

BRB Nos. 92-602
and 92-602A

P.L. COLLINS)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
INGALLS SHIPBUILDING,) DATE ISSUED: _____
INCORPORATED)
)
Self-Insured)
Employer-Respondent)
Cross-Petitioner) DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

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

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for the employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-3529) of Administrative Law Judge Kenneth A. Jennings 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant has been exposed to loud noise since he began working for employer in 1968. On October 14, 1986, claimant underwent an audiometric evaluation which was interpreted by audiologist Marianne Towell as indicating a zero percent hearing impairment in claimant's right ear

and an undetermined degree of impairment in claimant's left ear. She referred him for further evaluation. A subsequent audiometric evaluation performed on June 17, 1987, by Dr. Gilchrist indicated a zero percent impairment in claimant's right ear and a 22.5 percent impairment in his left ear for a binaural impairment of 3.8 percent. On August 14, 1987, claimant underwent a third audiometric evaluation which was interpreted by Dr. Wold as indicating a 39.3 percent impairment in claimant's left ear, but he did not quantify any degree of hearing loss in claimant's right ear. The percentage of binaural impairment is 6.5 percent. Claimant filed a claim for hearing loss benefits under the Act on October 13, 1987.

At the hearing, the contested issues were causation, claimant's entitlement to medical benefits, the extent of his disability, and his entitlement to a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e). The parties stipulated that claimant's average weekly wage is \$448.30, and that claimant was exposed to noise in the workplace sufficient to cause a noise-induced hearing loss. The administrative law judge found, based on this stipulation and the results of the two audiograms indicating claimant suffered some degree of hearing loss, that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his hearing loss resulted from noise at employer's workplace. Noting the lack of rebuttal evidence, the administrative law judge determined that claimant's hearing impairment is work-related.

The administrative law judge then found, based on the Board's holding in *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 173 (1991) (*en banc*)(Smith and Dolder, JJ., dissenting), *vacating on reconsideration en banc* 23 BRBS 345 (1990), *rev'd mem.*, 955 F.2d 41 (4th Cir. 1992), that claimant should be awarded benefits for a binaural impairment in accordance with Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), rejecting claimant's claim that he was entitled to compensation for a monaural impairment pursuant to Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A). The administrative law judge therefore found, based on the average of the later two audiograms, that claimant has a 5.2 percent binaural hearing loss. Decision and Order at 5. The administrative law judge also found that employer is liable for a ten percent penalty under Section 14(e), that claimant is entitled to interest on past due benefits, and to reimbursement from employer for past and future medical treatment. *Id.*

Claimant appeals the administrative law judge's determination that he is entitled to an award for a binaural impairment pursuant to Section 8(c)(13)(B), contending he is entitled to compensation for a monaural impairment under Section 8(c)(13)(A) pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993). BRB No. 92-602. Employer concedes claimant's entitlement to an award on a monaural basis.

Thereafter, claimant's attorney filed a fee petition for work performed before the administrative law judge, in which he requested a fee of \$3,687.50, representing 29.25 hours of services at \$125 per hour, plus \$31.25 in expenses. Employer filed objections to the fee petition, and claimant replied to employer's objections. In a Supplemental Decision and Order Granting Attorney Fees, the administrative law judge, addressing employer's objections to the fee request, disallowed

11 of the 29.25 hours claimed, reduced the hourly rate sought to \$100 for the junior associate, and awarded claimant's counsel the sum of \$1,850, in addition to \$31.25 in expenses. Employer appeals the administrative law judge's Supplemental Decision and Order. BRB No. 92-602A. Claimant responds, urging affirmance.

We agree with the parties that the holding of the Fifth Circuit in *Tanner*, 2 F.3d at 143, 27 BRBS at 113 (CRT), is dispositive of the issue raised by claimant on appeal, inasmuch as this case arises within the jurisdiction of the Fifth Circuit. In *Tanner*, the Fifth Circuit held that compensation for a claimant who suffers from a monaural impairment should be calculated under Section 8(c)(13)(A), rather than Section (8)(c)(13)(B), of the Act. We therefore vacate the administrative law judge's award of benefits for a 5.2 percent binaural hearing loss. Because no party challenges the administrative law judge's decision to average the results of the latter two audiograms, we modify the award to reflect claimant's entitlement to benefits for a 30.9 percent monaural impairment for 16.1 (52 x 30.9 percent) weeks at the stipulated average weekly wage. 33 U.S.C. §908(c)(13)(A).

Turning to employer's appeal of the administrative law judge's attorney's fee award, employer contends that the fee award should be reduced given the routine and uncomplicated nature of the case. Employer also contests the hourly rate of \$125 awarded to lead counsel and \$100 for associate counsel, asserting that a rate of \$75 to \$80 would be more appropriate. In addition, employer incorporates into its appellate brief the objections to various itemized entries it presented below.

We initially reject employer's contention that the amount of the fee award is excessive. Although employer asserts that a consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a substantial reduction of the \$1,850 fee awarded, we need not address these arguments which have been raised for the first time on appeal. See *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in part, part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1994); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Moreover, we note that employer paid no benefits voluntarily and that claimant's counsel's efforts before the administrative law judge resulted in claimant's obtaining an award of benefits under Section 8(c)(13), medical benefits, and a Section 14(e) assessment.

We further reject employer's contention that the \$125 hourly rate awarded to claimant's senior counsel and the \$100 hourly rate awarded to his associate counsel are excessive. As the administrative law judge specifically considered employer's objection to the hourly rate in reducing the \$125 rate requested for associate counsel to \$100 and as employer has not shown he abused his discretion in setting the hourly rates, we affirm the hourly rates. See *Watkins*, 26 BRBS at 181; *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer also contends that the time spent in certain discovery-related activity, in trial preparation, and in reviewing and preparing various legal documents was either unnecessary or excessive, or clerical in nature.¹ After evaluating claimant's fee request in light of employer's objections, the administrative law judge disallowed 11 hours, and found the remaining services claimed to be reasonable and necessary.² We decline to further reduce or disallow the hours approved by the administrative law judge. See *Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).³

¹Additionally, we reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (September 5, 1991), as fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. 33 U.S.C. §928(c); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

²For the reasons stated in *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993), we reject employer's reliance on *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991)(unpublished).

³The administrative law judge allowed one-quarter hour for writing letters, and the Fifth Circuit has stated that this is a reasonable amount of time for a one-page letter. See *Ingalls Shipbuilding, Inc., v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990). See also *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (unpublished). We reject employer's challenge to itemized entries it deems to be clerical tasks for the reasons stated in *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 22 (1994).

Accordingly, the Decision and Order of the administrative law judge is modified to reflect claimant's entitlement to an award for a monaural impairment in accordance with this decision. In all other respects, the administrative law judge's Decision and Order and Supplemental Decision and Order are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge