

BRB No. 97-0847

LESTER J. TEER
(Deceased)

Claimant-Petitioner

v.

INGALLS SHIPBUILDING,
INCORPORATED

Self-Insured
Employer-Respondent

DATE ISSUED:

DECISION and ORDER

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

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Attorney Fees (88-LHC-3711) 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 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel sought an attorney's fee of \$2,845.50 for 22.63 hours at \$125 an hour, and \$16.75 in costs, for work performed before the administrative law judge in connection with claimant's hearing loss claim. In his initial Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded counsel a fee of \$2,049.30, payable by employer. Employer appealed, arguing that claimant's counsel is not entitled to any attorney's fee because he did not successfully prosecute his claim, and,

in the alternative, argued that the attorney's fee awarded is excessive. Claimant responded, urging affirmance.

On appeal, the Board vacated the administrative law judge's award of an attorney's fee and remanded the case for the administrative law judge to "admit relevant documents into evidence as necessary and to address the parties' contentions with regard to the successful prosecution issue in greater detail."¹ *Teer v. Ingalls Shipbuilding, Inc.*, BRB No. 92-2638 (Jan. 25, 1996), slip op. at 3. On remand, for the first time, claimant's counsel argued that a judicial determination must be made as to the amount of benefits owed claimant based on the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993), because such action is necessary to truly determine whether there has been a successful prosecution of the claim. Specifically, claimant argued that benefits should have been paid pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23), and, thus, that claimant is actually entitled to greater benefits than had been initially paid by employer, entitling counsel to a fee for work performed before the administrative law judge.²

In his Decision and Order on Remand Denying Attorney Fees, the administrative law judge initially declined claimant's request that he determine the amount of benefits owed claimant. In addition, the administrative law judge determined that there has been no successful prosecution of the claim and therefore denied counsel an attorney's fee for work performed before him.

¹In its decision, the Board noted that employer's contentions on appeal were based on attachments to its brief in support of its Petition for Review, most notably the Notice of Final Payment, LS-208, indicating that claimant had been fully paid benefits prior to the case's referral to the Office of Administrative Law Judges, rather than on documents admitted into evidence. *Teer v. Ingalls Shipbuilding, Inc.*, BRB No. 92-2638 (Jan. 25, 1996).

²The United States Supreme Court, in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993), held that all claimants with occupational hearing loss claims should have their benefits calculated under the schedule provisions of Section 8(c)(13), 33 U.S.C. §908(c)(13).

On appeal, claimant's counsel argues that the administrative law judge erred by refusing to render a determination as to the amount of benefits actually owed claimant in light of *Bath Iron Works*. Counsel maintains that the additional benefits owed claimant as a result of the change in law is sufficient to establish a successful prosecution of the claim, thereby entitling her to an attorney's fee. Employer responds, urging affirmance.

The facts in this case are undisputed. Employer, at the hearing, presented its modified Notice of Final Payment, LS-208, documenting the payments made to claimant pursuant to Section 8(c)(23), wherein it was revealed that claimant had received an overpayment of benefits more than sufficient to account for the Section 14(e), 33 U.S.C. §914(e), penalty and interest claimant sought to have assessed against employer in this case.³ Employer's Exhibit G. In addition, this document showed that claimant had received all of the benefits owed him prior to his death on May 26, 1988,⁴ and thus, employer's full payment of the claim preceded the referral of this case to the Office of Administrative Law Judges. Employer's Exhibit G. As a result, the parties agreed at the hearing that claimant had received everything to which he was entitled for his hearing loss, Hearing Transcript (HT) at 4, and the administrative law judge granted the parties' joint Motion to Remand on the grounds that there were no issues left to be resolved.⁵ HT at 5.

After reciting these facts, the administrative law judge, on remand, declined counsel's request to make a judicial determination regarding the amount of benefits on three grounds. First, the administrative law judge determined that counsel's agreement, at the hearing and in her Motion to Remand, that claimant had received all that he was entitled to receive prior to his death, precludes any further consideration regarding the amount of benefits in this case. Second, the administrative law judge noted that the scope of the Board's remand order was limited to a determination of whether a "successful prosecution" had occurred for purposes of an attorney's fee and, thus, did not encompass a judicial determination of the benefits owed. Third, the administrative law judge found that claimant's counsel failed to put forth any specific evidence supporting her position that claimant's benefits had been improperly calculated. Moreover, the administrative law judge

³The evidence establishes that the overpayment occurred as a result of employer's initial payment of benefits for a 12 percent whole man impairment and the subsequent determination that claimant was entitled to benefits for only a ten percent whole man impairment.

⁴In fact, even after figuring in amounts owed under Section 14(e) and for interest, the parties acknowledged that claimant still had received an overpayment from employer of \$98.39. Employer's Exhibit G; HT at 4.

⁵Moreover, the Director, Office of Workers' Compensation Programs, who became involved in the claim upon claimant's death without any heirs seeking payment of any additional benefits owed claimant to the Special Fund, similarly conceded that no benefits were due and withdrew his participation.

noted that the parties had relied upon the prior determination and that employer had not been given any opportunity to submit evidence regarding this issue.

We affirm the administrative law judge's refusal to entertain counsel's request that he determine the amount of benefits owed claimant. The administrative law judge rationally determined that counsel, by agreeing with employer that no issues remained unresolved, waived any request for a judicial determination regarding benefits owed claimant. Additionally, given that claimant has been deceased for almost ten years, counsel's standing to seek additional benefits on claimant's behalf is rather tenuous. Moreover, we note that counsel's efforts in this instance are tantamount to a request for modification based upon a change in law which is, in and of itself, inappropriate and untimely. 33 U.S.C. §922; *McDonald v. Director, OWCP*, 897 F.2d 1510, 23 BRBS 56 (CRT)(9th Cir. 1990), *rev'g on other grounds McDonald v. Todd Shipyards Corp.*, 21 BRBS 184 (1988); *Ryan v. Lane & Co.*, 28 BRBS 132 (1994). Moreover, inasmuch as benefits in the instant case, including any amounts owed for the Section 14(e) assessment and interest, had been paid in full prior to the time the case was referred to the Office of Administrative Law Judges, we affirm the administrative law judge's determination that there has been no successful prosecution of this claim before the administrative law judge. *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). Consequently, the administrative law judge's denial of an attorney's fee in this case is affirmed.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Attorney Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

