BRB No. 91-714

LYNN M. CURLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SUN SHIP, INCORPORATED	)	DATE ISSUED: _____
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order and Decision and Order on Motion for Reconsideration of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Arthur G. Girton (Arthur G. Girton, P.C.), Chester, Pennsylvania, for claimant.

Anne Manero (Marks, Kent & O'Neill, P.C.), Philadelphia, Pennsylvania, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order on Motion for Reconsideration (88-LHC-1684) of Administrative Law Judge Frank D. Marden 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).

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant sustained an injury to her back on July 21, 1980, while working as a dock worker for employer. Claimant sought medical treatment and continued working until August 27, 1980; claimant has not worked since that date. Employer voluntarily paid claimant temporary total disability benefits from September 5, 1980 to April 8, 1987. 33 U.S.C. §908(b). Claimant subsequently filed a claim for permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge determined that claimant cannot return to her former occupational duties with employer, and that employer established the availability of suitable alternate employment. Accordingly, the administrative law judge denied claimant's claim for permanent total disability benefits. Thereafter, the administrative law judge affirmed his Decision and Order in a subsequent Decision and Order on Motion for Reconsideration.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment; in the alternative, claimant contends that an award of permanent partial disability is appropriate. Lastly, claimant alleges error in the administrative law judge's failure to award medicals and an attorney's fee. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Where, as in the instant case, claimant establishes that she is unable to return to her regular or usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. *See McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979); *see generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). While an employer need not actually obtain a job for claimant, it must nevertheless establish the existence of actual, not theoretical, job opportunities. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989). While the credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of establishing suitable alternate employment, the Board has held that such testimony which identifies only general job categories rather than actual job openings with specific employers does not establish the availability of suitable alternate employment opportunities. *See Price v. Dravo Corp.*, 20 BRBS 94 (1987); *see also Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

In the instant case, the administrative law judge found that the testimony and report of Dr. Spergel, employer's vocational psychologist, established suitable jobs "which are available in the marketplace." *See* Decision and Order at 12-14. Dr. Spergel, however, set forth general job categories that he believed were within claimant's medical limitations and which "exist in the national economy in reasonable numbers." *See* EX-11A at 14. Thereafter, in his deposition testimony, Dr. Spergel set forth a number of employers which he had previously used to place individuals; Dr. Spergel did not, however, testify regarding any specific available positions with any employer or identify the requirements of job opportunities with specificity. *See* EX-11. Because Dr. Spergel's testimony identifies only general job categories, rather than actual job openings with

specific employers, we hold that Dr. Spergel's report and testimony are insufficient as a matter of law to establish the availability of suitable alternate employment. *See generally McCabe*, 602 F.2d at 59, 10 BRBS at 614; *Bumble Bee*, 629 F.2d at 1327, 12 BRBS at 660; *Preziosi*, 22 BRBS at 468. As employer submitted no other evidence in support of a finding of suitable alternate employment, the administrative law judge's decision denying permanent total disability benefits is reversed. The decision is modified to reflect claimant's entitlement to ongoing permanent total disability benefits pursuant to Section 8(a) of the Act, 33 U.S.C. §908(a).

Lastly, we note that claimant's contentions that the administrative law judge erred in failing to award medicals and an attorney's fee are contained in the closing sentence of her brief; we decline to address these issues since claimant has clearly failed to adequately brief them.[1] *See generally Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986); 20 C.F.R. §802.211.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Motion for Reconsideration are reversed and modified to reflect claimant's entitlement to permanent total disability compensation.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

[1]We note that, as claimant's counsel has successfully prosecuted the instant claim, counsel is entitled to a fee. 33 U.S.C. §928. An attorney's fee award cannot be made, however, without the requisite filing of an application which conforms to the requirements of either 20 C.F.R. §702.132 or 20 C.F.R. §802.203. *See Olsen v. Healy Tibbits Construction Co.*, 22 BRBS 221 (1989)(Brown, J., dissenting on other grounds).