BRB No. 96-122

STEPHEN LAZZARI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MATSON NAVIGATION COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Awarding Attorney Fee of Alexander Karst, Administrative Law Judge, United States Department of Labor.

John R. Hillsman (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for self-insured employer.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and Order Awarding Attorney Fee (95-LHC-984) of Administrative Law Judge Alexander Karst 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 injured his neck on December 31, 1991, when the forklift he was driving overturned. The parties stipulated and the administrative law judge found that claimant's injury prevents him from performing his usual work.[1] The parties further stipulated that claimant was injured on a covered situs, *see* 33 U.S.C. §903(a), and employer conceded that claimant's primary responsibility was to provide routine maintenance to its fleet. The administrative law judge thus concluded that claimant's employment satisfied the status requirement for coverage under the Act. 33 U.S.C. §902(3). He declined to determine whether claimant was a "member of a crew" excluded from coverage under the Act, *see* 33 U.S.C. §902(3)(G)(1988), stating that the parties failed to introduce any evidence relating to this fact-specific issue. The administrative law judge found that employer did not establish the availability of suitable alternate employment, and that claimant's average weekly wage is $885.45 pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). The administrative law judge therefore ordered employer to pay claimant temporary total disability benefits from January 1, 1992 through January 27, 1993, and permanent total disability benefits from January 28, 1993 and continuing, with appropriate Section 10(f), 33 U.S.C. §910(f), increases. The administrative law judge also awarded medical expenses and interest.

Claimant's counsel thereafter filed a petition for an attorney's fee in the amount of $62,906.25, representing 222.20 hours at $250 an hour for John Hillsman's services and 68.75 hours at hourly rates ranging from $75 to $200 for other attorneys' services, plus $15,026.09 in costs. Employer filed objections, contending, *inter alia*, that the hourly rate of $250 requested for Mr. Hillsman's services is excessive. In an Order Awarding Attorney Fee, the administrative law judge, *inter alia*, reduced the hourly rate of Mr. Hillsman to $225 and awarded claimant's counsel an attorney's fee of $56,788.75, plus $13,899.63 in costs, payable by employer.

On appeal, employer initially challenged the administrative law judge's failure to rule on the issue of claimant's status as a member of a crew. By motion dated June 11, 1996, employer moved to withdraw its appeal of this issue. We grant employer's motion, *see generally* 20 C.F.R. §802.401(a), and affirm the administrative law judge's decision on this issue. In this decision, we will address the remaining issues raised by employer.

Employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment, his finding that claimant's average weekly wage should be calculated pursuant to Section 10(a), and the attorney's fee award. Claimant responds,

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[1]Employer voluntarily paid claimant benefits for temporary total disability at a rate of $602 a week until February 5, 1994, when it reduced the rate to $454.32 a week. On March 5, 1994, employer reduced the rate to $83.23 a week. Claimant filed a Jones Act complaint in Superior Court of the State of California on November 17, 1994, to which employer responded, denying that claimant was a seaman when he was injured. On January 13, 1995, employer terminated compensation payments on the ground that claimant "renounced his entitlement" to benefits under the Longshore Act. Cl. Ex. 34. The Superior Court Judge abated the Jones Act claim pending a decision by the administrative law judge. Cl. Ex. 37.

urging affirmance of the administrative law judge's decisions.

Employer contends that, based on the job surveys conducted by its vocational consultant, it established the availability of customer service jobs in 1993 and 1995. Employer contends that claimant could perform the customer service jobs but simply was not interested in them.

When, as here, a claimant establishes his inability to perform his usual work, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1991); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). To satisfy its burden of showing suitable alternate employment, employer must point to specific jobs that claimant can perform. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Stevens*, 909 F.2d at 1258, 23 BRBS at 92 (CRT)(1991); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Bumble Bee Seafoods*, 629 F.2d at 1330, 12 BRBS at 662. In determining the suitability of the jobs identified, the administrative law judge must consider claimant's age, education, transferable skills and physical restrictions, and whether he would be hired if he diligently sought the job. *Stevens*, 909 F.2d at 1258, 23 BRBS at 92 (CRT); *Hairston*, 849 F.2d at 1196, 21 BRBS at 123 (CRT).

The administrative law judge found that employer did not establish suitable alternate employment because the rehabilitation specialist, Ann Wilson, showed only theoretical employment possibilities. The administrative law judge found that Ms. Wilson identified customer service jobs with current openings paying $8 per hour, but that many of the employers required applicants with typing and computer skills that claimant does not possess, and some of them had only temporary or part-time positions available. The administrative law judge found that Ms. Wilson did not say how many hours claimant could be expected to work, how many openings were available, or whether claimant could obtain one of the jobs if he tried.

The administrative law judge also found that claimant's treating psychiatrist, Dr. Riopelle, testified that claimant suffers from depression due to his perceived mistreatment by employer, *i.e.*, being placed under surveillance and the "unjustifiable" reduction in benefits, and that it is Dr. Riopelles's "unchallenged" view that the depression has disabled claimant from pursuing the jobs employer claims were available to him. The administrative law judge also found that on August 1, 1995, claimant began classes at the International Travel Institute and San Francisco State University in an effort to qualify for a career in the travel industry, and employer stipulated that during the pendency of this schooling, claimant should be deemed totally disabled.

We hold that the administrative law judge erred in finding that all the jobs identified by Ms. Wilson are theoretical or that claimant was not qualified for them. The record reflects that four of the customer jobs Ms. Wilson identified in a September 3, 1993 labor market survey, those at Subscription Service Center, Drain Patrol, Quality Air Systems and Emporium/Capwell, require no significant training and little or no typing or computer skills. *See* Emp. Ex. H; Tr. II at 225-227. Subscription Service indicated the job required 30 hours a week and paid $7 an hour, and Quality

Air Systems indicated the job required 32 hours a week and paid $6 an hour. The labor market survey also provides a brief description of the jobs' requirements. These job listings, which indicate the number of hours and do not require additional skills, appear sufficiently specific to constitute suitable alternate employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145-146 (1992); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258, 260 (1988). We therefore must remand the case for the administrative law judge to reconsider the issue of suitable alternate employment, as he did not address with particularity individual job openings to determine if they constitute alternate employment within claimant's physical capabilities and transferable skills. *Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290 (1994).

We note that Dr. Riopelle's opinion that claimant is totally disabled due to depression could establish claimant is unable to perform any work. *See Lostaunau v. Campbell Industries, Inc.* , 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (1982), *cert. denied,* 459 U.S. 1104 (1983); *see generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). However, contrary to the administrative law judge's finding, Dr. Riopelle's opinion is not unchallenged as Dr. Becker, an orthopedist and psychiatrist, opined that claimant is not clinically depressed but suffers from somatoform pain disorder which is "hardly sufficient reason to hold up his retraining or rehabilitation efforts" and that, in fact, working would be beneficial for claimant. Emp. Ex. R. Inasmuch as Drs. Riopelle's and Becker's opinions conflict as to whether claimant is disabled by a psychiatric condition, on remand the administrative law judge should resolve the conflicts in this evidence when he discusses whether employer established the availability of suitable alternate employment.

Employer next challenges the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(a), contending that the administrative law judges should have calculated claimant's average weekly wage pursuant to Section 10(c). In determining claimant's average weekly wage, the administrative law judge found that in the year preceding the December 31, 1991 injury, claimant worked 36.5 weeks, five to seven days a week. The administrative law judge therefore found that claimant worked substantially the whole of the year, was a five day per week worker, and Section 10(a) applies. The administrative law judge determined that claimant worked 196 days during the year preceding his injury, earning $34,709.39, which yields an average daily wage of $177.09. The administrative law judge determined that claimant's average annual wage was $46,043.40 ($177.09 x 5 x 52), and his average weekly wage was $885.45 ($46,043.40/52).

Employer contends that Section 10(a) cannot be applied because claimant's work in the year preceding the December 31, 1991 injury was irregular. Employer contends that of the 36.5 weeks of employment during the 52 weeks preceding the injury, only nine consisted of a 40 hour work week; the other weeks were either more or less than 40. Employer contends that claimant's "relatively high earnings" in the last two-thirds of 1991 was an anomaly, and that it was speculative to presume his one year contract ending in August 1992 would have been renewed. Employer contends that prior to 1991, the most claimant ever earned was $24,635.53 or $473.46 per week, and in 1991,

claimant earned $39,303.57 or $755.84 per week. Employer contends a fair average weekly wage would be to add claimant's earnings in 1990 and 1991 totalling $50,394.05 ($39,309.57 plus $11,084.48) to obtain an average weekly wage of $484.56 [($50,394.05/2)/52].

Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act. Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. The Board has held that "substantially the whole of the year" refers to the nature of claimant's employment, regarding whether it is intermittent or permanent. *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). Section 10(b) also applies where claimant's employment is regular and continuous but the employee has not been employed in that employment for substantially the whole of the year. Under this subsection, the wages of similarly situated employees who have worked substantially the whole of the year may be used to calculate average weekly wage. Section 10(c) provides a general method for determining annual earnings where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Lobus v. I.T.O. Corp. of Baltimore, Inc.,* 24 BRBS 137 (1991); *Duncan*, 24 BRBS at 133.

In the instant case, the administrative law judge considered that claimant averaged $10,430.60 a year during his last five years of employment, but found the years where claimant did not have a salary or had a low salary were due to personal or health reasons which caused him to withdraw completely or partially from the work force and to permit his union status to expire. Decision and Order at 9. The administrative law judge found, however, that since April 1991, when claimant regained union seniority and was dispatched to Honolulu to work for employer, claimant had the intent to continue working steadily and regularly. Further, the administrative law judge considered that although claimant's employment contract at Sand Island in Honolulu was due to expire on August 23, 1992, the port agent, Marvin Honig, testified that claimant's position was hard to fill, which was why claimant had been dispatched from San Francisco to perform the job. The administrative law judge found that several of claimant's co-workers' contracts, which were similar to claimant's contract, were renewed year after year, and his co-workers continued to work at Sand Island through the time of the hearing. Thus, the administrative law judge rationally found that claimant's work for employer was likely to remain steady. Inasmuch as the administrative law judge's finding that Section 10(a) is applicable is based on a consideration of the proper factors, *see generally Duncan*, 24 BRBS at 133; *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986), his calculation of claimant's average weekly wage is affirmed.

Employer lastly challenges the administrative law judge's attorney's fee award, contending that the hourly rate of $225 awarded for Mr. Hillsman's services is excessive. Employer contends the hourly rate should not be augmented to account for anticipated delays or perceived unique services. The amount of an attorney's fee award is discretionary and may be set aside only if shown

by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The administrative law judge based his award of an hourly rate of $225 on his opinion that Mr. Hillsman's skills "are unique among the attorneys regularly practicing before this tribunal" and the fact that counsel does not receive his fee until the case becomes final. Order at 1. On this latter point, the administrative law judge stated "I take judicial notice that in the past this appeals process has often taken several years" and he noted that post-judgment interest on a fee award is not permitted. *Id.*

We reject employer's contention that Mr. Hillsman's qualifications are not relevant to a fee determination. The regulation at 20 C.F.R. §702.132(a) states that the quality of the representation is a factor to be determined in entering a fee award, and an attorney's experience and qualifications are appropriately considered in assessing the quality of the representation.

We agree with employer, however, that counsel's anticipated delay in receiving his fee is not a valid consideration. As to the issue of enhancement of the fee due to delay, in its recent decision in *Anderson v. Director, OWCP*, 91 F.3d 1322 (9th Cir. 1996), the United States Court of Appeals for the Ninth Circuit held that an attorney's fee awarded under the Act may be enhanced to account for delay in payment. The court also stated that "we hesitate to declare that the BRB intended to interpret the LHWCA as requiring enhancements in cases of ordinary delay." *Id.* at n. 3. On the other hand, the *Anderson* court cited as its authority to enhance attorney's fees for delay *Missouri v. Jenkins*, 491 U.S. 274 (1989), wherein the Supreme Court noted that, clearly, compensation received "several years" after the services were rendered is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed. *Missouri*, 491 U.S. at 283 (1989). In light of the *Anderson* decision by the court of appeals and *Missouri v. Jenkins*, we remand the case for the administrative law judge to consider the appropriate hourly rate for Mr. Hillsman's services.

Accordingly, the administrative law judge's Decision and Order is vacated with regard to the award of permanent total disability, and the case is remanded for the administrative law judge to reconsider whether employer established the availability of suitable alternate employment. In all other respects, the Decision and Order is affirmed. The administrative law judge's Order Awarding Attorney Fee is vacated, and the case remanded for further consideration in a manner consistent with this opinion.[2]

SO ORDERED.

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[2]Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board. Although claimant was successful on the issues of jurisdiction and average weekly wage, the full extent of his success is unknown given our decision in this case. Upon notification from claimant of the administrative law judge's decision on remand, the Board will consider counsel's fee petition at that time. 20 C.F.R. §802.203(c).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge