

BRB Nos. 91-1115
and 91-1115A

BILLY M. GRAY)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING, INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Decision Awarding Attorney Fees and the Denial of Motion for Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor, and the Compensation Order-Award of Attorney Fees of Edward B. Bounds, District Director, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, and Phillip J. Myles (Myles & Hanauer), San Diego, California, for claimant.

Carol L. Powell (Mullen & Filippi), San Francisco, California, for employer.
Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision Awarding Attorney Fees and the Denial of Motion for Reconsideration (88-LHC-3631) of Administrative Law Judge Alexander Karst and the Compensation Order-Award of Attorney Fees (No. 06-113652) of District Director Edward B. Bounds, and claimant's second attorney, Phillip J. Myles, appeals the denial of an attorney's fee by Administrative Law Judge Alexander Karst 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). 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 filed a claim for benefits under the Act, contending that he sustained a noise-induced, work-related binaural impairment. Claimant initially was represented by the firm of Maples & Lomax in Mississippi, but subsequent to his move to California during the pendency of

the proceedings was represented by Myles & Hanauer. Claimant underwent three audiometric evaluations, and the administrative law judge credited the last of the three, which Dr. Stanfield interpreted as demonstrating a 10 percent noise-induced binaural impairment. The administrative law judge converted the 10 percent binaural impairment to a 4 percent impairment of the whole man pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988)(AMA *Guides*), and concluded that claimant is entitled to benefits for 8 weeks (4 percent of 200) under Section 8(c)(13), 33 U.S.C. 908(c)(13).¹ Additionally, the administrative law judge stated in his decision that claimant's counsel may file a petition for an attorney's fee and costs within fifteen days of the service of the decision, with employer allowed fifteen days thereafter to file a response.

Claimant's first counsel, John F. Dillon, timely submitted a fee petition to the administrative law judge requesting an attorney's fee of \$852, representing 6.75 hours of services rendered at \$125 per hour and expenses of \$8.25. He also submitted a fee petition to the district director requesting an attorney's fee of \$919.50, representing 9.13 hours of services rendered at \$100 per hour, and expenses of \$6.50. Employer's attorney sent a letter to the administrative law judge stating employer was not objecting to the fee petition. A similar letter was sent to the district director, and it specifically stated that employer believed the fee requested was appropriate.

In a decision dated March 6, 1991, the administrative law judge awarded Dillon the requested fee of \$852, noting that the fee petition was unopposed. On the same day, however, based on the urging of the client, employer's counsel filed objections to the fee petitions with the administrative law judge and the district director. The administrative law judge considered the letter to be a motion for reconsideration, but he found that employer's objections were untimely and therefore he denied employer's motion. The district director, who received employer's objections prior to the issuance of his Compensation Order, stated that he noted employer's objections but these objections were not otherwise discussed. The district director awarded Dillon the requested attorney's fee of \$919.50.

Claimant's second counsel, Myles, did not submit his petition for an attorney's fee within the specified 15-day period. He sought a fee of \$831.25, representing 6.65 hours at \$125 per hour, 36

¹This hybrid award was not appealed. At the time the administrative law judge's decision was issued, the law in the Fifth Circuit, in whose jurisdiction this case arose, was that a retiree's hearing loss benefits were to be calculated pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23). *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). An award under Section 8(c)(23) is payable during the continuance of the impairment and is based on the applicable percentage impairment under the AMA *Guides* multiplied by two-thirds of the applicable average weekly wage; it does not run for a specified number of weeks as does a scheduled award. The Fifth Circuit's decision in *Fairley* was rejected by the Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), wherein the Court held that all occupational hearing loss is to be compensated under Section 8(c)(13).

days after service of the administrative law judge's original decision. The administrative law judge denied, without explanation, counsel's request to file his fee petition out of time.

On appeal, employer challenges the administrative law judge's summary dismissal of its objections as untimely, and the district director's failure to discuss its objections. Dillon responds, urging affirmance of the fee awards. In his appeal, Myles contends that the administrative law judge erred in denying him an attorney's fee. Employer responds, urging affirmance.

We affirm the fee awards of the administrative law judge and the district director to Dillon, as employer has not demonstrated that they abused their discretion in awarding the fees requested in light of employer's initial refusal to object to the fee petitions.² *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980). In fact, in its letter to the district director, employer specifically stated it believed the fee requested to be appropriate. Moreover, the district director noted employer's later-filed objections in his order.

We agree, however, with Myles that the case must be remanded to the administrative law judge for consideration of his fee petition. Based on the facts of this case, the administrative law judge abused his discretion in denying all attorney's fees to Myles for failure to submit a timely application, *i.e.*, within 15 days from the February 12, 1991, date of service. On March 20, 1991, Myles moved for leave to submit his petition out of time, stating that although the Decision and Order was received in his office on February 20, 1991, the fact that he was required to file a fee petition within 15 days of the decision's service did not come to his attention until he received the correspondence concerning Dillon's attorney's fee. Myles attached his fee petition to the motion. The administrative law judge stamped "Denied" on the motion.

The Act contains no time limit for an application for an attorney's fee. *Baker v. New Orleans Stevedoring Co.*, 1 BRBS 134 (1974); 33 U.S.C. §928. The regulation at 20 C.F.R. §702.132 states that the fee application "shall be filed...within the time limits specified by ... [the] administrative law judge..." Nonetheless, the loss of an attorney's fee is a harsh result and should not be imposed on counsel as a penalty except in the most extreme cases. In the instant case, the delay was not extreme, was apparently unintentional and was rectified promptly. *See Paynter v. Director, OWCP*, 9 BLR 1-190 (1986) (Ramsey, C.J., dissenting) (Board holds that district director abused his discretion in denying a fee where petition was filed one month after time limit and the time limit was in the "Findings" and not in the "Order"); *cf. Bankes v. Director, OWCP*, 7 BLR 1-102 (1984), *aff'd*, 765 F.2d, 8 BLR 2-1 (6th Cir. 1985) (denial of fee affirmed where counsel did not file a fee petition for over a year after the deadline and had been warned of the sanction for failure to comply). We therefore reverse the administrative law judge's denial of an attorney's fee to Myles and remand the case for consideration of his fee petition and any objections thereto.

Accordingly, the administrative law judge's Decision Awarding Attorney Fees and the Denial of Motion for Reconsideration are affirmed. The district director's Compensation Order is affirmed. The administrative law judge denial of an attorney's fee to Myles is reversed, and the case

²In view of this disposition, Dillon's Motion to Strike is moot.

is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge