BRB No. 00-0682

KARL B. LANE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: March 30, 2001
	)	
BELL HELICOPTER COMPANY	)	
	)	
and	)	
	)	
CIGNA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order-Awarding Attorney's Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order-Awarding Attorney's Fees (98-LHC-1012) of Administrative Law Judge James W. Kerr, Jr., 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 Defense Base Act, 42 U.S.C. §1651 *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 worked as a civilian for employer in Saudi Arabia and Kuwait during

the Gulf War. During his tenure, he was exposed to numerous toxic substances. Claimant testified that since his return from the war he has suffered from numerous ailments and difficulties, and learned in 1992 that he had developed colon cancer. Following his return from the war, claimant continued to work for employer until September 4, 1997, when he was fired for "insubordination." Although claimant attempted to work at three other aviation companies following his release from employer, he stopped working due to poor health. Claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant failed to establish a *prima facie* case that his colon cancer was due to his exposure to chemicals during his employment during the war. 33 U.S.C. §920(a). However, the administrative law judge found that claimant suffers from neurocognitive deficits which were caused by his exposure to substances during the war. The administrative law judge also found that claimant could not return to his former duties and that employer failed to establish suitable alternate employment. Thus, the administrative law judge awarded claimant temporary total disability benefits from September 4, 1997, and continuing, with an adjustment for the three intervening periods of temporary partial disability. The administrative law judge also awarded necessary and reasonable medical expenses for claimant's multisystem chronic illness, but denied medical benefits for his colon cancer.[1]

[1]This decision was appealed to the Board, *see* BRB Nos. 99-1007/A. The Board held that the evidence establishes that claimant's colon cancer was work-related pursuant to Section 20(a), 33 U.S.C. §920(a), as a matter of law, and remanded the case for consideration of any remaining issues, including any resulting disability and claimant's entitlement to medical benefits. In addition, the Board held that the administrative law judge erred in considering Section 49, 33 U.S.C. §948a, without affording the parties reasonable notice. Thus, the Board vacated the administrative law judge's finding that claimant was discharged in

Subsequent to the issuance of the administrative law judge's decision, claimant's counsel submitted a fee application requesting $100,110, representing 426 hours of legal services at the hourly rate of $235, plus $8,442.52 in costs. Employer filed objections to the hours spent preparing the attorney's fee petition, the hourly rate, and the number of hours requested.

The administrative law judge considered employer's objections and found that time spent preparing the attorney's fee petition is compensable, but that the number of hours requested for this service should be reduced to 20. In addition, the administrative law judge reduced the hourly rate requested to $200. Lastly, the administrative law judge found that the number of hours requested were "reasonable and necessary, not excessive for the work done and contributed to a successful prosecution of the case." Supplemental Decision and Order at 2. Thus, the administrative law judge awarded claimant's counsel an attorney's fee in the amount of $82,724, representing 413.62 hours of legal services at the hourly rate of $200, plus $8,442.52 in costs.

On appeal, employer contends that the administrative law judge erred in failing to reduce the hours requested given claimant's limited success and that the number of hours awarded is unreasonable. In addition, employer contends that the administrative law judge erred in awarding a fee for time spent preparing the fee petition. Claimant responds, urging affirmance of the administrative law judge's attorney's fee award.

Employer first contends that the administrative law judge erred in failing to reduce the amount of the fee award based on claimant's limited success. Employer contends that as the administrative law judge did not find that claimant's colon cancer was related to his workplace exposures, the time spent on this issue should not be compensable. In addition, employer contends that the number of hours awarded is unreasonable given the nature and complexity of the instant case. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation,

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violation of Section 49 and instructed the administrative law judge to reconsider this issue on remand. The administrative law judge's decision was affirmed in all other respects.

the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989); *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Initially, we reject employer's contention that the administrative law judge failed to reduce the hours requested given claimant's limited success. This contention was not raised before the administrative law judge cannot be raised for the first time before the Board.[2] *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We also reject employer's contention that the administrative law judge erred in awarding claimant's counsel a fee for time spent preparing the attorney's fee petition, as the Board has held that this time is compensable. *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (2000).

The administrative law judge, however, summarily awarded counsel all of the requested hours without specifically addressing employer's objections. In this regard, employer objected below to the number of hours requested for preparation of

[2]Moreover, we note that claimant's counsel successfully established the causal relationship between claimant's multisystem chronic illness and his work-related exposure to toxic substances and that claimant was awarded temporary total disability and medical benefits due to his multisystem chronic illness. Further, on appeal, the Board held that the evidence established that claimant's colon cancer was causally related to his workplace exposures as a matter of law. Therefore, as claimant was fully successful, this case is not, contrary to employer's assertions, inconsistent with *George Hyman Construction Co. v. Brooks,* 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

trial exhibits and the number of hours requested for preparation of the closing brief. The administrative law judge stated only that the hours "are reasonable and necessary, not excessive for the work done and contributed to a successful prosecution of the case." *See* Supplemental Decision and Order at 2. The administrative law judge's summary acceptance of the number of hours requested, without discussion of employer's objections, requires that we vacate the administrative law judge's supplemental decision, and remand the case for reconsideration of claimant's counsel's fee petition in light of employer's specific objections and counsel's reply thereto.[3] *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

[3]The number of hours requested in this case far exceeds that usually requested in a successful case under the Act. Claimant's response to employer's objections state his justification for the high fee request in this case.

Accordingly, the administrative law judge's Supplemental Decision and Order-Awarding Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge