

BRB Nos. 92-2499
and 92-2499A

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| CLYDE MARSHALL |) | |
| |) | |
| 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 on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (88-LHC-1296) 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). 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).

This case is before the Board for the second time. In his initial decision in this case, the administrative law judge granted claimant's motion for summary judgment and found that claimant, a retiree, should be compensated for his work-related hearing loss pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988). In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of \$875, to be paid by employer, representing 8.75 hours of services at \$100 per hour.

Employer appealed these decisions to the Board. Employer subsequently moved to remand the case to the administrative law judge for further action consistent with the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), in which the court held that a retiree's hearing loss benefits are to be calculated pursuant to Section 8(c)(23). In an Order dated September 11, 1991, the Board granted the motion to remand. *Marshall v. Ingalls Shipbuilding, Inc.*, BRB No. 89-0889 (September 11, 1991) (order). The Board further directed the administrative law judge to consider claimant's entitlement to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e). Lastly, the Board vacated the attorney's fee award and instructed the administrative law judge to reconsider the fee award in light of his decision on remand.

On remand, consistent with the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), the administrative law judge awarded claimant benefits pursuant to Section 8(c)(23) for a 4 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). The administrative law judge also held employer liable for a Section 14(e) penalty and reinstated the \$875 attorney's fee award previously made to claimant's counsel. Moreover, in a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of \$495 representing 4.5 hours of work at \$110 per hour for work performed before the administrative law judge on remand.

Claimant appeals the administrative law judge's decision arguing that the pursuant to the United States Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), he is entitled to compensation under Section 8(c)(13). Employer responds, indicating that it has no opposition to the issuance of a decision which is in accordance with *Bath Iron Works*.

Subsequent to the issuance of the administrative law judge Decision and Order On Remand in this case, the United States Supreme Court held in *Bath Iron Works* 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). Consequently, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). In his Decision and Order On Remand, the administrative law judge indicated that it was unclear from the record whether compensation should be awarded based on the 11.88 percent binaural hearing loss revealed in the September 8, 1986, filing audiogram or the 11.4 percent binaural hearing loss evidence on a June 2, 1987, audiogram but found it unnecessary to resolve the issue because both audiograms converted to a 4 percent whole person impairment under the AMA *Guides*. Upon reviewing the record, however, we note that in their summary judgment motions the parties agreed to average the two audiograms. Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, we modify the administrative law judge's award to reflect that claimant is entitled to receive permanent partial disability benefits for an 11.64 percent binaural hearing loss pursuant to Section 8(c)(13) of the Act consistent with the parties' agreement.

Next, we turn to employer's appeal of the \$875 fee award contained in the administrative law judge's Decision and Order on Remand. When the case was before the administrative law judge initially, claimant's counsel sought an attorney's fee of \$1,329.25 representing 8.75 hours at \$150 per hour, plus \$16.75 in expenses, for work performed in connection with claimant's hearing loss claim. In a Supplemental Decision and Order Awarding Attorney's Fees dated April 6, 1989, the administrative law judge, noting that no objections had been filed to the fee request, reduced the hourly rate requested to \$100, but otherwise found the fee application reasonable. Accordingly, he awarded claimant's counsel a fee of \$875 representing 8.75 hours of services at \$100 per hour but denied the requested expenses as a part of office overhead. In his Decision and Order On Remand, the administrative law judge summarily reinstated this fee. Employer cross-appeals the reinstated \$875 fee and claimant responds, urging affirmance.

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).

On appeal, employer initially contends that, since it tendered payment of compensation for an 11.4 percent binaural hearing impairment prior to referral, the administrative law judge erred in holding it liable for the reinstated \$875 fee. In the alternative, employer asserts that pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), any fee awarded should be limited to the difference between the amount of benefits initially paid to claimant and the amount ultimately awarded by the administrative law judge. Employer also contends that the consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal, or at least a substantial reduction of the \$875 fee awarded. Moreover, employer maintains that a fee award based on hourly rates of \$80 to \$85 for claimant's senior counsel, and \$70 to \$75 for the junior associates, would be more appropriate and in addition challenges counsel's use of a minimum quarter-hour billing method. As discussed previously, however, employer filed no objections to counsel's \$875 fee request below.¹ Accordingly, we need not address these arguments which employer has 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 part 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).

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works Corp.*, the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23) is vacated, and is modified to reflect claimant's entitlement to an award for an 11.64 percent binaural impairment pursuant to Section 8(c)(13)(B). In all other respects, the administrative law judge's

¹Employer states in its Petition for Review that it filed objections with the administrative law judge which are attached and incorporated by reference into its brief on appeal. We note, however, that the attached objections relate to the services claimed for work performed before the district director, not to those performed before the administrative law judge.

Decision and Order On Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge