

BRB Nos. 90-2139
and 92-0499

ERVIN TRAINOR)
)
 Claimant-Respondent)
)
 v.)
)
 INGALLS SHIPBUILDING,) DATE ISSUED:
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for the self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees (88-LHC-3093) of Administrative Law Judge Ben H. Walley 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). 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant has been employed intermittently as a pipefitter in employer's shipyard since 1968, where he has been exposed to workplace noise. On October 3, 1987, claimant underwent an audiological examination which was interpreted by Dr. James L. Fitch, Ph.D, as indicating a 5.6 percent impairment in claimant's right ear and a 50.6 impairment in his left ear, or a binaural hearing loss of 13.1 percent under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Dr. Fitch indicated that claimant's pattern of hearing is characteristic of a loss that is noise-induced. Cx. 2. A December 10, 1987, audiometric examination was interpreted by Dr. Douglas W. Lamppin as showing a zero percent hearing loss in claimant's right ear and a 39 percent loss in his left ear. Dr Lamppin opined that claimant's right ear hearing loss was consistent with a noise-induced hearing loss, but that the left ear loss was not the type classically seen in noise-induced hearing loss. A February 4, 1988, audiogram was interpreted by Dr. Gordon Stanfield, Ph.D., as indicating a zero percent hearing loss in claimant's right ear and a 39.38 percent hearing loss in his left ear. Dr. Stanfield indicated that he did not feel that the loss of hearing in claimant's left ear was noise-induced. Claimant filed a claim for hearing loss benefits under the Act on November 4, 1987.

In his Decision and Order Awarding Benefits, the administrative law judge found that although the hearing loss in claimant's right ear was work-related, his left ear loss was not.¹ Crediting the results of the later two audiograms which indicated that claimant exhibited a zero percent right ear hearing loss in accordance with Dr. Lamppin's testimony that the lowest audiogram contains the most accurate results, the administrative law judge concluded that claimant sustained no compensable hearing loss under the Act. The administrative law judge further determined that although claimant sustained no disability as a result of his noise exposure, he did suffer a work-related injury entitling him to reasonable and necessary medical benefits under Section 7 of the Act, 33 U.S.C. §907.

Claimant's attorney thereafter filed a fee petition for work performed at the administrative law judge level, requesting \$2,197.60 in fees representing 14.75 hours of time billed at \$125 per hour, and \$353.85 in expenses. Employer filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge addressed employer's objections to the fee request, reduced the hourly rate for lead counsel Lowry Lomax to \$100 and the rate for associate counsel Rebecca Ainsworth and John F. Dillon to \$90, and disallowed 3.125 hours of the 14.75 hours claimed. The administrative law judge, therefore, awarded claimant's counsel the sum of \$1425.10, representing 2.5 hours of attorney services performed by Lowry Lomax at \$100 per hour, 6.5 hours of services performed by Rebecca Ainsworth, at \$90 per hour, and 2.625 hours of services performed by John F. Dillon, at \$90 per hour, plus the requested expenses of \$353.85. Supplemental Decision and Order at 3.

On appeal, employer initially contends that the administrative law judge erred in awarding claimant future medical benefits. BRB No. 90-2139. Employer also appeals the administrative law

¹As no party has contested the administrative law judge's finding in this regard, we will not address the propriety of this determination.

judge's fee award, contending that the administrative law judge erred in awarding claimant's counsel a fee because there was no successful prosecution of the claim. In the alternative, employer contends that if a fee is owed, it should be far less than the amount awarded. BRB No. 92-0499. Claimant responds, urging affirmance of both of the administrative law judge's decisions.²

Employer's argument that the administrative law judge erred in awarding claimant future medical benefits is rejected. The recent opinion of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir.1993), is dispositive of the issue presented in this appeal. In *Baker*, the court held that where a claimant suffers a work-related hearing loss that does not result in measurable impairment under the *AMA Guides*, he may still be entitled to medical benefits under Section 7 if they are found to be reasonably necessary. The court also stated that there must be an evidentiary basis for the award of medical benefits, such as past expenses incurred or evidence of treatment necessary in the future. *Id.* In one of the two cases consolidated in *Baker*, the court reversed the award of medical benefits as it lacked such an evidentiary basis. In the second claim, the court remanded, noting conflicting evidence regarding the necessity of future treatment.

In the instant case, Drs. Fitch and Stanfield both advised claimant to undergo annual audiometric reevaluations. In addition, Dr. Fitch indicated that claimant was a candidate for amplification. Cl. Ex. 2; Emp. Ex. 6.³ As both Drs. Fitch and Stanfield stated that medical treatment would be necessary in the future, the administrative law judge's award of future medical benefits pursuant to Section 7 is affirmed as it is supported by substantial evidence and accords with law. *Baker*, 991 F.2d at 166, 27 BRBS at 16(CRT).

²Claimant's motion to strike statements contained in employer's brief in BRB No. 90-2139 is denied. We will, however, consider claimant's argument that Dr. Stanfield made a specific recommendation for annual re-evaluations contained therein as part of claimant's response to employer's appeal.

³Although the administrative law judge found that all of the doctors agreed that claimant should undergo yearly re-evaluations, only Drs. Fitch and Stanfield actually so opined. Dr. Lamppin did not give any opinion as to whether claimant should undergo yearly re-evaluations. Any error which the administrative law judge may have made in this regard is harmless; the opinions of Drs. Fitch and Stanfield provide substantial evidence to support the administrative law judge's award of future medical benefits.

Turning to the appeal of the administrative law judge's fee award, we reject employer's contention that the administrative law judge erred in holding it liable for claimant's attorney's fee because there was no successful prosecution of the claim.⁴ In this case, employer controverted causation, and claimant ultimately prevailed on this issue, a necessary prerequisite of establishing his entitlement to an award of future medical benefits. As claimant's counsel successfully prosecuted his claim for medical benefits, the administrative law judge's finding that claimant's attorney is entitled to a fee to be assessed against employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), is affirmed. *See Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); *Biggs v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 91-300, slip op. at 3-4 (November 24, 1993)(Brown, J., dissenting).

We also reject employer's alternate contention that the amount of the fee award is excessive. Although employer asserts that a consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal, or at least a substantial reduction, of the \$1,425.10 fee awarded, we need not address these arguments which have been raised for the first time on appeal. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(Brown and McGranery, JJ., concurring and dissenting); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).⁵ We note, however, that the administrative law judge explicitly considered the factors cited by employer in reducing the \$125 hourly rate requested to \$100 for claimant's lead counsel and to \$90 for claimant's associate counsel. Moreover, we note that employer paid no benefits voluntarily and that claimant's counsel's efforts before the administrative law judge resulted in claimant obtaining an award of future medical benefits. On these facts, employer has not met its burden of establishing that the award of \$1,071.25 in fees and expenses totalling \$353.85 was unreasonable.⁶

⁴Employer suggests that there has been no successful prosecution of this claim because the question of claimant's entitlement to future medical benefits is on appeal. It is well established, however, that to further the goal of administrative efficiency an administrative law judge may render an attorney's fee determination when he issues his decision; such an award, however, does not become effective, and thus is not enforceable, until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

⁵The general allegations made in employer's appellate brief regarding the amount of benefits do not raise the limited success issues addressed in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Employer identifies no specific manner in which the fee should be reduced due to claimant's success on only the medical benefits issue. *See Biggs v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 91-300, slip op. at 5 (November 24, 1993)(Brown, J., dissenting).

⁶Employer cites *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991)(unpublished) in support of its assertion that the fee awarded is excessive. In *Cuevas*, the Board reduced an attorney's fee award to \$1,000, holding that the administrative law judge abused his discretion in awarding \$2,150 for 23.5 hours of legal time, where it was obvious prior to the time that the claim was filed that the most claimant could hope to obtain was a *de minimis*, award of \$90 for his occupational hearing loss. The Board has held that unpublished cases should not be cited or

Although employer also asserts that the hourly rates awarded exceed reasonable and customary charges for routine compensation claims in the area in which the claim arose and urges that a rate of \$60 to \$65 for the junior associates and of \$75 to \$80 for claimant's lead attorney would be more appropriate, we also reject this argument. Employer's unsupported assertions are insufficient to meet its burden of establishing that the hourly rate awarded was unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). *See generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge, contending that time spent in certain discovery-related activity, in trial preparation, and in reviewing and preparing various legal documents was either unnecessary or excessive. In entering the fee award, the administrative law judge considered the totality of employer's objections, disallowed 3.125 of the itemized hours as excessive, and found the remaining services claimed to be reasonable and necessary. We decline to reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Finally, we reject employer contentions regarding claimant's counsel's quarter-hour minimum billing method. The Board has previously determined that this method is reasonable and complies with the applicable regulation, 20 C.F.R. §702.132. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). We thus reject employer's contentions on appeal and affirm the fee award made by the administrative law judge.

relied upon by the parties as they lack precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990). The Board's decision in *Cuevas*, moreover, was based on the facts of that case in determining that the administrative law judge abused his discretion in awarding a fee and has no bearing on the fee award herein. *See Poole v. Ingalls Shipbuilding, Inc.*, BRBS , BRB Nos. 92-1259 and 92-1259A (November 24, 1993).

Accordingly, the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fee of the administrative law judge are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge