

WILLIE JAMES JONES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED)	DATE ISSUED: 09/14/2011
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees and the Decision on Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney Fees of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Sue Esther Dulin (Dulin & Dulin, Limited), Gulfport, Mississippi, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees and the Decision on Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney Fees (2007-LHC-1256) of Administrative Law Judge Patrick M. Rosenow 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 injured his back on September 24, 2003, during the course of his employment with employer. Employer voluntarily paid temporary total disability benefits until January 4, 2006, at which time it commenced paying temporary partial disability benefits to claimant. Employer ceased making voluntary payments of benefits to claimant on August 20, 2006, on which date it offered claimant alternate employment at his pre-injury pay level.

In his Decision and Order, the administrative law judge agreed with claimant as to his average weekly wage, but found that employer established the availability of suitable alternate employment, paying \$7 per hour, retroactive to the date of maximum medical improvement, September 15, 2005. Accordingly, the administrative law judge awarded claimant permanent partial disability benefits from September 15, 2005 through August 20, 2006, based upon jobs identified in employer's labor market survey, and permanent partial disability benefits thereafter, based upon employer's offer of suitable alternate employment at its facility at a pay rate slightly lower than claimant's pre-injury earnings. Claimant subsequently sought an attorney's fee for services performed before both the district director and the administrative law judge. The district director awarded claimant's counsel a fee; the administrative law judge, however, denied claimant's request for an attorney's fee payable by employer. Claimant appealed the administrative law judge's permanent partial disability award and his denial of an attorney's fee payable by employer; employer appealed the district director's fee award.

The Board affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment; it vacated, however, the administrative law judge's award of permanent partial disability benefits as of September 15, 2005, and remanded the case for further consideration of the onset date of claimant's partial disability and for a determination of claimant's inflation-adjusted post-injury wage-earning capacity. The Board additionally reversed the administrative law judge's denial of an attorney's fee payable by employer, and affirmed the district director's order awarding an employer-paid attorney's fee. *W.J. [Jones] v. Northrup Grumman Ship Systems, Inc.*, BRB Nos. 08-0848, 09-0116 (Jun. 29, 2009)(unpubl.).

On remand, the administrative law judge awarded claimant permanent partial disability benefits from September 21, 2005 to August 21, 2006, based on a post-injury earning capacity of \$266.46, and ongoing permanent partial disability benefits thereafter, based on a post-injury earning capacity of \$951.91. Claimant's counsel subsequently submitted a petition for an attorney's fee totaling \$42,320.46, representing 156.125 hours of legal services at \$250 per hour, and \$3,289.21 in expenses, for work performed before the administrative law judge. Employer filed objections to counsel's fee request.

In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge addressed employer's objections and awarded claimant's counsel an attorney's fee of \$17,914.21, representing 130 hours of attorney services at an hourly rate of \$225, and expenses in the amount of \$3,289.21. The administrative law judge reduced the requested fee in view of the principles declared in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), as he found that claimant was not fully successful in pursuing his claim. In a Decision on Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge denied claimant's motion for reconsideration of his attorney's fee award and denied claimant's request for an attorney's fee for work performed on remand on the basis that no additional benefits had been obtained by claimant.

On appeal, claimant challenges the administrative law judge's decision to reduce the requested fee due to an alleged lack of success and to disallow payment for all of the time spent by counsel on behalf of claimant while the case was on remand. Employer responds, urging affirmance.

We affirm the administrative law judge's reduction of the requested attorney's fee in view of his rational determination that the requested fee was not commensurate with the degree of success. Specifically, the administrative law judge stated that, although successful on the issue of his average weekly wage, claimant achieved limited success on the issue of the extent of his disability;¹ consequently, the administrative law judge reduced counsel's requested fee by 50 percent. Although employer had stopped making disability payments, the administrative law judge found that claimant's recovery of ongoing permanent partial disability benefits of approximately \$111 per week was "limited" in relation to the litigation as a whole. See *Hensley*, 461 U.S. at 435-436. Supplemental Decision and Order at 5-6; Decision on Motion for Reconsideration at 3. The administrative law judge is in the best position of observing the factors affecting the amount of an attorney's fee award for work performed before him and the Board is not free to substitute its judgment concerning the amount of an appropriate fee in light of claimant's degree of success. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); see also *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Hill v. Avondale Industries, Inc.*,

¹While claimant sought total disability benefits, employer prevailed in establishing the availability of suitable alternate employment, thus rendering claimant's disability partial in extent. On remand, claimant prevailed in establishing that his partial disability commenced on September 21, 2005, rather than September 15, 2005, and in obtaining the administrative law judge's calculation of his post-injury wage-earning capacity with an inflation adjustment.

32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). As claimant has not established that the administrative law judge's decision to reduce the requested fee is contrary to law or an abuse of discretion in view of claimant's degree of success, we reject claimant's contentions of error in this regard. *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003); 20 C.F.R. §702.132.

Claimant also challenges the administrative law judge's decision to disallow the time expended before the administrative law judge after the Board remanded this case on June 29, 2009. Claimant asserts that the post-remand entries reflect legal work that was necessary to ensure the correct implementation of the Board's decision.

We agree with claimant that the administrative law judge's decision to disallow the totality of these post-remand requested services cannot be affirmed. In its June 29, 2009, Decision and Order, the Board remanded the case for further consideration of the onset date of claimant's partial disability as well as for a determination of claimant's adjusted wage-earning capacity. *See Jones*, slip op. at 11. The litigation on remand was essential to resolution of the claim and claimant's counsel is entitled to payment for her participation. The administrative law judge scheduled a conference call with the parties for the purpose of discussing the issues to be addressed on remand, and claimant's counsel thereafter filed a brief on behalf of claimant. Ultimately, claimant obtained additional compensation by virtue of the proceedings on remand. As claimant's counsel's fee petition for work on remand describes services performed which were reasonable and necessary to protect claimant's interests under the circumstances of this case, *see generally O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000), we reverse the administrative law judge's denial of payment for these services. Counsel specifically declines to appeal the reduction in hours allowed by the administrative law judge on remand, *see Claimant/Petitioner's Brief* at 6, but seeks a fee for an additional 6.375 hours of services on claimant's behalf. We modify the administrative law judge's fee award to reflect counsel's entitlement to an additional fee of \$717.19, representing 6.375 hours of services rendered by counsel while the case was pending before the administrative law judge on remand, at an hourly rate of \$225, reduced by 50 percent pursuant to our affirmance of the administrative law judge's application of *Hensley* to counsel's overall fee request.

Accordingly, the administrative law judge's fee award for work performed while the case was first before the administrative law judge is affirmed. The administrative law judge's denial of an attorney's fee for work performed on remand is reversed, and the administrative law judge's decision is modified to reflect claimant's counsel's entitlement to an additional attorney's fee of \$717.19, payable directly by employer to counsel.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge