

BRB Nos. 91-465
and 91-465A

CARL J. WALKER)	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and 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.

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

Carol B. Feinberg (Thomas S. Williamson, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits, and employer cross-appeals the Supplemental Decision and Order Awarding Attorney's Fees (89-LHC-2774) 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).

Claimant, on February 24, 1987, filed a claim for benefits under the Act for a work-related hearing loss. Previously, on February 6, 1987, claimant underwent an audiometric evaluation which revealed a 68.4 percent binaural impairment. Claimant subsequently underwent another audiometric evaluation on October 9, 1989, which revealed a 13.8 percent binaural hearing impairment. Employer filed a notice of controversion on December 28, 1987. At the formal hearing, the parties stipulated that claimant, a retiree, suffered a work-related hearing loss and was entitled to compensation at a rate of \$201.77. The parties further stipulated that based on the results of the October 9, 1989 audiogram and an audiogram administered on March 7, 1985, claimant's hearing impairment converted to a 5 percent whole man impairment. Thereafter, in a Decision and Order dated October 11, 1990, the administrative law judge determined that claimant's hearing loss should be compensated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Utilizing the stipulated whole man impairment rating and compensation rate, the administrative law judge concluded that claimant was entitled to a permanent partial disability award of \$10.09 per week. The administrative law judge also found employer liable for an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e), medical expenses and interest on all compensation due claimant.

Thereafter, claimant's counsel submitted a fee petition requesting an attorney's fee of \$3,815.25, representing 30 hours of services rendered at an hourly rate of \$125, and \$65.25 in expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order dated September 27, 1991, the administrative law judge considered employer's specific objections to the fee request, reduced the number of hours sought by counsel to 28.5, reduced the hourly rate sought to \$100, and thereafter awarded claimant's counsel an attorney's fee of \$2,850, representing 28.5 hours of services performed at the hourly rate of \$100, and \$30 in expenses.

On appeal, the Director contends that the administrative law judge erred in failing to provide a date on which claimant's benefits should commence. The Director further argues that the administrative law judge's Decision and Order sets forth no information as to whether the stipulated compensation rate is the correct rate in accordance with *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). Employer, in its appeal of the attorney's fee awarded to claimant's counsel by the administrative law judge, challenges both the amount of the attorney's fee and the hourly rate awarded by the administrative law judge. Claimant responds, urging affirmance of the administrative law judge's fee award.

The Director initially contends that the instant case must be remanded for a determination as to the date claimant's benefits should commence; specifically, the Director argues that the date claimant's compensation should begin is the date of claimant's retirement, since "if the onset date is found to be after retirement, the claimant will not receive any compensation for a period which he definitely did have an employment-related hearing impairment." Director's Brief at 3. We agree. Since the parties filed their briefs on appeal in the instant case, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which is dispositive of the issue raised by the Director. In *Bath Iron Works*, the Court found that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. As a loss of hearing occurs simultaneously with the exposure to excessive noise, the injury is complete when the exposure ceases, and the date of last exposure is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss. See *Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Based on this analysis, the court stated that hearing loss cannot be considered "an occupational disease which does not immediately result in disability," see 33 U.S.C. §910(i), and held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23).

Pursuant to the Supreme Court's decision in *Bath Iron Works* that the relevant time of injury for calculating a retiree's hearing loss benefits is the date of his last exposure to injurious noise levels, we hold that claimant's benefits must commence on the date of his retirement. To the extent that our decision is inconsistent with the Board's holding in *Howard v. Ingalls Shipbuilding, Inc.*, 25 BRBS 192 (1991) (wherein the Board held that benefits to voluntary retirees in hearing loss cases are payable under Section 8(c)(23) as of the date on which the employee's hearing impairment became permanent), that decision is overruled. In the instant case, the record reveals only that claimant retired in 1976. See Cl. Ex. 5. Accordingly, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to determine claimant's last date of employment with employer, and, thus, the onset date for the commencement of claimant's benefits.

As the Supreme Court's decision in *Bath Iron Works* is dispositive of the Director's appeal of the issue of the onset date for claimant's award, it would be incongruous to commence a Section 8(c)(23) award on the date of retirement and ignore the Supreme Court's holding that claims for hearing loss benefits under the Act, whether filed by current employees or retirees, must be compensated pursuant to Section 8(c)(13) of the Act. Thus, although no party on appeal has explicitly challenged the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23), in accordance with the holding of *Bath Iron Works* we vacate the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(23). At the hearing below, the parties stipulated that the results of the October 9, 1989 and March 7, 1985 audiograms were to be used to calculate claimant's 5 percent whole man impairment. However, the records regarding the 1985 audiogram are unclear as to the degree of claimant's hearing loss, see

Emp. Ex. 6; thus, we are unable to modify claimant's award to reflect claimant's entitlement to permanent partial disability benefits pursuant to Section 8(c)(13) of the Act. On remand, therefore, the administrative law judge must determine claimant's degree of hearing impairment, and his consequent award of permanent partial disability benefits, pursuant to Section 8(c)(13).

The Director additionally contends that the administrative law judge's Decision and Order is unclear as to whether the stipulated compensation rate is in accordance with *Ingalls Shipbuilding*. In his Decision and Order, the administrative law judge simply accepted the parties' stipulation that claimant's compensation rate is \$201.77. See Decision and Order at 2; Jt. Ex. 1. As neither claimant nor employer has appealed the administrative law judge's decision to accept their stipulation, we hold that the administrative law judge committed no reversible error in accepting the stipulation regarding the compensation rate to which claimant is entitled. See *Bath Iron Works*, 113 S.Ct. at 698 n.12, 26 BRBS at 153 n.12 (CRT). On remand, in view of the change in law, the administrative law judge may exercise his discretion to permit the parties to reopen this issue.

In its appeal, employer challenges the administrative law judge's award of an attorney's fee to claimant's counsel. An award of an attorney's fee 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).

Employer initially contends that the fee awarded to claimant's counsel by the administrative law judge is excessive, since the amount of benefits awarded to claimant were nominal. We note, however, that employer failed to raise this objection before the administrative law judge. An objection that was not raised before the administrative law judge cannot be asserted for the first time on appeal. See *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Accordingly, we decline to consider this issue as it is raised for the first time on appeal.¹ See also *Jackson v. Giant Foods, Inc.*, 11 BRBS 186 (1979).

Employer further contends that the lack of complexity of the instant case does not warrant the fee awarded by the administrative law judge. We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132. See generally *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). While the complexity of issues should be considered by the administrative law judge under Section 702.132, it is only one of the relevant factors. See generally *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge considered this specific objection in reducing counsel's requested hourly rate from \$125 to \$100; we therefore reject employer's contention that the awarded fee must be further reduced on this basis.

Employer additionally challenges the number of hours requested by counsel and approved

¹Moreover, it is not clear that the award is, in fact, "nominal," particularly in view of the fact it will be entered under Section 8(c)(13).

by the administrative law judge. In considering counsel's fee petition, the administrative law judge set forth each objection made by employer below and reduced the number of hours requested by 1.5. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus, we decline to reduce further or disallow the hours approved by the administrative law judge. See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). We further hold that the administrative law judge acted within his discretion in viewing counsel's billing method as permissible. *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); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Lastly, we reject employer's assertion that the awarded hourly rate of \$100 is excessive. The administrative law judge determined that the hourly rate of \$125 sought by claimant's counsel was excessive, and thereafter awarded claimant's counsel an hourly rate of \$100, finding that rate to be fair and reasonable in the region where this case was tried. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rate is excessive, we affirm the rate awarded by the administrative law judge to counsel.² See *Maddon*, 23 BRBS at 55; see generally *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

²We note that employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; this article, however, does not support employer's contention that the fee requested in the instant case was unreasonable.

Accordingly, in accordance with the Supreme Court's holding in *Bath Iron Works*, the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23) is vacated, and the case is remanded to the administrative law judge for a calculation of claimant's award of permanent partial disability benefits pursuant to Section 8(c)(13) in accordance with this decision. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge