BRB Nos. 99-0580
and 99-0580A

JOE MIRANDA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Granting Modification of Benefits and the Decision and Order Awarding Attorney's Fees of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Howard D. Sacks, San Pedro, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

BEFORE: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification of Benefits and the Decision and Order Awarding Attorney's Fees, and employer cross-appeals the Decision and Order Awarding Attorney's Fees (95-LHC-2527) of Administrative Law Judge Paul A. Mapes 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 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g.*, *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered work-related injuries to his back, left knee and ankle on November 3, 1992, while working for employer. Claimant subsequently underwent a laminectomy, discectomy, and neuroforaminotomy. In his initial Decision and Order, the administrative law judge found that claimant was unable to resume his usual employment duties with employer, that employer established the availability of suitable alternate employment, but that claimant diligently but unsuccessfully attempted to secure such employment post-injury. Accordingly, the administrative law judge awarded claimant permanent total disability compensation at a rate of $467.07 per week.

Employer thereafter filed a motion for modification alleging that suitable alternate employment has been available to claimant since December 20, 1996. 33 U.S.C. §922. In his decision on employer's petition for modification, the administrative law judge initially determined that claimant was capable of only part-time employment subsequent to May 14, 1998. Next, the administrative law judge found that employer established the availability of suitable alternate employment commencing December 20, 1996, based upon the numerous unarmed security guard positions identified by Paul Johnson, employer's vocational expert, in three labor market surveys. After further finding that claimant's post-injury wage-earning capacity as un unarmed security guard was $5.38 an hour, the administrative law judge modified claimant's award to reflect claimant's entitlement to permanent partial disability compensation from December 20, 1996 through May 14, 1998, based on two-thirds of the difference between his average weekly wage of $700.60 and his post-injury wage-earning capacity as a full-time unarmed security guard; thereafter, claimant's ongoing award of permanent partial disability compensation was calculated based upon two-thirds of the difference between his average weekly wage and his post-injury wage-earning capacity as a part-time unarmed security guard. *See* 33 U.S.C. §908(c)(21). Claimant's motion for reconsideration was summarily denied by the administrative law judge.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge seeking an attorney's fee of $10,250, representing 51.25 hours of services rendered at a rate of $200 per hour. Employer filed objections to the fee petition. After initially finding that employer is liable for a fee, the administrative law judge awarded claimant's counsel a fee of $3,334, representing 16.67 hours at an hourly rate of $200.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment as of December 20,

1996. In addition, claimant challenges the administrative law judge's finding that claimant failed to exercise reasonable diligence in trying to secure employment post-injury. Lastly, claimant asserts that the administrative law judge erred in awarding counsel a reduced fee. In its cross-appeal, employer challenges the administrative law judge's determination that it is liable for counsel's attorney's fee.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997)*; Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The Board has held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment.[1] *See, e.g., Jensen v. Weeks Marine Inc.*, 33 BRBS 97 (1999); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197, 204 (1998); *Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1, 8 (1994); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52 (1989); *Blake v. Ceres Inc.*, 19 BRBS 219, 221 (1987).

Thus where, as in the instant case, a claimant has established his *prima facie case* of total disability by establishing his inability to perform his usual work duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that employer must demonstrate that specific job opportunities exist which claimant could perform considering his age, education, work experience and physical restrictions and which are realistically and regularly available in his community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet its burden of demonstrating suitable alternate employment, employer

[1]Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo I,* 515 U.S. at 296, 30 BRBS at 3 (CRT); *Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 204 (1998); *Vasquez,* 23 BRBS at 431.

must demonstrate specific jobs which claimant is capable of performing given his physical restrictions. *See Bumble Bee,* 629 F.2d at 1329, 12 BRBS at 662. The administrative law judge must also determine whether there is "a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job." *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194, 1196, 21 BRBS 122, 123 (CRT) (9th Cir. 1988); *Fox v. West State Inc.*, 31 BRBS 118 (1997).

In his Decision and Order, the administrative law judge initially found that claimant was capable of working, albeit with restrictions, on a full time basis until May 14, 1998, and, based upon Dr. Docherty's testimony, on a part-time basis thereafter. As this finding is not challenged on appeal, it is affirmed.

Next, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment based upon the multiple unarmed security guard positions identified by Mr. Johnson, employer's vocational expert. After reviewing claimant's age, education and the most recent medical restrictions and limitations placed upon claimant by his treating physicians, including Dr. Docherty's 1998 deposition, Mr. Johnson prepared labor market surveys in December 1996, February 1998, and August 1998, each of which identified unarmed security guard positions which he opined were suitable and attainable for claimant. *See* EXS 1, 5; Tr. at 131. Mr. Johnson testified that, in preparing the aforementioned surveys, prospective employers were made aware of claimant's current restrictions, that employers were then queried as to whether positions were available within those restrictions, and that his third survey contained only jobs that were not considered to be stressful.[2] *See* Tr. at 45-47, 58-64, 75. It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, as Mr. Johnson's testimony and accompanying labor market surveys establish that multiple unarmed security guard positions are available within claimant's physical restrictions, the administrative law judge's finding that claimant is capable of performing the identified jobs is supported by substantial evidence and consistent with law. *See Wilson v. Dravo Corp.*, 22 BRBS 459 (1989); *Jones v. Genco*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment.[3]

[2]Although Dr. Docherty was at a loss to describe a specific job that claimant would be capable of performing, he conceded that claimant may be able to work within his restrictions for four hours a day. *See* EX 3 at 26-32.

[3]We reject claimant's contention that Mr. Johnson's testimony must be disregarded since he did not take into account claimant's use of medication. Although limitations provided by medications must be considered in determining the availability of suitable

alternate employment, *see Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992), the record reflects that Dr. Docherty did not place restrictions on claimant due to his medications.

Claimant next contends that the administrative law judge erred in failing to find that he diligently yet unsuccessfully sought employment post-injury. We disagree. Where as in the instant case employer has established the availability of suitable alternate employment, claimant can nevertheless establish entitlement to total disability benefits if he demonstrates that he diligently tried and was unable to secure such employment. *See Edwards*, 999 F.2d at 1376 n.2, 27 BRBS at 84 n.2 (CRT)*; see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366 (1990).

Contrary to claimant's contention, there is substantial evidence in support of the administrative law judge's conclusion that claimant did not make a good faith and diligent effort to find employment post-injury. Specifically, in addressing this issue, the administrative law judge found that claimant failed to respond to employer's offer to provide him with assistance in locating a job. Moreover, the administrative law judge noted that claimant on a number of occasions gave incorrect or unnecessary answers when filling out employment applications; for example, the record reflects that claimant gave incorrect answers to questions regarding his gender, age, and prior felony convictions. *See* EX 4. The administrative law judge properly recognized that it is claimant's burden to establish due diligence; in this instance, he found that claimant did not meet this burden. Accordingly, the administrative law judge's finding that claimant did not demonstrate due diligence is affirmed. *See, e.g., Wilson*, 22 BRBS at 466; *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

In its cross-appeal, employer challenges the administrative law judge's determination that it is liable for claimant's counsel's attorney's fee; specifically, employer asserts that since claimant was unsuccessful in opposing its modification petition, it cannot be held liable for a fee under the Act. Claimant responds, stating that contrary to employer's description of the outcome of the case below he did in fact succeed in opposing the relief sought by employer on modification. The administrative record in this case indicates that employer sought to establish that clamant was capable of full-time post-injury employment as of December 20, 1996. Employer was thus successful in establishing that claimant was capable of full-time employment from December 20, 1996 through May 14, 1998, and the administrative law judge ordered claimant's compensation for that period reduced from $467.07 to $323.60. The administrative law judge determined, however, that since May 15, 1998, claimant has been capable of working only twenty hours per week and therefore ordered compensation to be paid at a weekly rate of $395.23. Hence, the administrative law judge overruled employer's objection and determined that claimant was entitled to an attorney's fee for his limited success. Accordingly, we affirm the administrative law judge's

determination that employer is liable for a fee payable to claimant's counsel. *See generally Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999).

Claimant, in challenging the fee awarded by the administrative law judge, initially contends that the administrative law judge erred in applying the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to reduce his requested fee. Contrary to claimant's assertion, it is well-established that the Court's decision in *Hensley* is applicable to claims arising under the Act. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT)(9th Cir. 1996); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). We therefore reject claimant's assertion of error in this regard.

We agree with claimant, however, that the fee awarded cannot be affirmed; specifically, in light of the Supreme Court's decision in *Hensley*, we hold that the administrative law judge's fee award must be vacated and the case remanded for further consideration on this issue. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. The Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also Brooks*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *Horrigan*, 848 F.2d at 321, 21 BRBS at 73 (CRT). Where claims involve a common core of facts or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Moreover, while the most critical factor is the degree of success obtained, the Court stated that there is no precise rule or formula for making the determination as to what fee is reasonable under the particular circumstances of a case; rather, the body awarding the fee has the discretionary authority to attempt to identify the specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. Whatever the method utilized, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-437. *Ahmed*, 27 BRBS at 24.

In the present case, the administrative law judge initially found that there were no severable issues in the claim and that, thus, only the second prong of the test set forth in *Hensley* was applicable when determining the fee to be awarded to claimant's counsel. Next, the administrative law judge determined that, pursuant to his first-hand knowledge of the evidence, approximately two-thirds of counsel's time was devoted to unsuccessfully opposing employer's efforts to establish the availability of suitable alternate employment; pursuant to this finding, the administrative law judge reduced counsel's remaining 48.5 hours of claimed services by two-thirds, to 16.67 hours.[4] In rendering this reduction, however, the administrative law judge did not take into consideration the degree of success obtained by claimant in relation to the hours expended on defending against employer's modification petition, nor did he determine whether the amount ultimately awarded was reasonable in relation to the result obtained.[5] *See Hensley*, 461 U.S. at 435-437. Moreover, the

[4]We note that the administrative law judge's decision to disallow 2.75 hours claimed by counsel for the preparation of a petition for reconsideration is not challenged by claimant on appeal.

[5]In this regard, the administrative law judge found that claimant had been capable of working full-time from December 20, 1996 to May 14, 1998 and therefore awarded permanent partial disability compensation for that period, at a weekly rate of $323.60, a reduction of approximately 31 percent from his permanent total disability award of $487.07. The administrative law judge determined that thereafter claimant was capable of working only 20 hours per week; consequently, claimant's award was modified to reflect his entitlement to weekly benefits in the amount of $395.23, a reduction of approximately 15 percent from his permanent total disability award. In its motion for modification, employer had sought to prove that claimant had been capable of working full-time from 1996 until the

administrative law judge's summary statement regarding his knowledge of the evidence, and his consequent disallowance of two-thirds of counsel's requested hours without further discussion, renders his decision unreviewable. Thus, we vacate the administrative law judge's fee award and remand the case for reconsideration of counsel's fee petition pursuant to the second prong of the test set forth in *Hensley*.

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present.

Accordingly, the administrative law judge's Decision and Order Granting Modification of Benefits is affirmed.[6] The Decision and Order awarding Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]In view of our affirmance the administrative law judge's decision on modification, we also affirm, as uncontested on appeal, the administrative law judge's disallowance of compensation for the 2.75 hours spent in preparation of the unsuccessful motion for reconsideration. Decision and Order Awarding Attorney's Fees at 2.