BRB Nos. 96-0327
and 96-0327A

LUTHER T. BARNES	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order - Awarding Attorney's 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 Judges, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and employer cross-appeals the Supplemental Decision and Order - Awarding Attorney's Fees (94-LHC-0336) 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).

On April 16, 1993, claimant filed a notice of injury and a claim for hearing loss benefits against employer. Claimant worked for employer for approximately three weeks prior to March 7, 1971, and during the period of March 7, 1971 to May 7, 1971. Thereafter, during the late 1970's and 1980's, claimant was employed as a mechanic and in construction, during which time he was exposed to loud noise. On October 13, 1973, claimant underwent an audiometric evaluation which was subsequently interpreted by Dr. McDill in 1994 as indicating a mild to moderately severe sensorineural hearing loss, but a zero percent binaural impairment when computed under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed.1988)(the AMA *Guides).* Subsequent audiometric evaluations undertaken in 1993 and 1994 revealed binaural hearing impairments of 22.8 and 21.3 percent, respectively.

In his Decision and Order, the administrative law judge, after concluding that claimant's 1973 audiometric evaluation was entitled to probative weight, relied upon that report in determining that claimant sustained a zero percent binaural hearing impairment as a result of his employment with employer in 1971. As that evaluation did indicate, however, that claimant sustained an injury within the meaning of the Act, and that claimant is a candidate for hearing amplification, the administrative law judge awarded claimant future medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of $2,372.50, representing 12.9 hours of services rendered by lead counsel at $150 per hour and 3.5 hours of services rendered by associate counsel at $125 per hour, for work performed before the administrative law judge in connection with this hearing loss claim. Employer filed objections to the requested fee. In a Supplemental Decision and Order, the administrative law judge reduced the number of hours sought by counsel to 15.89, reduced the hourly rates sought to $125 for claimant's lead counsel and $110 for claimant's associate counsel, and thereafter awarded claimant's counsel an attorney's fee of $1,935.70.

On appeal, claimant contends the administrative law judge erred in crediting claimant's 1973 audiometric evaluation which, he asserts, does not conform to the requirements of the AMA *Guides*. Employer responds, urging affirmance of the administrative law judge's Decision and Order. In its cross-appeal, employer challenges the administrative law judge's fee award, incorporating by reference the objections it made below into its appellate brief. Claimant responds, urging affirmance of the fee award.

Claimant, in his appeal, contends that the administrative law judge erred in relying on

the October 13, 1973, audiometric evaluation when determining the extent of claimant's hearing impairment. Specifically, claimant asserts that the 1973 audiometric evaluation does not meet the requirements of the AMA *Guides* since it contains only three frequency level ratings and the identity of the person performing the evaluation is unknown. *See* 33 U.S.C. §908(c)(13)(1988). Thus, claimant contends that this audiometric evaluation should not be determinative of claimant's hearing loss.

In addressing the weight to be accorded to employer's October 13, 1973 audiogram, the administrative law judge agreed with claimant that that audiometric evaluation should not be deemed presumptive evidence of the extent of claimant's hearing loss at the time he left the employ of employer in 1971. *See* Decision and Order at 4. The administrative law judge subsequently concluded, however, that the 1973 audiometric evaluation was entitled to probative weight because (1) that evaluation was performed at a reputable institution, (2) Dr. McDill, who is employed at that institution, determined that no discrepancies with the 1973 test existed that would cause him to distrust the results, and (3) claimant has confidence in Dr. McDill because he urged reliance on the 1994 audiogram interpreted by Dr. McDill to determine the extent of his hearing impairment. Thereafter, the administrative law judge relied solely upon that report in determining claimant's work-related hearing impairment, stating that "the ends of justice are best served by deeming the 1973 test to be the fairest representation of claimant's hearing loss when he departed [Ingalls] in 1971." *Id.*

We affirm the administrative law judge's decision to credit the October 13, 1973, audiometric evaluation. *See generally Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). An administrative law judge is afforded considerable discretion in determinations pertaining to the admissibility of evidence, *see Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988), and his determinations may be overturned only if they are arbitrary, capricious or an abuse of discretion. *See generally Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990). In the instant case, the administrative law judge rationally determined that this audiometric evaluation was entitled to determinative weight, although he recognized it did not qualify as presumptive evidence under the regulation, 20 C.F.R. §702.441(b). Claimant's argument that this audiogram does not comply with the AMA *Guides* lacks merit in view of Dr. McDill's statement that it reflected a zero percent impairment under the *Guides.* Accordingly, the administrative law judge's determination that claimant sustained a zero percent hearing impairment and his consequent denial of compensation benefits to claimant are affirmed.

In its cross-appeal, employer challenges the attorney's fee awarded to counsel by the administrative law judge. Initially, employer contends that, as claimant did not engage in a successful prosecution of his claim, it should not be held liable for counsel's fee. We disagree. Because claimant's counsel established claimant's entitlement to future medical

benefits,[1] claimant is a "prevailing party" in this case, and employer is liable for counsel's attorney's fee, as employer contested the issues of causation and entitlement to medical benefits. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). We therefore reject employer's contention that it is not liable for counsel's attorney's fee.

Employer, citing the decisions of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and the United States Court of Appeals for the District of Columbia Circuit in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992), alternatively argues that since claimant received only an award of future medical benefits, the administrative law judge's fee award cannot be upheld. We agree with employer that the fee awarded by the administrative law judge cannot be affirmed; specifically, in light of *Hensley*, we hold that the administrative law judge's fee award must be vacated and the case remanded for the administrative law judge to award a reasonable fee consistent with claimant's limited success.

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.*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *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

[1]We note that the April 6, 1993, report of Joseph Holston, a clinical audiologist, and the June 21, 1994, report of Dr. McDill agree that claimant is a candidate for binaural amplification. CXS 7, 8.

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.

In the present case, employer properly raised the issue of the amount of benefits before the administrative law judge, arguing that the requested fee was excessive when evaluated against the results obtained. Under the Act, the second prong of the *Hensley* test requires the administrative law judge to award a reasonable fee consistent with claimant's success in obtaining an award. *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). In this case, the administrative law judge did not address this specific contention in awarding the fee; we therefore conclude that the administrative law judge erred in failing to consider the *Hensley* test when awarding counsel his requested fee. *See Baker*, 991 F.2d at 163, 27 BRBS at 14 (CRT); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). Thus, we vacate the fee award and remand the case for consideration of the fee petition pursuant to *Hensley*.

Accordingly, the administrative law judge's Decision and Order is affirmed. The Supplemental Decision and Order - Awarding Attorney's Fees is vacated, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES BROWN
Administrative Appeals Judge