

BRB Nos. 91-1502
91-1502A

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

Appeals of the Decision and Order-Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth and John F. Dillon (Maples and 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 and BROWN, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order-Awarding Benefits and claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-3356) of Administrative Law Judge A.A. Simpson, Jr. 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'Keefe 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 shown by the challenging party 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).

Claimant was employed by employer from 1940 to 1979 as a chipper/shipfitter which

exposed him to high levels of noise. Cl. Ex. 3. At the hearing, the parties stipulated, *inter alia*, that: a) claimant was exposed to workplace noise which could have caused a hearing loss; and b) claimant is a retiree within the meaning of the Act. The results of two audiograms were introduced into evidence: a February 14, 1987 audiogram demonstrating a 19.9 percent noise-induced binaural impairment,¹ and a January 26, 1988 audiogram demonstrating a 3.75 percent binaural impairment. The administrative law judge noted that the latter audiogram was interpreted as showing a 100 percent loss of hearing in claimant's left ear which is unrelated to noise exposure, and that Dr. Stanfield factored out this non-work-related impairment, resulting in a lower binaural impairment rating. The administrative law judge further stated that employer maintained that the extensive loss claimant has in his left ear should be disregarded and factored out for compensation purposes. The administrative law judge found, however, that the aggravation doctrine applies so that claimant is entitled to be compensated for the full extent of his binaural hearing loss, as the combination of the mixed loss produced an increased impairment. The administrative law judge therefore concluded that claimant sustained a binaural impairment of 19.9 percent resulting from or aggravated by claimant's employment. He awarded claimant benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988), for a binaural impairment of 19.9 percent converted to a whole person impairment of 7 percent. The administrative law judge also held employer liable for a Section 14(e) penalty and medical benefits. 33 U.S.C. §§907, 914(e).

Thereafter, claimant's counsel requested a fee of \$2,929 reflecting 23.25 hours at the hourly rate of \$125 per hour for time billed by three attorneys in the firm. In a Supplemental Decision and Order, the administrative law judge reduced various items and the hourly rate, which he based on the respective experience levels of the attorneys. The total attorney's fee awarded amounted to \$952.50.

On appeal, employer contends that the administrative law judge erred in finding employer liable for the full extent of claimant's binaural hearing loss inasmuch as a portion thereof is not noise-related. Claimant responds, urging affirmance of the administrative law judge's award. In his appeal, claimant contends that the administrative law judge abused his discretion and erred as a matter of law by disallowing without discussion two one-hour items claimed by a senior partner based on an affidavit attached to employer's objections to the fee application. Employer responds, urging affirmance.

¹Dr. McClelland stated that claimant has a 3.8 percent impairment in the right ear and a 100 percent impairment in the left ear. He stated that the audiometric configuration is consistent with noise-induced hearing loss. Cl. Ex. 2.

We reject employer's contention concerning the administrative law judge's finding that it is liable for the full extent of claimant's hearing loss. Assuming, based on Dr. Stanfield's opinion, that claimant's left ear hearing loss is not noise-induced, the administrative law judge correctly stated that claimant is entitled to compensation for the combination of his pre-existing 100 percent left ear impairment and his right ear work-related noise-induced impairment pursuant to the aggravation rule. *See Primc v. Todd Shipyards Corp.*, 12 BRBS 190, 193 (1980); *see also Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 201-202 (1986); *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). Additionally, Dr. McClelland stated claimant's binaural hearing loss is noise-induced. Since the administrative law judge reasonably relied on the February 14, 1987 audiogram administered by Dr. McClelland to conclude that claimant sustained a 19.9 percent noise-induced binaural impairment, we affirm the administrative law judge's finding as it is supported by substantial evidence and in accordance with law.

Moreover, we reject claimant's contention that the administrative law judge abused his discretion regarding the award of an attorney's fee. Section 702.132 of the regulations, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. In the instant case, the administrative law judge, *inter alia*, disallowed two one-hour charges in counsel's fee petition for preparation of a Motion to Compel and review of file on August 31, 1988. The administrative law judge relied on an uncontroverted affidavit submitted by employer that this attorney had already billed 27 1/2 hours on August 31, 1988 in cases other than claimant's.² Claimant asserts an inability to challenge the accuracy of the affidavit because the prior attorney's fee petitions are not identified and because there is no way to determine the amounts awarded therefor or whether the use of a minimum billing method may have affected the total hours requested on a certain day. Claimant asks the Board to modify the award and allow the two one-hour charges.

The administrative law judge, in disallowing the time requested for August 31, 1988, relied on the sworn affidavit submitted by employer that prior to the petition at issue in this case claimant's counsel had billed employer 27 1/2 hours for work performed on that date in connection with other cases. In addition to the affidavit, the administrative law judge also cited the repetitious nature of the discovery documents requested by the Motion to Compel, stating that the identical motion had been filed in numerous cases. We conclude that the administrative law judge's reliance on the affidavit and repetitive nature of the Motion to Compel does not constitute an abuse of discretion, inasmuch as his explanation for disallowing two hours on August 31, 1988 is rational. Consequently, claimant has failed to meet his burden to establish otherwise. *See Welch v. Pennzoil Co.*, 23 BRBS 395, 402 (1990); *Muscella*, 12 BRBS at 273. *See generally Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). We, therefore, affirm the attorney's fee award.

Accordingly, the Decision and Order and Supplemental Decision and Order of the

² The affidavit states that the affiant, an employee of employer's insurance administrator, has personal knowledge that the attorney in question previously billed 27 1/2 hours on August 31, 1988 in claims other than claimant's.

administrative law judge are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I concur in the result reached by my colleagues in this case.

JAMES F. BROWN
Administrative Appeals Judge