BRB No. 91-0294

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

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

John L. Hunter (Cumbest, Hunter & McCormick), Pascagoula, Mississippi, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (89-LHC-3250) 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.* (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).

*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 was exposed to repeated noise during his employment as a chipper with employer from 1953 through 1975. On December 23, 1971, claimant underwent an audiometric evaluation which reflected a 45.32 percent binaural impairment. *See* EX 5. Subsequent audiometric evaluations performed on October 16, 1986, July 7, 1987, and August 6, 1987, revealed binaural hearing impairments of 63 percent, 59 percent, and 46.3 percent, respectively. *See* CX 2; EX 15; EX 4. On November 6, 1986, employer filed a Form LS-202, First Report of Injury, in which it stated that it first became aware of claimant's alleged work-related hearing loss on October 13, 1986. *See* EX 1. During 1987 and 1988, employer unsuccessfully attempted to settle the claim. *See* EXS 9, 10. On May 10, 1988, employer filed a Notice of Controversion. *See* EX 2. Thereafter, on December 2, 1988, employer voluntarily commenced payment of compensation to claimant based on a 55.33 percent binaural impairment, which it converted to a 19 percent impairment of the whole person. *See* EX 11.

At the formal hearing, the parties stipulated that the date of the filing audiogram, August 6, 1987, represented the date of injury, and that claimant filed a claim for compensation, Form LS-203, on March 13, 1989. *See* JX 1. In his Decision and Order Awarding Benefits, the administrative law judge, after accepting the forementioned stipulations, found that the claim was timely pursuant to Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913 (1988). Next, the administrative law judge found the most recent audiometric evaluation, which revealed a 46.3 percent binaural impairment, to be determinative of claimant's hearing loss, converted that impairment into a 16 percent whole person impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), and awarded claimant compensation under Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988). Lastly, the administrative law judge found claimant entitled to penalties under Section 14(e), 33 U.S.C. §914(e), interest in accordance with 28 U.S.C. §1961 on all past due benefits, and medical expenses arising out of his work injury.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of $1,354, representing 13.2 hours of services rendered at $100 per hour and .85 hours for paralegal services at $40 per hour, plus expenses of $390.75. Employer filed objections to the fee petition. After reviewing employer's objections to this petition, the administrative law judge awarded the amount requested by counsel.

On appeal, employer contends that the administrative law judge erred in finding this claim timely filed and in determining that it is liable for claimant's counsel's fee. Claimant responds, urging affirmance.

Initially, we reject employer's contention that the administrative law judge erred in applying the Act as amended in 1984 in this case. Section 28(a) of the Amendments provides that the 1984 Amendments to Sections 8(c)(13), 12, and 13 apply to claims pending or filed after September 28, 1984, the date of enactment. Publ.L.No. 98-426, §28(a), 98 Stat. 1639, 1655; *see Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989). Since the instant claim was either pending or filed after the enactment date, the amended provisions of the Act are applicable. This holding is in accordance with prior decisions that an amendment to the statute of limitations is procedural, going to matters of remedy, and thereby applies to claims filed after the amendment of

the limitations provision. *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982), *cert. denied*, 459 U.S. 1034 (1982); *Cooper Stevedoring of Louisiana, Inc. v. Washington*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977). Thus, the administrative law judge committed no error in applying the amended Act to this claim.

Employer next contends that the administrative law judge erred in commencing the running of the notice and filing requirements contained in Sections 12 and 13 of the Act as of August 6, 1987. Employer asserts that the commencement date of the statute of limitations should be December 23, 1971, the date of claimant's initial audiometric evaluation or, alternatively, October 6, 1986, the date claimant received a copy of the 1971 audiogram. We disagree. Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D) (1988), provides that the time for filing a notice of injury for a loss of hearing under Section 12 or a claim for compensation under Section 13 will not commence "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." *See Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

In the instant case, employer does not contend that claimant received a copy of his 1971 audiogram when that test was performed; thus, as claimant did not physically receive a copy of his audiogram with the accompanying report at that time, we reject employer's assertion that the running of the statute of limitations commenced on December 23, 1971. Furthermore, claimant's receipt in October 1986 of a graph of his 1971 audiogram cannot support a commencement date of October 1986, since it is uncontroverted that the graph received by claimant at that time was unaccompanied by a report. *See* EX 5. Accordingly, as employer has failed to establish that claimant received an audiogram with an accompanying report earlier than August 6, 1987, we affirm the administrative law judge's determination that that the statute of limitations did not commence prior to this date.

Employer next asserts that because claimant did not file a claim for compensation until March 12, 1989, the administrative law judge erred in finding the claim to be timely filed pursuant to Section 13 of the Act, 33 U.S.C. §913 (1988). In the instant case, the administrative law judge, after finding that the running of the statute of limitations commenced on August 6, 1987, summarily concluded that "Claimant's notices to Employer November 6, 1986 and March 13, 1989 are timely."[1]

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[1]The administrative law judge apparently relied upon expanded statute of limitations for occupational diseases contained in Section 13(b)(2) of the Act, which provides:

. . . a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease or disability, or within one year of the date of the last payment of compensation, whichever is later.

See Decision and Order at 3.

Subsequent to the appeal of this case, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), wherein the Court found that a worker who sustains a work-related hearing loss suffers a disability simultaneously with his or her exposure to excessive noise. As a loss of hearing occurs simultaneously with the exposure to excessive noise, the injury is complete when the exposure ceases, and the date of last exposure is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss. *See Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Based on this analysis, the court stated that hearing loss cannot be considered "an occupational disease which does not immediately result in disability," *see* 33 U.S.C. §910(i), and held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated 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). As Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2), contains language similar to Section 10(i), the Board has recently noted the inapplicability of Section 13(b)(2) in cases arising as a result of an alleged work-related loss of hearing. *See Vaughn*, 28 BRBS at 131-132. In the instant case, as Section 13(b)(2) does not apply, we vacate the administrative law judge's finding that the claim was timely filed and we remand the case for the administrative law judge to reconsider this issue in light of *Bath Iron Works*.

On remand, the administrative law judge must specifically address the conflicting evidence of record regarding the date upon which claimant filed his claim. A claim need not be on a particular form to satisfy the requirements of Section 13, and any writing will suffice so long as it discloses an intention to assert a right to compensation. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988). In the instant case, the parties stipulated that claimant filed his claim form on March 13, 1989, *see* JX 1; this document is not in the record. Employer's exhibits, however, make repeated references to the existence of a claim prior to 1989. Specifically, employer acknowledges the existence of a claim in its settlement offer of August 21, 1987. *See* EX 9. Employer's claims administrator recognized the existence of a claim in a July 5, 1988, letter to claimant. *See* EX 10. Thereafter, employer commenced voluntary payments of compensation in December 1988. The administrative law judge on remand, when addressing the timeliness issue, must determine when claimant asserted a right to compensation and reach a conclusion as to whether a claim was timely filed pursuant to Section 13 of the Act.

Lastly, since *Bath Iron Works* is applicable to the timeliness issue raised, it would be incongruous to ignore the Supreme Court's holding that claims for hearing loss benefits under the Act, whether filed by current employees or retirees, must be compensated pursuant to Section 8(c)(13). Accordingly, although neither party challenges the administrative law judge's award of benefits under Section 8(c)(23), pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23) and modify the award to reflect that claimant, should he establish that his claim is timely, is entitled to

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33 U.S.C. §913(b)(2)(1988).

permanent partial disability compensation pursuant to Section 8(c)(13).[2] Accordingly, on remand, should the administrative law judge determine that the claim is timely filed, he must calculate claimant's award of permanent partial disability compensation pursuant to Section 8(c)(13) of the Act. *See generally Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

In a supplemental appeal, employer challenges the administrative law judge's award of an attorney's fee.[3] 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). Since we remand the case for reconsideration of the timeliness of the claim and calculation of the award, we vacate the fee award and remand it for reconsideration. In the interest of administrative efficiency, we will address employer's specific contentions regarding the administrative law judge's fee award, in the event the administrative law judge awards benefits on remand.

We initially reject employer's contention that it should not be held liable for the fee as the case is on appeal. It is well-established that a fact-finder may award an attorney's fee even if a case is on appeal in order to further the goal of administrative efficiency. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248, 253 (1987). Any such award of an attorney's fee does not become effective and is thus not enforceable until all appeals are exhausted. *Id.* Thus, in the instant case, claimant's counsel's fee is contingent upon claimant's successfully obtaining on remand an award of benefits.

[2]Employer on appeal does not challenge its liability for claimant's hearing loss pursuant to Section 8 of the Act.

[3]We note that on appeal employer incorporates by reference the objections it raised before the administrative law judge.

Employer next argues that it should not be liable for a fee as claimant was not successful in obtaining compensation greater than that voluntarily paid. We disagree. Specifically, we note that although employer made voluntary payments of compensation to claimant based on a 19 percent impairment of the whole person, our decision modifies the administrative law judge's Decision and Order to reflect that claimant, should his claim be found to be timely, is entitled to permanent partial disability compensation pursuant to Section 8(c)(13), based upon claimant's binaural impairment.[4] Thus, claimant, with the assistance of counsel, has potentially succeeded in establishing entitlement to compensation payments higher than those voluntarily tendered by employer. Moreover, claimant's attorney was successful before the administrative law judge in establishing claimant's entitlement to a Section 14(e) assessment. Claimant's counsel is entitled to a fee for necessary services performed in obtaining these successful results. *See* 33 U.S.C. §928.

Employer additionally contends that it is should not be held liable for counsel's fee since it offered to settle this claim prior to the referral of the case to the Office of Administrative Law Judges. Employer, however, failed to raise this contention in its objections to the fee petition which it filed with the administrative law judge; thus, we will not address this contention for the first time on appeal.[5] *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); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

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[4]We note that claimant's lack of success at the administrative law judge level in obtaining an award for his binaural impairment under Section 8(c)(13) was due to the law applicable in the Fifth Circuit at that time, rather than a failure by claimant in submitting evidence to prove his claim. Thus, claimant's ultimate success in obtaining benefits under Section 8(c)(13) renders his attorney entitled to a fee for services performed before the administrative law judge if the instant claim is found to be timely. *See generally Hogan v. International Terminal Operating Co.*, 13 BRBS 734 (1981).

[5]Employer also cites to the ruling of the United States Court of Appeals for the District of Columbia Circuit in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992), that where an attorney achieves only limited success in a claim filed under the Act, he may not be entitled to a fee for all hours expended on the case. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the case at bar, however, claimant's attorney did not achieve only partial success, but, rather, was potentially successful in resolving the controverted issues of the nature and extent of claimant's disability, the applicability of Section 8(c)(13), liability for a Section 14(e) penalty, and an attorney's fee in claimant's favor. Thus, the fee award made by the administrative law judge is not inconsistent with *Hensley* and *Brooks*. *See Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993) (Brown, J., dissenting).

Employer next alleges that the lack of complexity of the instant case mandates a reduction in the amount of the attorney's fee awarded by the administrative law judge.[6] An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done and the complexity of the legal issues involved 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). Thus, the complexity of the legal issues is but one factor to be considered when awarding an attorney's fee. *See* 20 C.F.R. §702.132; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge specifically noted that he had considered the quality of representation, the work performed, the complexity of the case, and the benefits awarded, when considering claimant's counsel's fee request. We, therefore, reject employer's contention that the awarded fee must be reduced on this basis.

Employer next challenges the number of hours requested by claimant's counsel and approved by the administrative law judge, contending that time spent in preparing for the formal hearing and in telephone conferences with claimant is unreasonable. In considering the fee petition, the administrative law judge noted employer's objections and thereafter determined that the time requested by claimant's counsel for services rendered were both reasonable and necessary. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; we decline to reduce or disallow the hours approved by the administrative law judge. *See Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Lastly, employer's challenge to the hourly rate awarded to claimant's counsel is rejected. The administrative law judge specifically determined that the requested hourly rate was reasonable and appropriate in the geographic area where this claim arose. Employer's mere assertion that the awarded hourly rate does not conform to the reasonable and customary charges in the area where the claim arose is insufficient to meet its burden of proving that the rate is unreasonable.[7] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Accordingly, the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees are vacated, and the case remanded for reconsideration consistent with this opinion.

SO ORDERED.

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[6]Employer additionally contends that counsel's fee should be reduced since the case was "a routine and uncontested hearing loss claim." Contrary to this assertion, our review of the record reveals that before the administrative law judge employer controverted the issues of the nature and extent of claimant's disability, the applicable subsection under which claimant was entitled to benefits, the applicability of Section 14(e) to this case, and its liability for counsel's fee.

[7]It should be noted that employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; this article, however, does not support employer's contention that the fee awarded in the instant case was unreasonable.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge