BRB No. 07-0112

M.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HURLBERT AIR FORCE BASE, MORALE, WELFARE AND RECREATION FUND	)	DATE ISSUED: 08/23/2007
	)	
and	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney's Fees of William Dorsey, Administrative Law Judge, United States Department of Labor.

Peter W. Preston and Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

Roy H. Leonard (Office of Legal Counsel, Air Force Services Agency), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney's Fees (2005-LHC-02036) of Administrative Law Judge William Dorsey 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 (the Act). 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 was injured during the course of her employment for employer as a caregiver at a child development center. In a decision issued in January 2002, she was awarded permanent total disability benefits for a combination of knee, back and psychological conditions related to her work injury. A dispute subsequently arose over claimant's entitlement to medical care for her work injuries. *See* 33 U.S.C. §907. After an informal conference failed to resolve the disputed issues, the case was referred to the Office of Administrative Law Judges (OALJ) for a hearing.

In his decision, the administrative law judge found that prior to the hearing the parties resolved most of the issues, including those regarding bills for knee surgery, pathology services, dental work, vision care, and durable medical equipment. Employer withdrew its controversion of liability for all past prescription medications, but reserved the right to controvert any future prescriptions for Robinul (glycopyrrolate). Claimant withdrew her claim for interest charges on dental fees after the dentist had written-off the charge. The unresolved issue at the hearing was whether employer would pay for the plastic surgery procedures proposed by the treating surgeon, Dr. Crofts. The administrative law judge found that employer agreed in principle prior to the hearing to pay for three cosmetic surgeries to remove excess skin after bariatric surgery resulted in claimant's experiencing significant weight loss. Claimant subsequently withdrew her claim for face and neck lifts after she consulted with Dr. Crofts. The administrative law judge found that employer's objection, arising after the hearing adjourned, to the proposed fees Dr. Crofts would charge for the approved surgeries should be initially addressed by the district director.

Claimant's counsel subsequently submitted an amended fee petition to the administrative law judge requesting an attorney's fee of $11,807.50, representing 38 hours of attorney time by Peter Preston at $270 per hour, 3.5 hours by Meagan A. Flynn at $235 per hour, and 7.25 hours of paralegal time at $100 per hour, plus expenses of $382.85. In his supplemental decision, the administrative law judge addressed employer's objections, reduced the hourly rate for Mr. Preston to $250 and for Ms. Flynn to $225, and disallowed one hour by Mr. Preston and .75 of an hour by Ms. Flynn for time expended after the hearing related to claimant's withdrawn claim for face and neck lifts and associated costs of $50. Accordingly claimant's counsel was awarded a fee of $10,593.75 and expenses of $332.85. Employer appeals the administrative law judge's fee award. Claimant responds, urging affirmance.

Employer first challenges the administrative law judge's allowing a fee for time expended pursuant to claimant's claim for an inversion table and ergonomic chair after employer had agreed to supply these items prior to referral of the claim to the OALJ. In his supplemental decision, the administrative law judge found that counsel acted reasonably in pursuing these claims because counsel was not aware that employer had supplied these items.

We note that employer does not object to any specific entries in the fee petition as time expended in relation to claimant's entitlement to an inversion table and the ergonomic chair. Moreover, it is well established that an attorney's work is compensable if, at the time the attorney performed the work in question, he could reasonably regard it as necessary to establish entitlement. *See, e.g., O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). In this case, claimant has been represented by the same counsel with respect to this claim for a number of years. Employer does not contend that it informed claimant's counsel of its agreement to provide claimant with an inversion table and ergonomic chair prior to a September 19, 2005, letter to claimant's counsel from employer's counsel. Accordingly, the administrative law judge properly concluded that employer is liable for any time claimant's counsel expended on these issues prior to September 19, 2005, as he reasonably regarded any work as necessary to establish entitlement to these medical benefits.

Employer next argues that the administrative law judge erred by awarding claimant's counsel a fee for time expended on administrative tasks that claimant should have performed herself. In his supplemental decision, the administrative law judge found that attorney time expended procuring prescription benefits was not, in this case, "mundane administrative activity" as evidenced by the parties' inability to resolve this issue until after the claim was referred for a hearing. The administrative law judge also found that claimant requires greater attention by employer's claims administrator inasmuch as there is a psychological overlay to her physical injuries, which employer must accommodate.

The record shows that claimant's knee, back, and psychological conditions required extensive medical care, including knee surgery, gastric by-pass surgery, and cosmetic surgery for excess skin removal, dental work, and vision care. Supplemental Decision and Order at 1-2; EX 1. Claimant has been prescribed durable medical equipment, including an elliptical glider or exercise bicycle, car seat, bed, inversion table, exercise shoes, and ergonomic chair. EXs 27-30. Employer stated in a September 2004 letter that it had recently authorized filling 22 different prescription medications. CX 33. Claimant submitted numerous exhibits at the hearing documenting unpaid medical bills, including prescription medication for claimant's work-related injuries. CXs 4-10, 18-19, 21, 27-28, 30-32, 35, 38-39; *see also* EX 15. Based on this record, and the failure of the parties to resolve the outstanding medical issues before the district director, the administrative law judge properly concluded that claimant's attorney is entitled to a fee for time expended securing claimant's prescription benefits. *See Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*).

Finally, employer argues that the administrative law judge erred by awarding a fee for time expended after most of the issues between the parties had been resolved. The administrative law judge found that on the morning of the formal hearing on November 29, 2005, the parties resolved four outstanding issues: 1) claimant dropped her claim for late payment charges formerly sought by Dr. Mangelson; 2) employer accepted liability for Dr. Adler's bill for vision services; 3) employer agreed to pay claimant's prescription for Robinul through August 8, 2005; and, 4) employer agreed to pay for cosmetic surgery, except for procedures to the face and neck. The administrative law judge found that claimant's counsel is entitled to a fee for time expended on these issues through the date of the hearing.

The administrative law judge properly found that claimant's counsel is entitled to a fee for work on any issues that were favorably resolved just prior to the hearing.[1] *See Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991); *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). However, the record contains evidence supporting employer's contention that some of these issues had been agreed upon prior to September 20, 2005. Specifically, in his decision, the administrative law judge found that employer agreed in principle on June 2, 2005, for cosmetic surgery to remove excess skin. Decision and Order at 3; *see also* EX 13. Moreover, the record includes a letter dated September 19, 2005, by employer's counsel to claimant's counsel stating that employer agreed to pay for prescription Robinul per the May 12, 2005, report of Dr. Ayers. CX 33 at 2; *see* CX 25. The letter also reiterated that employer agreed to pay for the proposed excess skin removal surgery by Dr. Crofts. Claimant's counsel's fee petition includes approximately 29 hours in attorney time between September 20, 2005, when claimant's counsel received this letter from employer's counsel, and the date of the hearing on November 29, 2005.

Claimant's counsel is entitled to a fee for services reasonably commensurate with the necessary work performed during this period. 20 C.F.R. §702.132(a). In addition,

[1] In his supplemental decision, the administrative law judge found that time expended after Dr. Mangelson wrote-off the interest charge would not be reimbursable, but that neither party proved the waiver date. In this regard, employer submitted Dr. Mangelson's deposition testimony taken on October 19, 2005, in which he stated that he wrote-off the interest charge as a bad debt. EX 35 at 14. A review of claimant's counsel's fee petition does not show any time expended on this issue after October 19, 2005. Accordingly, any error in the administrative law judge finding that the waiver date was not established is harmless. The administrative law judge properly awarded a fee for this work before October 19, 2005. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

any fee for services for the period between September 20 and November 29, 2005, must bear some reasonable relationship to the success claimant achieved. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). Since the administrative law judge did not address the evidence that some of the issues were resolved several months before the hearing rather than right before it, and whether claimant's counsel performed necessary work related to the issues that remained in contention, we must remand the case for further findings on this issue.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees is vacated, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge