

GLADYS SOLOMON) BRB No. 91-591
(Widow of LEON M. SOLOMON))
)
Claimant-Petitioner)

v.)

ALABAMA DRY DOCK AND)
SHIPBUILDING CORPORATION)
)
Self-Insured)
Employer-Respondent)

GLADYS D. SOLOMON) BRB No. 92-816
(Widow of LEON M. SOLOMON))
)
Claimant-Respondent)

v.)

ALABAMA DRY DOCK AND)
SHIPBUILDING CORPORATION)
)
Self-Insured)
Employer-Petitioner)

DATE ISSUED:

DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order-Award of Attorney's Fees of N. Sandra Kitchin, District Director, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof), Mobile, Alabama, for the claimant.

Winn S.L. Faulk, Mobile, Alabama, for the self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (89-LHC-3532) of Administrative Law Judge James W. Kerr, Jr., and employer appeals the Compensation Order-Award of Attorney's Fees (6-104550) of District Director N. Sandra Kitchin 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). 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).

Decedent was exposed to loud noise while working in employer's shipyard from 1947 to 1980, when he voluntarily retired. On December 6, 1986, an audiometric evaluation performed by Daniel E. Sellers, Ph.D, revealed a 35.9 percent binaural impairment. Decedent filed a claim for benefits on December 22, 1986, providing notice to employer that same day. Decedent died on December 20, 1988, and his widow was substituted as the claimant in his case. Prior to the hearing, the parties stipulated that decedent's hearing loss arose out of and in the course of his employment with employer. The only contested issues remaining for adjudication before the administrative law judge were whether to calculate the award of hearing loss benefits under Section 8(c)(13), 33 U.S.C. §908(c)(13), or Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988), claimant's entitlement to an assessment under Section 14(e), 33 U.S.C. §914(e), and claimant's entitlement to an attorney's fee.

In his Decision and Order, the administrative law judge found that because the United States Court of Appeals for the Eleventh Circuit, within whose appellate jurisdiction the current case arises, had yet to rule on the issue of whether occupational hearing loss benefits for retirees were to be calculated under Section 8(c)(13) or Section 8(c)(23), he was going to follow *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). Accordingly, converting the 35.9 percent binaural hearing loss evidenced on the only audiogram in the record to a 12 percent whole person impairment, the administrative law judge awarded claimant compensation under Section 8(c)(23) based upon the stipulated average weekly wage of \$302.66 for the period from December 6, 1986, until December 20, 1988.¹ The administrative law judge further found that inasmuch as employer had timely controverted the claim, claimant was not entitled to a Section 14(e) assessment, but determined that employer was liable for reasonable and necessary medical expenses and interest. Claimant appeals the administrative law judge's award, contending that he erred in calculating the award of hearing loss benefits under Section 8(c)(23) rather than under Section 8(c)(13). BRB No. 91-591.²

¹The Order portion of the administrative law judge's decision erroneously refers to the termination date of the award, the date decedent died, as December 20, 1989.

²Claimant's attorney thereafter filed a fee petition for work performed at the administrative law judge level, requesting a fee for 23.75 hours of time billed at \$150 per hour plus expenses of \$25. The administrative law judge issued a Supplemental Decision and Order Granting Attorneys Fees in

Following this award claimant's counsel filed a petition for an attorney's fee for work performed before the district director, requesting \$412.50, representing 2.75 hours of services at an hourly rate of \$150. In a Compensation Order-Award of Attorney's Fees dated February 14, 1991, the district director, after considering claimant's counsel's fee petition and employer's objections thereto, reduced the hourly rate to \$100 but otherwise allowed the fee requested. Accordingly, she awarded claimant's counsel a fee of \$275 representing 2.75 hours at \$100 to be paid by employer. Employer appeals the district director's award, incorporating the objections it raised below into its brief on appeal. BRB No. 92-816. Claimant, incorporating her response brief to employer's objections below, responds, urging affirmance.

On appeal, claimant contends that the administrative law judge erred in applying Section 8(c)(23) to calculate the award of hearing loss benefits in this case, because the instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, and the Board held in *Brown v. Bath Iron Works Corp.*, 24 BRBS 90 (1990)(*en banc*)(Stage, C.J., concurring in result)(Brown and McGranery, JJ., concurring and dissenting), *aff'd in part, part sub nom. Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), *aff'd*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), that Section 8(c)(13) rather than Section 8(c)(23) was to be applied to hearing loss claims for retirees arising outside of the Fifth Circuit. Employer responds, urging affirmance of the administrative law judge's award under Section 8(c)(23).

Subsequent to the issuance of administrative law judge's Decision and Order and the filing of briefs in this case,³ the United States Supreme Court decided *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which is dispositive of this issue. In *Bath Iron Works Corp.*, the Supreme Court held that all claims for hearing loss should be compensated under Section 8(c)(13), regardless of whether the claimant is currently employed or is a voluntary retiree. See *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). In the instant case,

which he considered claimant's attorney's fee petition and employer's objections thereto. In this Supplemental Decision and Order, the administrative law judge reduced claimant's hourly rate to \$100 but made no other reductions, awarding claimant's counsel the sum of \$2,375 to be paid by employer, plus \$25 in expenses. Supplemental Decision and Order at 2. Employer initially appealed this award, BRB No. 91-591A, but the Board subsequently dismissed the appeal as abandoned in an Order dated May 13, 1994, when employer failed to submit a Petition for Review and brief in response to show cause order.

³After initial briefs were filed in this case, the United States Court of Appeals for the Eleventh Circuit issued *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229 (CRT) (11th Cir. 1991), wherein the court rejected the Director's position that because Section 10(i), 33 U.S.C. §910(i), only applies where an occupational disease does not immediately result in disability, the date of last exposure to noise rather than claimant's date of awareness under Section 10(i) should be used to determine the applicable average weekly wage in an occupational hearing loss case. Both parties cited *Sowell* as supplemental authority supportive of their positions.

therefore, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award under Section 8(c)(23). Since the administrative law judge's finding that claimant suffered a 35.9 percent binaural hearing loss based on the only audiogram in the record is not challenged on appeal, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits based on the stipulated average weekly wage of \$302.66 for 71.8 weeks (35.9 percent of 200 weeks) pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B).

In its appeal of the district director's fee award, employer contends that the district director erred in awarding a fee for excessive and unreasonable time claimed in an unsworn fee petition which was not supported by contemporaneous time records or other evidence. Employer maintains that the time claimed in the fee petition was excessive on its face in light of evidence it offered which proved that the time claimed on November 23, 1988, for preparation of the LS-18 could not have been performed by an attorney because claimant's counsel's law firm filed in excess of 450 virtually identical LS-18s on that date. Employer further asserts that, at any rate, the one hour claimed for preparation of the LS-18 on November 23, 1988,⁴ and .5 hours claimed for review of the form letter of referral and review of the file on August 22, 1989, are excessive, and there are no contemporaneous time records to support the remaining itemized entries.

We reject employer's arguments on appeal. Initially, we note that a fee request need not be sworn or accompanied by supporting contemporaneous documentary evidence. *See McCloud v. George Hyman Construction Co.*, 11 BRBS 194 (1979). Rather, pursuant to 20 C.F.R. §702.132, a fee application need only be supported by a complete statement describing with particularity the work performed, the professional status of the person performing the work, and the normal billing rate and time spent by each such person for each category of work. *See Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975).⁵ As claimant's counsel's fee petition was in conformance with these guidelines, we reject employer's argument that the fee cannot stand because the fee petition itself was deficient.

Employer's challenge to the number of hours requested and approved by the district director similarly must fail. In entering the fee award, the district director considered employer's objections but found that the 2.75 hours claimed involved work which was both reasonable and necessary. We decline to further reduce or disallow the hours which were approved by the district director. *See*

⁴We note that the time claimed on November 23, 1988, also included time for reviewing the file and for preparing a letter requesting referral to the Office of Administrative Law Judges.

⁵Employer cites *Ayers Steamship Co. v. Bryant*, 544 F.2d 812 (5th Cir. 1977), for the proposition that fee applications must be sworn under the Act. The United States Court of Appeals for the Fifth Circuit indicated in *Ayers* that it was adopting the procedures previously outlined by the United States Court of Appeals for the Third Circuit for assessment of attorney fees under the Act, which require sworn affidavits to accompany fee requests, in cases before that court. The court also recognized, however, that a fee award is within the discretion of the body awarding the fee. *Id.* at 814

Maddon v. Western Asbestos Co., 23 BRBS 55 (1989). As employer has not met its burden of showing that the minimal \$275 fee awarded by the district director awarded was unreasonable, the fee award made by the district director is affirmed.⁶

⁶Employer also contends that any fee awarded must be made consistent with the principle of "billing judgment" enunciated by the United States Court of Appeals for the Eleventh Circuit in *Norman v. Housing Authority of the City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988). In the present case, however, the district director properly evaluated the fee petition consistent with the factors enunciated in 20 C.F.R. §702.132 and determined that while the \$150 hourly rate sought was excessive, the time spent in pursuit of the claim was reasonable. In finding that the total amount of time claimed was reasonable, the district director, in effect, found no error in counsel's billing judgment. *See Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173, 179 (1993)(Brown, J., dissenting).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits under Section 8(c)(23) is vacated, and the decision is modified to award claimant compensation for a 35.9 percent binaural hearing loss pursuant to Section 8(c)(13)(B). BRB No. 91-591. The district director's Compensation Order-Award of Attorney's Fees is affirmed. BRB No. 92-816.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge