BRB No. 95-1629

WANDA PERDUE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED:
	)	
and	)	
	)	
ESIS	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Danny E. Darnall, Elizabethtown, Kentucky, for claimant.

Kim Hoffman-Bradley (Army & Air Force Exchange Service), Dallas, Texas, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order (94-LHC-0335) of Administrative Law Judge Donald W. Mosser 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

On December 23, 1987, claimant injured her back during the course of her employment with employer as a stocker. She has not worked since her injury. Employer voluntarily paid claimant temporary total disability benefits through the date of the hearing. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on February 8, 1994, and that claimant is incapable of performing her previous employment duties with employer. After finding that employer failed to establish the availability of suitable alternate employment, the administrative law judge awarded claimant temporary total disability compensation from December 23, 1987 through February 7, 1994, and permanent total disability compensation thereafter. 33 U.S.C. §908(a), (b).

Thereafter, the administrative law judge issued a Supplemental Decision and Order in which he amended the rate under which claimant would be awarded disability compensation. He further awarded claimant's counsel an attorney's fee of $4,427.50.

On appeal, employer challenges the administrative law judge's decision to reject the jobs that it identified as being suitable for claimant. Employer also challenges the administrative law judge's Supplemental Decision and Order awarding claimant's counsel a fee and costs payable by employer. Claimant responds, urging affirmance of the award of an attorneys' fee.

Where, as in the instant case, claimant is unable to perform her usual employment duties, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to satisfy this burden, employer must demonstrate that there are jobs reasonably available in the geographic area in which claimant resides, which claimant is capable of performing based upon her age, education, work experience and physical restrictions and could realistically secure if she diligently tried. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In order to meet its burden by offering claimant a job in its facility, employer must demonstrate the availability of work which is necessary and which claimant is capable of performing. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

We will first address employer's argument that the light duty jobs identified by its vocational specialist establish the availability of suitable alternate employment for claimant. In order for employment opportunities to be considered realistic, employer must establish their nature, terms, and availability. *See Reiche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984). In the instant case, the administrative law judge rejected the positions identified by Ms. Collins, employer's vocational specialist, because Ms. Collins admitted that she did not have a complete picture of the lifting requirements of those jobs.[1] Tr. at 78. Given the absence of the jobs' requirements, the administrative law judge was unable to determine if claimant is physically capable of performing the

[1]Both physicians of record, Drs. Malik and Jacob, provided lifting limitations for claimant on both an occasional and frequent basis. *See* CX-2, EX-7.

jobs. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985)(Ramsey, C.J. dissenting on other grounds), *recon. denied*, 17 BRBS 160 (1985)(Ramsey, C.J., concurring and dissenting). We therefore affirm the administrative law judge's determination that the testimony of Ms. Collins and the jobs identified in her labor market study are insufficient to establish the availability of suitable alternate employment. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer additionally contends that the administrative law judge erred by failing to find that the cashier/checker position identified at its facility and offered to claimant constituted suitable alternate employment which claimant is capable of performing. In finding that this position was unsuitable for claimant, the administrative law judge specifically credited claimant's testimony that she would be unable to perform this position. Additionally, the administrative law judge found that claimant has difficulty standing in one place for more than 20 or 30 minutes, which is something that the job requires. The administrative law judge noted that employer's vocational expert conceded at the hearing that the claimant may have difficulty with this position if pain makes it difficult for her to concentrate. *See* Decision and Order at 7. We note, however, that the administrative law judge did not address employer's vocational specialist's testimony regarding the requirements of this position. Specifically, Ms. Collins, based upon her personal observation of the cashier position, testified that the position would enable claimant to sit or stand as she wished, that a stool would be provided if necessary, and that fifteen minutes breaks were scheduled during the six-hour shift. *See* Tr. at 68-69. Moreover, the administrative law judge did not address claimant's inconsistent statements regarding her ability to perform this position. *See* Tr. at 35-37. As the administrative law judge did not compare claimant's physical restrictions with the specific requirements of the position identified in employer's facility, we vacate the administrative law judge's finding that the cashier/checker position at employer's facility is unsuitable for claimant. The case is remanded for the administrative law judge to compare claimant's physical restrictions with the requirements of the identified position and to determine whether employer has met its burden under the standard set forth in *Turner*. *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Lastly, employer challenges the attorney's fee award rendered by the administrative law judge in his Supplemental Decision and Order. Employer initially contends that the administrative law judge's award of claimant's attorney's fee is premature since the administrative law judge's Decision and Order is on appeal, thereby rendering the award unenforceable. It is well established, however, that a fact-finder may render an attorney's fee determination when the decision is issued in order to further the goal of administrative efficiency. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987). As employer correctly asserts, any such award of attorney's fees does not become effective and is thus not enforceable until all appeals are exhausted and claimant is successful. *Id.* We therefore reject employer's contention of error, and we affirm the administrative law judge's determination that employer is liable for claimant's counsel's fee. *See* 33 U.S.C. §928.

Employer additionally contends that the $13 in expenses the administrative law judge awarded for telephone calls should be disallowed as the $1 per call charged is an arbitrary figure and the cost should be considered part of overhead expenses. Claimant's attorney responds, contending

that his method of accounting is reasonable as the $13 expense reflects only the number of long distance calls his secretary made pertaining to the case and does not reflect the total long distance toll, the time expended by his secretary, or the numerous calls claimant's attorney made personally with regard to the case. We reject employer's contention of error, as employer has not demonstrated that the award of $13 in telephone expense is unreasonable and the administrative law judge considered a number of factors in addressing claimant's counsel's request for telephone charges. *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Accordingly, the administrative law judge's finding that suitable alternate employment was not established is vacated and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other aspects, the Decision and Order and the Supplemental Decision and Order are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge