

F.H.	)	BRB No. 08-0612
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS,	)	DATE ISSUED: 02/12/2009
INGALLS SHIPBUILDING DIVISION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
	)	
F.H.	)	BRB No. 08-0802
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS,	)	
INGALLS SHIPBUILDING DIVISION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeals of the Compensation Order Award of Attorney’s Fees of David A. Duhon, District Director, and the Supplemental Decision and Order Awarding Attorney’s Fees and Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Robert E. O’Dell, Vancleave, Mississippi, for claimant.

Susan F.E. Bruhnke (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (Case Nos. 07-161698, 07-162305) of District Director David A. Duhon and claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees and Decision on Motion for Reconsideration (2006-LHC-02041, 2007-LHC-00928) 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). 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained a work-related injury to her shoulder on October 5, 2001. Employer voluntarily paid claimant temporary total disability benefits from October 31, 2001 to December 10, 2001. EX 10 at 1. Claimant alleged that she sustained an injury to her back on December 11, 2001, the first day she returned to work after her shoulder injury. Specifically, claimant alleged that she felt "a pop in her back when she bent over to tie her work boots." Dr. Barnes diagnosed claimant with a work-related bulging disc at L4-L5, and he performed back surgery on April 5, 2002. Claimant returned to full-duty work for employer without any permanent restrictions on June 22, 2001. CX 5. Employer declined to pay claimant any benefits for her alleged back injury.

Thereafter, claimant filed two separate claims for the shoulder and back injuries. Employer controverted the claims. The district director conducted informal conferences on October 21, 2004, and August 22, 2006. The shoulder claim was referred to the Office of Administrative Law Judges (OALJ) on September 11, 2006, and the back injury claim was referred to the OALJ on February 27, 2007. The administrative law judge did not award claimant any additional benefits for her October 2001 shoulder injury. The administrative law judge found, however, that claimant sustained a work-related injury to her back and awarded temporary total disability benefits plus interest for the period from December 12, 2001, to June 25, 2002, based on an average weekly wage of \$812.94. The administrative law judge also awarded claimant medical benefits pursuant to Section 7, 33 U.S.C. §907. The administrative law judge rejected claimant's claim for ongoing permanent partial disability benefits.

Subsequently, claimant's counsel filed petitions with both the district director and the administrative law judge seeking an employer-paid attorney's fee. For work performed before the district director, claimant's counsel sought \$9,280.88, representing

40 hours of attorney services at an hourly rate of \$225 per hour, plus costs of \$280.88. Employer filed objections to the hourly rate, to the amount of the fee sought given claimant's "limited success," and to various itemized entries. The district director disallowed 4.25 hours of services and awarded claimant's counsel a fee of \$8,324.63 for 35.75 hours at \$225 per hour, plus costs of \$280.88.<sup>1</sup>

For work performed before the administrative law judge, counsel submitted an amended fee petition seeking \$16,531.03, representing 61.25 hours of attorney services at \$225 per hour, paralegal services for 3.75 hours at \$75 per hour, and expenses of \$2,496.65. Employer filed objections to the hourly rate, to the amount sought given claimant's "limited success," to time spent by counsel with the vocational consultant, and to costs billed by the vocational consultant for his time. The administrative law judge awarded counsel a fee of \$7,017.25. The administrative law judge reduced the hourly rate from \$225 to \$200, disallowed the 5.5 hours counsel claimed for time spent with a vocational consultant, and disallowed the \$1,335.65 billed as an expense for the consultant's time. The administrative law judge stated that counsel is not entitled to an attorney's fee relating to the unsuccessful permanent partial disability issue. The administrative law judge then reduced the remaining 55.75 hours by 50 percent, and awarded counsel \$7,017.25 for 27.875 hours at \$200 per hour, three hours of paralegal work at \$75 per hour, and the remaining costs of \$1,161.

On appeal of the district director's fee award, employer challenges the amount of the fee awarded as excessive given claimant's limited success before the administrative law judge. Claimant responds, urging affirmance of the district director's fee award. Employer filed a reply brief. BRB No. 08-0612. On appeal of the administrative law judge's fee award, claimant's counsel argues that the administrative law judge erred in reducing the hourly rate, in reducing the amount of the fee, in disallowing time counsel spent with the vocational expert, and disallowing the time billed by the vocational expert. Employer responds, urging affirmance of the administrative law judge's fee decisions. BRB No. 08-0802.

---

<sup>1</sup> Following the administrative law judge's reduction of counsel's fee and award of \$7,017.25, employer petitioned the district director, via a motion for reconsideration, to reduce the fee he had awarded on the basis enunciated by the administrative law judge. In a letter dated April 29, 2008, the district director denied the motion, stating that upon another review of the fee petition, he was unable to sever services provided on unsuccessful issues from those on successful issues. *See infra*.

Initially, we address employer's appeal of the district director's fee award. Employer contends the award fails to account for claimant's limited success in pursuing her permanent partial disability claim. The district director acknowledged that claimant was not fully successful before the administrative law judge, but he twice reviewed counsel's fee petition and stated he was unable to separate the services on the unsuccessful issues from those on the successful issues. The district director also stated that the permanent partial disability claim was not the primary focus of the work performed before his office. Therefore, he declined to reduce the fee request on this basis.

We reject employer's contention of error, as employer has not established that the district director abused his discretion in not reducing the fee to reflect claimant's limited success. Claimant succeeded in establishing the work-relatedness of the back injury and in obtaining temporary total disability benefits. The district director was not required to reduce the fee request because claimant did not successfully obtain permanent partial disability benefits for this injury based on his rational findings that services on this issue could not be distinguished from other services on this claim and that the wage-earning capacity issue was not a significant focus of the claim at his level. Consequently, we affirm the district director's fee award of \$8,324.63. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3<sup>d</sup> Cir. 2001); *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983).

We now address claimant's appeal of the administrative law judge's fee award. Counsel first argues that the administrative law judge erred in reducing the hourly rate. The administrative law judge reduced the \$225 per hour sought by claimant's counsel to \$200, finding "that this was not a complex case and that the \$200 per hour is more in keeping with the customary fee in this region." Supplemental Decision and Order Awarding Attorney's Fees at 1. Contrary to claimant's contention, this statement encompasses consideration of the relevant regulatory criteria. *See* 20 C.F.R. §702.132. Moreover, counsel has not established an abuse of the administrative law judge's discretion in this regard, and therefore, we reject his contention of error. *See generally B & G Mining, Inc., v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6<sup>th</sup> Cir. 2008); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

Counsel also challenges the administrative law judge's disallowance of a fee for 5.5 hours of attorney services spent with a vocational expert, as well as the cost of \$1,335.65 for the vocational expert's services. In this regard, counsel argues that the administrative law judge improperly disallowed time expended on a "lost issue" because the case involved only two issues: entitlement to compensation and medical benefits and claimant prevailed on both.

We reject counsel's contention. The administrative law judge properly found that claimant did not prevail on the issue of entitlement to permanent partial disability benefits, notwithstanding that this issue was part of the back injury claim on which claimant prevailed. Moreover, as the disallowed entries and costs related entirely to the permanent partial disability issue, the administrative law judge did not err in disallowing them in their entirety. *See generally George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992).

Counsel further avers that the administrative law judge improperly reduced his fee twice in view of claimant's limited success. In addition to disallowing the specific entries for time spent in consultation with the vocational counselor, the administrative law judge reduced the remaining hours by 50 percent to reflect claimant's limited success, rejecting employer's suggestion of a two-thirds reduction. When claimant's success is limited in comparison to the litigation as a whole, the administrative law judge may award a reduced fee that is commensurate with the degree of success, even if itemized entries cannot be identified with the "losing" issue. *See Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). In this case, the administrative law judge found a fee of 50 percent of compensable hours commensurate with the degree of success achieved. Claimant has not established that this conclusion is arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Therefore, the administrative law judge's fee award is affirmed.

Accordingly, we affirm the district director's Compensation Order Award of Attorney's Fees, BRB No. 08-0612, and the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees. BRB No. 08-0802.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge