BRB No. 91-1792

HARLON J. FRIERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: _____
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order--Awarding Attorney's Fee of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order--Awarding Attorney's Fee (89-LHC-2946) of Administrative Law Judge James W. Kerr, Jr., 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 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 only be set aside if shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a retired electrician, worked for employer from 1947 to 1949 and from 1971 to 1972, where he was exposed to loud workplace noise. Thereafter, in 1984 and 1986, he underwent audiological testing as part of pre- and post-employment physicals in connection with his work with another employer, Mason Chamberlain, Incorporated. An audiometric examination subsequently performed on February 4, 1987, was interpreted by Dr. McClelland as indicative of a 9.7 percent binaural impairment. On February 24, 1987, claimant filed a claim for occupational hearing loss benefits under the Act based on the results of the February 4, 1987, audiogram and provided employer with notice of his injury. Employer filed a notice of controversion on January 14, 1988. An audiometric examination performed on March 16, 1989, was interpreted by Dr. Stanfield as showing a 5 percent binaural hearing impairment. On June 22, 1989, the case was referred to the Office of Administrative Law Judges. As of the time of the hearing, the contested issues included the timeliness of the claim under Section 13, 33 U.S.C. §913, the nature and extent of disability, and employer's liability for Section 14(e), 33 U.S.C. §914(e), penalties and an attorney's fee.

The administrative law judge found that the claim filed on February 24, 1987 was timely under Section 13 and determined that claimant sustained a 7.35 percent binaural hearing loss based on the average of the latter two audiograms. As claimant was a retiree, the administrative law judge converted claimant's 7.35 percent binaural hearing impairment to a 2 percent whole person impairment and awarded him compensation pursuant to 33 U.S.C. §908(c)(23) (1988).[1] The administrative law judge also awarded claimant interest, medical benefits, and an assessment under Section 14(e), the exact amount of which was to be determined by the district director.

On appeal, employer asserts that the administrative law judge erred in finding that the February 24, 1987, claim was timely filed under Section 13 of the Act. Claimant responds, urging that the administrative law judge's Section 13 findings be affirmed. In a supplemental appeal, employer challenges the administrative law judge's attorney's fee award.

After consideration of the Decision and Order in light of the evidence of record, we affirm the administrative law judge's finding that the February 24, 1987, claim was timely filed. Section 8(c)(13)(D) of the Act provides that, in claims for a loss of hearing, the time period of Section 13 will not commence "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 33 U.S.C. §908(c)(13)(D)(1988). *See* 20 C.F.R. §702.221(b); *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27, 29 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994). Moreover, Section 8(c)(13)(D) must be read in conjunction with the requirement for awareness under Sections 12 and 13, as an audiogram generally provides only a measure of the degree of impairment and may not indicate the relationship between its results and claimant's work. Therefore, the Board has held that a claimant is aware of the relationship between his work and his hearing loss, for purposes of Sections 12 and 13, when he receives an audiogram with report and "has knowledge of the causal connection between his work and his loss of hearing." *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

[1]No one challenges the award of compensation benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23). *Cf. Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993) (all hearing loss is properly compensated under 33 U.S.C. §908(c)(13)).

See also Ranks v. Bath Iron Works Corp., 22 BRBS 301 (1989).

Employer argues on appeal that the Section 13 statute of limitations should have commenced on October 24, 1984, because claimant signed the audiogram of that date, thereby indicating his receipt of it, and conceded that he was aware of his hearing loss at that time. The administrative law judge found that the record is insufficient to establish that claimant received either the 1984 or 1986 audiogram or an accompanying report. Even if employer is correct that the record establishes claimant's receipt of the October 1984 audiogram, this error is harmless as claimant's physical receipt of the audiogram is not determinative of the timeliness issue before us in this case. Employer does not allege, and no evidence was presented sufficient to establish, that claimant was provided with an accompanying report at that time. Moreover, while claimant conceded in his deposition testimony that he was aware that he had a hearing problem at the time of the October 1984 audiogram, Ex. 13 at 31, there is also no evidence of record which suggests that he related his loss of hearing to his employment at that time.

Employer bears the burden of establishing that the claim was not timely filed pursuant to Section 20(b), 33 U.S.C. §920(b). As there is no evidence of record sufficient to establish that claimant was provided with an audiogram with accompanying report and was aware that he had sustained a permanent hearing loss related to his employment at any time prior to February 4, 1987, the administrative law judge's finding that the claim filed on February 24, 1987, was timely is affirmed. *See generally Bridier*, 29 BRBS at 89; *Vaughn*, 26 BRBS at 29; *Horton v. General Dynamics Corp.*, 20 BRBS 99, 102 (1987); *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986).

Employer also appeals the administrative law judge's fee award on various grounds, incorporating the arguments it made below into its appellate brief. Claimant has not responded to employer's appeal of the administrative law judge fee award.

Claimant's counsel submitted a fee petition for work performed at the administrative law judge level, requesting $3,477.25 for 27.25 hours of services at $125 per hour, plus $71 in expenses. Employer filed objections to counsel's fee request, and claimant replied to employer's objections, requesting an additional one hour for time expended in defending the fee petition. In his Supplemental Decision and Order -- Awarding Attorney's Fee, the administrative law judge, addressing employer's objections to the fee request, disallowed 5.25 of the total 28.25 hours claimed, and reduced the $125 hourly rate requested to $110. Accordingly, he awarded claimant's counsel a fee of $2,614.75, representing 23.125 hours of legal work at $110 per hour plus the $71.00 in requested expenses.

On appeal, employer initially contends that the fee award is premature, arguing that there has been no successful prosecution as the administrative law judge's determination that the claim was timely is an issue currently on appeal. We disagree. It is well established that to further the goal of administrative efficiency, an administrative law judge may render an attorney's fee determination when he issues his decision; such an award, however, does not become effective, and thus is not enforceable, until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248

(1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). We hold, therefore, that the administrative law judge committed no error in considering claimant's counsel's fee petition while the case was pending on appeal before the Board.

We also reject employer's contention that the amount of the fee award is excessive. Although employer argues that consideration of the quality of representation provided, the complexity of the issues presented, and the amounts of benefits obtained mandates a complete reversal, or at least a substantial reduction in the fee awarded, we need not address these arguments, as they have been raised for the first time on appeal. *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 in pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994), (McGranery, J., dissenting) (decision on recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). We note, however, that the administrative law judge did consider the factors cited by employer in rendering the fee award in this case. While employer also argues that the $110 hourly rate awarded is excessive and that an hourly rate of $80 to $85 for claimant's senior counsel and $70 to $75 for the junior associates would be more appropriate, we affirm his hourly rate determination as employer has not established an abuse of discretion by the administrative law judge in this regard.[2] *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); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).[3]

Employer also objects to counsel's use of the minimum quarter-hour billing method. Although counsel submitted a petition using this method of billing, and the administrative law judge summarily dismissed employer's objection in this regard, the administrative law judge nonetheless reduced six one-quarter hour entries claimed in connection with the preparation or review of routine correspondence on December 11, 1989, December 15, 1989, January 19, 1990, June 6, 1990 and June 28, 1990, from one-quarter to one-eighth of an hour. The administrative law judge's reduction of these entries is consistent with the United States Court of Appeals for the Fifth Circuit's mandate in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990)(unpublished), and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpublished), that attorneys should generally charge no more than one-eighth of an hour for review of a one-page letter and no more than one-quarter of an hour for preparation of a one-page

[2]Employer attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This article does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

[3]We reject employer's contention that the unpublished fee order of Administrative Law Judge Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (Sept. 5, 1991), mandates a different result in this case as the determination of the amount of an attorney's fee is within the discretion of the administrative law judge awarding the fee. *See* 20 C.F.R. §702.132.

letter. The remaining one-quarter hour entries claimed for review of correspondence were properly awarded by the administrative law judge; the record reveals that the correspondence in question was either non-routine or longer than one page. As the administrative law judge's fee award complies with *Fairley* and *Biggs*, we find no error on this basis. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Finally, we reject employer's contention that time spent in certain discovery-related activity, in file review, and in trial preparation or attendance was either unnecessary, excessive, or clerical in nature. In entering the fee award, the administrative law judge considered employer's objections, disallowed 5.25 hours sought by counsel, and found the remaining itemized services to be reasonable and necessary. We decline to disturb this rational determination. *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Inasmuch, however, as the administrative law judge failed to consider employer's objection to the two hours charged on December 11, 1989, for preparation and filing of Motions to Compel Discovery and Production of Documents, the case must be remanded to allow him to do so.

Accordingly, the Decision and Order - Awarding Benefits is affirmed. The Supplemental Decision and Order -- Awarding Attorney's Fee is affirmed in part and vacated in part, and the case is remanded for further consideration of the fee award consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge