

BRB Nos. 91-466
and 91-466A

MARGUERITE B. STUTES)	
(Widow of TERRANCE E. STUTES))	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	DATE ISSUED:
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION AND ORDER

Appeals of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Carol B. Feinberg (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

*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).

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-2779) 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).¹ 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).

Decedent, claimant's husband, underwent audiometric testing on February 27, 1987, revealing a 4.7 percent binaural hearing loss, on March 4, 1987, revealing a 1.8 percent binaural hearing loss, and on February 2, 1989, revealing a 4.06 percent binaural hearing loss. Employer filed a Notice of Controversion on April 20, 1987. Decedent filed a claim for benefits under the Act for a work-related hearing loss on August 17, 1987. Employer made no voluntary payments of compensation but accepted liability for medical expenses. Jt. Ex. 1. At the formal hearing, the parties stipulated, *inter alia*, that decedent, a retiree, suffered a work-related hearing loss, that decedent's applicable average weekly was \$471.45 with a compensation rate of \$314.30, and that decedent died on April 30, 1990.

In his Decision and Order Awarding Benefits, the administrative law judge determined that the award of compensation to claimant for decedent's loss of hearing should be made pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). The administrative law judge found that the March 4, 1987 audiogram was the most reliable of the three audiograms, and utilizing the American Medical Association *Guides to the Evaluation of Permanent Impairment*, converted the 1.8 percent binaural impairment to a 1 percent whole person impairment. Relying on the parties' stipulated compensation rate, the administrative law judge awarded claimant permanent partial disability benefits in the amount of \$3.14 a week under Section 8(c)(23) of the Act for 1 percent whole man impairment to be paid through the date of decedent's death on April 30, 1990.

Thereafter, claimant's counsel submitted a fee petition requesting an attorney's fee of \$3,625, representing 29 hours of services rendered at an hourly rate of \$125, and \$44.75 in expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge considered employer's specific objections to the fee request, reduced the number of hours sought by counsel to 27.5, reduced the hourly rate sought to \$100, and thereafter awarded claimant's counsel an attorney's fee of \$2,750. He denied the expenses, finding that they were to be included in overhead.

¹Claimant's appeal, BRB No. 91-466B, was dismissed at her request by Board Order dated May 28, 1993.

On appeal, the Director contends that the administrative law judge erred in failing to determine the date on which benefits should commence. The Director further argues that the administrative law judge's Decision and Order sets forth no information as to whether the stipulated compensation rate is the correct rate in accordance with *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). Neither claimant nor employer has responded to the Director's appeal. Employer, in its appeal of the attorney's fee awarded to claimant's counsel by the administrative law judge, challenges the amount of the attorney's fee, and incorporates by reference into its appellate brief the arguments it made below regarding the fee request. Claimant responds, urging affirmance of the administrative law judge's fee award.

The Director initially contends that the administrative law judge erred in failing to determine the date on which benefits should commence. Specifically, the Director argues that the date claimant's compensation should begin is the date of decedent's retirement. We agree. Since the parties filed their briefs on appeal in the instant case, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which is dispositive of the issue raised by the Director. In *Bath Iron Works*, the Court found that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. As a loss of hearing occurs simultaneously with the exposure to excessive noise, the injury is complete when the exposure ceases, and the date of last exposure is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss. *See Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Based on this analysis, the court stated that hearing loss cannot be considered "an occupational disease which does not immediately result in disability," *see* 33 U.S.C. §910(i), and held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to section 8(c)(13), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23). Pursuant to the Supreme Court's decision in *Bath Iron Works* that the relevant time of injury for calculating a retiree's hearing loss benefits is the date of his last exposure to injurious noise levels, we hold that decedent's benefits must commence on the date of his retirement, February 27, 1987. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993); Jt. Ex. 1.

As the Supreme Court's decision in *Bath Iron Works* is dispositive of the Director's appeal of the issue of the onset date for claimant's award, it would be incongruous to commence a Section 8(c)(23) award on the date of retirement and ignore the Supreme Court's holding that claims for hearing loss benefits under the Act, whether filed by current employees or retirees, must be compensated pursuant to Section 8(c)(13) of the Act. *Moore*, 27 BRBS at 79. Thus, although no party on appeal has explicitly challenged the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23), in accordance with the holding of *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(23). *Id.* Since the administrative law judge relied on the March 4, 1987 audiogram revealing a 1.8 percent binaural hearing loss, we modify the administrative law judge's permanent partial disability award to one for 3.6 weeks (1.8 percent of 200) commencing February 27, 1987, in the amount of \$314.30 a week pursuant to Section 8(c)(13)(B). *Id.*

The Director additionally contends that the administrative law judge's Decision and Order is unclear as to whether the stipulated compensation rate is in accordance with *Ingalls Shipbuilding*. In his Decision and Order, the administrative law judge simply accepted the parties' stipulation that claimant's compensation rate is \$314.30. See Decision and Order at 2-3; Jt. Ex. 1. As neither claimant nor employer has appealed the administrative law judge's decision to accept their stipulation, we hold that the administrative law judge committed no reversible error in accepting the stipulation regarding the compensation rate to which claimant is entitled. See *Bath Iron Works*, 113 S.Ct. at 698 n.12, 26 BRBS at 153 n.12 (CRT).

In its appeal, employer first contends that the fee awarded to claimant's counsel is excessive in light of the nominal benefits obtained. Employer, however, did not raise this contention below, and we need not address it for the first time on appeal. See *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting). We note, however, that employer did not pay any benefits voluntarily in this case, and thus claimant was fully successful in prosecuting the claim. *Id.* The fee awarded is reasonable under these circumstances. *Id.*

Employer further contends that the lack of complexity of the instant case does not warrant the fee awarded by the administrative law judge. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132. See generally *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). While the complexity of issues should be considered by the administrative law judge under Section 702.132, it is only one of the relevant factors. See generally *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge considered this specific objection in reducing counsel's requested hourly rate from \$125 to \$100. We therefore reject employer's contention that the awarded fee must be further reduced on this basis. Moreover, we reject employer's assertion that the awarded hourly rate of \$100 is excessive, as the administrative law judge rationally determined this rate to be fair and reasonable in the region where this case was tried. See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); see generally *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge. Among the objections made is that the services performed on March 23, 1990 and May 7, 1990, are duplicative of those performed on November 22, 1989. Specifically, counsel charged four hours on November 22, 1989 for the receipt and review of employer's request for admissions, request for production, and interrogatories, and for the preparation and filing of claimant's responses thereto. The three hours charged on March 23 and May 7, 1990 are indeed duplicative of the services performed in November 1989, and we agree with employer that the three hours in question should be disallowed in their entirety. With regard to the remaining hours in question, the administrative law judge set forth each objection made by employer below and reduced the number of hours requested by 1.5. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in

this regard. Thus, we disallow three hours at \$100 per hour; the fee awarded is otherwise affirmed.² See *Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's award of permanent partial disability benefits under Section 8(c)(23) is modified to an award under Section 8(c)(13) as herein stated. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is modified to disallow three hours at \$100 per hour. The administrative law judge's Decision and Order and Supplemental Decision and Order are affirmed in all other respects.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

²We reject employer's challenge to counsel's billing method for the reasons stated in *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds). See also *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).