BRB No. 98-1200

GEORGE H. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT, INCORPORATED	)	DATE ISSUED: June 17, 1999
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May), Glastonbury, Connecticut, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar), Stamford, Connecticut, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fee (97-LHC-1583, 97-LHC-2297) of Administrative Law Judge David W. Di Nardi 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 if they 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who was exposed to noise while working for employer and its predecessor New Haven Terminal Corporation, filed a claim for a work-related hearing loss in 1997. In his Decision and Order, the administrative law judge determined that employer is responsible for the payment of any benefits due claimant, that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation, and that employer failed to rebut this presumption. The administrative law judge subsequently found, however, that claimant's hearing loss did not result in a measurable impairment, and that claimant is therefore not entitled to disability compensation under the Act. Next, the administrative law judge awarded claimant "reasonable, necessary, and appropriate future medical benefits for his hearing impairment, including hearing aids, if necessary, subject to the provisions of Section 7 of the Act." *See* Decision and Order at 36.

Subsequently, claimant's counsel filed a petition requesting an attorney's fee of $8,910.04, representing 30.7 hours of lead attorney services at $195 per hour, 15.4 hours of services by associate counsel at $140 per hour, 8 hours of paralegal services at $50 per hour, and $367.54 in expenses. Employer filed objections to this fee request. In his Supplemental Decision and Order, the administrative law judge agreed with employer that the $195 hourly rate requested for lead counsel was excessive and, accordingly, reduced the hourly rate for lead counsel to $185. The administrative law judge rejected employer's contentions that the fee should be reduced, first, on the basis of the lack of complexity of the legal issues involved in this case and, secondly, to reflect the fact that claimant achieved limited success in the prosecution of his claim. Lastly, the administrative law judge specifically addressed each of employer's specific objections to various entries in the fee petition, and reduced number of hours requested by 5.4. Accordingly, the administrative law judge awarded counsel a fee of $7,811.04.

On appeal, employer challenges the administrative law judge's award of medical benefits to claimant, as well as the fee awarded to claimant's counsel. Claimant responds, urging affirmance.

Employer initially asserts that the administrative law judge erred in awarding claimant future medical benefits, including hearing aids, for his work-related hearing loss.[1] The Longshore Act sets forth specific provisions regarding a claimant's entitlement to medical benefits. Specifically, Section 7, 33 U.S.C. §907, of the Longshore Act generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this regard, Section 7(a) of the Act states that

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require.

[1]We note that employer does not challenge the administrative law judge's finding that it failed to establish rebuttal of the Section 20(a) presumption linking claimant's hearing loss to his employment with employer.

33 U.S.C. §907(a); *see Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical expenses, but requires only that the injury be work-related, and that the medical expenses be appropriate for the injury. Thus, inasmuch as claimant has established the existence of a work-related hearing loss, claimant is eligible for medical benefits pursuant to Section 7, even though claimant may have no measurable work-related impairment. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). In order to be entitled to such benefits, however, claimant must provide an adequate evidentiary basis sufficient to support the award. *Id.* Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, only Drs. Anwar and Astrachan addressed the issue of whether claimant should undergo future audiological testing. In this regard, Dr. Anwar opined that claimant should have a follow-up examination in order to monitor his hearing, *see* RX 5 at 49, while Dr. Astrachan stated that an audiological follow-up examination "would be reasonable, but not necessary." *See* LX 13 at 30, 48-49, 53. As these statements provide an adequate evidentiary basis to support the administrative law judge's finding of Section 7 entitlement, we affirm the administrative law judge's award of medical benefits to claimant.[2] *See generally Baker*, 991 F.3d at 163, 27 BRBS at 14 (CRT); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

Employer also alleges that the administrative law judge erred in determining that claimant may recover from it the cost of hearing aids. We agree. In finding claimant to be entitled to hearing aids, the administrative law judge stated that "it is my judgment that hearing amplification might enhance [claimant's] hearing acuity and such hearing aids are the responsibility of the Employer." *See* Decision and Order at 36. Dr. Anwar, however, stated only that claimant's need for hearing aids was "potentially possible if the further workup suggests that." *See* RX 5 at 49. Similarly, Dr. Astrachan opined that claimant was not in need of hearing aids at this time. *See* LX 13 at 29-30. Thus, in the instant case, each of the physicians who addressed claimant's present need for hearing aids concluded that such devices were not necessary at this time. As it is well-established that an administrative law

[2]In order for treatment costs to be paid by employer, the treatment must also be authorized. 33 U.S.C. §907(d). Where employer refuses authorization, however, treatment procured thereafter need only be reasonable and necessary for employer to be liable. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Thus, employer may raise the issue of whether any particular medical expense is reasonable and necessary at the time claimant seeks authorization for a particular medical service. *See generally* 33 U.S.C. §907; *Baker*, 991 F.3d at 163, 27 BRBS at 14 (CRT).

judge may not substitute his opinion for that of the medical experts, *see generally Pietrunti v. Director, OWCP,* 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997), we reverse the administrative law judge's finding that claimant may recover the cost of hearing aids from employer.[3]

Lastly, employer challenges the fee awarded to claimant's counsel. Initially, employer argues that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n,* 22 BRBS 434 (1989). The administrative law judge in the instant case specifically recognized that while the complexity of the issues should be considered, it is only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Const. Co.,* 21 BRBS 94 (1988). As employer's assertion that the complexity of the legal issues does not warrant the fee awarded is insufficient to satisfy employer's burden of establishing that the administrative law judge abused his discretion in his consideration of this factor, we reject employer's contention that the fee must be reduced on this basis.

Employer further asserts that the awarded hourly rate of $185 for lead counsel is excessive, suggesting that an hourly rate of $165 would be more appropriate. The administrative law judge agreed with employer that the $195 hourly rate sought by claimant's lead counsel was excessive, and awarded him an hourly rate of $185. We hold that employer's assertions are insufficient to meet its burden of establishing that the hourly rates awarded by the administrative law judge are unreasonable. *See Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989).

[3]We need not address employer's additional contention that claimant should not be entitled to recover the cost of his pre-hearing audiological examination because of his alleged failure to comply with Section 7(d) of the Act since it is raised for the first time on appeal. *See Boyd v. Ceres Terminals,* 30 BRBS 218 (1997); *Shaw v. Todd Pacific Shipyards Corp.,* 23 BRBS 96 (1989).

We agree with employer, however, that the administrative law judge erred in not applying the holding of the United States Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 421 (1983), that the attorney's fee awarded should be commensurate with the degree of success obtained in a given case, when considering claimant's fee request. We hold, accordingly, that the administrative law judge's fee award must be vacated and the case remanded for further consideration of this issue.

In *Hensley,* a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. As the Supreme Court stated in *Hensley*, the most critical factor is the degree of success obtained. *Hensley,* 461 U.S. at 437. Under the Act, the second prong of the *Hensley* test requires the administrative law judge to award a reasonable fee after consideration of employer's objections and the regulatory criteria, 20 C.F.R. §702.132. *See 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).

In the present case, employer properly raised the applicability of *Hensley* before the administrative law judge, arguing that the attorney's fee awarded must be commensurate with the limited success achieved by claimant. In rejecting employer's objection regarding claimant's limited success, the administrative law judge, without addressing the applicability of *Hensley*, ruled that there is no requirement that the amount of the fee award be

commensurate with claimant's award of benefits. *See* Supp. Decision and Order at 2. Thus, as the administrative law judge failed to address employer's specific contention regarding claimant's limited success in accordance with the applicable legal standards as set forth in *Hensley*, we vacate the fee award and remand the case for consideration of the fee petition pursuant to *Hensley*. *See generally George Hyman Const. Co.*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *Ahmed v. Washington Metropolitan Area Transit Authority,* 27 BRBS 24 (1993).

Accordingly, the administrative law judge's award of hearing aids to claimant is reversed. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge