BRB No. 08-0669

R.N.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 03/30/2009<u>2009</u>
	)	
Self-Insured Employer-Respondent	)	

DECISION and ORDER

Appeal of the Decision and Order, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., W. Jared Vincent, Jr., and V. Jacob Garbin (Law Office of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

Richard S. Vale, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees (2007-LHC-01432) of Administrative Law Judge C. Richard Avery 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).

On August 7, 2002, claimant injured his lower back while in the course of his employment as a sandblaster and painter. He was diagnosed with lumbar spondylosis and treated conservatively with injections and pain medications. Claimant cannot return to his former duties and sought temporary total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant established a *prima facie* case of total disability as he cannot return to his usual employment. However, he also found that employer established the availability of suitable alternate employment and that claimant did not establish reasonable diligence in attempting to secure some type of alternate employment. Thus, the administrative law judge found that claimant is entitled to temporary partial disability benefits. In determining claimant's average weekly wage under Section 10 of the Act, 33 U.S.C. §910, the administrative law judge found that the application of Sections 10(a) and (b) was not appropriate on the facts of this case, and thus applied Section 10(c). The administrative law judge found that at the time of the injury claimant's average weekly wage was $504.54. The administrative law judge denied claimant's motion for reconsideration and attempt to submit post-hearing evidence.

Subsequently, claimant filed a petition for an attorney's fee to be paid by employer. Claimant requested an attorney's fee in the amount of $23,846.87, representing 78.62 hours of legal services at the hourly rate of $250, 18.625 hours of legal services by counsel's associates at the hourly rate of $225, and $3,143.20 in costs. The administrative law judge found that counsel is entitled to an hourly rate of $225 and his associates to an hourly rate of $190. The administrative law judge rejected employer's objections to 24 entries at .25 hours each as counsel reasonably estimated the time required to perform the task described. Lastly, the administrative law judge agreed that the overall amount of the fee should be reduced to reflect counsel's limited success. Thus, the administrative law judge reduced the fee by 70 percent, and awarded a fee payable by employer in the amount of $6,368.81, plus the requested costs of $3,143.20.

On appeal, claimant contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment and that claimant did not exercise reasonable diligence in attempting to secure alternate employment. Claimant also contends that the administrative law judge erred in his determination of claimant's average weekly wage. Lastly, claimant contends that the administrative law judge erred in reducing the attorney's fee award by 70 percent, and requests that the Board order the administrative law judge to reconsider the amount of the award if claimant is successful on appeal. Employer responds, urging affirmance of the administrative law judge's decisions. Claimant has filed a reply brief.

Average Weekly Wage

Claimant contends that the administrative law judge erred in finding that Section 10(a) is not applicable in this case. The administrative law judge found that Section 10(a) is inapplicable as there are no records to indicate the exact number of days claimant worked in the 52 weeks preceding the injury. Decision and Order at 22. Section 10 of the Act sets forth methods for determining claimant's average weekly wage. Section 10(a) applies when the employee worked for substantially the whole of the year prior to his injury in the employment in which he was injured, the employee was a five or six-day per week worker, and the administrative law judge can calculate an average daily wage from the evidence of record. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Proffit v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). Section 10(a) requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months; this average daily wage is calculated by dividing claimant's earnings during the year prior to the work injury by "the actual number of *days* for which the employee was paid." *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 265, 31 BRBS 119, 125(CRT) (4th Cir. 1997) (emphasis in original); *see also Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Section 10(a) next directs multiplying the average daily wage by 260 for a five-day per week worker to arrive at the claimant's average annual earnings. Finally, pursuant to Section 10(d)(1), 33 U.S.C. §910(d)(1), claimant's average weekly wage is calculated by dividing by 52 claimant's average annual earnings. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978).

Contrary to the administrative law judge's statement, the record contains evidence of claimant's work history for the 52 weeks preceding the injury with the number of days worked per week indicated.[1] *See* Cl. Ex. 3; Emp. Ex. 2. Therefore, as the administrative law judge's reason for rejecting the application of Section 10(a) is not supported by the record and there is relevant evidence of record which the administrative law judge did not address, we vacate the administrative law judge's decision on this issue and remand the case for reconsideration of whether Section 10(a) applies in calculating claimant's average weekly wage. *See Gulf Best Electric*, 396 F.3d 601, 38 BRBS 99(CRT); *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000).

[1] This evidence indicates that claimant did not work all of the weeks in the year preceding the injury that is the subject of the instant claim due to other injuries. *See* discussion, *infra.*

If the administrative law judge on remand concludes for other reasons that Section 10(a) cannot be applied, then Section 10(c) must be used to compute the claimant's average weekly wage.[2] *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Claimant contends that if average weekly wage is determined under Section 10(c), the administrative law judge should be instructed to use claimant's actual earnings with a divisor of 39.857 weeks, in order to factor out the 85 days (or 12.143 weeks – 85/7) claimant was off work for an unrelated injury. Specifically, claimant contends that the administrative law judge's use of a divisor of 42 weeks does not account for the weeks claimant was able to work only one or two days, and thus unfairly reduces claimant's average weekly wage. The administrative law judge properly found that the determination of claimant's average weekly wage must account for the time he was unable to work due to the unrelated injury. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *see also Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000). The administrative law judge, however, did not specifically address claimant's contention that he missed over 12 weeks of work due to the unrelated injury, an issue raised in claimant's motion for reconsideration.[3] Therefore, if the administrative law judge finds on remand that Section 10(c) should be used to determine claimant's average weekly wage, he must address claimant's contentions regarding the effect claimant's absence due to an unrelated injury had on his annual earning capacity. *Id.*

Suitable Alternate Employment

Claimant also contends the administrative law judge erred in finding that employer established the availability suitable alternate employment. Once, as here, claimant establishes his inability to perform his usual employment, he is totally disabled unless and until his employer satisfies its burden of establishing the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine that jobs are realistically available to claimant and suitable for him given his age, education, medical restrictions, and

[2] No party contends Section 10(b) is applicable in this case.

[3] The motion for reconsideration was summarily denied by the administrative law judge.

vocational history. *Id.*; *see also Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

In this case, the administrative law judge found that employer submitted two labor market surveys which identified eight potential jobs. The administrative law judge found that the vocational counselor considered claimant's physical limitations, work history, educational background, English-speaking skills, and prescription medication in reviewing potential positions. Of the positions identified, the administrative law judge rejected the jobs which required interaction with the general public due to claimant's limited English skills.[4] However, the administrative law judge found that the Breakfast Attendant and Bridge Toll Collector positions require minimal to no communication with the general public and that claimant's English-speaking skills are sufficient for these jobs. The administrative law judge also noted that employer identified two positions at its facility and that claimant's treating physician approved them as compatible with claimant's physical restrictions.

We agree with claimant that the positions at employer's facility cannot establish the availability of suitable alternate employment. An employer's offer of a suitable job at its facility is sufficient to establish the availability of suitable alternate employment. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). The record must contain sufficient evidence that the job is suitable given claimant's restrictions and is available to him. *Id.* In the present case, while claimant's physician approved the jobs of brush painter and fire watcher as being within claimant's physical limitations, there is no evidence of record from which the administrative law judge could determine the suitability and availability of these positions as the specific requirements of these positions were not established on the record. *See Ryan v. Navy Exch. Serv. Command*, 41 BRBS 17 (2007). Moreover, Mr. Capielano, a vocational counselor with the Department of Labor, testified that claimant's use of pain medication was an issue when considering whether these positions are appropriate, H.Tr. at 123, and he observed that the jobs were never offered to claimant. *Id*. at 125.

We affirm, however, the administrative law judge's finding that the Breakfast Attendant and Bridge Toll Collector positions establish the availability of suitable alternate employment. On appeal, claimant contends that the actual description of the Bridge Toll Collector position, as found on the state's internet site, requires lifting that exceeds claimant's restrictions and greater skill in English than claimant possesses, and

[4] Specifically, the administrative law judge rejected the positions of Answer Service Operator Trainee and four Cashier/Host/Receptionist jobs. Decision and Order at 19; Emp. Ex. 3.

thus, that this position is not suitable for claimant. In addition, claimant contends that the state has a hiring freeze in place, making these positions unavailable after January 15, 2008. Claimant attempted to enter this evidence into the record before the administrative law judge by attaching it to his motion for reconsideration. The administrative law judge denied claimant's motion because the evidence offered was available prior to the hearing.[5] Claimant contends that the Board may take "judicial notice" of the information contained on the official state government website. The Board's review of an administrative law judge's decision is limited to consideration of the evidence admitted into the record by the administrative law judge. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301. Although the Board may take judicial notice of items such as official court documents, *see Hill v. Avondale Industries, Inc.*, 32 BRBS 188 (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), the Board may not take such notice of documents requiring findings of fact as the Board is not permitted to engage in fact-finding. *See* 5 U.S.C. §566(e) (hearing officer may take official notice); 29 C.F.R. §18.45 (administrative law judge may take official notice). Thus, we decline to address this additional information.[6] Moreover, claimant does not assign any specific error to the suitability of the Breakfast Attendant position.[7] Therefore, we affirm the administrative law judge's finding that the positions of Bridge Toll Collector and Breakfast Attendant establish the availability of suitable alternate employment. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

[5] Claimant does not contend that the administrative law judge's refusal to admit the evidence on reconsideration was arbitrary, capricious or constituted an abuse of discretion. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

[6] On remand, claimant may move for modification based on a mistake in fact if he wishes the administrative law judge to consider this evidence. *See* 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *R.V. v. Friede Goldman Halter* ___ BRBS ___, BRB No. 08-0605 (Mar. 13, 2009).

[7] In his reply to employer's response brief, claimant contends that the Breakfast Attendant position was not a readily available job, but rather was a "listing for people filing for unemployment." This position is listed through LA Works, which is not a direct employer. However, the vocational counselor testified that he had contacted the employers for the jobs listed and that this was an actual available position. *See* Emp. Ex. 3; H.Tr. at 73.

Due Diligence

If the employer establishes the availability of suitable alternate employment, the employee may nonetheless prevail in obtaining total disability benefits if he demonstrates that he diligently tried but was unable to secure alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). Claimant contends that the administrative law judge erred in finding that he did not diligently seek alternate work.

The administrative law judge found that claimant presented evidence of his job search. The administrative law judge found that claimant contacted all potential employers identified by employer, but that he did not apply for two of the jobs. Contrary to the administrative law judge's implication, claimant is not required to attempt to obtain all of the exact positions identified by employer in order to establish that he diligently sought alternate employment. It is sufficient if he diligently seeks work of the general type shown by employer to be suitable and available. *See Palombo,* 937 F.2d 70, 25 BRBS 1(CRT). Moreover, the administrative law judge found that not all of the jobs identified by employer were suitable for claimant; claimant is not required to apply for unsuitable jobs. In addition, claimant reported that he did not apply for jobs when the employer told him it was not accepting an application. Cl. Ex. 13.

However, the administrative law judge also found that claimant actually was offered a job by one of the employers he contacted, New South Parking System, and that there is no indication in the record as to why claimant did not accept the position.[8] Decision and Order at 20; Cl. Ex. 13. This finding is supported by the record. Cl. Ex. 13. In addition, the administrative law judge found that, in 2007, claimant had worked as a subcontractor, which required little to no physical labor, and that claimant was responsible for payroll, the purchase of materials, and the supervision of work. H.Tr. at 46-49; Cl. Ex. 12. The administrative law judge rationally credited claimant's testimony that he quit this job due to a disagreement with the contractor over claimant's testimony that he stopped working due to back pain. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979); Decision and Order at 20; H.Tr. at 48.

[8] The administrative law judge found that claimant contacted this employer on his own initiative. However, this position was identified in employer's labor market survey dated November 20, 2006. Emp. Ex. 3 at 13.

On appeal, claimant does not address the administrative law judge's findings regarding the job at New South Parking System, or his post-injury work as a subcontractor, but merely asserts that the evidence in general is sufficient to establish he diligently sought alternate employment. We affirm the administrative law judge's finding, based on the parking and subcontractor jobs, that claimant did not diligently but unsuccessfully seek alternate employment as it is rational and supported by substantial evidence. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see also DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *see Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Therefore, we affirm the administrative law judge's finding that claimant is entitled to temporary partial disability benefits, rather than temporary total disability benefits.

Attorney's Fee

Claimant contends that the administrative law judge erred in reducing the amount of the fee award by over 50 percent to account for limited success. Claimant urges the Board to vacate the administrative law judge's fee award if the Board reverses or vacates the administrative law judge's findings regarding extent of disability or the amount of claimant's pre-injury average weekly wage. We reject claimant's contention regarding the reduction in the fee award due to his limited success. An administrative law judge may apply an across-the-board reduction where he determines that claimant achieved limited success. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Thus, on the present award of benefits, the fee award is affirmed. However, as the case is being remanded to the administrative law judge to reconsider the calculation of claimant's average weekly wage, he is instructed to reconsider the amount of claimant's attorney's fee in light of his findings on remand. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is vacated, and the case is remanded for further findings consistent with this opinion. In addition, the administrative law judge should reconsider the amount of claimant's attorney's fee in light of his findings on remand. The administrative law judge's Decision and Order, Decision on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees are affirmed in all other respects.

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