

BRB No. 99-0689

ROBERT LIBBY)
)
 Claimant-Respondent)
)
 v.)
)
 LOGISTEC OF CONNECTICUT,) DATE ISSUED:
)
 INCORPORATED)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May), Glastonbury, Connecticut, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar, L.L.P.), Stamford, Connecticut, 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 Fee of Administrative Law Judge David W. Di Nardi (98-LHC-253, 98-LHC-254) 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 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. See *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who was exposed to noise while working for employer and its predecessor New Haven Terminal Corporation, filed a claim for benefits for a work-related hearing loss. In a Decision and Order-Awarding Benefits, the administrative law judge determined that employer is responsible for the payment of any benefits due claimant, that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation, and that employer failed to rebut this presumption. The administrative law judge subsequently found, however, that claimant's hearing loss did not result in a measurable impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1995), and that claimant is therefore not entitled to disability compensation under the Act. Next, the administrative law judge found employer liable for \$225 incurred for claimant's visits to the Yale Clinic for a hearing evaluation, the cost of hearing aids, and all reasonable and necessary expenses for future medical care and treatment related to claimant's hearing impairment, pursuant to Section 7 of the Act, 33 U.S.C. §907.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of \$5,347.50, representing 16.9 hours of services at \$185 per hour for Attorney Kelly, 14.9 hours at \$140 per hour for Attorney Moynihan, 2.7 hours of paralegal services at \$50 per hour, and \$414.63 in expenses. Employer filed objections to the fee petition.

In a Supplemental Decision and Order Awarding Attorney's Fee, the administrative law judge, addressing employer's challenges to specific items on claimant's fee petition, disallowed 2.1 hours for Attorney Moynihan's attendance at a deposition, and reduced the fee requested by \$294. The administrative law judge addressed and rejected employer's remaining objections, finding the fee petition to be a "fair, reasonable and accurate" determination of the appropriate fee. Accordingly, he awarded claimant's counsel a fee of \$5,468.13, including the expenses requested, based on 16.9 hours of services at \$185 per hour for Attorney Kelly, 12.8 hours at \$140 per hour for Attorney Moynihan, and 2.7 hours of paralegal services. Employer appeals the fee award and claimant responds, urging affirmance. Employer has filed a reply brief.

On appeal, employer asserts that the administrative law judge failed to apply the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and the decision 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), to his consideration of the fee petition in this case. Employer alleges that the administrative law judge did not tailor the fee award to claimant's limited success. Employer maintains that in light of *Hensley*, the administrative law judge's award of an attorney's fee of \$5,468.13 is unjustified, given the discrepancy between

what he actually awarded claimant and the \$13,203.49 that claimant would have been awarded had he been fully successful.

In *Hensley*, the United States Supreme Court, creating a two-prong test, held that the attorney's fee awarded should be commensurate with the degree of success obtained in a given case, and defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees. *Hensley*, 461 U.S. at 434; see also *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), cert. denied, 488 U.S. 997 (1988). The Court held that where plaintiff achieves only partial or limited success, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The Court emphasized that the most critical factor is the degree of success obtained. *Hensley*, 461 U.S. at 437. See also 20 C.F.R. §702.132; *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).

Contrary to the employer's contention, the administrative law judge, in addressing the fee petition in the instant case, explicitly applied the two-prong test set out in *Hensley*. Addressing the first prong, the administrative law judge concluded that the legal and factual issues presented in this claim were greatly intertwined, as the time and effort expended by claimant's counsel in regard to the disability claim were material, useful, necessary, and interrelated to obtaining the award for future medical expenses. With regard to the second prong, the administrative law judge rejected employer's assertions that the fee is unreasonable in light of the lack of complexity of the issues involved, concluding that despite lack of success in obtaining disability compensation, claimant's recovery is substantial. The administrative law judge thus considered and resolved the pertinent issues pertaining to the fee petition in accordance with the standards of *Hensley*, and the award of a reasonable fee related to an award of medical benefits also accords with *Baker*. As employer has not shown that the fee award in the instant case is arbitrary, capricious, an abuse of discretion or not in accordance with law, it is affirmed.¹

¹The administrative law judge is not bound by either the decisions of other

administrative law judges or his own decisions in other cases based on different facts.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge