BRB No. 13-0223

DARREN HUGGINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MASSMAN TRAYLOR JOINT VENTURE	)	
	)	
	)	
and	)	
	)	DATE ISSUED: Jan. 28, 2014
ST. PAUL GUARDIAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision on Remand of Supplemental Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Quentin McColgin, Jackson, Mississippi, for claimant.

Elton A. Foster (Waller & Associates), Metairie, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision on Remand of Supplemental Decision and Order (2009-LHC-978) of Administrative Law Judge Patrick M. Rosenow 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 will not be set aside unless shown by the challenging party 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).

This case has previously been before the Board. The appeal before the Board relates solely to the administrative law judge's award of attorney's fees for work performed by claimant's counsel in Case No. 2009-LHC-978. To summarize the facts and procedural history relevant to this appeal, claimant was injured in a fall at work on April 4, 2005, and sought benefits for disability resulting from injuries to his left knee and back and the aggravation of his pre-existing psychological condition.[1] In a Decision and Order issued on November 16, 2010, the administrative law judge found that claimant established a causal relationship between his employment and his present knee and back conditions, but that claimant failed to establish that his work accident aggravated his pre-existing psychological condition. The administrative law judge found, *inter alia*, that claimant's work-related back and knee conditions prevent him from returning to his usual employment duties with employer, and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from May 20 through November 18, 2005, and permanent total disability benefits from November 19, 2005, and continuing. 33 U.S.C. §908(a), (b). Thereafter, the administrative law judge denied both parties' motions for reconsideration.

On or about May 27, 2011, employer filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, and submitted new medical evidence and a new labor market survey (Case No. 2011-LHC-2186). Subsequently, on October 15, 2012, the parties submitted to the administrative law judge a petition for settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). The parties' settlement petition stated that employer had paid claimant a total of $254,762.82 in disability benefits and $14,045.60 in medical benefits to date, and that the parties agreed to settle the claim for an additional $295,000 to be paid for disability benefits, plus a Medicare Set Aside not to exceed $18,814.[2] In a Decision and Order issued on October 19, 2012, the administrative law judge approved the settlement of the claim and the agreed-upon fee for claimant's

[1] The initial hearing in this case, held on May 18, 2007, addressed only the issue of whether claimant's injury was covered under the Act (Case No. 2006-LHC-1830). In a Decision and Order issued on September 18, 2007, the administrative law judge found the claim to be covered under the Act. Thereafter, on November 23, 2009, a second hearing was held to address the merits of the claim (Case No. 2009-LHC-978).

[2] The settlement agreement also provided for an attorney's fee for the work performed by claimant's counsel before the administrative law judge with respect to the modification and settlement proceedings (Case No. 2011-LHC-2186) in the amount of $25,170.74 and an additional attorney's fee for work performed before the Office of Workers' Compensation Programs (OWCP) related to the modification proceedings in the amount of $2,000.

counsel's work performed before the administrative law judge in Case No. 2011-LHC-2186.

Prior to the filing of employer's Section 22 modification petition, claimant's counsel had filed a fee petition with the administrative law judge seeking a fee of $96,371.52[3] for work related to the merits of the claim for disability and medical benefits under the Act (2009-LHC-978).[4] The administrative law judge's Supplemental Decision and Order awarding an attorney's fee was issued on July 14, 2011, prior to the parties' ultimate settlement of the claim pursuant to Section 8(i) during the modification proceedings. In this decision, the administrative law judge reduced counsel's requested hourly rate to $250, and approved the requested paralegal rate of $75 per hour. With respect to the number of hours itemized in Case No. 2009-LHC-978, the administrative law judge approved 238.125 hours of attorney services, and 83.5 hours of paralegal services, and then reduced the resulting fee by 40 percent in order to reflect claimant's limited success. Specifically, the administrative law judge found that claimant was successful with regard to his knee and back injury claims, but not with regard to his psychological injury claim. The administrative law judge additionally approved costs of $8,055.18 related to Case No. 2009-LHC-978.

Claimant appealed the administrative law judge's fee award to the Board, contending that the administrative law judge incorrectly applied the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to reduce his fee for services performed in Case No. 2009-LHC-978 by 40 percent in order to reflect claimant's limited success.[5] The Board agreed with claimant that the administrative law

[3] This amount represents 236.125 hours of attorney services at $300 per hour, 83.5 hours of paralegal services at $75 per hour, and $8,107.52 in expenses itemized in the initial fee petition, and an additional 36 hours of attorney services at $300 per hour itemized in the supplemental fee petition.

[4] This fee petition also included a request for a fee of $70,708.26 for work before the administrative law judge on the initial case involving the issue of coverage under the Act (2006-LHC-1830). In his Supplemental Decision and Order issued on July 14, 2011, the administrative law judge awarded a fee of $42,000, plus $2,003.62 in costs, for work performed before him in Case No. 2006-LHC-1830. As noted *supra*, the fee awarded by the administrative law judge for work in that case is not at issue in the appeal presently before the Board nor was it at issue in the Board's previous decision in this case, *Huggins v. Massman Traylor Joint Venture*, BRB No. 11-0792 (June 27, 2012)(unpub.).

[5] Claimant did not challenge on appeal the administrative law judge's reduction in his requested hourly rate or the reduction of specific time entries, and, thus, the Board affirmed those reductions in its previous decision in this case, *Huggins v. Massman*

judge's analysis of the issue of the extent of claimant's success did not comport with the Supreme Court's decision in *Hensley*. The Board therefore vacated the 40 percent reduction made by the administrative law judge and remanded the case for further consideration, noting that claimant's success should be determined based on the results achieved and not solely on the basis of "successful issues."[6] *Huggins v. Massman Traylor Joint Venture*, BRB No. 11-0792 (June 27, 2012)(unpub.).

The administrative law judge's Decision on Remand of Supplemental Decision and Order was issued on January 30, 2013, subsequent to his approval of the parties' settlement of the underlying claim. In his Decision on Remand, the administrative law judge determined that as claimant's counsel obtained a period of past-due total disability benefits and an ongoing award of permanent total disability benefits up to the point that the case was settled during modification proceedings, claimant was 70 percent successful. The administrative law judge therefore reduced counsel's fee by 30 percent. This determination resulted in an additional fee award to claimant's counsel of $7,079.38.

On appeal, claimant contends that the administrative law judge erred on remand in reducing counsel's fee by 30 percent based on claimant's limited success in obtaining benefits. Employer responds, urging affirmance. Claimant has filed a reply brief.

In challenging the fee awarded by the administrative law judge on remand, claimant contends that the administrative law judge abused his discretion in applying an across-the board 30 percent reduction in counsel's fees based on claimant's limited success. We disagree. The Supreme Court held in *Hensley* that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *See Hensley*, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-36. The courts have

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Traylor Joint Venture, BRB No. 11-0792 (June 27, 2012)(unpub.). Consequently, those reductions are not at issue in the appeal presently before the Board.

[6] As both the administrative law judge's initial fee award in this case and the Board's previous decision in this case predated the parties' ultimate settlement of the underlying claim, the Board's discussion of the issue of the extent of claimant's success was based on the posture of the case prior to administrative law judge's approval of the parties' settlement agreement.

recognized the broad discretion of the adjudicator in assessing the amount of an attorney's fee pursuant to the principles espoused in *Hensley*. *See, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT). Where the adjudicator has determined that the claimant has achieved only limited success, he may make an across-the-board reduction in claimant's counsel's fee. *See B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129, 134 (2009); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91, 94 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192-93 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 794, 33 BRBS 184, 186-87(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

In this case, the administrative law judge found on remand that the most important and contentious issue adjudicated by the parties was the psychological injury claim. Decision on Remand at 3. Specifically, he found that had claimant successfully established that his psychological condition was aggravated by his work injury, it was likely that he would have received extended medical benefits for that condition and that his award of permanent total disability benefits would not be easily susceptible to modification by employer.[7] *Id*. With respect to claimant's assertion that he reasonably expended time developing evidence regarding claimant's psychological condition in order to prevail on the issue of whether employer had established the availability of suitable alternate employment, the administrative law judge stated that the jobs identified by employer's vocational expert were not rejected on the basis that they were incompatible with claimant's psychological condition, but rather, because employer failed to establish the dates the jobs were available or wages for those jobs. *Id*. Lastly, in determining the extent of claimant's success, the administrative law judge considered that claimant obtained total disability benefits for a past-due period as well as an award of permanent total disability benefits that continued until the time that the case was settled during modification proceedings. The administrative law judge concluded that claimant was 70 percent successful and accordingly reduced the fee by 30 percent. *Id*.

Claimant has not established error in the administrative law judge's finding that claimant's success was limited in view of the litigation as a whole nor has claimant established that the reduced fee award is based on an abuse of the administrative law judge's discretion. Contrary to claimant's arguments on appeal, the administrative law judge properly assessed claimant's success in terms of the recovery obtained by claimant as compared to his claimed entitlement. *See Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (the primary consideration under a *Hensley* analysis is "the amount of damages awarded as compared to the amount sought"). Indeed, the Supreme Court emphasized in *Hensley*

[7] The administrative law judge noted in this regard that employer did, in fact, seek Section 22 modification and that the claim was subsequently settled. Decision on Remand at 3 n.8.

that even when the plaintiff obtained significant relief, a reduced fee is nonetheless appropriate "if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440. The administrative law judge is in the best position to observe the factors affecting the fee determination and the Board is not free to substitute its judgment concerning the amount of an appropriate fee in light of claimant's degree of success. *Barbera,* 245 F.3d at 289-90, 35 BRBS at 32(CRT); *Horrigan,* 848 F.2d at 326, 21 BRBS at 82-83(CRT). Thus, as claimant has not established that the administrative law judge's reduction of the fee sought by his counsel is contrary to law or an abuse of discretion in view of claimant's success, we affirm the administrative law judge's reduction of counsel's fee by 30 percent to account for claimant's limited success.

Accordingly, the administrative law judge's Decision on Remand of Supplemental Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH BOGGS
Administrative Appeals Judge