

BRB Nos. 93-0691
and 93-0691A

ROY R. EUBANKS)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order, Decision on Motion for Reconsideration and Amending Final Decision and Order, and Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Decision on Motion for Reconsideration and Amending Final Decision and Order (92-LHC-0605) and employer appeals the Supplemental Decision and Order Awarding Attorney Fees 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, 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, a retiree, was exposed to loud noise while working as a welder and rod room attendant for employer from 1964 to 1978. On January 14, 1989, an audiometric evaluation performed at the University of South Alabama Speech and Hearing Center revealed a 30 percent binaural hearing impairment. Based on the results of this audiogram, claimant filed a claim under the Act for occupational hearing loss benefits on December 1, 1989, providing notice to employer that same day. A subsequent audiometric evaluation was performed on May 23, 1990 at the Mobile Eye, Ear, Nose & Throat Center, which revealed an 11.9 percent binaural hearing impairment.

In his Decision and Order issued on October 1, 1992, the administrative law judge found that claimant suffered an 11.9 percent binaural impairment, and that employer was liable for compensation of claimant's hearing loss and medical benefits. Inasmuch as claimant was a retiree, the administrative law judge converted the 11.9 percent binaural impairment to a 4 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), and, based upon the stipulated average weekly wage of \$318.12, determined that claimant was entitled to ongoing weekly compensation benefits of \$12.72 pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). Upon consideration of employer's Motion for Reconsideration filed on November 5, 1992, the administrative law judge issued a Decision on Motion for Reconsideration and Amending Final Decision and Order on November 6, 1992, in which he acknowledged that his prior Decision and Order inadvertently referred to \$318.12 as the agreed compensation rate when, in fact, it was the agreed upon average weekly wage, and, applying the actual compensation rate, found claimant entitled to weekly benefits of \$8.48 rather than \$12.72.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting \$3,685.00, representing 22 hours of services at \$150 per hour and 3.50 hours of services at \$110 per hour, plus \$75 in expenses for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of \$2,805.00, representing 25.50 hours of services at an hourly rate of \$110, plus expenses of \$75.

Claimant appeals the administrative law judge's decisions on the merits, arguing that pursuant to the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), the administrative law judge erred in awarding him compensation for his work-related loss of hearing pursuant to Section 8(c)(23) of the Act. BRB No. 93-0691. Employer responds, stating that it has no opposition to the issuance of a decision in accordance with the Supreme Court's decision in *Bath Iron Works*. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. BRB No. 93-0691A. Claimant has not responded to employer's appeal.

We agree that the Supreme Court's decision in *Bath Iron Works* is dispositive of the issue presented by claimant on appeal. In *Bath Iron Works*, the Court 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). Accordingly, pursuant to

the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Since the administrative law judge's finding that claimant has an 11.9 percent binaural hearing loss is unchallenged, we modify his award to reflect that claimant is entitled to receive permanent partial disability benefits for an 11.9 percent binaural hearing loss pursuant to Section 8(c)(13)(B) of the Act.

Turning to employer's appeal of the administrative law judge's fee award, employer's objections to the number of hours and hourly rate awarded are rejected, as it has not shown that the administrative law judge abused his discretion in this regard.¹ See *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer's contentions which were not raised below will not be addressed for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

¹Although employer objected below to the quarter-hour entries claimed on January 7, 1992, April 16, 1992, May 7, 1992, June 2, and 12, 1992, and July 20, 1992 and to an aggregate 1 hour claimed on January 6, 1992, July 28, 1992 and October 6, 1992 for telephone conference with the claimant on the ground that the entries do not comply with the regulation at 20 C.F.R. §702.132(a), the administrative law judge did not abuse his discretion in awarding a fee for these entries.

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, the administrative law judge's award of permanent partial disability benefits under Section 8(c)(23) is vacated, and is modified to reflect that claimant is entitled to compensation for an 11.9 percent binaural hearing loss pursuant to Section 8(c)(13). In all other respects, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration are affirmed. The Supplemental Decision and Order Awarding Attorney Fees is also affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge