

BRB No. 98-568

LUTHER T. BARNES)
)
 Claimant-Respondent) DATE ISSUED: _____
)
 v.)
)
 INGALLS SHIPBUILDING,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery,
Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, 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
BROWN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (94-LHC-336) 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 may be set aside only if shown 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).

In his decision issued on October 21, 1995, the administrative law judge
denied claimant's claim for compensation for a work-related hearing loss, but he

found employer liable for claimant's reasonable and necessary medical expenses related to his work-related hearing impairment. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of \$1,935.70 for work performed before him.¹ Claimant appealed the denial of disability benefits to the Board, and employer appealed the fee award. In its decision issued in March 1997, the Board affirmed the denial of disability benefits and employer's liability for claimant's attorney's fee. The Board, however, vacated the amount of the fee award and remanded the case to the administrative law judge for reconsideration, as he had not considered employer's objection that the fee awarded was excessive in view of the results obtained, pursuant to the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).² *Barnes v. Ingalls Shipbuilding, Inc.*, BRB Nos. 96-327/A (March 27, 1997).

On remand, the administrative law judge set forth the two-prong *Hensley* analysis³ and determined that the issues in this case involved a "common core of facts" in that they were based on related legal theories, namely establishing a causal relationship between claimant's hearing impairment and his work. Decision and Order on Remand at 2. Consequently, although counsel did not succeed in obtaining disability benefits for claimant, the administrative law judge stated that counsel did succeed in establishing employer's liability for future medical expenses and that counsel could not have done any more or less work to achieve the same result, as the denial of disability compensation was dictated by guidelines established by law. *Id.*; see 33 U.S.C. §908(c)(13)(E). For these reasons, the

¹This amount represents a reduction from the requested amount of \$2,372.50. *Barnes v. Ingalls Shipbuilding, Inc.*, BRB Nos. 96-327/A (March 27, 1997); Supp. Decision and Order.

²Employer paid claimant a total of \$5,833.36 in disability benefits prior to the administrative law judge's denial of compensation due to credible evidence which established that claimant's work-related hearing impairment measured zero percent. Before the administrative law judge, and following appeal to the Board, claimant was successful in establishing only employer's liability for medical expenses, such as hearing evaluations and hearing aids, related to the work-related injury.

³The administrative law judge considered the following instruction of *Hensley*: "[D]id Claimant fail to prevail on issues unrelated to those on which he succeeded, and did Claimant achieve a level of success that makes the hours reasonably expended by his attorney a satisfactory basis for the fee sought?" Decision and Order on Remand at 2.

administrative law judge reaffirmed his fee award of \$1,935.70. *Id.* at 3. Employer appeals the decision on remand, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in analyzing this case under *Hensley*. It argues that claimant obtained, at most, limited success and that the fee should be reduced or reversed. It also notes that it has nearly a \$6,000 credit against benefits it previously paid to claimant and that claimant's future medical expenses likely will not equal that amount.

Initially, we reject employer's assertion that its overpayment of disability benefits stands as a credit against its liability for claimant's future medical benefits. An employer may not reduce its liability for medical benefits against its voluntary disability payments, as medical benefits are not compensation within the meaning of Section 2(12), 33 U.S.C. §902(12). 33 U.S.C. §914(j); *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991).

Further, we disagree with employer's argument that the administrative law judge erred in applying *Hensley* in this case. The administrative law judge fully analyzed this case under the guidelines of *Hensley*, and rationally determined that claimant's degree of success made the hours expended by counsel a satisfactory basis for the fee awarded. Specifically, claimant succeeded in establishing a causal relationship between his hearing loss and his employment, which the administrative law judge properly noted is the foundation of, or "common core" for, employer's liability for both disability and medical benefits.⁴ See generally *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). The administrative law judge also concluded that counsel could not have performed less work to achieve this result, and that the fee should not be reduced merely because disability compensation was denied. As employer has not established that the administrative law judge's decision is contrary to law or that the fee awarded constitutes an abuse of discretion, the fee awarded by the administrative law judge is affirmed.

⁴As the administrative law judge noted, the denial of disability compensation was dictated by the guidelines set forth by the American Medical Association, see 33 U.S.C. §908(c)(13)(E), and not because claimant did not have a work-related hearing loss.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge:

I concur only in the result reached by my colleagues in this case.

JAMES F. BROWN
Administrative Appeals Judge