BRB Nos. 02-0826
and 03-0100

DAVID W. SENTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARD CORPORATION	)	DATE ISSUED: 08/26/2003
	)	
and	)	
	)	
FREMONT INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Compensation Order Approval of Attorney Fee of Karen P. Staats, District Director and the Decision and Order Denying Claimant's Petitioner for Attorney's Fees and Costs of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Nicole A. Hanousek (William D. Hochberg), Edmonds, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order Approval of Attorney Fee (OWCP No. 14-132800) of District Director Karen P. Staats and the Decision and Order Denying Claimant's Petition for Attorney's Fees and Costs (2002-LHC-00197) of Administrative Law Judge Anne Beytin Torkington 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a voluntary retiree, underwent an audiometric evaluation on March 6, 2000. Thereafter, he filed a claim for a 3.4 percent binaural work-related hearing loss. Employer controverted the claim on March 23, 2000, contending it was time-barred. After reviewing the file, employer again controverted the claim on June 21, 2000, indicating to claimant that it was the "final determination." Consequently, claimant hired an attorney who requested claimant's wage information from employer. Counsel renewed the request for the wage information on September 17, 2000, and, on September 20, 2000, employer sent a letter to claimant informing him of employer's acceptance of his hearing loss claim. Employer sent claimant a check for permanent partial disability benefits in the amount of $4,155.39, representing 6.86 weeks of benefits at a compensation rate of $604.42 per week. Employer also agreed to pay for claimant's hearing aids. Based on claimant's counsel's interpretation of employer's statement regarding medical benefits, *see infra*, claimant rejected the "settlement offer" on September 26, 2000, stating that negotiations could not begin until he received the wage information. On October 18, 2001, the case was transferred to the Office of Administrative Law Judges (OALJ). On June 17, 2002, prior to any action by the administrative law judge, claimant informed both the district director and the administrative law judge of the "settlement" between the parties, with the exception of an attorney's fee.

Claimant's counsel filed an application for an attorney's fee with the district director for $1,644.17 for services performed between June 28, 2000, and September 21, 2001, plus three entries in 2002 for preparation of the fee petition. The district director reduced the requested hourly rate for Mr. Hochberg from $225 to $210 and awarded a fee of $1,549, plus $86.17 in expenses. However, because the district director found that employer accepted the claim and paid benefits as of September 25, 2000, and that counsel's services produced no additional compensation after that date, she determined that employer is liable only for a fee of $510.50, plus costs, for services performed between June 28 and September 25, 2000, and that claimant is liable for the remainder of the awarded fee. Comp. Order at 1. Claimant appeals the district director's finding that employer is not liable for his entire fee, as well as the reduction of Mr. Hochberg's hourly rate. Employer responds, urging affirmance. BRB No. 02-0826.

Counsel also filed a fee application with the administrative law judge, requesting $1,329.50, later amended to $1,851, for services performed between October 23, 2001, and June 12, 2002. The administrative law judge also determined that counsel's services produced no additional benefit for claimant after September 25, 2000, and she denied

counsel a fee. Claimant appeals the denial of a fee, and employer responds, urging affirmance. BRB No. 03-0100.

Initially, we reject claimant's contention that the district director erred in reducing Mr. Hochberg's hourly rate to $210. The applicable regulation, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). The district director considered the appropriate regulatory factors in rendering her fee award, and she determined that an hourly rate of $210 was commensurate for the services of an attorney with Mr. Hochberg's experience in a case arising in the Seattle and Portland areas. We hold that the district director's conclusion is reasonable and that claimant has not established an abuse of discretion in this regard. *See id.; see also O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Thus, we affirm the hourly rate awarded to Mr. Hochberg.

We next address claimant's challenge to the findings of the district director and the administrative law judge that employer is not liable for a fee after September 25, 2000. Under Section 28(a), an employer is liable for a fee if it declines to pay claimant benefits within 30 days of its receipt of a claim from the district director. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, __ F.3d ___, No. 01-71860, 2003 WL 21697956 at *2 (9th Cir. July 23, 2003). Because employer controverted the claim within 30 days of its receipt of the claim, and claimant thereafter obtained benefits, the district director properly held employer liable for claimant's fee up to the time employer paid benefits on September 25, 2000. *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990).

We reject, however, claimant's contention that the district director erred in holding claimant liable for services after employer paid benefits, and that the administrative law judge erred in denying a fee altogether. Claimant contends that employer's September 20, 2000, letter did not fully accept the claim and, thus, a dispute remained between the parties regarding claimant's entitlement to future medical benefits. After advising claimant that it accepted the hearing loss claim, employer set forth its calculation of disability benefits, and it enclosed a check. Next, employer stated:

> Dr. Lynch also indicated that you would benefit from the use of hearing aids. At this time, I ask that you please make an appointment to be fitted for a pair of hearing aides (sic). **I ask that you make this appointment within 30 days, so that we may pay your last medical bills and close your claim.** After you have been fitted for the hearing aides (sic), the hearing aide (sic) provider MUST contact me to seek authorization for the

type and cost of the specific hearing aide (sic) they are recommending.

Cl.'s Brief at exh. 10 (all emphasis in original). In a letter dated September 26, 2000, claimant acknowledged receipt of the letter and payment, but he declined the "settlement offer," stating that he would like the claim for future medical benefits to remain open. Claimant also noted he could not agree to an average weekly wage until the wage information was forthcoming, and he asserted a claim for an attorney's fee. *Id.* at exh. 11. A letter dated April 23, 2002, written by employer's counsel, stated that employer offered medical care in September 2000, but claimant made no subsequent request for the approval of any medical treatment or for hearing aids. In the letter, employer also denied that it had attempted to deny future medical benefits, stating that the closing of an insurance file has nothing to do with claimant's entitlement under the Act. Cl.'s Brief at exh. 12. By May 2002, claimant obtained a letter from employer setting forth its position that claimant is entitled to "full future medical benefits under §7" and that the only remaining issue is that of attorney's fees and costs. *Id.* at exh. 13. On June 17, 2002, claimant's counsel informed the district director and the administrative law judge that the parties had "settled" the claim for disability benefits and medical care.

Both the district director and the administrative law judge rejected claimant's assertion that a dispute remained after September 25, 2000. The district director stated that nothing in the September 20, 2000, letter could be "construed as a denial of entitlement to compensation and other benefits under the Longshore Act." Comp. Order at 1. The administrative law judge found that employer paid claimant's permanent partial disability benefits in full and that the "language used in the letter of acceptance cannot be construed as altering Claimant's right to future medical benefits." Decision and Order at 3. She reasoned that "[e]mployer merely requested that Claimant make an appointment to be fitted for his hearing aid within 30 days[,]" and that this language "does not cut Claimant off indefinitely, but merely closes the claim at this point in time." She further stated "[t]here is no evidence that Employer had any intention of denying future medical benefits to Claimant, were he to request them." *Id.*

We hold that the district director and administrative law judge reasonably concluded that no dispute existed after claimant received the payment of permanent partial disability benefits on September 25, 2000, and employer's offer to pay for hearing aids is consistent with Dr. Lynch's opinion. It was rational for the district director and the administrative law judge to reject the conclusion that employer intended to limit claimant's entitlement to future medical benefits, especially since claimant never sought any additional medical treatment, including hearing aids. *Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993) (an award of future medical benefits is appropriate only where there is evidence indicating such are needed). Moreover, as both the district director and the administrative law judge

determined, counsel's services after September 25, 2000, gained claimant no benefit beyond what employer already tendered and paid. *Richardson,* 2003 WL 21697956 at *2-3. Thus, as claimant obtained some benefits while the case was before the district director, we affirm the district director's assessment against claimant of that portion of the fee for services rendered after employer paid benefits. 33 U.S.C. §928(c); *Boe v. Dep't of the Navy/MWR,* 34 BRBS 108 (2000). We also affirm the administrative law judge's denial of a fee for worked performed before the OALJ, as claimant did not obtain any additional benefits while the case was before the administrative law judge. 33 U.S.C. §928(a), (b); *Richardson*, 2003 WL 21697956 at *2-3; *Barker*, 138 F.3d 431, 32 BRBS 171(CRT); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

Accordingly, the district director's Compensation Order and the administrative law judge's Decision and Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge