

BRB No. 96-1002

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

Appeal of the Order Dismissing Claimant's Motion to Set Aside Final Order For Lack of Jurisdiction of Subject Matter of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer.

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

PER CURIAM:

Claimant appeals the Order Dismissing Claimant's Motion to Set Aside Final Order For Lack of Jurisdiction of Subject Matter (88-LHC-3622) 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). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

In the initial decision in this case, Administrative Law Judge Simpson awarded claimant compensation for a .9 percent binaural hearing impairment pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). On September 20, 1990, claimant's counsel filed an amended fee petition requesting a fee of \$1,701 for 13.5 hours of services at \$125 per hour, plus \$13.50 in expenses. Employer filed objections to which claimant replied. The administrative law judge reduced the hourly rate for senior attorney Lowry Lomax from \$125 to \$100, and reduced the hourly rate for the junior associate, John Dillon, to \$80 for work performed in 1989, \$85 for work performed in 1990, and \$95 for work

performed in 1991. The administrative law judge disallowed the time requested for work performed on September 20, 1988, and reduced the time requested for work performed on April 4, 1989 and May 25, 1989. Consequently, he awarded claimant's counsel a total fee of \$773.50, representing 6.75 hours of services performed by Lowry Lomax at \$100 per hour, 1 hour of services performed by John Dillon at \$85 per hour, plus \$13.50 in expenses. Claimant appealed the reduction of the fees to the Board, with no response from employer.

On appeal, claimant contended that the administrative law judge abused his discretion in disallowing the time performed on September 20, 1988, based on an affidavit supplied by employer to the effect that claimant's attorney previously had billed employer for 26.5 hours on the day in question. Claimant asserted an inability to challenge the accuracy of the affidavit because the prior attorney's fee petitions were not identified and because there was no way to determine the amounts awarded therefor or whether the use of a minimum billing method may have affected the total hours requested on a certain day. The Board rejected claimant's contentions, holding that the administrative law judge's reliance on the affidavit does not constitute an abuse of discretion and his explanation for disallowing the three hours on that day is rational. *Greenhouse v. Ingalls Shipbuilding, Inc.*, BRB No. 91-2087 (Dec. 10, 1993).

After this decision became final, claimant's counsel conducted discovery on the issue of the validity of employer's affidavits. Subsequently, on September 7, 1995, claimant's counsel filed a motion to refer the claim to the administrative law judge for a formal hearing on the issue of whether the administrative law judge's Supplemental Decision and Order should be set aside as it is based on false and misleading information. Based on the newly discovered documents, claimant's counsel alleged the affidavits on which the administrative law judge relied in reducing the fee request were fraudulent. Claimant's motion was referred to the Office of Administrative Law Judges (OALJ) on September 21, 1995, for resolution.

Administrative Law Judge Avery found that the Board's decision became final 60 days after it was issued on December 10, 1993, when no appeal was taken. He concluded that whether the affidavit relied on by Judge Simpson in this case was fraudulent does not matter because the OALJ does not have subject matter jurisdiction over a final order of the Board. Thus, the administrative law judge denied claimant's motion for a hearing to set aside the Supplemental Decision and Order Awarding Attorney Fees.

On appeal, claimant contends that application of Rule 60(b) of the Federal Rules of Civil Procedure (FRCP), confers jurisdiction on the administrative law judge to reopen the case. Employer responds, urging affirmance of the administrative law judge's decision that he did not have jurisdiction of this claim as it is in accordance with applicable law.

Claimant contends that the administrative law judge erred in failing to consider the evidence of alleged fraudulent misrepresentations by employer in order to find jurisdiction to reconsider the final attorney's fee order pursuant to Rule 60(b) of the FRCP. We

disagree.

Section 21(c) of the Act provides:

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the Circuit in which the injury occurred, by filing in such court within 60 days following the issuance of such Board Order a written petition praying that the Order be modified or set aside.

33 U.S.C. §921(c). In addition, Section 802.406 of the implementing regulations provides that a decision rendered by the Board shall become final 60 days after the issuance of the decision unless a written petition for review praying that the order be modified or set aside is filed in the appropriate court of appeals prior to the expiration of the 60 day period. 20 C.F.R. §802.406. Moreover, Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final compensation orders. However, as attorney's fees are not "compensation" within the meaning of Section 22, it does not apply, and fee awards may not be modified pursuant to Section 22. See *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982).

As the Act and regulations do not provide a method to reopen a case in which an order awarding an attorney's fee has become final, claimant relies on Rule 60(b) of the FRCP to contend that the administrative law judge's order awarding an attorney's fee should be reopened due to the reliance of Judge Simpson on fraudulent misrepresentations made by employer. Rule 60(b) provides that "on motion and upon such terms as are just, the court may relieve a party or [his] legal representative from final judgment, order, or proceeding for" *inter alia*, "fraud, misrepresentation, or other misconduct of an adverse party."¹ However, Rule 60(b) also provides that a motion made on this basis may not be made more than one year after the judgment, order, or proceeding was entered or taken.

¹In addition, 29 C.F.R. §18.1 states that the Federal Rules of Civil Procedure "shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." See *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989); 29 C.F.R. §18.29.

In the present case, claimant's counsel filed the motion to refer the claim to the administrative law judge for a formal hearing on September 7, 1995. The administrative law judge's original order was issued on August 14, 1991, and the Board's decision affirming the administrative law judge's order was issued on December 10, 1993. As no appeal of the Board's decision was taken, nor motion for reconsideration filed, the administrative law judge's award of an attorney's fee in this case became final February 8, 1994, or 60 days from the date of the Board's decision. Thus, we reject claimant's contention that Rule 60(b) provides relief in a case, such as this one, that has been final for over one year. Moreover, as there is no authority in the Act or the regulations for reopening a case that has reached finality and is not subject to modification, we hold that the administrative law judge properly found that he did not have subject matter jurisdiction in this case.²

Accordingly, the Order Dismissing Claimant's Motion to Set Aside Final Order For Lack of Jurisdiction of Subject Matter is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²We note that the administrative law judge based his denial of subject matter jurisdiction on the ground that he has no authority to reopen a final award of the Board. However, in this case, claimant is attempting to reopen the administrative law judge's order awarding an attorney's fee, not the Board's affirmance of that order. If Rule 60(b) of the FRCP were applicable, it would reopen the case at the administrative law judge's level, not the Board's, as the administrative law judge found. Therefore, we affirm the administrative law judge's order on other grounds.