BRB No. 93-2051

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

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

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, 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 - Awarding Benefits and Supplemental Decision and Order Denying Attorney Fees (91-LHC-2905) 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 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). 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 under the Act seeking compensation for a work-related noise-induced hearing loss based upon an audiological evaluation performed on October 14, 1986, which revealed a mild mixed hearing impairment in his right ear and a moderate mixed hearing loss in his left ear. EX 4. In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant suffers a 6.9 percent binaural hearing impairment based upon an unmeasurable hearing impairment in his right ear and a 41.2 percent impairment in his left ear.

Next the administrative law judge, relying upon medical evidence that claimant suffered a zero impairment in his right ear related to noise exposure and a hearing loss typical of a possible closed head injury in his left ear, concluded that claimant suffers a zero percent hearing loss in each ear due to work-related noise exposure. Accordingly, he found claimant is entitled to no compensation and, therefore, no penalties under Section 14(e), 33 U.S.C. §914(e). Decision and Order at 2. However, because he found there had been some incalculable employment-related hearing loss, the administrative law judge awarded claimant medical benefits and instructed claimant's counsel to file a fee petition.

Subsequently, claimant's attorney filed a fee petition seeking a fee of $1,025, representing 8 hours at $125 per hour plus expenses of $25. In a Supplemental Decision and Order, the administrative law judge denied claimant's request for a fee.

Claimant appeals, contending that the administrative law judge erred in finding that he is entitled to no compensation for his hearing loss and in denying his request for an attorney's fee in its entirety. Employer responds, urging affirmance of both of the administrative law judge's decisions.

Claimant initially challenges the administrative law judge's determination that he is not entitled to compensation for his hearing loss. In determining whether an injury is caused or aggravated by conditions of his employment or a work accident, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after the claimant establishes a *prima facie* case. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the presumption is invoked, the burden shifts to employer to rebut it by producing facts to show that a claimant's employment did not cause, aggravate, or contribute to his injury. *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Under the aggravation doctrine, if a work-related injury aggravates, accelerates, or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*).

The issue of the applicability of the aggravation doctrine has recently been addressed by the United States Court of Appeals for the Ninth Circuit in *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), *aff'g in pert. part Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989). In *Port of Portland*, the Ninth Circuit affirmed the Board's holding that claimant Ronne was entitled to benefits for his entire hearing loss despite the fact that the parties did not agree on what portion of claimant's impairment was attributable to presbycusis. The court

reasoned that the aggravation rule, to warrant compensation for the full disability, does not require that the work injury interact with the pre-existing condition to cause a worsening of the pre-existing condition or that it combine in more than an additive way. *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 140-141 (CRT). Further, the court quoted *Nash*, a decision rendered by the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the instant case arises, and noted that the aggravation rule applies "even though the worker did not incur the greater part of his injury with that particular employer." *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 141 (CRT), *quoting Nash*, 782 F.2d at 519 n. 10, 18 BRBS at 51 n.10 (CRT); *see Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986).

Pursuant to this case precedent, we hold that the administrative law judge erred in failing to apply the aggravation rule, and in not giving claimant the benefit of the Section 20(a) presumption. Contrary to employer's contention, there is no basis for holding the aggravation rule inapplicable merely because claimant's hearing loss due to noise is not ratable. Neither Dr. McDill or Dr. Muller unequivocally stated that claimant's hearing loss, including the measurable impairment in claimant's left ear, was not in part related to noise. The aggravation rule does not permit apportionment between work-related and non work-related causes merely because the percentage of impairment attributable to each cause may not be ascertained from the record. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982).

Thus, Section 20(a) is invoked in this case, as the evidence demonstrates that claimant has a harm, *i.e.*, loss of hearing, which could have been caused, at least in part, by noise exposure. The burden shifted to employer to put forth evidence that claimant's exposure to noise at work did not aggravate or combine with his hearing impairment resulting from other causes. *See generally Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989). In the instant case, Dr. McDill stated that claimant had a mixed hearing impairment in both ears, rating the impairment at zero percent in the right ear and 41.2 percent in the left ear. Dr. Muller stated that claimant suffered some loss in hearing due to noise exposure in both ears, although it was zero percent in the right ear and incalculable in the left ear. Dr. Muller also stated that claimant's hearing loss in the left ear was more typical of a possible closed head injury type loss. As both doctors state that a portion of claimant's loss in both ears is due to noise, neither opinion constitutes affirmative evidence ruling out noise exposure as an aggravating or contributing factor in claimant's hearing loss. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). The fact that the loss in one ear cannot be measured affects the extent of disability; it is uncontested that a loss exists and there is no evidence in the record that noise exposure has had no effect on claimant's hearing.

Thus, as employer has failed to disprove aggravation or combination, the Section 20(a) presumption is not rebutted. The presumption therefore controls, and claimant's hearing loss is work-related as a matter of law. *Obert*, 23 BRBS at 160. Therefore, the administrative law judge's denial of disability benefits is vacated, and the case remanded to him for resolution of the remaining issues.

Lastly, claimant contends that the administrative law judge erred in denying his request for

an attorney's fee. Subsequent to the administrative law judge's award of benefits, claimant's attorney submitted a fee petition seeking a fee of $1,025, representing 8 hours of services at $125 per hour plus expenses of $25. In his supplemental decision, the administrative law judge reduced the number of hours and the hourly rate requested, finding compensable services rendered in 1991 to be 1/2 hour at $95 per hour and in 1992 and 1993 to be 3 3/8 hours at $100 per hour; he disallowed the expenses requested. Thus, the administrative law judge concluded that he would have awarded claimant's counsel a total fee of $385 were he to allow fees for the requested services. *See* Supplemental Decision at 2. Because the administrative law judge found that claimant's fee petition did not meet the standards set forth in *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 218 (1993), *aff'g en banc* 27 BRBS 45 (1993), he then disallowed all services except for one hour spent at claimant's hearing. However, the administrative law judge ultimately denied the fee in its entirety, concluding that the holding 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), controlled the issue of liability for counsel's fee. In *Baker*, the court held that in cases where medical benefits are the only compensation awarded, the fee should be tailored to claimant's limited success. 991 F.2d at 166, 27 BRBS at 16 (CRT). In the instant case, the administrative law judge reasoned that in the absence of evidence of past or future medical expenses related to claimant's work-related hearing loss, claimant had gained no benefits and, therefore, claimant's counsel was not entitled to a fee.

Based upon our disposition of the case on appeal, claimant has successfully prosecuted his claim; therefore, claimant is entitled to an attorney's fee award payable by employer. *See* 33 U.S.C. §928(b). Accordingly, the administrative law judge's denial of the fee is vacated; on remand, the administrative law judge should provide claimant's counsel the opportunity to submit a second fee petition which conforms to the regulations. *See Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Supplemental Decision and Order Denying Attorney Fees are vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge