told by Dr. Stiles to not seek employment until February 2001 is not "inherently incredible or patently unreasonable," *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and his finding that claimant diligently sought suitable employment is supported by substantial evidence. *See Palombo,* 937 F.2d at 74, 25 BRBS at 8(CRT); *see also DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Fortier v. Electric Boat Co.*, 38 BRBS 75 (2004). The administrative law judge addressed the particular jobs relied upon by employer, and considered both the nature and sufficiency of claimant's efforts in determining whether claimant was genuinely seeking alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. *Palombo,* 937 F.2d at 74, 25 BRBS at 8(CRT); *Fortier,* 38 BRBS at 79. As the administrative law judge is entitled to weigh the evidence and to make credibility determinations, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), the administrative law judge's finding that claimant undertook a diligent yet unsuccessful post-injury job search and thus rebutted employer's showing of suitable alternate employment is affirmed. *Fortier,* 38 BRBS at 79; *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998). Consequently, the award of ongoing permanent total disability benefits is affirmed.

We next address claimant's counsel's request for an attorney's fee for work performed before the Board in the prior appeals in this case, BRB Nos. 02-0486/A, 02-0514, 03-0770. On August 19, 2003, counsel for claimant submitted an attorney's fee petition to the Board for work performed in BRB Nos. 02-0486/A, 02-0514, seeking a fee totaling $4,501 for 23.86 hours of work. In its last decision, the Board declined to award a fee at that time as the full degree of claimant's success was unknown. *Toomer,* BRB No. 03-0770, slip op. at 7. The Board noted that claimant was unsuccessful in having employer's appeal in BRB No. 02-0486 dismissed and his appeal in BRB No. 02-0514 reinstated. *See* 20 C.F.R. §802.203(b). The Board directed claimant to refile his fee

petition upon completion of the proceedings on remand. 20 C.F.R. §802.203(c). Moreover, to the extent feasible, counsel was further directed to specifically delineate in which appeal each service was rendered so that the Board may assess the compensability of the service. 20 C.F.R. §802.203(d). Counsel re-filed his attorney's fee petition on June 10, 2005. Counsel asserts that claimant was fully successful in defending employer's appeal in BRB No. 02-0486; therefore, counsel argues that he is entitled to a fee for all time expended in this regard, including time expended on his unsuccessful motion to dismiss employer's appeal in BRB No. 02-0486. Counsel also submitted an attorney's fee petition to the Board for work performed in BRB No. 03-0770. Counsel seeks a fee totaling $4,452.50 for 19.41 hours of work.[2] Employer filed objections to the fee request to which claimant replied. Counsel also requested a fee for an additional two hours for preparation of the reply brief.

Employer first contends that claimant prematurely filed his fee petitions, alleging that a fee petition can be filed only after there is a final order on the claim. We reject employer's contention. It is not inappropriate for claimant's attorney to file a fee petition during the pendency of an appeal, or for the Board to award an attorney's fee at the same time as it addresses the parties' substantive contentions. *Luna v. Todd Shipyards Corp.*, 12 BRBS 70 (1980); *see, e.g., Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). The fee award, however, is not enforceable until all appeals are exhausted. *Thompson v. Potashnik Constr. Co.*, 812 F.2d 574 (9th Cir. 1987).

Claimant's counsel is entitled to an attorney's fee payable by employer for successfully prosecuting his claim in BRB No. 02-0486A and defending against employer's appeals in BRB Nos. 02-0486 and 03-0770. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). By virtue of the Board's disposition in the current appeal, claimant is entitled to an ongoing award of permanent total disability benefits. However, contrary to claimant's contention, counsel is not entitled to a fee payable by employer for unsuccessful work spent on claimant's motion to dismiss and motion for reconsideration of the Board's denial of the motion to dismiss in BRB No. 02-0486, as this issue is wholly severable from the issue on which claimant succeeded. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In addition, counsel is not entitled to any fee in BRB No. 02-0514 as claimant's appeal was dismissed. Accordingly, we reduce counsel's requested fee in BRB Nos. 02-0486/A by 10.65 hours and in 02-0514 by .13 hours.[3] *See Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds). In addition, we disallow .52 hours on April 15 and 16, and May 21, 2002, as work not performed before the Board.

[2] Counsel erroneously calculated the total fee as $4,402.50.

[3] Specifically, we disallow all itemized time from July 28, 2002, through September 20, 2002, and all itemized time between January 4 and January 6, 2003.

Employer next argues that the fee petitions lack specificity, and that the time expended is excessive given the lack of complexity of the case. Employer also objects to the billing by two attorneys in the same firm. We reject employer's assertion that the fee petitions require greater specificity, as counsel herein provided specific dates, a summary of the tasks and the hours performed on each date, and the initials of the person performing the task. *See Marinelli*, 34 BRBS 112; *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988); 20 C.F.R. §802.203(d). Moreover, as there is no duplicative billing, we reject employer's contention that work performed by a second attorney in counsel's firm should be disallowed. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). In all other respects, we find the number of hours requested in counsel's fee petitions to be reasonably commensurate with necessary work performed given the issues in these appeals and we reject employer's contentions to the contrary. 20 C.F.R. §802.203(e).

Employer also objects to the hourly rates claimed. In BRB Nos. 02-0486/A, counsel requests an hourly rate of $225 for attorney Camden and $160 for Attorney Brown. In BRB No. 03-0770, attorney Camden requests an hourly rate of $250 and attorney Brown $200. We reject employer's contentions that these rates are excessive as they are appropriate in the geographic area where the claim arose. *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); 20 C.F.R. §802.203(d)(4).

In sum, in BRB Nos. 02-0486/A, we award counsel a fee of $2,578.50, representing 1.5 hours of paralegal time at $80 per hour, 2 hours of attorney time at $160 per hour, and 9.06 hours of attorney time at $225 per hour. In BRB No. 03-0770, we award counsel a fee of $4,952.50, representing 13.41 hours of attorney time at $250 per hour and 8 hours of attorney time at $200 per hour.

Accordingly, the administrative law judge's Decision and Order on Second Remand is affirmed. Claimant's counsel is awarded a fee of $7,531 for work performed before the Board in the prior appeals, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge