BRB Nos. 88-2762
and 88-2762A

JEAN McGEE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of R.S. Heyer, Administrative Law Judge, United States Department of Labor.

Russell A. Metz (Witherspoon, Kelley, Davenport & Toole, P.S.), Seattle, Washington, for self-insured employer.

Michael S. Hertzig (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (86-LHC-1695) of Administrative Law Judge R. S. Heyer 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).

Claimant hurt her low back while working as a shipscaler on April 22, 1980. She returned to work the following day and continued working until May 16, 1980, when she experienced a sharp pain. She has not worked since that time. Claimant consulted numerous doctors over the years and was diagnosed as having a lumbosacral strain and psychological impairment unrelated to the subject work injury. Claimant holds a college degree in business administration and has work experience other than longshore work, including participation in a bank management trainee program. Employer voluntarily paid claimant temporary total disability compensation from May 1980 until October 5, 1984, and temporary partial disability compensation from October 6, 1984 until May 27, 1986. Claimant sought temporary total disability compensation and permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from May 16, 1980 through December 10, 1980. He denied claimant any additional compensation thereafter, however, reasoning that employer established the availability of suitable alternate employment which paid in excess of claimant's pre-injury average weekly wage in May 1984 and that there was nothing in the record to suggest that the same or comparable employment at comparable wages was not available between December 10, 1980, when an orthopedic panel first indicated that claimant could perform alternate work, and November 12, 1986, when claimant reached maximum medical improvement. The administrative law judge further determined that claimant was not entitled to any permanent disability compensation once she reached maximum medical improvement on November 12, 1986, because the orthopedic panel which evaluated her at that time indicated that she was capable of working at her pre-injury performance level.

The Director appeals, arguing that the administrative law judge erred in finding that employer met its suitable alternate employment burden and that, accordingly, claimant is entitled to temporary total disability compensation through the date of maximum medical improvement and permanent total disability compensation thereafter. Employer responds that the Board need not reach the issue of suitable alternate employment because the administrative law judge should have concluded that claimant was no longer disabled after December 10, 1980, but that, in any event, suitable alternate employment was established. Employer cross-appeals, arguing that the administrative law judge erred in determining the date of maximum medical improvement, and in determining that it was liable for claimant's attorney's fee.[1] The Director responds, urging that the administrative law judge's finding regarding the date of maximum medical improvement be affirmed.

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[1]Although employer also contends that the administrative law judge erred in finding that claimant was temporarily partially disabled between December 10, 1980 and November 11, 1986, we note that no disability compensation was awarded after December 10, 1980. Employer is apparently referring to a superfluous statement made by the administrative law judge that throughout the period of temporary partial disability from December 10, 1980 through November 12, 1986, claimant sustained no actual wage loss. Decision and Order at 5.

Initially, we reject employer's assertion that the administrative law judge's finding that maximum medical improvement was reached in November 1986 is in error. Employer contends that the administrative law judge should have found that claimant reached maximum medical improvement on either July 21, 1980, when Dr. Burns stated that claimant could return to regular working hours with some lifting restrictions, or on December 10, 1980, when an orthopedic panel evaluated claimant and assigned her a five percent impairment rating. Emp. Ex. 2.2.[2] In making his determination as to the date of maximum medical improvement, the administrative law judge considered the orthopedic panel's 1980 report and assignment of a five percent impairment rating, but acting within his discretion found it to be non-determinative in light of later medical reports showing that claimant continued to receive extensive medical attention after December 1980. In finding November 12, 1986 to be the operative date, the administrative law judge credited a November 1986 orthopedic panel report which indicated that at that point claimant's condition was medically stationary, and that no further medical or surgical treatment was needed relating to her 1980 work injury. A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition, *see Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or his condition has stabilized. *Lusby v. WMATA*, 13 BRBS 446 (1981). Inasmuch as the November 12, 1986 report of the orthopedic panel provides substantial evidence to support the administrative law judge's finding that claimant did not reach maximum medical improvement until that date, we affirm this determination.

We also reject the Director's assertion that the administrative law judge erred in finding that employer met its burden of establishing the availability of suitable alternate employment.[3] Once a claimant has established that she is physically unable to return to her pre-injury employment, the burden shifts to her employer to demonstrate the availability of suitable alternate employment that she is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329, 12 BRBS 660, 661 (9th Cir. 1980). In order to meet its burden, the employer must point to specific jobs which there is a reasonable likelihood of claimant obtaining based on her age, education and background. *Bumble Bee*, 629 F.2d at 1330, 12 BRBS at 662. The employer must establish the precise nature and terms of specific job opportunities it contends constitute suitable alternate employment. *See, e.g., Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

In the instant case, the administrative law judge found suitable alternate employment established based on a May 15, 1984, report submitted by employer's vocational consultant, Harry C. Springer, regarding an evaluation performed on May 10, 1984. Emp. Ex. 3.[4] After interviewing

[2]The December 10, 1980 report of the orthopedic panel does not appear in the record, but other evidence alludes to it. *See* Decision and Order at 2; Emp. Exs. 3.9-3.10, 4.2, 5.1.

[3]Employer does not dispute the administrative law judge's finding that claimant could not return to her pre-injury employment until December 10, 1980.

[4]The record also contains a vocational evaluation performed by another company on October 7, 1986. Emp. Exs. 4, 6.

claimant, and reviewing her vocational, educational, and medical history, Mr. Springer identified several jobs opportunities through the employment listings in the *Seattle Times* which he felt might be suitable for claimant. He then obtained employment bulletins for three of the positions identified which included the job descriptions, qualification requirements, and salary information. Emp. Ex. 3.48.[5] Although the Director asserts that employer failed to establish that the jobs identified by its vocational expert through the want ads were realistically available to claimant, we disagree. Contrary to the Director's assertions, employer's vocational expert did not simply pull jobs out of the want ads. Rather, Mr. Springer found that three specific jobs listed in the newspaper were consistent with claimant's age, education, and limitations after obtaining the specific job requirements and salary information from the prospective employers. Although the Act does not, as the Director avers, require the vocational counselor to inform prospective employers of claimant's limitations in order to establish the availability of suitable alternate employment, *see generally Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990), we note, that in this case, Mr. Springer reviewed claimant's background with one of the prospective employers, the City of Seattle, and in addition confirmed that claimant's degree and work experience would qualify her for another of the openings. Emp. Ex. 3.50-3.51. Because the administrative law judge's finding that employer successfully established suitable alternate employment opportunities which were realistically available is rational, supported by substantial evidence, and in accordance with applicable law, we affirm this determination. *O'Keeffe*, 380 U.S. at 359. *See generally Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196, 21 BRBS 122, 123 (CRT) (9th Cir. 1988).

The administrative law judge erred, however, in terminating claimant's award of temporary total disability compensation on December 10, 1980. An injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 111 S.Ct. 798 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Inasmuch as the administrative law judge found that suitable alternate employment was established based on employer's May 15, 1984 vocational report, a finding which is being affirmed on appeal, we modify the administrative law judge's decision to reflect that claimant is entitled to temporary total disability compensation until May 15, 1984.[6]

[5]These openings were for a transportation/ridesharing planning specialist, public information representative and neighborhood planner (part-time). Although the administrative law judge refers to four positions, only three are substantiated in the record.

[6]As no party challenges the administrative law judge's finding that claimant's post-injury wage-earning capacity is higher than her pre-injury average weekly wage, we affirm the administrative law judge's determination that claimant is not entitled to additional benefits subsequent to the establishment of suitable alternate employment.

Finally, we reject employer's contention that claimant's counsel is not entitled to an attorney's fee. Although employer made voluntary payments of disability compensation in excess of that ultimately awarded under the Act, we note that advance payments of compensation may not be credited against awarded medical benefits. *See Aurelio v. Louisiana Stevedores Inc.*, 22 BRBS 418, 423 (1989). Claimant's counsel was successful in establishing her right to past and future medical benefits while the case was before the administrative law judge; establishing entitlement to these additional benefits will support an attorney's fee award payable by employer. *See generally Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision after remand); 33 U.S.C. §928(b).[7]

Accordingly, the administrative law judge's Decision and Order is modified to reflect that claimant is entitled to temporary total disability compensation until May 15, 1984. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[7]The administrative law judge's determination that claimant's counsel would only be entitled to a limited attorney's fee under these circumstances is consistent with *Hensley v. Eckerhart*, 461 U.S. 424 (1983).