BRB No. 04-0883

JOHN LESICA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEALAND SERVICE, INCORPORATED	)	DATE ISSUED: 08/10/2005
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Frank S. Hlavenka (Hlavenka & Weisberg), Woodbridge, New Jersey, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates, LLP), New York, New York, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order on Remand (2001-LHC-2009) of Administrative Law Judge Ralph A. Romano 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). 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 a work-related injury to his back on July 16, 1993, while working for employer as a refrigerator mechanic. Pursuant to the parties' stipulations, the district director awarded claimant permanent total disability benefits beginning on January 2, 1995, at the rate of $886 per week. Subsequently, employer filed a petition for modification under Section 22 of the Act, 33 U.S.C. §922, alleging that claimant was able

to return to his usual employment. Alternatively, employer alleged that claimant was able to perform suitable alternate employment and therefore is only partially disabled.

In his Decision and Order Modifying Benefits, the administrative law judge found that claimant remains unable to perform his usual work, but that employer identified alternate employment suitable for claimant given his restrictions. After determining claimant's post-injury wage-earning capacity, the administrative law judge modified claimant's permanent total disability award to one for permanent partial disability, effective January 12, 2001.

Subsequently, claimant's counsel submitted a fee petition to the administrative law judge seeking an attorney's fee of $50,820, representing 169.40 hours of services rendered at a rate of $300 per hour, plus $3,988.43 in costs.[1] Employer filed objections to the fee petition on the ground that claimant was not successful in defending his award. Employer also contended that neither Section 28(a) nor 28(b) provides a basis for fee liability under the circumstances of this case, and that therefore claimant should be held liable for the fee pursuant to Section 28(c). 33 U.S.C. §928(a)-(c). Finally employer contended that the fee request was not commensurate with claimant's degree of success.

The administrative law judge found that claimant successfully defended his award in that his benefits were not terminated and claimant retained a compensation rate in excess of that urged by employer; therefore, he held employer liable for claimant's attorney's fee. The administrative law judge reduced the requested hourly rate from $300 to $200, finding a rate of $200 to be "more reflective of the quality of representation and complexity of issues involved than the $300 claimed." Supp. Decision and Order at 2. Accordingly, the administrative law judge found employer liable for an attorney's fee of $29,940, for 149.7 hours of attorney services at $200 per hour and the requested costs of $3,988.43.

Both parties appealed the administrative law judge's award of counsel's fee. The Board affirmed the administrative law judge's finding that claimant successfully defended his entitlement to benefits against employer's modification request, since although claimant's benefits were reduced they were not terminated or reduced to the extent employer sought. The Board thus affirmed the conclusion that employer is liable for a fee. The Board agreed with employer that the administrative law judge did not adequately address its contention that the fee award should be tailored to claimant's

[1] By correspondence dated March 26, 2003, claimant's counsel advised the administrative law judge that he had inadvertently included in his fee petition work performed before the district director.

degree of success and remanded the case for reconsideration of the amount of the fee award. *Lesica v. Sealand Services, Inc.*, BRB Nos. 03-0477/A (April 7, 2004) (unpubl.).

In his Order on Remand, the administrative law judge reconsidered claimant's counsel's requested fee in light of the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), and he thereafter affirmed his prior attorney's fee award, finding that that award is reasonable in relation to the results obtained by claimant's counsel. On appeal, employer challenges this attorney's fee award. Claimant responds, urging affirmance.

Employer argues on appeal that the administrative law judge erred in refusing to reduce the time of those entries allocated to claimant's unsuccessful attempt to retain his prior award of permanent total disability benefits. We reject this contention. Where a case involves issues on which claimant has mixed success, if the issues can be differentiated or severed, no fee is permitted for services performed on the unsuccessful issues. *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. 1992); *see also General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). In this regard, in *Hensley*, 461 U.S. 421, 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. Specifically, 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? Secondly, 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 Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that a 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. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. As the Supreme Court stated in *Hensley*, the most critical factor is the degree of success obtained. *Hensley*, 461 U.S. at 437.

In the instant case, it is undisputed that employer initiated a modification proceeding seeking to terminate claimant's benefits or, alternatively, to reduce claimant's permanent total disability award to one for permanent partial disability, and that claimant defended the issue of the extent of his disability. The administrative law judge, finding that employer established the availability of suitable alternate employment, modified the award to one for ongoing permanent partial disability benefits. Claimant's counsel's fee petition documented services performed which both defended his ongoing award and addressed the extent of his disability.[2] Under these circumstances, the administrative law judge committed no reversible error in concluding that the issues all related to the extent of claimant's disability and thus were interrelated, and in considering the case under the second prong of *Hensley*. *See* Order on Remand at 1; *Hensley*, 461 U.S. at 434. Accordingly, as the case involved interrelated issues, the administrative law judge properly addressed whether the work expended on the claim was reasonable in relation to claimant's success in defending his award against employer's request for modification.

Employer challenges the administrative law judge's finding that claimant in this case obtained excellent results, arguing that claimant's counsel's fee must be reduced since the reduction of claimant's benefits from an award for permanent total disability to an award for permanent partial disability resulted in a future loss to claimant of almost $600,000 in compensation benefits.[3] Er's br. at 16. We disagree. Finding that claimant's counsel in this case "obtained excellent results" in accordance with the second prong of *Hensley*, the administrative law judge determined that claimant achieved a level of success which makes the hours reasonably expended by counsel in this case a satisfactory basis for making a fee award. Order on Remand at 1. Specifically, the administrative law judge determined that claimant avoided having his benefits entirely terminated, as urged by employer. In this regard, we note that pursuant to the district director's initial award, claimant had been receiving weekly permanent total disability

[2] We note that claimant is not required to file a fee application that distinguishes the work that he devoted to each issue on behalf of claimant. Rather, Section 702.132(a) of the regulations, 20 C.F.R. §702.132(a), requires an attorney's fee petition to describe with particularity the professional status of the person performing the work, the billing rate, and the hours devoted to each category of work. *See Newport news Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied,* 439 U.S. 979 (1978). In the case at bar, claimant's counsel's fee application is in compliance with the regulation.

[3] Employer alleges that based on claimant's life expectancy the original permanent total disability award, which had a future value of nearly $1.4 million on a non-discounted basis, was reduced to $855,000 as a result of the modification proceedings. Er. br. at 18.

benefits of $886. As a result of the modification proceedings, claimant's weekly compensation rate was reduced to $636.06, as of January 12, 2001, and to $555.15, as of January 15, 2002. Thus, claimant was successful in defending against employer's attempt to terminate his benefits altogether and in obtaining a not insubstantial ongoing permanent partial disability award. On these facts, the administrative law judge's decision not to further reduce counsel's requested fee is consistent with *Hensley*.[4] *See Barbera*, 245 F.3d 282, 35 BRBS 27(CRT). We thus reject employer's contention of error and affirm the administrative law judge's fee award.

Claimant's counsel has filed a fee petition with the Board seeking an attorney's fee of $4,800, representing 16 hours of services at a rate of $300 per hour for work performed while this case was previously before the Board. BRB Nos. 03-0477/A. In response to this fee request, employer seeks a reduction in the hourly rate requested from $300 to $200, and a 50 percent reduction in the overall fee. Claimant has filed a reply to employer's objections.

We note employer's objections, and we agree that the requested hourly rate is excessive in view of the nature and complexity of the initial appeal; accordingly, we reduce claimant's counsel's hourly rate to $250. We conclude, however, that as claimant's counsel was ultimately successful in defending his fee against employer's appeal, the hours requested are reasonable. We therefore award counsel a fee of $4,000, to be paid directly to counsel by employer, for services performed while this case was pending before the Board in BRB Nos. 03-0477/A. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 33 U.S.C. §928; 20 C.F.R. §802.203.

[4] The administrative law judge, in his initial fee award, reduced claimant's counsel's requested hourly rate from $300 to $200, a reduction of 33 percent.

Accordingly, the administrative law judge's Order on Remand is affirmed. Claimant's counsel is awarded a fee of $4,000 for work performed before the Board, in BRB Nos. 03-0477/A, payable directly to counsel by employer.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge