BRB No. 98-1201

PETER TUCKELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT, INCORPORATED	)	DATE ISSUED: _____
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits, Decision on Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May), Glastonbury, Connecticut, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar), Stamford, Connecticut, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits, Decision on Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fee of Administrative Law Judge David W. Di Nardi (97-LHC-2402, 97-LHC-2403) 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 if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim for his work-related hearing loss in 1997, and employer controverted the claim. At the hearing, the parties stipulated, *inter alia*, that claimant had not been paid compensation or medical benefits, and that the unresolved issues included whether claimant's hearing loss constitutes a work-related injury, the nature and extent of claimant's disability, the applicable average weekly wage, the applicability of Section 8(f), 33 U.S.C. §908(f), the responsible employer, and claimant's entitlement to medical benefits. In his Decision and Order, the administrative law judge determined that claimant is entitled to compensation for a work-related 2.813 percent binaural impairment pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), that employer is responsible for the payment of claimant's benefits, and that employer is not entitled to Section 8(f) relief. Next, the administrative law judge found that claimant's average weekly wage was $843.36, pursuant to Section 10(c), 33 U.S.C. §910(c). The administrative law judge further found employer responsible for the payment of the Yale University Occupational Health Clinic (Yale) medical bill as a necessary medical expense and for any reasonable and necessary future medical benefits for claimant's hearing impairment pursuant to Section 7 of the Act, 33 U.S.C. §907. Lastly, the administrative law judge determined that employer also is liable for an attorney's fee. Thereafter, the administrative law judge denied employer's motion for reconsideration, rejecting employer's challenge to the reliability of the Yale audiogram and reaffirming his previous decision to average the audiogram results.

Subsequently, claimant's counsel filed a petition requesting an attorney's fee of $6,187.95, representing 25.1 hours of services by lead counsel at $195 per hour, 8.2 hours of services by associate counsel at $140 per hour, and 4.2 hours of paralegal services at $50 per hour, plus $25.45 in expenses. Employer filed objections to this fee request. In a supplemental order, the administrative law judge agreed with employer that the $195 hourly rate requested for lead counsel is excessive, and, accordingly, reduced the hourly rate for lead counsel to $185. The administrative law judge rejected employer's further contentions that the fee should be reduced, first, on the basis of the lack of complexity of the legal issues involved in this case and, secondly, to reflect the fact that claimant achieved limited success in the prosecution of his claim. Accordingly, he held employer liable for an attorney's fee in the amount of $5,911.50.

On appeal, employer argues that the administrative law judge erred in including the

Yale audiogram in his determination of the extent of claimant's hearing loss, and that, based on the remaining audiograms, claimant's hearing loss should be considered to be equivalent to a zero percent binaural impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Employer also challenges the administrative law judge's decision to award claimant reimbursement for the cost of the Yale hearing evaluation and for any reasonable and necessary future medical services, including hearing aids. Lastly, employer appeals the attorney's fee award, arguing that claimant is not entitled to compensation or medical benefits and, thus, has not successfully prosecuted his claim or, in the alternative, that the fee should be reduced in light of claimant's limited success. Claimant responds, urging affirmance.

In assigning error to the administrative law judge's consideration of the Yale audiogram in his determination of the extent of claimant's hearing loss, employer specifically argues, first, that this audiogram does not conform to the requirements of Section 8(c)(13)(C) of the Act, 33 U.S.C. §908(c)(13)(C), and its implementing regulation, 20 C.F.R. §702.441(b)(1).[1] In his Decision and Order - Awarding Benefits and Decision on Motion for

[1]Section 8(c)(13)(C) of the Act states:

> An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

33 U.S.C. §908(c)(13)(C).

Section 702.441(b)(1) of the regulations provides as follows:

> (b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:
>
> (1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered

Reconsideration, the administrative law judge specifically found that the Yale audiogram qualifies as "presumptive evidence" of the amount of claimant's hearing loss on the date administered pursuant to Section 8(c)(13)(C) of the Act and Section 702.441(b)(1) of the regulations, on the basis that the audiogram was performed by a qualified individual and interpreted and certified by a licensed physician. *See* Decision and Order at 25; Decision on Motion for Reconsideration at 1. In order to qualify as "presumptive evidence," however, an audiogram must be ultimately interpreted and certified by a licensed or certified audiologist or otolaryngologist. *See* 33 U.S.C. §908(c)(13)(C); 20 C.F.R. §702.441(b)(1). In the instant

---

> qualified by a hearing conservation program authorized pursuant to 29 C.F.R. 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.

20 C.F.R. §702.441(b)(1).

case, the record clearly indicates that Dr. Anwar, the physician who interpreted the Yale audiogram, is Board-certified in internal medicine, and is not an otolaryngologist. *See* LX 16b at 4-6. Accordingly, we hold as a matter of law that the Yale audiogram cannot be considered to be "presumptive evidence" pursuant to Section 8(c)(13)(C) of the Act and Section 702.441(b)(1) of the regulations.[2] We therefore vacate the administrative law judge's findings with respect to the extent of claimant's hearing loss and remand the case for further consideration of this issue consistent with our decision *infra.*

[2]We are unable to determine, on the basis of the record before us, whether the qualifications of Carolyn Gregory, R.N., who administered the Yale audiogram, are sufficient to meet the requirements of 20 C.F.R. §702.441(b)(1).

We note that an audiogram that fails to qualify as "presumptive evidence" of the extent of a claimant's hearing loss nonetheless may be considered to be probative evidence by the administrative law judge in his determination of the extent of the claimant's hearing loss.[3] *See generally Norwood v. Ingalls Shipbuilding, Inc.,* 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds); *Dubar v. Bath Iron Works Corp.,* 25 BRBS 5 (1991). Thus, in the instant case, although the administrative law judge could not properly regard the Yale audiogram as "presumptive evidence," he could consider and evaluate this audiogram in light of the other evidence in the record. *Id.*

In determining the extent of claimant's hearing loss, the administrative law judge found that both Dr. Astrachan's audiogram and the Yale audiogram show the same indicia of reliability, and, accordingly, averaged the results of the two tests. The administrative law judge, citing *Pietrunti v. Director, OWCP,* 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997), as support for his determination to give greater weight to the testimony of claimant's treating physician, Dr. Anwar, regarding the procedures used in administering the Yale audiogram, rejected employer's assertion that the unreliability of the Yale audiogram made it unreasonable to average the two audiogram results to determine the amount of claimant's hearing loss. *See* Decision and Order at 27. We note, initially, that contrary to employer's suggestion on appeal, an administrative law judge is not required to credit the lowest audiometric rating. *See Norwood,* 26 BRBS at 68. In the instant case, the administrative law judge found the Yale audiogram to be reliable based on Dr. Anwar's testimony concerning the procedures used in administering that audiogram. An administrative law judge is not bound by a treating physician's opinion, however, if it is contradicted by substantial evidence to the contrary. *Pietrunti,* 119 F.3d at 1042, 31 BRBS at 89 (CRT). Where there are conflicts in the record evidence, the administrative law judge must resolve these conflicts and explain what evidence he weighed and why, consistent with the requirements of the

[3]In the instant case, nothwithstanding the administrative law judge's references to the Yale audiogram as "presumptive evidence," his findings that the Yale audiogram and Dr. Astrachan's audiogram are equally reliable and that, accordingly, claimant's hearing loss should be determined by averaging the results of the two audiograms may indicate that the administrative law judge, in actuality, viewed the Yale audiogram as probative evidence, rather than "presumptive evidence."

Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). *See Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163, 168 (1997); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Thus, an administrative law judge may not simply credit a medical opinion without evaluating it in light of other contrary evidence in the record. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140-141, 32 BRBS 48, 52 (CRT) (4th Cir. 1998).

Given the record in the instant case, we are unable to determine whether the administrative law judge "simply disregarded significant probative evidence or reasonably failed to credit it." *Gremillion*, 31 BRBS at 168 (quoting *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997). Moreover, we are unable to discern from the record before us whether the administrative law judge received into evidence and considered the deposition testimony of Dr. Astrachan taken in this matter on February 4, 1998.[4] We note that Dr. Astrachan's deposition contains testimony relevant to the issue of the reliability of the Yale audiogram; if this deposition, in fact, was received into evidence, it must be considered by the administrative law judge on remand.[5] Based on the foregoing, the administrative law

[4]Dr. Astrachan's deposition was not included in the record forwarded to the Board by the district director. In light of the statement in employer's Petition for Review that the administrative law judge had received into evidence Dr. Astrachan's deposition, the Board requested clarification from both counsel for employer and claimant as to whether Dr. Astrachan's deposition was, in fact, admitted into evidence. With the consent of claimant's attorney, employer's counsel served a copy of Dr. Astrachan's deposition on the Board.

[5]In reciting the evidence regarding the procedures used in conducting audiometric testing, the administrative law judge set forth at length the deposition

judge on remand must reconsider the extent of claimant's hearing loss, providing a reasoned analysis of the totality of the medical evidence relevant to question of the probative value of the respective audiograms. *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In weighing the evidence on remand, the administrative law judge must examine the reasoning underlying the medical opinions and resolve the conflicts in the evidence concerning the reliability of the Yale audiogram. *See generally Carmines*, 138 F.3d at 140-141, 32 BRBS at 52 (CRT); *Gremillion*, 31 BRBS at 168.

---

testimony given by audiologist Marcia Cornell. *See* Decision and Order at 14-17. As correctly noted by employer, however, the deposition testimony cited by the administrative law judge relates not to the claimant in the instant case but, rather, to the claimant in another matter, *George Miller*, Case No. 97-LHC-2297, OWCP No. 1-140536.

We turn next to employer's challenge to the administrative law judge's award of medical benefits pursuant to Section 7 of the Act. Initially, we reject employer's contention that claimant is not entitled to Section 7 benefits for the expense of the hearing evaluation conducted at the Yale Clinic. After undergoing a hearing evaluation conducted under the direction of Dr. Amato on behalf of employer on August 1, 1996, claimant was advised that his testing revealed a mild hearing difficulty that needed to be followed up by claimant's private physician. *See* CX A, B. Claimant thereafter underwent further audiometric testing at the Yale Clinic. As claimant had been advised by Dr. Amato to follow up his initial test with his private physician, we disagree with employer that the administrative law judge erred in finding the Yale Clinic hearing evaluation to be a reasonable and necessary medical expense under Section 7. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).[6]

We agree with employer, however, that the administrative law judge's award of future medical benefits must be vacated in light of the administrative law judge's failure to identify record evidence to support his finding that future medical benefits, including hearing aids, are reasonable and necessary.[7] *See Baker,* 991 F.2d at 166, 27 BRBS at 16 (CRT); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996). On remand, the administrative law judge must reconsider the medical evidence with respect to the issue of whether future medical services are reasonably necessary. *See Baker,* 991 F.2d at 166, 27 BRBS at 16 (CRT).

---

[6]We decline to address the assertion, made in employer's reply brief, that claimant failed to seek authorization for the Yale Clinic examination pursuant to Section 7(d), 33 U.S.C. §907(d), as this issue was not raised by employer at the hearing or in its post-hearing brief. *See Boyd v. Ceres Terminals,* 30 BRBS 218 (1997); *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP,* 931 F.2d 331, 28 BRBS 1 (CRT)(5th Cir. 1991).

[7]Our review of Dr. Astrachan's report, LX 4, and deposition reveals no support for the administrative law judge's statement that Dr. Astrachan was reluctant to prescribe hearing aids because claimant probably would not wear them, *see* Decision and Order at 31; rather, on deposition, Dr. Astrachan testified simply that he did not think claimant would be benefited by hearing aids, *see* Deposition at 8. Dr. Anwar's testimony concerning the usefulness of hearing aids for claimant, *see* LX 16b at 79-81, was not addressed by the administrative law judge. Moreover, the administrative law judge failed to address the testimony of Drs. Anwar, *see* LX 16b at 78, and Astrachan, *see* Deposition at 34-38, regarding the need for medical follow-up of claimant's hearing loss.

Lastly, we consider employer's appeal of the administrative law judge's award of an attorney's fee. We reject employer's initial contention that the fee award must be vacated on the basis that claimant should not have been found entitled to compensation or medical benefits. It is well-established that an administrative law judge may render an attorney's fee determination when he issues his decision, in order to further the goal of administrative efficiency. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248, 253 (1987). The fee award does not become effective, and thus is not enforceable, until all appeals are exhausted. *Id.*

We agree with employer, however, that the administrative law judge erred in not applying the holding of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), that the attorney's fee awarded should be commensurate with the degree of success obtained in a given case, when considering claimant's fee request. We hold, accordingly, that the administrative law judge's fee award must be vacated and the case remanded for further consideration of this issue.

In *Hensley*, 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? Second, 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 George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the 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 present case, employer properly raised the applicability of *Hensley* before the administrative law judge, arguing that the attorney's fee awarded must be commensurate with

the limited success achieved by claimant. Claimant sought compensation for a 5.625 percent binaural impairment which would have entitled him to 11.25 weeks of compensation, and was awarded compensation for a 2.813 percent binaural impairment, entitling him to 5.63 weeks of compensation. *See* 33 U.S.C. §908(c)(13)(B). In rejecting employer's objection regarding claimant's limited success, the administrative law judge, without addressing the applicability of *Hensley*, ruled that there is no requirement that the amount of the fee award be commensurate with claimant's award of benefits. *See* Supp. Decision and Order at 2. Thus, as the administrative law judge failed to address employer's specific contention regarding claimant's limited success in accordance with the applicable legal standards as set forth in *Hensley*, we vacate the fee award and remand the case for consideration of the fee petition pursuant to *Hensley*.[8] *See generally Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); *George Hyman Const. Co.*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

Accordingly, the administrative law judge's findings in his Decision and Order - Awarding Benefits and Decision on Motion for Reconsideration with respect to the extent of claimant's hearing loss and claimant's entitlement to future medical benefits are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is vacated, and the case is remanded for further consideration of the fee award.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[8]We note that the administrative law judge's consideration of claimant's limited success must be made in light of the degree of success claimant achieves on remand.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge