BRB Nos. 93-1530
and 93-1530A

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

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

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

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:

Claimant appeals the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration, and employer appeals the Supplemental Decision and Order-Awarding Attorney's Fee (92-LHC-1138) 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 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. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who worked for employer as a welder for approximately one year from 1962 to

1963,[1] sought compensation under the Act, contending that he incurred hearing loss due to exposure to excessive noise and to ear burns he sustained while working for employer. After leaving employer, claimant was initially self-employed as a service station operator but later worked for various non-maritime employers where he performed truck driving, construction work, and welding. A January 13, 1990, audiogram performed at the University of South Alabama revealed a 0 percent impairment of the right ear, a 15 percent impairment of the left ear, or a binaural hearing impairment of 2.5 percent. Cx. 5 at 1. On August 6, 1990, claimant was seen on an emergency basis by Dr. George Arrington, Jr., after he apparently irritated his ears by over zealous cleaning with Q-tips and alcohol. Ex. 13. Dr. Arrington performed an audiogram which is uninterpreted, removed a small metal fragment from claimant's right ear, and noted that claimant had multiple burns in his ears from welding. *Id.* A subsequent audiometric examination at the University of South Alabama on June 3, 1992, showed a 0 percent loss in the right ear and an 11.2 percent loss in the left ear or a binaural loss of 1.9 percent. Cx. 5 at 2-7. In the report which accompanied this examination, Mr. Holston concluded that claimant did have bilateral sensorineural hearing loss and recommended amplification. Cx. 5 at 2-3.

In addition to the audiometric evaluations performed at the University of South Alabama, claimant underwent an audiological examination at employer's request by Drs. Muller and McDill on September 9, 1991, which revealed a 3.8 percent loss in the right ear and an 11.2 percent loss for the left ear, for a binaural hearing loss of 1.9 percent. The record reflects that Dr. McDill attempted to eliminate the non-noise-induced portion of claimant's hearing loss, which Dr. Muller related to a suspected perforation of the left tympanic membrane, by basing the left ear figures on bone conduction scores. Ex. 3.

At the hearing before the administrative law judge, claimant contended that his hearing loss occurred due to noise exposure and to burns he sustained while working as a welder for employer. Claimant argued that Dr. Arrington's audiogram should be excluded and that his award of compensation should be calculated based on the average of the remaining three audiograms as a binaural impairment of 4.8 percent. In his Decision and Order, the administrative law judge found that although claimant sustained bilateral noise-induced hearing loss, the traumatic element of his left ear hearing loss was not due to inner ear burns, noting that the only physician to discuss the issue, Dr. Muller, stated that the conductive portion of the hearing loss in the left ear is probably related to the suspected perforation of the tympanic membrane which was observed both by otologic examination and microscopically. The administrative law judge then determined that the most recent audiogram performed at the University of South Alabama on June 3, 1992, which revealed a 0 percent loss in the right ear, and an 11.2 percent in the left, or a bilateral hearing loss of 1.9 percent, most accurately reflected the extent of claimant's disability. The administrative law judge then found that inasmuch as this audiogram indicated that claimant's noise-related right ear hearing loss was 0 percent and noise-induced hearing loss should be approximately the same in both ears, claimant would have a similar noise-induced impairment to the left ear of 0 percent. Accordingly, disability benefits were denied but claimant was awarded past and future medical expenses,

[1]Claimant had previously worked for other maritime employers.

including the costs of hearing aids. Claimant's motion for reconsideration of the administrative law judge's finding regarding the extent of his disability was denied by Order dated April 8, 1993.

On appeal, claimant challenges only the administrative law judge's findings regarding the extent of his disability.[2] Claimant contends that the administrative law judge's determination that claimant sustained a 0 percent binaural hearing loss violates the aggravation rule which precludes the administrative law judge from siphoning out the separate causes of a claimant's hearing loss where there has been an aggravation of a pre-existing condition. Claimant further avers that inasmuch as the administrative law judge found that he suffered a sensorineural hearing loss in both ears, he was required to determine the extent of claimant's binaural hearing loss based on the results of the valid hearing tests of record which reflected a binaural hearing loss of between 1.9 and 2.5 percent. Employer responds, urging affirmance.

After consideration of claimant's arguments in light of the evidence of record, we affirm the administrative law judge's findings regarding the extent of claimant's hearing loss because it is rational, supported by substantial evidence and in accordance with law. We reject claimant's argument regarding the aggravation rule, which provides that where a work-related loss aggravates, accelerates, or combines with a prior condition, the entire resulting disability is compensable. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1986). In Dr. Arrington's 1983 report, the earliest evidence in the record, he indicates that he had flushed out a twig from claimant's ear, but the drum had not been perforated. The first evidence of record to actually mention the perforation of claimant's left ear drum is the September 9, 1991, report of Dr. Muller, although in his August 6, 1990 report, Dr. Arrington noted that he had seen claimant on an emergency basis after claimant had been digging in his ears with Q-Tips and alcohol and described claimant's left ear as irritated from too much cleaning. Inasmuch as this evidence establishes that the perforation of claimant's left ear drum occurred subsequent to his work for employer, which ended in 1963, and claimant does not contest the causation findings made by the administrative law judge with regard to claimant's traumatic hearing loss, we reject claimant's assertion that the aggravation rule is applicable. The aggravation rule applies only where employment aggravates a pre-existing condition, which is not the case here. *See Leach v. Thompson's Dairy*, 13 BRBS 231 (1981). The administrative law judge thus properly determined that employer was relieved of liability for that portion of claimant's disability due to this subsequent non work-related injury. *See generally Davison v. Bender Shipbuilding & Repair Company, Inc.*, 30 BRBS 45 (1996).

Claimant also argues that the administrative law judge erred in concluding that his left ear noise-related hearing loss was the same as his right ear hearing loss, contending that inasmuch as he found that claimant had a bilateral noise-induced hearing loss, he was required to adopt a binaural hearing loss figure of between 1.9 and 2.5 percent consistent with the results of the valid audiograms performed by Dr. Jim McDill and the University of South Alabama. We disagree. Although the

[2]Claimant does not challenge the administrative law judge's findings regarding the cause of his traumatic hearing loss.

administrative law judge found that the most recent June 3, 1992, audiogram, performed at the University of South Alabama, best reflected claimant's disability, he acted reasonably in declining to base his award on the 2.5 percent binaural hearing loss contained therein, given that this binaural rating encompassed a left ear measurement which did not factor out the portion of claimant's left ear hearing loss due to his subsequent non-work-related tympanic membrane injury. It is within the administrative law judge's discretionary authority to accept or reject all or any part of any medical expert's testimony and to draw reasonable inferences therefrom. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). Moreover, it is claimant's burden to establish the extent of his disability. *See Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1980). In the absence of more definitive evidence regarding the extent of claimant's noise-related left ear hearing loss evidenced on the June 1992 audiogram, we hold that the administrative law judge's determination that claimant's left ear noise-related hearing loss was the same as his noise-related right ear loss was rational.[3] *See generally Dubar v. Bath Iron Works Corp.*, 25 BRBS 5, 8 (1991). Accordingly, we reject claimant's arguments and affirm the administrative law judge's findings regarding the extent of claimant's disability.

Turning to employer's arguments on cross-appeal relating to the administrative law judge's award of attorney's fees, claimant's counsel sought a fee of $2,125, representing 17 hours at $125 per hour, plus $29.25 in expenses, for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of $2,029.25, representing 16 hours at an hourly rate of $125, plus expenses of $29.25. Employer appeals the administrative law judge's award of attorney's fees, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the administrative law judge's fee award.

Initially, we reject employer's contention that the administrative law judge erred in holding it liable for claimant's attorney's fee because there was no successful prosecution of the claim. In this case, employer controverted causation, and claimant ultimately prevailed before the administrative law judge in establishing his entitlement to an award of future medical benefits. As claimant's counsel successfully prosecuted his claim for medical benefits, the administrative law judge's finding that claimant's attorney is entitled to a fee to be assessed against employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), is affirmed. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer's objections to the number of hours and hourly rate awarded are rejected, as it has not shown that the administrative law judge abused his discretion in this regard. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Employer's specific objection to counsel's

[3]The administrative law judge apparently based his finding that claimant's noise-induced hearing loss should be the same in both ears on *Hicks v. Ingalls Shipbuilding, Inc.*, BRB Nos. 89-3451/A (October 22, 1992)(unpublished), wherein the Board upheld the administrative law judge's crediting of Dr. Lamppin's opinion that noise-induced hearing loss is generally the same in both ears, which employer had affixed to its post-trial brief.

method of billing in minimum increments of one-quarter hour also is rejected, as the administrative law judge considered employer's objections, and his award conforms to the criteria set forth in the decisions of the United States Court of Appeals for the Fifth Circuit 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) (table).

Employer's contentions which were not raised below will not be addressed 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 mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Order Denying Motion for Reconsideration, and Supplemental Decision and Order-Awarding Attorney's Fee, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge