BRB No. 05-0438

MICHAEL D. WEATHERINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	))	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 07/18/2005
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of Attorney Fee Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Attorney Fee Order (2002-LHC-2228) of Administrative Law Judge Richard K. Malamphy 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). 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).

On June 13, 1994, claimant experienced back pain and discomfort during the course of his employment with employer as a welder. Claimant subsequently underwent four surgical procedures and presently takes various medications for muscle relaxation, hypertension and pain. Employer voluntarily paid claimant temporary total disability

compensation for various periods of time post-injury. 33 U.S.C. §908(b). Thereafter, claimant sought total disability benefits under the Act, while employer took the position before the administrative law judge that claimant was partially disabled as a result of his work-related injury.

In his Decision and Order, the administrative law judge weighed the evidence before him and determined claimant's physical restrictions. Applying these restrictions to the vocational evidence submitted by employer, the administrative law judge concluded that employer failed to establish the availability of suitable alternate employment. Accordingly, as neither party averred that claimant's condition was permanent, the administrative law judge awarded claimant temporary total disability compensation from June 20, 2002, and continuing.[1]

Subsequently, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of $21,088.90, and expenses of $1,426.63, for work performed before the administrative law judge. Employer filed objections, arguing that claimant's counsel's fee petition was not ripe since the case was on appeal. Alternatively, employer sought to exclude all charges related to claimant's alleged cervical spine condition, and it challenged various time entries submitted by claimant's counsel. Claimant's counsel replied to employer's specific objections and also submitted a petition for a fee for an additional two hours of work for defending his original fee petition.

In his Attorney Fee Order, the administrative law judge considered employer's specific objections to claimant's counsel's fee request. He determined that the fee issue was ripe for adjudication, declined to reduce counsel's requested fee pursuant to the United States Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), disallowed 4.5 hours sought by counsel, and corrected a mathematical error in counsel's fee petition. As a result, claimant's counsel was awarded a fee of $20,044.20, plus $1,426.63 in expenses.

On appeal, employer challenges this attorney's fee award. Claimant responds, urging affirmance.

Initially, we reject employer's contention that it is not responsible for the payment of claimant's attorney's fee because claimant's counsel did not satisfy the criteria of 33

[1] Employer appealed the administrative law judge's Decision and Order to the Board, which subsequently affirmed that decision in its entirety. *Weatherington v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 04-0648 (Apr. 29, 2005)(unpub.). Employer has since appealed the Board's decision to the United States Court of Appeals for the Fourth Circuit.

U.S.C. §928(b) of the Act; specifically, citing the decision of the United States Court of Appeals for the Fourth Circuit in *Virginia Int'l Terminals v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), employer asserts that the failure of the district director to both hold an informal conference and issue a written recommendation in the case at bar precludes its liability to claimant's counsel's claim for an attorney's fee pursuant to Section 28(b) of the Act.[2] Employer, however, did not raise the issue of its liability for claimant's counsel's fee in its objections to the fee petition which it filed with the administrative law judge below. As objections must be raised before the administrative law judge in order to be considered on appeal, we will not address employer's liability argument which is raised for the first time on appeal. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(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*, 46 F.3d 66 (5th Cir. 1995); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Next, employer asserts that the administrative law judge erred in determining that claimant's successful claim for his low back condition was so closely related to his allegation that his cervical spine condition was work-related that the time spent by counsel on these two issues was inseparable. Thus, employer challenges the administrative law judge's decision to award claimant's counsel a fee for services rendered between December 23, 2002 and April 24, 2003, during which period of time employer contends that the only contested issue involved the potential causal relationship between claimant's cervical spine condition and his employment with employer. Since claimant subsequently withdrew his allegation that this condition is work-related, employer posits that claimant did not prevail on this issue and is therefore not entitled to a fee for services performed during this period of time. Er's br. at 11-13. In response, claimant acknowledges that he withdrew the issue of the potential causal relationship between his neck condition and his employment and that, as such, the administrative law judge did not address that issue; claimant contends, however, that he was required to continue his representation of claimant during the period of time challenged by employer since the issue of the extent of claimant's disability remained in dispute.[3] Claimant also

[2] In response, claimant asserts that the requirements of Section 28(b) were met, as documentary evidence establishes that an informal conference was held via correspondence and that a recommendation was issued on December 11, 2002, recommending that employer pay temporary total disability benefits, which employer did not do in a timely manner.

[3] In this regard, claimant notes that employer, during this period of time, continued to develop the record regarding the issue of extent of claimant's disability.

asserts that he defended and ultimately prevailed against employer's evidence purporting to establish the availability of suitable alternate employment, that he was thus fully successful in adjudicating his claim for ongoing total disability benefits, and that he is therefore entitled to the fee awarded to him by the administrative law judge. Clt's br. at 11-12.

Where a case involves issues on which claimant has mixed success, if the issues can be differentiated or severed, no fee is permitted for services performed on the unsuccessful issues. *Geo. Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. 1992); *see also General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). In this regard, in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Secondly, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that a district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. As the Supreme Court stated in *Hensley*, the most critical factor is the degree of success obtained. *Hensley*, 461 U.S. at 437.

In the instant case, it is undisputed that claimant filed a claim seeking total disability benefits under the Act as a result of a work-related back injury and that employer controverted the issue of the extent of claimant's disability. For a period of time between December 2002 and April 2003, claimant also alleged that his cervical spine condition was related to his employment, but he withdrew that allegation prior to the formal hearing. The administrative law judge, finding that employer failed to establish the availability of suitable alternate employment, ultimately awarded claimant ongoing temporary total disability benefits. Claimant's counsel's fee petition documents

services performed in pursuit of the total disability claim before the administrative law judge, including those during the period at issue.[4] Under these circumstances, the administrative law judge committed no reversible error in concluding that the case involved interrelated issues, and considering the case under the second prong of *Hensley*. *See* Attorney Fee Order at 3; *Hensley*, 461 U.S. at 434-534. Thus, the administrative law judge properly addressed whether claimant's success justified the work expended on the claim.

Employer asserts that any fee awarded to claimant's counsel must be reduced to exclude the $4,620.50 claimed for work between December 23, 2002, and April 24, 2003. We reject this contention. Initially, employer has not established that all of the time during this period related to the cervical spine issue, especially since claimant's entitlement to total disability was at issue during this period. Claimant was fully successful in obtaining an ongoing total disability award. *See* Er's br. at 12-13. The administrative law judge considered the overall relief obtained by claimant and found that claimant was successful in the prosecution of his claim and that he could receive an additional $202,264 in future benefits over the course of his lifetime as a result of his counsel's efforts. Attorney Fee Order at 3-4. On these facts, the administrative law judge's decision not to further reduce the fee is consistent with *Hensley*. We thus reject employer's contention of error and affirm the administrative law judge's fee award.

[4] We note that claimant is not required to file a fee application that distinguishes the work that he devoted to each issue on behalf of claimant. Rather, Section 702.132(a) of the regulations, 20 C.F.R. §702.132(a), requires an attorney's fee petition to describe with particularity the professional status of the person performing the work, the billing rate, and the hours devoted to each category of work. *See Newport news Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978). In the case at bar, claimant's counsel's fee application is in compliance with the regulation.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge