

BRB No. 01-0365

RENE M. DARBY)
)
 Claimant-Petitioner)
)
 v.)
)
 INGALLS SHIPBUILDING,)
 INCORPORATED) DATE ISSUED: Dec. 28, 2001
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard D. Mills,
Administrative Law Judge, United States Department of Labor.

Blewett W. Thomas, San Antonio, Texas, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for
self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (91-LHC-49, 97-LHC-1556) of
Administrative Law Judge Richard D. Mills 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; the
award will not be set aside unless it is shown by the challenging party to be arbitrary,
capricious, an abuse of discretion or not in accordance with law. *See, e.g., Corcoran*
v. Preferred Stone Setting, 12 BRBS 201 (1980).

This case has a protracted procedural history, which we need not recount. Relevant to
the instant appeal, the administrative law judge awarded claimant's counsel an attorney's fee
of \$21,791.25, representing 242.125 hours at an hourly rate of \$120, and expenses
of \$2,272.55, for work performed before the administrative law judge. Claimant
appealed the fee award. The Board affirmed the administrative law judge's decision
to reduce the number of compensable hours by 25 percent to account for claimant's

limited success. The Board also affirmed specific reductions in itemized entries as within the administrative law judge's discretion. The Board remanded the case for the administrative law judge to reconsider counsel's entitlement to a fee for certain costs, noting that an award of costs is not to be reduced to account for limited success. *See* 33 U.S.C. §928(d). The Board also remanded for the administrative law judge to reconsider counsel's entitlement to a fee for services performed in connection with counsel's investigation of the labor market. Finally, the Board remanded the case for reconsideration of the hourly rate. In this regard, the Board stated that counsel was not requesting an enhanced hourly rate, but was claiming his normal billing rate of \$175 per hour. The Board stated that the applicable regulation, 20 C.F.R. §702.132(a), states that the fee application should state the normal billing hour of the person performing the work. Moreover, pursuant to Section 702.132(a), the fee awarded should be reasonably commensurate with the necessary work performed and take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. *Darby v. Ingalls Shipbuilding, Inc.*, BRB No. 99-0618 (March 10, 2000).

On remand, the administrative law judge awarded counsel an additional fee and costs of \$3,172.30. Pertinent to the issue now before the Board, the administrative law judge reinstated his initial determination that counsel is entitled to his fee based on the hourly rate of \$120. Claimant appeals this determination, and employer responds in support of the administrative law judge's decision on remand.¹

Claimant contends that the awarded hourly rate of \$120 is so low so as to constitute an abuse of the administrative law judge's discretion. Claimant contends the administrative law judge improperly reduced the fee request due to limited success in terms of both the hourly rate and the number of hours. We reject claimant's contentions. Section 28(b) of the Act, 33 U.S.C. §928, which is applicable here, provides for employer's liability for a "reasonable" attorney's fee. The administrative law judge properly considered the hourly rate in terms of the regulation at 20 C.F.R. §702.132(a), which states that the fee awarded should be

¹Claimant initially contends that employer improperly interpreted the administrative law judge's fee award on remand regarding the additional fee to which claimant's counsel is entitled. In its response brief, employer states that it re-read the administrative law judge's decision and agrees with claimant's contention that it is liable for an additional fee and costs totaling \$3,172.30. This issue, therefore, is moot.

reasonably commensurate with the necessary work performed, the quality of the representation, and the amount of benefits awarded. The administrative law judge stated that the quality of the representation was “decidedly average,” and that the preparation of the record could have been more efficient. The administrative law judge found that the issues presented were of only ordinary complexity, involving basic components of a claim: nature and extent of claimant’s disability, causation, and wage-earning capacity; the administrative law judge thus found that neither special legal skill nor extraordinary research was required. The administrative law judge also found that given the number of hours for which services were awarded, an hourly rate of \$175 would result in an excessive fee in relation to the success obtained.

The administrative law judge’s decision on remand comports with the Board’s instruction that he consider the hourly rate in conjunction with 20 C.F.R. §702.132(a), and his findings regarding the factors pertinent to the fee award in this case are within his discretion and are rational. Moreover, as the Board stated in its prior decision, the administrative law judge is not required to award counsel the hourly rate claimed if he determines that the number of hours times the normal billing rate would result in an excessive fee given the degree of success. *See Hensley v. Eckerhart*, 461 U.S. 421, 435-436 (1983); *Stowars v. Bethlehem Steel Corp.*, 19 BRBS 134 (1986). In this case, the administrative law judge’s fee award amounts to over \$24,500. Claimant has not established that this fee award constitutes an abuse of discretion based on claimant’s success in this case.² *See generally Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999). Thus, we affirm the administrative law judge’s fee award based on an hourly rate of \$120.

Accordingly, the administrative law judge’s Decision and Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY

²As the Board has noted previously, claimant was unsuccessful in obtaining additional benefits for his 1987 injury when the case was before the administrative law judge after remand from the Fifth Circuit. Thus, claimant’s success was limited to his recovery of temporary total disability, permanent total disability and ongoing permanent partial disability benefits for his 1992 injury. *See Darby*, BRB No. 99-0618, slip op. at 2-3; *see also* Board’s fee orders dated May 24, 1999 and August 20, 1999, in BRB No. 92-1547.

Administrative Appeals Judge

BETTY JEAN HALL

Administrative Appeals Judge