

BRB No. 92-0908

WILLIE REED, JR.)
)
 Claimant-Respondent)
)
 v.)
)
 INGALLS SHIPBUILDING,) DATE ISSUED:
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (89-LHC-3348) of Administrative Law Judge C. Richard Avery 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, Inc.*, 12 BRBS 272 (1980).

Claimant filed a claim on January 28, 1987 for benefits under the Act, contending that he sustained a noise-induced, work-related hearing loss. Claimant previously injured his head in 1972 in a fall at work. Employer controverted the claim on May 18, 1988, and it was referred to the Office of Administrative Law Judges on August 9, 1989 for a formal hearing. In 1990, claimant amended his claim, seeking benefits for the hearing loss sustained as a result of the 1972 accident. The issues to be resolved at the hearing included the cause of claimant's injury, the nature and extent of his disability, claimant's entitlement to medical benefits, the applicability of Section 14(e), 33 U.S.C. §914(e), and the amount of and employer's liability for an attorney's fee.

The administrative law judge awarded benefits to claimant based on the parties' stipulated average weekly wage of \$560, for a 100 percent monaural hearing impairment of the left ear pursuant to Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A). The administrative law judge also awarded claimant medical benefits for both ears pursuant to Section 7 of the Act, 33 U.S.C. §907, interest on outstanding past due benefits, and found that claimant's counsel is entitled to an attorney's fee for services rendered. The administrative law judge found that employer is not liable for a penalty under Section 14(e) in this case. Employer's motion for reconsideration was denied.

Claimant's counsel subsequently filed a fee petition for work performed at the administrative law judge level, requesting a fee for 37.375 hours of services rendered at \$125 per hour, plus expenses of \$35.75, for a total of \$4,707.61. Employer submitted objections to counsel's fee request. Employer argued, *inter alia*, that the fee petition should be denied in its entirety as it was filed outside the time limit set by the administrative law judge. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge found that inasmuch as employer was not prejudiced by the late filing, he would consider the fee petition. The administrative law judge, addressing employer's objections below to the fee requested, reduced the hourly rate sought by claimant's counsel to \$100 per hour, reduced the time requested by 1.5 hours, denied the expenses of \$35.75, and denied the request of claimant's counsel for an additional fee for one hour for answering employer's objections to the fee petition. The administrative law judge held employer liable for an attorney's fee in the amount of \$3,587.50.

Employer appeals the fee award, incorporating by reference the arguments it raised below into its appellate brief. Claimant responds, urging affirmance of the fee award.

We reject employer's contention that the administrative law judge abused his discretion in considering the late-filed fee petition on the facts of this case. The Act contains no time limit for an application for an attorney's fee. *Baker v. New Orleans Stevedoring Co.*, 1 BRBS 134 (1974); 33 U.S.C. §928. The regulation at 20 C.F.R. §702.132 states that the fee application "shall be filed...within the time limits specified by...[the] administrative law judge..." Nonetheless, the loss of an attorney's fee is a harsh result and should not be imposed on counsel as a penalty except in the most extreme cases. In the instant case, the administrative law judge ordered that claimant's counsel file his fee petition within 30 days of service of his Decision and Order, which was filed in the Office of the District Director on February 15, 1991. Counsel, however, did not file his fee petition until June 19, 1991. The administrative law judge, within his discretion, stated he would consider the fee petition since there is no evidence of prejudice to employer. We affirm this determination as within his discretion. *See Paynter v. Director, OWCP*, 9 BLR 1-190 (1986)(Ramsey, C.J., dissenting)(Board holds that district director abused his discretion in denying a fee where petition was filed one month after time limit and the time limit was in the "Findings" and not in the "Order"); *cf. Bankes v. Director, OWCP*, 7 BLR 1-102 (1984), *aff'd*, 765 F.2d, 8 BLR 2-1 (6th Cir. 1985)(denial of fee affirmed where counsel did not file a fee petition for over a year after the deadline and had been warned of the sanction for failure to comply).

Employer additionally contends that consideration of the quality of the representation, the complexity of the legal issues, and the amount of benefits awarded mandates a reduction in the amount of the fee awarded.¹ We need not consider this issue as employer failed to raise it before the administrative law judge. *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 in pertinent part mem. sub. nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). Moreover, the administrative law judge considered the complexity of the case in reducing counsel's requested hourly rate from \$125 to \$100. Additionally, employer refused to pay any compensation voluntarily, and claimant's counsel successfully established that claimant's injury was caused by a 1972 traumatic work-related injury to his left ear and aggravated by exposure to noise, and that the claim was not time-barred. Claimant's counsel obtained a substantial award, *i.e.*, an award for a 100 percent monaural impairment in claimant's left ear, medical treatment for both ears, and interest on past due compensation. We therefore reject employer's contention that the awarded fee must be reduced further on this basis.

We also reject employer's assertion that the awarded hourly rate does not conform to the reasonable and customary charges in the area where the claim arose. Employer's mere assertion in this regard is insufficient to meet its burden of proving that the awarded rate is excessive; we therefore affirm the rate awarded to counsel by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge. In considering counsel's fee petition, the administrative law judge specifically addressed employer's objections to itemized entries, and reduced the requested time by 1.5 hours. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion, and we decline to further reduce the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Finally, we decline to consider employer's objection concerning counsel's use of the quarter-hour minimum billing method inasmuch as employer did not raise this argument before the administrative law judge and may not raise it for the first time on appeal. *Bullock*, 27 BRBS at 94.

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

SO ORDERED.

¹We reject employer's reliance on the fee award of Administrative Law Judge A.A. Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3355 (Sept. 5, 1991), in which Judge Simpson reduced various entries as duplicative of the work performed in other cases, and awarded different hourly rates to claimant's attorneys based on their status as either a senior partner or a relatively new associate. The amount of the attorney's fee award lies within the discretion of the body awarding the fee, and the decision of an administrative law judge regarding the fee is not binding precedent on another body in a different case.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge