

PETER TUCKELL) BRB No. 00-0377

Claimant-Respondent)

v.)

LOGISTEC OF CONNECTICUT,)
INCORPORATED)

and)

SIGNAL MUTUAL INDEMNITY)
ASSOCIATION)

Employer/Carrier-)
Petitioners)

GEORGE H. MILLER) BRB No. 00-0415

Claimant-Respondent)

v.)

LOGISTEC OF CONNECTICUT,)
INCORPORATED)

and)

SIGNAL MUTUAL INDEMNITY)
ASSOCIATION)

Employer/Carrier-)
Petitioners)

CHARLES F. PARKER, JR.) BRB No. 00-0420

Claimant-Respondent)

v.)

LOGISTEC OF CONNECTICUT,)
INCORPORATED)

and)

DATE ISSUED: Dec. 20, 2000

SIGNAL MUTUAL INDEMNITY)
ASSOCIATION)
Employer/Carrier-)
Petitioners) DECISION and ORDER

Appeals of the Decision and Order on Remand - Awarding Benefits and the Decisions and Orders on Remand - Awarding Attorney Fee of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May), Glastonbury, Connecticut, for claimants.

John F. Karpousis (Freehill, Hogan & Mahar, LLP), New York, New York, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (97-LHC-2403, 2403) and the Decisions and Orders on Remand - Awarding Attorney Fee (97-LHC-1583, 2297, 97-LHC-2537, 2538) of Administrative Law Judge David W. DiNardi rendered on claims 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant Tuckell filed a claim for a work-related hearing loss in 1997. In his first decision, the administrative law judge determined, *inter alia*, that clamant was entitled to compensation for a work-related 2.813 percent binaural hearing impairment pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), and that employer was responsible for the payment of the Yale University Occupational Health Clinic (Yale Clinic) medical bills as a necessary medical expense, and for any reasonable and necessary future medical

¹By Order dated February 11, 2000, the above captioned cases were consolidated at the request of employer for purposes of decision on appeal.

benefits for claimant's hearing impairment pursuant to Section 7 of the Act, 33 U.S.C. §907. Subsequently the administrative law judge awarded claimant's attorney a fee of \$5,911.50. Both of these decisions were appealed to the Board. On appeal, the Board vacated the administrative law judge's findings regarding the extent of claimant's hearing loss, the award of future medical benefits, and the attorney fee awarded to counsel, and the case was remanded for reconsideration of the extent of claimant's hearing loss, employer's liability for future medical benefits and consideration of the holding of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), regarding counsel's fee. *Tuckell v. Logistec of Connecticut, Inc.*, BRB No. 98-1201(June 7, 1999)(unpublished). On remand, the administrative law judge discussed the audiograms and medical opinions of record and thereafter found claimant Tuckell entitled to compensation for a 2.813 percent binaural hearing impairment and future medical benefits. Lastly, the administrative law judge, after taking into consideration the Supreme Court's decision in *Hensley*, reinstated counsel's attorney fee award of \$5,911.50.

Claimant Miller filed a claim for a work-related hearing loss in 1997. In his first decision, the administrative law judge determined that while claimant was entitled to the Section 20(a) presumption of causation, 33 U.S.C. §920(a), claimant's hearing loss did not result in a measurable impairment; accordingly, the administrative law judge concluded that claimant was not entitled to disability compensation under the Act. The administrative law judge did, however, award claimant reasonable, necessary and appropriate future medical benefits for his hearing impairment, including if necessary hearing aids. 33 U.S.C. §907. Subsequently, the administrative law judge awarded claimant's attorney a fee of \$7,811.04. On appeal, the Board reversed the administrative law judge's award of hearing aids to claimant but affirmed his Decision and Order in all other respects; the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee was vacated and the case remanded for further consideration. *Miller v. Logistec of Connecticut, Inc.*, BRB No. 98-1200 (June 17, 1999)(unpublished). On remand, the administrative law judge awarded claimant's counsel an attorney's fee of \$6,000.

Claimant Parker filed a claim for a work-related hearing loss in 1997. The administrative law judge found that claimant was entitled to compensation for a work-related 6.8 percent monaural impairment to his right ear pursuant to 33 U.S.C. §908(c)(13)(A), as well as the payment of Dr. Russi's medical bills and future medical benefits. Subsequently,

²Claimant Tuckell's attorney requested a fee of \$6,187.95, representing 25.1 hours of services by lead counsel at \$195 per hour, 8.2 hours of services by associate counsel at \$140 per hour and 4.2 hours of paralegal services at \$50 per hour, plus \$25.45 in expenses. The administrative law judge, after reducing lead counsel's hourly rate to \$185, approved the remaining hourly rates and hours sought by counsel.

³Claimant Miller's attorney had requested a fee of \$8,910.04, representing 30.7 hours of lead counsel services at \$195 per hour, 15.4 hours of services by associate counsel at \$140 per hour, 8 hours of paralegal services at \$50 per hour and \$367.54 in expenses.

the administrative law judge awarded an attorney's fee in the amount of \$11,071.62. On appeal, the Board vacated the administrative law judge's award of an attorney's fee to claimant's counsel and remanded the case for further consideration. *Parker v. Logistec of Connecticut, Inc.*, BRB No. 98-1202 (May 18, 1999)(unpublished). On remand, the administrative law judge reinstated the full amount of the previous fee award, \$11,071.62.

Employer now appeals the above three decisions on remand. Specifically, employer avers that the administrative law judge's award of permanent partial disability compensation to claimant Tuckell is in error because he included in his deliberations the allegedly inaccurate results of the audiometric evaluation performed by the Yale Clinic as well as the opinions rendered by Dr. Anwar and Nurse Gregory. Additionally, in each case, employer argues that the administrative law judge improperly applied the holding of the United States Supreme Court in *Hensley* in making his awards of attorney fees. Claimants respond, urging affirmance.

We first address employer's challenge to the administrative law judge's award of permanent partial disability compensation to claimant Tuckell. In its first decision, the Board instructed the administrative law judge on remand to reconsider the extent of claimant Tuckell's hearing loss, analyzing all of the evidence of record and providing a reasoned explanation for his weighing of the conflicting underlying medical opinions. *See Tuckell*, slip op. at 6; *see generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140-141, 32 BRBS 48, 52 (CRT)(4th Cir. 1998); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring). On remand, the administrative law judge considered the differing results obtained from the February 19, 1997, audiometric evaluation performed at the Yale Clinic, which exhibited a 5.625 percent binaural hearing impairment and that of claimant's October 20, 1997, examination which revealed a zero percent impairment. The administrative law judge thereafter averaged the results of these two evaluations and awarded claimant permanent partial disability compensation for a 2.813 percent binaural hearing impairment. *See* 33 U.S.C. §908(c)(13)(B).

Employer now contends that the administrative law judge erred in relying on the results obtained by the Yale Clinic in making his award of permanent partial disability compensation because the tests administered at that facility were not performed by a qualified technician nor interpreted by a licensed certified otolaryngologist or audiologist. *See* 20 C.F.R. §702.441(b)(1); 33 U.S.C. §908(c)(13)(C). In its first decision, the Board noted that the Yale Clinic audiogram, although not "presumptive evidence," may be considered "probative evidence" by the administrative law judge in his determination of the extent of claimant's hearing loss which he could consider and evaluate in light of the other

⁴Claimant Parker's attorney had requested a fee of \$11,445.62, representing 37.4 hours of services by lead counsel at \$195 per hour, 22.5 hours of services by associate counsel at \$140 per hour, and 4.2 hours of paralegal services at \$45 per hour, plus \$792.62 in expenses.

evidence of record. *See Tuckell*, slip op. at 5; *see generally Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992)(Stage, C.J., dissenting on other grounds); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). Thus, on remand, the administrative law judge could consider the Yale Clinic audiogram along with the other audiogram of record and relevant testimony including the deposition of Dr. Astrachan in reaching a reasoned conclusion resolving the conflicts in the evidence. *See generally Carmines*, 138 F.2d at 140-141, 32 BRBS at 52 (CRT); *Gremillion*, 31 BRBS at 168.

On remand, the administrative law judge referred to the discussion in his first decision regarding the reliability of the Yale Clinic audiogram, which he found to be supported by the deposition testimony of Dr. Anwar and Nurse Gregory, and which contrasted with the opinion of Dr. Astrachan that these results were invalid because of procedural irregularities. The administrative law judge thereafter relied on the testimony of Nurse Gregory regarding her testing procedures as supported by the fact that the test was performed by an industrial hygienist in compliance with OSHA standards. *See Gregory depo.* at 12-14; *Anwar depo.* at 43. The administrative law judge concluded that in such a battle of “dueling authorities,” the most reasonable approach was to average the results of the two audiograms. Thus, as directed by Board, the administrative law judge fully weighed the medical evidence and, thereafter, acted within his authority as factfinder in relying upon both the Yale Clinic results and the results obtained on October 20, 1997. *See Calback v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge’s findings on this issue are rational and supported by the evidence of record, we affirm his award of permanent partial disability compensation to claimant Tuckell for a 2.813 percent binaural hearing impairment. *See McGrath v. Hughes* 289 F.2d 403 (2d Cir. 1961).

We additionally reject employer’s argument that the administrative law judge erred in awarding claimant Tuckell medical benefits under Section 7 of the Act, 33 U.S.C. §907. This argument also rests on employer’s assertion that the Yale Clinic audiogram is unreliable. As we affirm the administrative law judge’s reliance upon the Yale Clinic audiogram and report recommending future monitoring, which was also supported by the deposition testimony of Dr. Astrachan, we affirm the administrative law judge’s award of Section 7 medical benefits to claimant Tuckell.

Employer next appeals the attorney fee awards in each of the captioned cases, arguing that the administrative law judge failed to comply with the Board’s instructions on remand that he analyze the fee requests in terms of the criteria set forth in *Hensley*, particularly given that the claimants herein received limited compensation benefits. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act

⁵Moreover, the administrative law judge noted that although Dr. Astrachan did not find any rateable disability, he did find a mild, high frequency most likely noise induced sensorineural hearing loss.

of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained “excellent” results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. The Court, however, provided no rule or formula for a calculating a fee. *Hensley*, 461 U.S. at 435-436. *See 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 mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). Moreover, the court did not define the “success” of an action solely in terms of the monetary amount awarded, but, rather, in terms of how successful the plaintiff was in achieving the claims asserted. In cases arising under the Act, however, the amount of benefits awarded is a relevant factor in determining the amount of an attorney’s fee. *See* 20 C.F.R. §702.132(a).

In the instant cases, the administrative law judge, in addressing the respective fee petitions, explicitly applied the two-pronged test set out in *Hensley*. In addressing the first prong, the administrative law judge listed the unresolved issues at the time of the hearings and noted that the claimants were successful on most of the contested issues to some degree. Moreover, he noted the work expended by claimants’ counsel in obtaining successful results in each of these cases even if the total amount of benefits initially sought were not awarded. We hold that the administrative law judge rationally analyzed the issues in concluding that claimants’ attorney was effective and successful on contested issues. Accordingly, we affirm the administrative law judge’s conclusion that claimant’ attorney has survived the first hurdle of the *Hensley* test.

With regard to the second prong of the *Hensley* analysis, the administrative law judge

⁶The unresolved issues shared by all three claimants were: whether the alleged hearing loss was work-related, the date of injury, extent of hearing loss, extent of any pre-existing hearing loss, responsible carrier, and entitlement to medical benefits.

in the cases of claimants Tuckell and Parker rejected employer's assertions that the fees requested were unreasonable in light of the fact that these claimants received only minimal compensation and future medical benefits. Specifically, the administrative law judge stated in each case success should be defined in terms of how successful the plaintiff was in achieving the claims asserted. As claimant Turkell was found to be successful, and claimant Parker at least partially successful, in prosecuting the issues presented, the administrative law judge concluded that their counsel was entitled to the fees previously awarded. The administrative law judge thus considered and resolved the pertinent issues pertaining to the fee petitions of claimants Tuckell and Parker in accordance with the standards of *Hensley*; specifically, the administrative law judge considered the extent of claimant's success in relation to the fee. As employer has not shown that the fee awards in either the *Tuckell* or *Parker* cases are arbitrary, capricious, an abuse of discretion or not in accordance with law, they are affirmed.

In addressing the second prong of the *Hensley* analysis in the case of claimant Miller, the administrative law judge noted that the amount of the fee to be awarded is not necessarily limited to the amount of compensation gained since to do so would drive competent counsel from the field. See *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc.*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds). After noting that claimant Miller was unsuccessful in prosecuting the key issue of the extent of his hearing loss and only partially successful in establishing entitlement to medical benefits, the administrative law judge reduced his prior fee award of \$7,811.04 to \$6,000, an "amount arrived at by comparing the number of issues on which [claimant's counsel] was successful or partially successful to the amount previously awarded." See *Miller*, slip op. at 4.

While we agree that the amount of compensation is not necessarily indicative of the amount of a fee to be awarded to claimant's counsel, the fee awarded by the administrative law judge should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. However, in the case of claimant Miller, the administrative law judge failed to specifically address claimant's failure to obtain any present disability compensation; rather, the administrative law judge appears to have awarded a fee based upon a finding that claimant was successful on approximately 75 percent of the issues presented for adjudication. The administrative law judge, therefore, based his award on the fact that

⁷As set forth *infra*, claimant Tuckell ultimately received an award of permanent partial disability compensation for a 2.813 percent binaural hearing impairment and further medical benefits, while claimant Parker received an award of permanent partial disability compensation for a 8 percent monaural hearing impairment and future medical benefits.

⁸Of the seven unresolved issues listed by the administrative law judge, six were of relevance to claimant Miller's claim. The administrative law judge determined that he was totally unsuccessful on establishing the extent of claimant's current hearing loss and only partially successful in establishing his entitlement to medical benefits. Thus, he appears to have determined that claimant's attorney was successful on approximately 75 percent of the

claimant was successful on the majority of issues even though he was unsuccessful on the issues that would establish his entitlement to disability compensation. This mathematical calculation, *i.e.*, utilizing the percentage of successful issues adjudicated to summarily reduce a requested fee by that percentage, is unsupported by case law and is contrary to *Hensley*.

Thus, we agree with employer that the administrative law judge erred in determining claimant Miller's success based on the percentage of issues on which his attorney prevailed. This is particularly relevant in light of the administrative law judge's acknowledgment that the issues upon which claimant's counsel failed to prevail were significant. While the administrative law judge cited the Supreme Court's decision in *Hensley*, he did not apply its holding that the attorney's fee awarded should be commensurate with the degree of success obtained in a given case in relation to both successful issues and benefits received in rendering his fee determination. Thus, the administrative law judge, by merely counting issues, failed to properly apply the second prong of *Hensley*. The administrative law judge's award of attorney fees in the *Miller* case, therefore, must be vacated and the case remanded for further consideration consistent with this opinion.

Accordingly, the administrative law judge's award of permanent partial disability compensation and future medical benefits to claimant Tuckell, and his attorney's fee award to claimant Tuckell's counsel, are affirmed. BRB No. 00-0377. The administrative law judge's award of an attorney's fee to claimant Parker's counsel is affirmed. BRB No. 00-0420. The administrative law judge's award of an attorney's fee to claimant Miller's counsel is vacated, and the case is remanded for further consideration consistent with this opinion. BRB No. 00-0415.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

issues. *See Miller*, slip. op. 3-4.

⁹Rather, claimant Miller succeeded only in obtaining future medical benefits.

