BRB No. 91-648

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

Appeal 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 & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

R. Bennett and Traci M. 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 Supplemental Decision and Order Awarding Attorney's Fees (89-LHC-2777) 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 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). 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, and 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)(1988).

Claimant was employed as a pipefitter in employer's shipyard for various periods from 1942 until he retired in 1975 where he was exposed to loud workplace noise. An August 29, 1986, audiogram was interpreted by Dr. E. E. Thompson as indicating a moderate bilateral high frequency sensorineural hearing loss which resulted in no measurable impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988)(AMA *Guides).* A January 2, 1987, audiogram was interpreted by Dr. James H. Wold, Ph.D., as indicating a 5.6 percent impairment in claimant's right ear, a zero percent impairment in his left ear, or a .9 percent binaural impairment, the pattern of which was characteristic of a noise-induced hearing loss. CX 2. A December 1, 1988, audiogram was interpreted by Dr. Douglas W. Lamppin as showing a moderate high frequency sensori-neural hearing loss compatible with noise exposure, but which did not result in any measurable impairment under the AMA *Guides*. Claimant filed a claim for occupational hearing loss benefits under the Act on January 16, 1987.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant has a zero percent work-related hearing loss based on Dr. Lamppin's test results. The administrative law judge further determined that as claimant sustained no compensable disability under the Act, no penalty could be assessed against employer pursuant to Section 14(e), 33 U.S.C. §914(e). Finally, the administrative law judge determined that, although employer had accepted liability for claimant's future medical benefits at the outset of the hearing, employer's liability for the examination previously performed by Dr. Wold remained in dispute. Although employer argued that it was not liable for this examination because claimant had chosen Dr. Thompson as his initial free choice of physician and had not requested a change in physicians, the administrative law judge found that as employer effectively refused claimant's request to provide any benefits, including medical benefits, claimant was excused from the requirement of obtaining employer's prior authorization for additional medical care. Accordingly, the administrative law judge determined that employer was liable for both future medical benefits and the previous charge for the 1987 examination performed by Dr. Wold pursuant to Section 7 of the Act, 33 U.S.C. §907.

Claimant's attorney thereafter filed a fee petition for work performed at the administrative law judge level, requesting $3,496.50 in fees representing 27.50 hours of attorney time billed at $125 per hour, and $59 in expenses. Employer filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge addressed employer's objections to the fee request, reduced the hourly rate to $100, and disallowed 1.5 hours of the 27.50 hours claimed and $34 of the expenses. The administrative law judge accordingly awarded claimant's counsel a fee of $2,625 representing 26 hours of attorney services and $25 in expenses.

On appeal, employer contends that inasmuch as claimant sustained no compensable disability, the administrative law judge erred by awarding him future medical benefits. Employer maintains that inasmuch as claimant is retired and noise-induced hearing loss is not progressive, any future medical expenses which claimant incurs cannot be causally related to his employment. Employer also contends that as no future medical benefits are owed, the administrative law judge erred in holding it liable for claimant's attorney's fee, arguing that there has not been a successful prosecution of the claim. In the alternative, employer challenges the amount of the fee award on

various grounds, incorporating the objections it made below into its brief on appeal. Claimant responds, urging affirmance of both decisions.[1]

Employer's argument that the administrative law judge erred by awarding claimant future medical benefits is rejected. In the present case, employer stipulated to liability for claimant's future medical benefits at the outset of the hearing. JX 1. Stipulations are generally binding upon the parties that make them unless the stipulation evinces an incorrect application of law. *Puccetti v. Ceres Gulf*, 24 BRBS 25, 29 (1990). In the present case, as employer's stipulation that it was liable for claimant's future medical benefits is in accordance with 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), the administrative law judge did not abuse his discretion in holding employer bound to its stipulation. In *Baker*, the court held that where a claimant suffers a work-related hearing loss that does not result in measurable impairment under the AMA *Guides*, he may still be entitled to medical benefits under Section 7, provided that an adequate evidentiary basis exists sufficient to support the award such as past expenses incurred or evidence of necessary treatment in the future. Inasmuch as both Dr. Wold and audiologist Marianne Towell advised that claimant undergo annual audiometric reevaluations, CX 2, EX 5, and inasmuch as Drs. Lamppin and Thompson indicated that claimant might benefit from a hearing aid, Ex. 5, 6, the requisite evidentiary basis necessary to support the administrative law judge's award of future medical benefits is present in this case. Accordingly, the administrative law judge's award of future medical benefits is affirmed as it is rational, supported by substantial evidence, and in accordance with law. *Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT).

Turning to employer's appeal of the administrative law judge's fee award, we reject employer's contention that the administrative law judge erred in holding it liable for claimant's attorney's fee. As claimant was ultimately successful in establishing his right to future medical benefits[2] and in addition prevailed on the contested issue of employer's liability for the cost of the audiological examination previously conducted by Dr. Wold, claimant's counsel successfully prosecuted his claim.[3] The administrative law judge's finding that claimant's attorney is entitled to a

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[1]Claimant's motion to strike employer's argument regarding its liability for future medical benefits is denied. We will, however, consider claimant's argument in response to employer's appeal that employer accepted liability for future medical benefits at the formal hearing.

[2]We note that, although employer stipulated to liability for claimant's future medical benefits, it did not, contrary to the administrative law judge's findings, stipulate to causation. *See* JX 1; Tr. at 14. This finding, however, is not challenged on appeal.

[3]Although employer suggests there has been no successful prosecution of this claim because the question of claimant's entitlement to future medical benefits is currently on appeal, it is well established that to further the goal of administrative efficiency an administrative law judge may render an attorney's fee determination when he issues his decision. Such an award, however, does not become effective, and thus is not enforceable, until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980),

fee to be assessed against employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), is accordingly affirmed. *See Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237, (1993)(Brown, J., dissenting).

We also reject employer's alternate contention that the amount of the fee award is excessive. Although employer asserts that a consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal, or at least a substantial reduction, of the $2,625 fee award, we need not address these arguments which have been raised for the first time on appeal. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(Brown and McGranery, JJ., concurring and dissenting); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).[4] We note, however, that the administrative law judge explicitly considered the factors cited by employer in reducing the $125 hourly rate requested by claimant's counsel to $100. Moreover, we note that employer did not provide benefits voluntarily, that employer did not enter into any stipulations until the date of the hearing, and that claimant's counsel's efforts before the administrative law judge resulted in claimant's obtaining an award of past and future medical benefits. On these facts, employer has not met its burden of establishing that the of $2,625 fee awarded was unreasonable. Although employer also asserts that the hourly rate awarded exceeds reasonable and customary charges for routine compensation claims in the area in which the claim arose and urges that a rate of $70 to $75 for the junior associates and of $80 to $85 for claimant's lead attorney would be more appropriate, we also

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aff'd, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

[4]The general allegations made in employer's appellate brief regarding the amount of benefits do not adequately raise the limited success issues addressed in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Employer identifies no specific manner in which the fee should be reduced to account for claimant's success on only the medical benefits issue. *See Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting).

reject this argument.[5] Employer's argument is insufficient to meet its burden of establishing that the $100 hourly rate awarded was unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). *See generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge, contending that time spent in certain discovery-related activity, in trial preparation, and in reviewing and preparing various legal documents was either unnecessary or excessive. In entering the fee award, the administrative law judge considered the totality of employer's objections, disallowed 1.5 of the itemized hours as excessive, and found the remaining services claimed to be reasonable and necessary. We therefore decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Finally, we reject employer's contentions regarding claimant's counsel's quarter-hour minimum billing method. The Board has previously determined that this method is reasonable and complies with the applicable regulation, 20 C.F.R. §702.132.[6] *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). We thus reject employer's contentions on appeal and affirm the fee award made by the administrative law judge.

[5]We 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.

[6]We reject employer's contention that the fee order of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, No. 89-4459 (5th Cir. July 25, 1990)(unpublished), mandates a different result in this case. In that fee order, the court declined to award fees for work before it that were based on a quarter-hour minimum billing method. The determination of the amount of an attorney's fee, however, is within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge