BRB No. 98-589

ALMETIA BOSTON	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	
	)	
and	)	
	)	
THOMAS HOWELL GROUP	)	
	)	
Self-Insured Employer/Administrator-Petitioner	)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Gretchen Guzman (Cantrell, Green, Pekich, Cruz, McCort, & Baker), Long Beach, California, for claimant.

Roy D. Axelrod (Law Offices of Roy Axelrod), San Diego, California, for self-insured employer.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Order Awarding Attorney's Fees (94-LHC-283) of Administrative Law Judge Edward C. Burch 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). 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 was awarded permanent partial disability benefits of $65.05 per week by Administrative Law Judge James R. Howard in 1983, as a result of a work-related head injury occurring on July 30, 1978. Subsequent to this award, claimant requested modification on October 19, 1993, pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting that she was entitled to total disability benefits due to a change in her medical condition. Employer responded to claimant's request by filing a request for modification based on a mistake in fact in Judge Howard's award. On modification before Administrative Law Judge Edward C. Burch (the administrative law judge), claimant was awarded permanent total disability benefits of $184.58 per week from October 19, 1993, and continuing. Employer's motion for modification was denied. Upon appeal to the Board, the Board affirmed the administrative law judge's award of permanent total disability benefits and the denial of employer's motion for modification. The Board, however, limited claimant's weekly compensation rate to $97.58 pursuant to Section 6(b)(2) of the Act, 33 U.S.C. §906(b)(2). *Boston v. Army & Air Force Exchange Service*, BRB No. 96-1602 (Aug. 18, 1997)(unpub.).[1]

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of $21,595, representing 123.4 hours at $175 per hour, plus $4,707.25 in expenses. Employer filed objections to the fee petition to which claimant's counsel replied and filed an addendum to the reply. In his Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel an attorney's fee of $19,915, representing 113.8 hours at $175 per hour, plus $4,689.75 in expenses.

On appeal, employer contests the administrative law judge's award of an attorney's fee, challenging the hourly rate and asserting that the fee award does not comport with the holding of the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Employer specifically contends that as a result of the Board's reduction of the compensation rate, claimant was only partially successful in pursuing her claim, and that therefore the fee award should be reduced by half. Claimant responds in support of the administrative law judge's fee award.

[1]Contrary to a statement in employer's brief, the Board stated that claimant is entitled to annual adjustments pursuant to 33 U.S.C. §910(f). *Boston*, slip op. at 6.

We affirm the administrative law judge's fee award as it comports with the holding in *Hensley* and as the hourly rate of $175 is reasonable. In *Hensley*, the Supreme Court created a two-prong test:

> 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. 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. Thus, where a plaintiff has obtained "excellent" results, the fee awarded should not be reduced simply because the plaintiff 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 reasonably hourly rate, may result in an excessive award; the award should be for the amount of fees that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. Here, the Court provided no rule or formula. The Court did, however, emphasize the discretion of the district court in determining the amount of a fee award, requiring the lower court to provide a concise and clear explanation of the award and stating:

> When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained.

Hensley, 461 U.S. at 437.

In the instant case, the administrative law judge clearly considered *Hensley's* two-prong test. *See* Order at 3. Initially, he found that claimant did not fail to prevail on any issue as claimant succeeded on all issues on her request for modification, and she defended against employer's motion for modification, which, if successful, would have resulted in the denial of all future benefits. Next, the administrative law judge acknowledged that the Board's modification of claimant's compensation rate cut claimant's award nearly in half, from $184.58 to $97.58 per week, and that counsel's fee request is considerable. However, he stated he would not reduce the fee based on this factor because he did not want to penalize counsel for his computation error. Moreover, he recognized that counsel successfully obtained modification of claimant's award after three years of work and reasoned that

claimant actually lost nothing on appeal as she was never legally entitled to an award of $184.58 per week. The administrative law judge emphasized that claimant succeeded totally in obtaining her right to the maximum compensation rate permitted under Section 6(b)(2), and because of this, he would not reduce the fee requested by claimant's counsel for work performed before him based on *Hensley*. As the administrative law judge fully considered the two-prong test in *Hensley* and acted within his discretion in determining the amount of the fee award after explicitly considering the relationship between the amount of the fee awarded and the results obtained, we affirm the administrative law judge's fee award, as we are unable to find that the award is not in accordance with law or constitutes an abuse of discretion. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see generally George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

Moreover, the administrative law judge acted within his discretion in finding that $175 is a reasonable hourly rate for attorneys with similar experience to that of both Ms. Guzman and Mr. Baker, based on his knowledge of longshore practice in the Long Beach area.[2] *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); Order at 2. As employer failed to establish that the administrative law judge abused his discretion in this regard, we reject employer's challenge to the requested hourly rate of $175. We, therefore, affirm the administrative law judge's award of an attorney's fee.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[2]Contrary to employer's contention, the court's holding in *Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121 (CRT)(9th Cir. 1995) (affirming Board's reduction of hourly rate from $175) is distinguishable from the instant case in that the fee request in *Finnegan* originated from counsel's work performed before the Board and not an administrative law judge. Therefore, the Board was not bound by the abuse of discretion standard in that case as it is in reviewing an administrative law judge's hourly rate determination, as here.

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's award of attorney's fees in the case at bar. I would remand the case for the administrative law judge to apply the teaching of *Hensley v. Eckerhart,* 461 U.S. 424 (1983).

Although the majority asserts that it affirms the administrative law judge's decision because the administrative law judge properly applied the Supreme Court's directive in *Hensley*, in fact, neither the administrative law judge's opinion nor the majority's reflects the fundamental teaching of *Hensley:* that the "results obtained" is the "crucial" factor in calculating an attorney's fee. *Hensley,* 461 U.S. at 435. In *Farrar v. Hobby,* 506 U.S. 103 (1992), the Supreme Court made clear that the "results obtained" are measured by the purpose of the litigation. The plaintiff in *Farrar* proved that a defendant had deprived him of a civil right, but plaintiff was awarded only nominal damages. The High Court held that because the purpose of civil rights litigation is recovery of private damages, plaintiffs' attorneys were entitled to no fee. *Farrar,* 506 U.S. at 114-115.

Since the purpose of claimant's litigation under the Longshore Act was to receive compensation,[3] the attorney's fee award should be tailored to the limited amount claimant was awarded. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 166, 27 BRBS 14, 16 (CRT)(5th Cir. 1993); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1540, 25 BRBS 161, 172 (CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan,* 848 F.2d 321, 21 BRBS 73 (CRT)(1st. Cir.), *cert. denied,* 488 U.S. 992 (1988).

In 1978, claimant suffered a work-related head injury for which she was awarded permanent partial disability benefits of $65.05 per week. In 1993, she petitioned for modification, contending that she was entitled to permanent total disability benefits. Employer responded with its own petition for modification, asserting that the administrative law judge had made a mistake in fact and that claimant was entitled to no compensation. The new administrative law judge assigned to the case denied employer's motion and granted claimant's request,

[3]Claimant's right to medical benefits was not contested in the litigation at issue.

awarding permanent total disability benefits at a rate of $184.58 from October 19, 1993 and continuing, with annual adjustments pursuant to 33 U.S.C. §910(f). Employer appealed the administrative law judge's Decision and Order to the Board which reduced claimant's compensation rate to $97.58.

Claimant's counsel requested an attorney's fee in the amount of $21,595 for 123.4 hours of work by attorneys at $175 per hour. Employer objected and the administrative law judge awarded an attorney's fee of $19,915 for 113.8 hours of work at $175 per hour, and $4,689.75 in expenses. Although the administrative law judge purported to apply the *Hensley* test, even quoting it verbatim, he clearly failed to understand it:

> 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; Order at 3.

The administrative law judge found that because claimant received an award for permanent total disability benefits, "she succeeded totally in preserving her right to the maximum compensation rate permitted under Section 6(b)(2)." Order at 3. He therefore concluded that *Hensley* did not warrant reduction of the attorney's fee. And the majority agrees.

Both the administrative law judge and the majority fail to recognize that in this Longshore Act case, the "level of success" is the amount of compensation awarded, just as in civil rights suits, the level of success is the amount of damages awarded, *see Farrar,* 506 U.S. at 115. The administrative law judge never considered his attorney's fee award of $19,915 in light of the permanent compensation award at a rate of $97.58 per week to a claimant who was fifty years old at the time of the hearing in 1996.[4] Is an attorney's fee of $19,915 reasonable in

[4]Since employer contested in the litigation at issue claimant's right to receive any compensation, the administrative law judge should consider the entire sum awarded, $97.58 per week for permanent total disability, not just the amount of the increase over claimant's past award of $65.05 for permanent partial disability.

the instant case when claimant would not receive a comparable sum in compensation for nearly four years? The Supreme Court repeatedly directs the trial court in *Hensley* to "make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." 461 U.S. at 438. The analysis of this relationship was never undertaken by the administrative law judge. For that reason I would remand the case

for the administrative law judge to undertake the analysis required by *Hensley,* tailoring the attorney's fee award to claimant's limited success. *See Baker,* 991 F.2d at 166, 27 BRBS at 16 (CRT); *Brooks,* 963 F.2d at 1540, 25 BRBS at 172 (CRT).

REGINA C. McGRANERY
Administrative Appeals Judge