BRB Nos. 91-225
and 91-225A

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

Appeal of the Decision and Order-Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. and Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order, and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-1571) of Administrative Law Judge Quentin P. McColgin awarding benefits 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant has been employed by Ingalls Shipbuilding since 1943, where it is uncontested he

has been exposed to workplace noise which could have caused hearing loss. In an audiological report dated May 9, 1987, Dr. Wold reported a 0 percent impairment in claimant's left ear and a 20.6 percent impairment in his right ear for a binaural impairment of 3.4 percent. Dr. Wold stated that claimant's pattern of hearing loss is characteristic of a loss that is noise-induced in the left ear and aggravated by noise in the right ear. *See* Cl. Ex. 1. Claimant also was evaluated on January 27, 1987; the audiogram was interpreted by Dr. Lamppin as showing a 0 percent loss of hearing in the left ear and a 28 percent hearing loss in the right ear. Dr. Lamppin noted that the left ear loss is consistent with a noise-induced hearing loss, but the right ear does not demonstrate the type of loss seen in noise-induced hearing loss. *See* Cl. Ex. 5; Emp. Ex. 5.

On May 22, 1987, claimant filed his notice of injury and claim for compensation and employer filed notices of controversion on July 22, 1987 and March 3, 1988. On May 14, 1987, Assistant District Director[1] Robert H. Bergeron advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, or controversions, and from making payments in regard to these claims, until 28 days following the service on employer of a claim by the district director's office. Employer received notice of the claim from the district director on December 7, 1987.

In his Decision and Order, the administrative law judge found that there was no evidence that the hearing loss in claimant's right ear was causally related to conditions at his workplace, and thus refused to invoke the Section 20(a) presumption with regard to the right ear impairment. 33 U.S.C. §920(a). Therefore, as the claimant had no ratable impairment in his left ear under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), the administrative law judge found that claimant was not entitled to any compensation for his binaural impairment. Decision and Order at 4. Consequently, as claimant did not establish entitlement to compensation, the administrative law judge also denied assessment of a ten percent penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). Decision and Order at 4. The administrative law judge did find, however, that the evidence was sufficient to establish a non-ratable hearing impairment in claimant's left ear that was related to his working conditions and thus he awarded medical benefits. 33 U.S.C. §907; Decision and Order at 4. Further, based on the award of medical benefits, the administrative law judge awarded claimant's attorney a fee in the amount of $2,012.50 based on 20.125 hours at $100 per hour, and $85.50 for expenses. Supplemental Decision and Order Awarding Attorney Fees.

[1]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

On appeal, claimant contends that the administrative law judge erred in determining the extent of his disability, asserting that he is entitled to permanent partial disability compensation for his hearing impairment under the aggravation rule. Moreover, claimant contends that he is entitled to a ten percent penalty under Section 14(e) as employer did not timely controvert the claim or begin payments. In its cross-appeal, employer contends that the administrative law judge erred in awarding medical benefits and therefore erred in holding it liable for an attorney's fee. In a supplemental appeal, employer urges reversal of the attorney's fee award as there was no successful prosecution in this case, and employer also contends the fee awarded is excessive. Claimant responds, urging affirmance of the awards of medical benefits and an attorney's fee.

Specifically, on appeal claimant contends that the administrative law judge erred in determining the extent of disability as there is some noise-induced pathology that has injured claimant's hearing as a whole and thus the entire resultant condition is compensable. The administrative law judge declined to invoke the Section 20(a), 33 U.S.C. §920(a), presumption with regard to claimant's right ear, based on his finding of no evidence establishing a causal connection between the hearing impairment in claimant's right ear and the conditions at his workplace. Moreover, the administrative law judge concluded that as claimant had no ratable impairment of his left ear, he is not entitled to compensation for a binaural impairment, as it solely reflects the non work-related hearing loss in his right ear. Decision and Order at 4.

The administrative law judge's decision cannot be affirmed as it is inconsistent with the aggravation rule and the evidence in this case. Under the aggravation rule, claimant is entitled to compensation for his entire hearing loss when work-related acoustic trauma aggravates or combines with a prior hearing impairment. *See Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in pertinent part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991). In *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986), the claimant had a 65.52 percent non work-related hearing loss in his right ear and a 15 percent work-related hearing loss in his left ear, which resulted in a combined 23.436 percent binaural hearing loss. The Board held that claimant's work-related left ear hearing loss combined with claimant's existing right ear hearing loss to produce a greater impairment than the left ear injury alone would have caused. *Worthington*, 18 BRBS at 201. The Board noted that because claimant already had a substantial hearing loss in his right ear, his right ear was not able to compensate for the work-related hearing loss in his left ear. *Id.*; *see also Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327, 15 BRBS 52 (CRT) (4th Cir. 1982); *Primc v. Todd Shipbuilding Corp.*, 12 BRBS 190 (1980). Thus, the Board concluded that when one ear has a noise-induced loss, the loss in the claimant's binaural function is compensable. *Worthington*, 18 BRBS at 202.

Contrary to the administrative law judge's assertion in the instant case, the principle espoused in *Worthington* applies herein; both doctors agree that claimant's left ear impairment, though unratable under the AMA *Guides*, is related to noise exposure. Moreover, claimant, having established an impairment to his hearing and exposure to noise at work, is entitled to invocation of the Section 20(a) presumption that his hearing impairment in the right ear as well as the left is causally connected to workplace noise. *See Sinclair v. United Food and Commercial Workers*, 23 BRBS 148, 151 (1989). In this regard, the administrative law judge also erred in finding no evidence linking claimant's loss in his right ear to noise exposure. As claimant asserts, Dr. Wold opined that workplace noise aggravated claimant's loss in his right ear. Furthermore, there is no evidence of record which would establish rebuttal of the Section 20(a) presumption. In order to rebut, employer must establish that claimant's hearing loss was neither caused nor aggravated by his employment. *See Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). Dr. Wold reported that the workplace noise caused claimant's loss in the left ear and aggravated the hearing loss in claimant's right ear. Dr. Lamppin found claimant's left ear loss is noise-induced and did not rule out that claimant's right ear impairment is aggravated by noise exposure. Therefore, we hold that the administrative law judge erred in failing to apply the Section 20(a) presumption, *see Sinclair*, 23 BRBS at 154, and we reverse the administrative law judge's finding that claimant is not entitled to compensation benefits for his hearing impairment. *See Ronne*, 22 BRBS at 348; *Worthington*, 18 BRBS at 202. As the administrative law judge has not addressed the credibility of the audiometric reports, we remand the case to the administrative law judge for a finding regarding the extent of claimant's hearing impairment.

Claimant also contends on appeal that he is entitled to a 10 percent penalty under Section 14(e), 33 U.S.C. §914(e), to be assessed against employer. Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the district director after a showing that owing to conditions over which employer had no control, such installment could not be paid within the period prescribed for the payment. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the 14th day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

In the present case, it is uncontroverted that the claim was filed on May 22, 1987 with simultaneous notice to employer and that employer did not file a notice of controversion until July 22, 1987. Therefore, we also hold that as claimant is entitled to compensation benefits, employer is liable for an additional 10 percent assessment on benefits due in this case for claimant's hearing impairment. *See Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); 33 U.S.C. §914(b), (d), (e). The period of assessment is from the stipulated date of injury, May 9, 1987, to the date employer controverted the claim, July 22, 1987. *See Pullin v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 91-131 (May 7, 1993)(*order on recon.*); *Browder v. Dillingham Ship Repair*, 25 BRBS 88 (1991), *aff'g on recon.*, 24 BRBS 216 (1991). On remand, the administrative law judge shall enter an assessment under

Section 14(e) consistent with his award of benefits.

On cross-appeal, employer contends that the administrative law judge erred in awarding medical benefits. We disagree. The administrative law judge found that the evidence establishes that claimant is entitled to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, as Dr. Lamppin opined that the slight loss of hearing in claimant's left ear would cause communication problems for him and that he would benefit from amplification. The recent opinion 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), is dispositive in resolving this issue. In *Baker*, the court held that although a claimant may suffer a work-related hearing loss that does not result in a measurable impairment under the AMA *Guides*, he may still be entitled to medical benefits under Section 7 if they are found to be reasonably necessary. The court also stated that there must be an evidentiary basis for the award of medical benefits, such as past expenses incurred or evidence of treatment necessary in the future. *Id.* In one of the two cases consolidated in *Baker*, the court reversed the award of medical benefits as it lacked such an evidentiary basis. In the second claim, the court remanded, noting conflicting evidence regarding the necessity of future treatment.

In the present case, both Drs. Wold and Lamppin stated that claimant could benefit from amplification.[2] Dr. Lamppin noted in his deposition that claimant would have problems hearing conversation and functional problems with communication, *see* Dr. Lamppin Dep. at 9, and Dr. Wold recommended that claimant have hearing re-evaluations at intervals not to exceed one year, *see* Cl. Ex. 1. As both Drs. Lamppin and Wold stated that medical treatment would be necessary in the future, we affirm the administrative law judge's award of medical benefits pursuant to Section 7 as it is supported by substantial evidence and accords with law. *Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT). Further, inasmuch as we have held that claimant has a compensable impairment and he was employed as of the date of the hearing, we reject employer's contention that because claimant has no ratable impairment in his left ear, any future medical benefits will be unrelated to his noise exposure.

We also reject employer's contention in its supplemental appeal that the administrative law judge erred in awarding claimant's attorney a fee as there was no successful prosecution of the claim. Pursuant to Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). The administrative law judge found that there was no evidence that employer had voluntarily accepted responsibility for providing medical benefits to claimant and that no medical benefits have been paid.[3] Therefore, as he found claimant entitled to medical benefits pursuant to Section 7, the administrative law judge found that the claim had been successfully

[2]It appears employer accepted liability for some medical expenses. *See* Emp. Ex. 7.

[3]However, as noted earlier, it does appear from the record that employer accepted liability for some medical benefits. *See* Emp. Ex. 7.

prosecuted and awarded claimant's attorney a fee in the amount of $2,012.50 based on 20.125 hours of representation at $100 per hour, plus expenses in the amount of $85.50.

In *Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT), the Fifth Circuit vacated an award of an attorney's fee when it reversed the award of medical benefits as the "decision nullifies the only heretofore successful element of [the] claim." In the consolidated case, the court remanded a second claim to the administrative law judge for reconsideration of claimant's entitlement to medical benefits, instructing the administrative law judge on remand to tailor the fee award to the limited success if medical benefits are again awarded.[4] *Id*. Thus, in essence, the court concluded that an award of only medical benefits may be sufficient to satisfy the successful prosecution requirement of Section 28(a), although the amount of the award may be reduced based on the limited success attained. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In the present case, employer contested causation and by prevailing on that issue, counsel established claimant's entitlement to medical benefits. The necessity of medical treatment is demonstrated by uncontroverted evidence. Furthermore, as discussed earlier, we have reversed the administrative law judge's denial of disability benefits and held that claimant is entitled to a 10 percent penalty pursuant to Section 14(e). Therefore, as claimant's attorney successfully prosecuted the claim, we affirm the administrative law judge's finding that claimant's attorney is entitled to a fee award to be assessed against employer pursuant to Section 28(a) of the Act. 33 U.S.C. §928(a).

Employer also contends that the amount awarded by the administrative law judge is excessive. Contrary to employer's contention, the administrative law judge considered all of employer's objections to the amount of time spent on items identified in the attorney's fee application, reduced a number of the items, and found that the remaining identified work was necessary to establish entitlement. *See generally* 20 C.F.R. §702.132. Moreover, the administrative law judge reduced counsel's requested hourly rate from $125 to $100, finding $125 per hour to be excessive in light of the routine nature of the case. Inasmuch as employer has provided no support for its allegations that the number of hours and hourly rate awarded are excessive, we hold that employer has not met its burden of showing the award of an attorney's fee is unreasonable.[5] *See generally Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993).

Accordingly, the administrative law judge's Decision and Order denying compensation benefits and an assessment of a 10 percent penalty under Section 14(e) is reversed, and the case is remanded for further consideration consistent with this decision. The administrative law judge's

---

[4]No compensation benefits were awarded in the case.

[5]We will not address employer's argument that the attorney's fee should be limited by the amount of compensation awarded, in light of our reversal of the denial of benefits and a Section 14(e) penalty. *Watkins v. Ingalls Shipbuilding Inc.*, 26 BRBS 179 (1993). Moreover, this contention was not raised before the administrative law judge and cannot be raised for the first time before the Board. *See Bullock v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB Nos. 90-1941A (July 16, 1993)(Brown and McGranery, JJ., dissenting); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

finding that claimant is entitled to medical benefits is affirmed. Finally, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge