BRB No. 98-0375

DANIEL ION	)	
	)	
Claimant-Respondent	)	DATE ISSUED: Nov. 24, 1998
	)	
v.	)	
	)	
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY	)	
	)	
and	)	
	)	
SIGNAL ADMINISTRATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand -- Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

Larry J. Peterson, St. Paul, Minnesota, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (95-LHC-2204, 2205) of Administrative Law Judge Daniel L. Leland 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).

This is the second time that this case has been appealed to the Board. To briefly recapitulate the facts, claimant worked for employer for 24 years as a composite mechanic. His position was abolished in December 1992, so he worked as a mechanic trainee for employer in a storage facility from then until July 30, 1993. In March 1993, during the course of his work as a trainee, claimant fell and injured his lower back and left knee. In March and May 1993, claimant underwent surgeries on his wrists to relieve work-related carpal tunnel syndrome. After he returned to work in July 1993, claimant injured his neck while climbing a ladder. Claimant was laid off in July 1993, but was called back in January 1994 and assigned to shoveling snow for nine days. Claimant sought total disability benefits for the combination of his injuries.

In adjudicating this claim, the administrative law judge permitted claimant to conduct a post-hearing job search based on the jobs first identified at the hearing by employer's vocational consultant, Mr. Utities. The administrative law judge thereafter found, *inter alia*, that claimant was capable of performing jobs only in the "sedentary" category. Next, relying on claimant's post-hearing affidavit, the administrative law judge determined that claimant was duly diligent in seeking employment post-injury, but was unable to secure the identified employment. Accordingly, the administrative law judge concluded that claimant is totally disabled and entitled to permanent total benefits under Section 8(a) of the Act, 33 U.S.C. §908(a).

On appeal, the Board held that while it was within the administrative law judge's discretion to permit claimant to conduct a post-hearing job search in view of employer's failure to inform claimant of the jobs identified by Mr. Utities prior to the hearing, the administrative law judge violated employer's right to due process of law by failing to provide employer with an opportunity to cross-examine claimant or respond to his post-hearing affidavit regarding his job search. The Board thus vacated the administrative law judge's findings that claimant conducted a diligent job search and rebutted employer's evidence of the availability of suitable alternate employment, and remanded the case for the administrative law judge to give employer an opportunity to refute claimant's post-hearing affidavit. *Ion v. Duluth, Missabe & Iron Range Ry. Co.,* 31 BRBS 75 (1997).

On remand, the administrative law judge issued an order holding the record open for 60 days to allow employer the opportunity to submit evidence in response to claimant's post-hearing affidavit. Employer thereafter filed a Notice of Taking of Deposition of Mr. Utities, employer's vocational expert. The administrative law judge then issued an Order of Clarification stating that any new vocational evidence would not be admitted into the record since such evidence would be beyond the

scope of rebuttal. Regarding this issue, the administrative law judge noted that evidence such as claimant's deposition or the depositions or affidavits of any of the employers the claimant contacted during his post-hearing job search would be appropriate rebuttal evidence and therefore admissible.

In attempt to rebut claimant's assertion that he had conducted a diligent job search, employer submitted an affidavit signed by a paralegal from employer's law firm. Therein, the affiant stated that she contacted personnel at seven of the jobs to which claimant contended that he applied in December 1995, and that for various reasons including length of time passed, these employers no longer had applications on file; they had no memory of claimant's applying for the respective jobs nor whether openings had existed at that time. Furthermore, employer submitted a letter from its vocational consultant, Mr. Utities, wherein he stated that the vast majority of employers do not keep applications for more than a year and many destroy them after six months; moreover, Mr. Utities stated that most employers would have difficulty in trying to remember someone stopping in and applying for a position approximately 1.5 to 2 years later.

In his Decision and Order on Remand - Awarding Benefits, the administrative law judge stated that the passage of time, in this case twenty months, did not automatically destroy employer's due process rights. The administrative law judge further found that although employer maintains that it is unable to submit meaningful rebuttal evidence, it had not availed itself of all the opportunities to do so, in that it has not deposed claimant nor any of the employers he contacted, and that employer made only cursory contacts with seven of the twelve employers mentioned in claimant's affidavit. Therefore, the administrative law judge once again found that claimant conducted a diligent job search and his failure to find work rebutted employer's evidence of available job opportunities; accordingly, the administrative law judge awarded claimant permanent total disability benefits.

On appeal, employer contends that the administrative law judge made various errors concerning his admission of evidence regarding whether claimant made a diligent effort to search for employment. Employer contends that the only remedy is to exclude all evidence submitted by all parties following the formal hearing before the administrative law judge. In the alternative, employer recommends that the award be vacated, and the case remanded for a new hearing on all issues. Claimant responds, urging affirmance.

Where, as in the instant case, a claimant has established that he is unable to perform his usual employment duties due to a work-related injury, claimant has established a *prima facie* case of total disability. The burden then shifts to employer

to demonstrate within the geographic area where claimant resides, the availability of specific jobs which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he can compete and reasonably secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Claimant can rebut employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Employer initially contends that the administrative law judge abused his discretion by permitting claimant to submit post-hearing evidence regarding his search for employment; in this regard, employer asserts that the administrative law judge should have decided the case based upon the evidence submitted at the time of the formal hearing. The issue of whether the administrative law judge erred in allowing claimant to submit evidence post-hearing was fully considered and resolved by the Board in the prior appeal of this case by employer; thus, we hold that the Board's decision on this issue constitutes the law of the case, and we decline to consider this issue again.[1] *See Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

Next, employer alleges that the administrative law judge erred in not allowing it

[1]The rule of "law of the case" is a discretionary rule of practice based upon sound policy that when a case is on its second appeal, an appellate body will adhere to its original decision, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first decision was clearly erroneous and allowing it to stand would result in manifest injustice. *See Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359 (1992).

to use vocational evidence to rebut claimant's job search. We disagree. Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operations of the Benefits Review Board, provides that "[w]here a case is remanded, such proceedings shall be initiated and other such action shall be taken as is directed by the Board." *See Obert v. John T. Clark and Son of Maryland,* 23 BRBS 157 (1990). Moreover, the Board has interpreted the relevant provisions of the Act's implementing regulations, 20 C.F.R. §§702.338, 702.339, as affording administrative law judges considerable discretion in ruling on requests for the admission of evidence into the record. *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988). In the instant case, we hold that the administrative law judge acted within his discretion in determining that further vocational evidence which went beyond the scope of rebuttal would not be admitted into the record; in this regard, the administrative law judge specifically noted that evidence such as claimant's deposition or the depositions or affidavits of any of the employers the claimant contacted from December 7, 1995 to December 27, 1995, the time period referred to in claimant's affidavit, would be appropriate evidence and therefore admissible. Thus, as employer has failed to establish that the administrative law judge abused his discretion in declining to admit evidence which went beyond the scope of the Board's remand order, employer's contention of error is rejected.

Lastly, employer asserts that, due to the passage of time, it was permanently precluded from rebutting claimant's alleged post-hearing job search; employer thus urges the Board to remand the case for a hearing on the continued availability of suitable alternate employment. Employer's contention is without merit. As set forth by the administrative law judge, employer in the case at bar declined to avail itself of all of the opportunities available to it in attempting to rebut claimant's showing that he diligently, but unsuccessfully, sought post-injury employment.[2] Accordingly, we affirm the administrative law judge's determination that claimant rebutted employer's showing of suitable alternate employment, and his consequent award of permanent total disability compensation to claimant. *See generally Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT).

Finally, we address claimant's request for an attorney's fee for work performed before the Board which was filed in the previous appeal of this case, BRB No. 96-1301. Claimant's counsel submitted a petition for an attorney's fee before the Board for services rendered between July 1, 1996 and January 10, 1997, for

[2]The administrative law judge specifically noted that employer declined to depose either claimant or the employers whom he allegedly contacted; moreover, employer made only cursory contact with seven of the twelve employers set forth in claimant's affidavit. *See* Decision and Order on Remand at 2.

$5,161.25, representing 24.25 hours of attorney time at $185 per hour, and 11.5 hours of paralegal time at $60 per hour. Employer filed objections to this fee request. Claimant's counsel is entitled to an attorney's fee payable by employer since he successfully defended against employer's appeal. *See Lewis v. Todd Pacific Shipyards Corp*., 30 BRBS 154 (1996). Having reviewed counsel's fee petition, we find the requested fee reasonably commensurate with the necessary work performed. *See Mikell v. Savannah Shipyard Co.,* 24 BRBS 100 (1990), *aff'd on recon.,* 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. V. Mikell*, 14 F.3d 58 (11th Cir. 1994); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). We accordingly award counsel a fee of $5,161.25, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Decision and Order on Remand - Awarding Benefits is affirmed. Claimant's counsel is awarded a fee of $5,161.25 for work performed before the Board in BRB No. 96-1301, payable directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge