

CHARLENE DAVIS)
)
 Claimant-Respondent)
)
 v.)
) DATE ISSUED: May 7, 2002
 AVONDALE INDUSTRIES,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

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

Joseph G. Albe, Metairie, Louisiana, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for self-
insured employer.

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

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (1996-LHC-2209) 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 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).

Claimant injured her back during the course of her employment in 1993. Employer
voluntarily paid claimant temporary total disability benefits for various periods between 1993
and 1995 and again commencing in 1998. In the case on the merits, the administrative law
judge awarded claimant future medical benefits for psychiatric treatment and a combined
total of \$736.50 for a Section 14(e), 33 U.S.C. §914(e), penalty and interest. He denied
claimant's claim for past medical benefits and continuing disability compensation. In a

supplemental decision, the administrative law judge awarded claimant's counsel a fee for 155 hours of services at a rate of \$150 per hour, but he reduced the fee by one-third due to claimant's limited success, ultimately awarding a total fee of \$15,500.¹ Employer appealed, and the Board held that employer is liable for claimant's attorney's fee under Section 28(b), 33 U.S.C. §928(b), because claimant obtained additional medical benefits and a penalty and interest. However, the Board vacated the fee award and remanded the case for the administrative law judge to address the extent to which counsel's efforts, as opposed to those of the administrative law judge, played a role in claimant's success. Further, the Board remanded for the administrative law judge to explain his rationale for reducing the fee by one-third and to determine whether such a reduction was sufficient in light of claimant's limited success, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Davis v. Avondale Industries, Inc.*, BRB Nos. 00-345/A (Dec. 8, 2000).

On remand, the administrative law judge determined that claimant's award was the result of a combination of counsel's efforts and the administrative law judge's application of the law, as "without counsel's diligent work . . . the Court would not have heard the case." Decision and Order on Remand at 2. Thus, the administrative law judge concluded that counsel's efforts were "intimately related" to claimant's success. *Id.* at 3. With regard to the one-third reduction, the administrative law judge reasoned that claimant was successful on four of six issues, which equates to a success rate of two-thirds; therefore, a reduction by one-third was warranted. The administrative law judge specifically stated that a further reduction in the fee was not necessary. Consequently, he reaffirmed the fee award of \$15,500. *Id.* at 3. Additionally, he awarded counsel a fee of \$800, representing eight hours at a rate of \$150 per hour, reduced by a factor of one-third, for his work on remand. *Id.* at 4. Employer appeals, and claimant responds, urging affirmance.

Pursuant to the decisions in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992), employer contends the administrative law judge should have denied claimant a fee or awarded a greatly reduced fee in light of claimant's limited success. Specifically, employer argues that the award of a \$15,500 fee is exorbitant in view of the facts that claimant was awarded only future medical benefits and \$736.50 in penalties and interest and because these amounts were obtained through the efforts of the administrative law judge, and not

¹The administrative law judge denied employer's motion for reconsideration of the fee award as well as claimant's motion for modification of the fee award to include interest on that award. Orders (April 5, 2000; Nov. 23, 1999).

claimant's counsel. The Board previously remanded this case for the administrative law judge to address these issues, and on remand, the administrative law judge further explained his fee award. He found that counsel's efforts were key to the award because counsel provided "invaluable representation" and concluded that, without counsel's representation and information, he would not have had reason to hear the case or to grant future medical benefits or the penalty or interest. Decision and Order on Remand at 2-3. As the administrative law judge found that counsel's efforts were important to claimant's success, he reaffirmed that a one-third reduction was sufficient to account for claimant's lack of success. *Id.* at 3.

We reject employer's argument that we should interfere with these findings and order a further reduction in the fee award. The administrative law judge has great discretion in compensating counsel for work performed before him. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). This well-established rule is based on the fact that the administrative law judge is in the best position to "observe firsthand the factors affecting [the] analysis of counsel's fee award." *Barbera*, 245 F.3d at 289, 35 BRBS at 32(CRT). In *Barbera*, Administrative Law Judge Barnett awarded the claimant medical benefits, but denied him a nominal award as she believed such an award was precluded by Board law. *Id.*, 245 F.3d at 285, 288, 35 BRBS at 28, 31(CRT). In awarding a fee to the claimant's counsel, Judge Barnett found that claimant successfully prosecuted his claim in the face of employer's contesting every issue. As she determined the case was complex, she awarded claimant's counsel a fee of \$71,247.89, plus \$1,060 for defending the fee. *Id.*, 245 F.3d at 286, 35 BRBS at 29(CRT). The Board affirmed the denial of a nominal award, but vacated the fee award with instructions for the administrative law judge to reconsider the amount of the fee in light of *Hensley* and claimant's limited success in obtaining only medical benefits. In light of the death of Judge Barnett, the case was assigned to Administrative Law Judge Chapman, who affirmed the number of hours requested in the fee petition but reduced the requested hourly rates by one-third. Judge Chapman further reduced this resulting figure by two-thirds to reflect claimant's limited success. *Id.*, 245 F.3d at 286, 35 BRBS at 29-30(CRT). The Board affirmed the reduced fee awards, and the case was appealed to the United States Court of Appeals for the Third Circuit. That court first held that the claimant was entitled to a nominal award of benefits based on Judge Barnett's findings. On the issue of the fee award, the court held that the Board erred in disturbing Judge Barnett's award, as she was most familiar with the case, she recited appropriate factors in assessing the propriety of the fee requested, and her findings were supported by substantial evidence. *Id.*, 245 F.3d at 286, 289-290, 35 BRBS at 30, 32(CRT). The court specifically held that Judge Barnett's fee award was consistent with *Hensley*, and that the Board did not have a basis for substituting its opinion for that of Judge Barnett. *Id.*

In the present case, employer seeks to have the Board vacate or reverse the administrative law judge's fee award of \$15,500 based on its position that the award of benefits does not justify such a fee. We decline to do so. As stated previously, the administrative law judge has great discretion in awarding an attorney's fee. Many factors come into consideration in awarding a fee, and, as the court stated in *Barbera*, the administrative law judge is in the best position to decide what constitutes appropriate compensation for services rendered on a claimant's behalf. Here, the administrative law judge considered the relevant factors. First, he considered claimant's success in obtaining future medical benefits as well as \$736.50 in interest and penalties. Although no dollar figure is given for the award of future medical benefits, claimant was awarded future psychiatric treatment. Such an award cannot be considered insignificant. *Barbera*, 245 F.3d at 290, 35 BRBS at 32(CRT) ("by securing future medical benefits, counsel obtained a substantial benefit" for claimant); *see generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989) (considering future disability award is not unreasonable when awarding fee). Moreover, the administrative law judge specifically found that counsel's services were related to claimant's success, provided the administrative law judge with necessary information, and allowed him to reach a reasoned conclusion. Finally, the administrative law judge acknowledged that claimant was not fully successful, and he accounted for this partial success by reducing the fee award by one-third. This is a reasonable means of adjusting the fee award to account for limited success. *See Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999). As the administrative law judge addressed the issues presented by the Board's order of remand, and as he has fully explained his reasons for awarding an attorney's fee of \$15,500, which is within his discretion, we affirm the administrative law judge's fee award.

Employer also contends the administrative law judge erred in awarding counsel an additional fee of \$800 for work performed on remand. It argues that counsel's efforts on remand did not affect or protect claimant's interests; therefore, he is not entitled to a fee for that work. The administrative law judge found there was no precedent prohibiting the award of a fee for work performed on remand defending a fee. After considering the specific objections, the administrative law judge awarded a fee for eight hours of work at a rate of \$150 per hour. He then reduced the fee by one-third, to match the reduction factor of the original fee, and awarded a fee of \$800 for services performed on remand. Decision and Order on Remand at 3-4.

It is well-established that counsel is entitled to an attorney fee for services performed in defending his entitlement to a fee. *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001); *Barbera*, 245 F.3d at 290, 35 BRBS at 32-33(CRT); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982). In this case, the administrative law

judge considered the fee requested, as well as employer's objections, and awarded a reasonable fee for services performed on remand in defending the original fee award. As employer has not demonstrated that the administrative law judge abused his discretion and a fee for this work accords with law, *id.*, we affirm his determination that counsel is entitled to a fee of \$800 for work performed on remand.

Accordingly, the administrative law judge's fee award, totaling \$16,300, is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's award of an attorney fee for \$15,500 in the case at bar. Despite specific direction from the Board to apply 33 U.S.C. §928(b), authorizing the award of a "reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid . . .," the administrative law judge did not even acknowledge in his Decision and Order on Remand that this is the applicable law. The difference between the amount awarded and the amount paid in the instant case is \$736.50 in penalties and interest and future medical benefits.²

²Employer does not contend that future medical benefits cannot support an attorney's fee award under Section 28(b), although that is an "open question" in the courts. *Barker v. U.S. Department of Labor*, 138 F.3d 431, 439, 32 BRBS 171, 177(CRT)(1st Cir. 1998). Future medical benefits will clearly support an attorney's fee award under Section 28(a),

Furthermore, the administrative law judge did not undertake the appropriate analysis, recognizing that a reasonable attorney's fee compensates counsel only for work related to the issues on which he prevailed, *i.e.*, penalties, interest and future medical benefits. *George Hyman Constr. Co. v. Brooks*, 963 F.3d 1532, 25 BRBS 161(CRT)((D.C. Cir. 1992). In his Decision and Order on Remand, the administrative law judge also failed to acknowledge that he supplied the legal theory on which those awards were based, which his prior decision demonstrates. Decision and Order at 24, 27, 28.

Finally, the administrative law judge failed to tailor the attorney's fee award to counsel's limited success, as the Fifth Circuit directed in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 166, 27 BRBS 14, 16(CRT) (5th Cir. 1993), applying the Supreme Court's teaching in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Farrar v. Hobby*, 506 U.S. 103 (1992), and as the statute makes abundantly clear: "a reasonable attorney's fee [shall be awarded] based solely upon the difference between the amount awarded and the amount tendered or paid . . ." 33 U.S.C. §928(b). Accordingly, I would vacate the attorney's fee award of \$15,500 and remand the case for the administrative law judge to award an attorney's fee in accordance with Section 28(b) of the Longshore Act and the courts' teaching in *Hensley*, *Farrar*, *Brooks* and *Ingalls Shipbuilding*.

REGINA C. McGRANERY
Administrative Appeals Judge

which does not have the restrictive language of Section 28(b)("based solely upon the difference. . ."). See *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).