BRB Nos. 96-0140
and 96-0140S

JAMES R. SMALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVENS SHIPPING AND TERMINAL COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
GEORGIA INSURERS INSOLVENCY POOL	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Paul H. Felser (Portman & Felser) and Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Edward T. Brennen and Gabrielle Marder Mann (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order (93-LHC-1672) of Administrative Law Judge Robert S. Amery 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 and Dry Dock Co.,* 12 BRBS 272 (1980).

Claimant filed a claim for compensation under the Act as a result of an October 9, 1985, work-related injury to his right arm. Employer controverted the claim. In the original Decision and Order, Administrative Law Judge Robert J. Shea ordered employer to pay claimant compensation for an ongoing temporary total psychological disability resulting from this injury as well as certain medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907(a). The Board affirmed this decision. *Small v. Stevens Shipping & Terminal Co.*, BRB No. 88-2850 (July 31, 1990)(unpublished). Claimant then filed a claim for the reimbursement of medical expenses totalling $5,560, authorization for a new treating physician, and possible future surgery. In his Decision and Order, Administrative Law Judge Amery (hereinafter the administrative law judge) ordered employer to reimburse claimant $1,100 for the medical expenses which he incurred as a result of his treatment with Dr. Jordan. The administrative law judge additionally denied both claimant's request for authorization of Dr. Hodges as claimant's new treating physician and, consequently, employer's liability for related medical expenses, and claimant's request for authorization for future surgery.

Claimant's counsel sought an attorney's fee of $8,250, representing 41.25 hours of services at $200 per hour, plus $435.01 in expenses, for work performed before the administrative law judge in connection with the instant claim. In a Supplemental Decision and Order, the administrative law judge reduced the number of hours sought in the fee petition by 20.875, reduced the hourly rate to $175, and awarded claimant's counsel an attorney's fee totalling $4,000.64, including $435.01 in expenses.

Claimant thereafter apparently hired new counsel, who appealed the administrative law judge's Decision and Order to the Board on October 10, 1995. BRB No. 96-0140. On February 12, 1996, claimant's initial counsel filed an appeal of the administrative law judge's Supplemental Decision and Order.[1] BRB No. 96-0140S. On December 11, 1996, claimant's new counsel moved to withdraw his appeal of the administrative law judge's Decision and Order, BRB No. 96-0140. Section 802.401(a), 20 C.F.R. §802.401(a), of the Board's implementing regulations provides that at any time prior to the issuance of a decision by the Board, the petitioner may move that the appeal be dismissed. Consistent with this section, we hereby grant claimant's motion and dismiss his appeal of the administrative law judge's Decision and Order, BRB No. 96-0140, with prejudice. 20 C.F.R. §802.401(a). Consequently, the only appeal pending in this matter is claimant's appeal of the administrative law judge's Supplemental Decision and Order, BRB No. 96-0140S.

[1]We note that employer filed a cross-appeal of the administrative law judge's Decision and Order in this case on October 18, 1995. By motion dated November 27, 1995, employer requested that this appeal be withdrawn. The Board granted this motion in an Order dated January 17, 1996.

On appeal, claimant challenges the fee awarded by the administrative law judge. Employer responds, contending that the administrative law judge's fee award was proper, if not generous, considering the amount of medical benefits awarded.

Claimant contends that the administrative law judge erred by failing to provide an adequate rationale for reducing the fee sought by counsel; specifically, claimant asserts that, since all of the issues presented for adjudication were interrelated and the hourly rate was verified as the prevailing rate, he is entitled to a full award of his requested fee.

We affirm the $4,000.64 attorney's fee awarded by the administrative law judge in view of the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). 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 Construction 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. *See 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); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

In the present case, the administrative law judge found, in addressing employer's objections in which it cited, *inter alia*, the Supreme Court's decision in *Hensley*, that claimant was not successful in all of his claims; specifically, claimant, although successful in recovering $1,100 of the $5,560 in medical benefits sought, was unsuccessful on the issues of authorization of Dr. Hodges as his new treating physician and of authorization for future surgery. The administrative law judge thus allowed fifty percent of the remaining 40.75 hours of legal services on the medical expenses issue, and disapproved 20.375 hours based on claimant's lack of complete success on all issues. Accordingly, the administrative law judge considered, consistent with *Hensley*, claimant's failure to

succeed on unrelated claims as well as his degree of ultimate success as compared to the hours expended on the case as a whole. The administrative law judge further considered the complexity of the issues and the amount of compensation awarded in finding that $175 is a more appropriate hourly rate than the $200 per hour rate requested by counsel. 20 C.F.R. §802.203; *see Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Accordingly, we hold that the administrative law judge provided an adequate rationale in reducing both the number of hours and the hourly rate requested in this case. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Lastly, claimant contends that the administrative law judge erroneously disallowed a fee for services performed pertaining to an examination by claimant with Dr. Tillinger. We disagree. The administrative law judge did not abuse his discretion by disallowing one-half hour of services provided by counsel on December 27, 1994 and March 8, 1995, because he found that these services "pertain to an independent medical exam to investigate the Claimant's psychological condition, rather than any of the issues before this court." Supplemental Decision and Order at 1; 20 C.F.R. §702.132. As the administrative law judge's decision indicates, claimant's present claim involved the reimbursement of medical expenses, as well as authorization for a change in physician and future surgery; accordingly, because the administrative law judge's consideration of counsel's fee petition and the resulting fee award are in accordance with applicable law, we affirm the administrative law judge's award of an attorney's fee totalling $4,000.64, in this case.

Accordingly, the administrative law judge's Supplemental Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge