

BRB No. 90-2029

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

Appeal of the Decision and Order Awarding Benefits and Decision and Order Denying Reconsideration of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax), Pascagoula, Mississippi, for claimant.

Traci Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision and Order Denying Reconsideration (88-LHC-3181) of Administrative Law Judge A.A. Simpson, Jr., 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 if they 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). 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*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)(Supp. V 1987).

Claimant has been exposed to workplace noise throughout the course of his employment for employer as a painter and sandblaster since 1977. On June 19, 1987, claimant underwent an

audiometric evaluation by Dr. James Wold, an audiologist, which showed a 5.6 percent binaural hearing loss. A subsequent November 28, 1988, audiometric evaluation conducted by audiologist Dr. Jim McDill was interpreted by otolaryngologist Dr. Donald J. Muller as showing a mild bilateral high frequency hearing impairment which measured as a zero percent binaural hearing impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* 3d ed. (1988) (*AMA Guides*). On August 18, 1987, claimant filed an occupational hearing loss claim under the Act and notified employer of his injury that same day. No voluntary payments of compensation or medical benefits were made. On December 30, 1987, employer filed its Notice of Controversion. On August 11, 1988, the case was referred to the Office of Administrative Law Judges for a formal hearing.

In his Decision and Order, crediting the results of the most recent audiogram which Drs. Muller and McDill interpreted as indicating a zero percent hearing impairment under the *AMA Guides*, the administrative law judge concluded that claimant did not sustain a compensable hearing loss under the Act. The administrative law judge further determined that as claimant had no compensable disability, he also was not entitled to a Section 14(e), 33 U.S.C. §914(e), assessment. As claimant did suffer some degree of work-related hearing loss, however, the administrative law judge determined that claimant was entitled to medical expenses causally related to this condition. *See* 33 U.S.C. §907. Finally, the administrative law judge concluded that inasmuch as claimant's counsel prevailed in establishing his right to medical benefits, claimant's counsel was entitled to an attorney's fee payable by employer.¹ Claimant's motion for reconsideration of the denial of disability compensation was denied. In a Supplemental Decision and Order Awarding Attorney's Fees dated August 5, 1991, the administrative law judge reduced the requested fee of \$2,048 to \$979.25.

On appeal, employer contends that because neither Dr. McDill nor Dr. Muller, upon whom the administrative law judge relied, indicated that there was any current need for medial treatment, the administrative law judge erred in awarding claimant future medical expenses. Employer accordingly asserts that since the award of future medical benefits is the only issue on which claimant prevailed, the administrative law judge also erred in holding employer liable for claimant's attorney's fee as there was no successful prosecution of the claim. Claimant responds that because employer controverted causation and claimant ultimately prevailed on this issue, the administrative law judge properly determined that claimant was entitled to past and future medical benefits. Claimant asserts that counsel's successful prosecution of this issue is sufficient to support an award of an attorney's fee payable by employer.²

¹The administrative law judge instructed claimant's counsel to file an amended fee petition reflecting the services each attorney performed, indicating that the amount awarded for each service would vary depending upon the attorney performing the work.

²Claimant's motion to strike statements contained in employer's petition for review because of employer's alleged mischaracterization of factual findings made by Drs. McDill and Muller is denied. We will, however, consider claimant's argument as part of claimant's response to employer's appeal.

Employer's argument that the administrative law judge erred in awarding claimant future medical benefits is rejected. The recent opinion of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993), is dispositive of the issue presented in this appeal. In *Baker*, the court held that where a claimant suffers a work-related hearing loss, he may be entitled to medical benefits under Section 7 even though his loss does not result in measurable impairment under the *AMA Guides*. Claimant may recover medical benefits under Section 7 if they are found to be reasonably necessary. The court also stated that there must be an evidentiary basis for the award of medical benefits, such as past expenses incurred or evidence of treatment necessary in the future. *Id.* In one of the two cases consolidated in *Baker*, the court reversed the award of medical benefits as it lacked such an evidentiary basis. In the second claim, the court remanded, noting conflicting evidence regarding the necessity of future treatment.

In the instant case, the only medical opinion to address claimant's need for future medical treatment is that of Dr. Wold, who stated that claimant should have yearly re-evaluations and that he was candidate for amplification. Cx. 1. Moreover, as claimant correctly asserts, the medical benefits claim before the administrative law judge was not limited solely to future medical benefits; employer did not make any payment of medical benefits, and there were unreimbursed requests for payment of past medical treatment including the cost of claimant's initial evaluation. Because the requisite evidentiary basis necessary to support an award of medical benefits under *Baker* is present in this case, the administrative law judge's determination that claimant is entitled to medical expenses associated with his work-related hearing loss is affirmed. *Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT).

In light of our affirmance of the administrative law judge's award of medical benefits in this case, we reject employer's contention that the administrative law judge erred in holding it liable for claimant's attorney's fee. In this case, employer controverted causation, and claimant ultimately prevailed on this issue and in establishing his entitlement to an award of past and future medical benefits. As claimant's counsel successfully prosecuted his claim for medical benefits, the administrative law judge's finding that claimant's attorney is entitled to a fee to be assessed against employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), is affirmed. *See Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); *Biggs v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 91-300, slip op. at 3-4 (November 24, 1993)(Brown, J., dissenting).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Denying Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge