BRB Nos. 09-0294 and 09-0294A

ROBERT GREEN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: 01/12/2010
	)	
	)	
Self-Insured	)	
Employer- Petitioner	)	
Cross- Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees and Costs of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Ann Marie Scarpino (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order and employer appeals the Supplemental Decision and Order Awarding Attorney's Fees and Costs (2008-LHC-00280) of Administrative Law Judge Richard K. Malamphy 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, who worked as a longshoreman for 23 years, underwent audiometric testing by Mr. Gillespie, a licensed and Board-certified audiologist, on July 11, 2007. The audiogram revealed a 3.75 percent binaural hearing loss. Mr. Gillespie opined that the results of the hearing evaluation were consistent with noise exposure and noise-induced hearing loss and concluded that noise exposure has contributed to claimant's permanent hearing loss. Claimant also underwent audiometric testing by Mr. Cohen, a licensed and Board-certified audiologist, on November 8, 2007. Mr. Cohen reported that this test revealed a zero percent hearing impairment, but he further stated that claimant has a sensorineural loss bilaterally, which is mild on the right and mild to moderate on the left. Both audiologists recommended hearing aids for claimant's hearing loss, though Mr. Cohen recommended one only for the left ear. Claimant sought disability and medical benefits under the Act.

In his decision, the administrative law judge found that neither audiogram is presumptive evidence of the degree of claimant's hearing loss because there is no evidence that claimant was provided with a copy of either audiogram and accompanying report within 30 days of the date of the examination. Moreover, the administrative law judge found that there is no evidence that either test is flawed, and he thus averaged the results to find that claimant suffers a hearing loss of 1.875 percent. The administrative law judge found that claimant is entitled to hearing aids for his work-related hearing impairment. As the administrative law judge found that both audiologists agree that the hearing aids recommended by Mr. Cohen will benefit claimant, he awarded claimant the cost of these hearing aids, $2,500, plus an additional 20 percent, totaling $3,000, pursuant to the fee schedule used by the South Carolina Workers' Compensation Commission.

Subsequently, claimant filed a fee petition with the administrative law judge, seeking a fee and costs totaling $11,260.52. In his Supplemental Decision, the administrative law judge found that employer is liable for claimant's fee pursuant to Section 28(a), 33 U.S.C. §928(a), because employer controverted the claim before the expiration of the 30-day period provided in that section. Moreover, the administrative law judge found that Section 28(b), 33 U.S.C. §928(b), is not applicable because the $1 "payment" employer made was not an installment of compensation. The administrative

law judge also found that the fee award should not be reduced due to "limited success" as employer contested claimant's entitlement to compensation and medical benefits and the administrative law judge found claimant entitled to both. In addition, the administrative law judge rejected employer's contention that the hourly rates requested are excessive. In reviewing the necessity of the individual entries, the administrative law judge disallowed a total of 2.75 hours of attorney services and 1.25 hours of paralegal services. Thus, the administrative law judge awarded claimant's counsel a fee in the amount of $10,390.10, representing 26.93 hours of attorney services at the hourly rate of $300, 7.88 hours of paralegal services at $95 per hour, 12.5 hours of brief writer services at the hourly rate of $125, and $594.69 in costs to be paid by employer.

On appeal, employer contends that the administrative law judge improperly averaged the results of the audiograms instead of placing on claimant the burden of proof to establish the extent of his hearing loss. In addition, employer contends that the evidence does not establish that claimant needs a hearing aid for each ear, that the administrative law judge erred in awarding claimant 120 percent of the cost of the hearing aids, and that the administrative law judge erred in allowing claimant to select his audiologist, as an audiologist is not a "physician." Claimant responds, urging affirmance of the administrative law judge's findings on these issues. In his appeal, claimant contends that administrative law judge erred in finding that claimant is not entitled to the hearing aids recommended by his treating audiologist, Mr. Gillespie, and in relying on the South Carolina Workers' Compensation Commission's fee schedule to determine the amount for which employer is liable rather than on the reasonable and customary charges in the area where the service is provided. Employer responds, urging affirmance of the administrative law judge's finding that the hearing aids recommended by Mr. Cohen are medically adequate.

Employer also appeals the supplemental decision awarding an attorney's fee, contending that the administrative law judge erred in applying Section 28(a) to determine employer's liability for claimant's attorney's fee because it paid some compensation to claimant and that it cannot be held liable under Section 28(b) as no informal conference was held. Employer also contends that the administrative law judge erred in awarding claimant's counsel an hourly rate of $300 and in rejecting employer's contention that the fee should be reduced due to limited success. Claimant responds, urging affirmance of the administrative law judge's fee award. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's appeal of the attorney's fee award, contending that the administrative law judge correctly determined employer's liability for claimant's attorney's fee pursuant to Section 28(a).

Employer contends that the administrative law judge erred in averaging the results of the two audiograms to determine the extent of claimant's hearing loss. Employer

contends that the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), requires a finding that since the administrative law judge found the audiograms equally probative, claimant has not met his burden of proving he has an impairment, because the second audiogram did not reveal a measurable impairment. We reject these contentions. The administrative law judge found both audiograms credible and probative, and he relied on Mr. Gillespie's explanation as to the possible reasons for the differences in the test results, which exceeded the test/retest variability of 5 db plus/minus in any ear for any frequency.[1] Decision and Order at 10. Therefore, the administrative law judge determined that as both tests were credible, and thus of equal probative value, he would average the results to determine the extent of claimant's hearing loss.

The Board has held that an administrative law judge is generally not required to credit the audiogram producing the lowest values. *Norwood v. Ingalls Shipbuilding, Inc*., 26 BRBS 66 (1992) (Stage, C.J., dissenting on other grounds). Moreover, the Board has held that an administrative law judge may average the results of reliable audiograms to determine the extent of a claimant's hearing loss, thus affording an administrative law judge the discretion to determine the weight to be accorded to the evidence of record. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001). The decision in *Greenwich Collieries* does not preclude an administrative law judge from averaging impairment ratings where he finds audiograms to be equally probative. In addition, contrary to employer's implication, Mr. Gillespie did not invalidate the audiogram he administered, but rather suggested that a third test could be performed to reconcile the two results. The administrative law judge found that the July 2007 audiogram registering a measurable impairment was administered by a qualified audiologist and that employer did not establish that the test is flawed.[2] As both audiologists opined that claimant has a sensorineural bilateral hearing loss and as the administrative law judge rationally found both audiograms credible and probative, we affirm the administrative law judge's rational decision to average the results of the two audiograms to determine the extent of claimant's hearing loss. *Steevens*, 35 BRBS 129. Thus, we affirm the finding that claimant has a 1.875 percent binaural impairment as it is supported by substantial evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In addition, the administrative law judge found that both audiologists diagnosed a

[1] Mr. Gillespie stated claimant could have some other medical condition that could have caused variation in the test results. Cl. Ex. 4 at 7, 15, 18.

[2] Moreover, both audiologists evaluated claimant's hearing pursuant to the AMA *Guides* as required by Section 8(c)(13)(E). *Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299 (4th Cir. 2009).

bilateral sensorineural loss and stated that amplification would be useful. The administrative law judge thus found that claimant is entitled to hearing aids for both ears based on Mr. Gillespie's recommendation notwithstanding that Mr. Cohen recommended amplification in only the left ear. Therefore, we affirm the administrative law judge's finding that claimant established the necessity of hearing aids for both ears as it is supported by substantial evidence. *See J.R. [Rodriguez] v. Bollinger Shipyard, Inc.,* 42 BRBS 95 (2008).

In his appeal, claimant contends that the administrative law judge erred in awarding the hearing aids recommended by Mr. Cohen, rather than those recommended by Mr. Gillespie. Claimant contends that employer does not have the right to supervise claimant's medical care and thus to pick the treating audiologist. In order to be entitled to medical benefits under Section 7, 33 U.S.C. §907, claimant must provide an adequate evidentiary basis sufficient to support the award, such as evidence of past expenses incurred or of necessary treatment in the future. *See, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). The administrative law judge has the authority to determine the necessity of medical care based on the evidence of record. *Weikert v. Universal Maritime Service Corp.,* 36 BRBS 38 (2002). Moreover, the administrative law judge properly noted that neither party is entitled, by statute or regulation, to choose which hearing aid is to be procured. *See* 33 U.S.C. §907(b); 20 C.F.R. §702.404; *Potter v. Electric Boat Corp.,* 41 BRBS 69 (2007).

In this case, the administrative law judge considered the recommendations of the two audiologists to determine which hearing aids were necessary to treat claimant's hearing loss. Mr. Gillespie recommended a pair of Widex Inteo canal hearing aids which cost $6,500 per pair. He testified that the Widex hearing aid fits deeper in the ear canal and thus is better suited for a younger, more active patient like claimant. Cl. Ex. 4. He also stated that the Widex hearing aids produce less wind noise, perform better with a telephone, and transfer sounds into regions where the patient's hearing is better. *Id*. Mr. Cohen recommended for claimant the Phonak UNA MAZ behind-the-ear hearing aid with open mold fitting, which cost $2,500. Cl. Ex. 1. He stated that this model reduces the "voice-in-the-barrel" effect commonly reported by hearing aid users. He also stated that the open mold fitting accentuates high frequency gain where claimant needs the amplification the most and rolls off the low frequency gain where claimant's hearing is essentially normal. *Id.* Although he recommended the Widex hearing aids, Mr. Gillespie stated that the Phonak hearing aid recommended by Mr. Cohen is "one of my favorites as well" and "both instruments would be beneficial to this patient." Cl. Ex. 4 at 34.

The administrative law judge considered the cost and functionality of the two recommended hearing aids and noted that both audiologists agreed that claimant would benefit from the Phonak hearing aids. Therefore, he awarded these devices to claimant.

The administrative law judge properly stated that the Act requires only that employer pay for reasonable and necessary treatment, not the more expensive and technologically advanced. *See* 33 U.S.C. §907(a); *see also Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). Thus, we reject claimant's contention that the administrative law judge improperly allowed employer to supervise claimant's medical care. The administrative law judge made a finding of fact on a contested issue, and we affirm the finding that Phonak hearing aids are a reasonable and necessary treatment for claimant's binaural hearing loss as this finding is supported by substantial evidence of record. *See generally Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

Next, the administrative law judge considered the amount to award claimant for the cost of the Phonak hearing aids. The administrative law judge addressed the regulation at Section 702.413, which provides:

> All fees charged by medical care providers for persons covered by this Act shall be limited to such charges for the same or similar care (including supplies) as prevails in the community in which the medical care provider is located and shall not exceed the customary charges of the medical care provider for the same or similar services. Where a dispute arises concerning the amount of a medical bill, the Director shall determine the prevailing community rate using the OWCP Medical Fee Schedule (as described in 20 C.F.R. 10.411) to the extent appropriate, and where not appropriate, may use other state of federal fee schedules.

20 C.F.R. §702.413.[3] As the administrative law judge found that hearing aids are not listed in the OWCP Medical Fee Schedule, he concluded that he must look to the fee schedule in South Carolina, the state in which this case arises, to determine the amount to award for the hearing aids. The administrative law judge rejected claimant's contention that hearing aids are not durable medical equipment, and found that, under the state schedule, unlisted durable medical equipment is reimbursed at the actual cost of the item plus 20 percent. Decision and Order at 12. Further, the administrative law judge rejected employer's contention that the "actual cost" referenced in the state regulation refers to the cost to the provider, and found that the "actual cost" is the amount to be paid by claimant, $2,500, plus 20 percent, or $500. Thus, the administrative law judge awarded claimant $3,000 for the Phonak hearing aids. Decision and Order at 12, 13.

[3] The OWCP Medical Fee Schedule is now referenced at 20 C.F.R. §10.800 *et seq.*

The parties do not dispute the administrative law judge's finding that hearing aids are not specifically listed in the OWCP Medical Fee Schedule. *See* 20 C.F.R. §702.413. However, claimant contends that hearing aids are not "durable medical goods" and that the administrative law judge erred in referring to the South Carolina schedule to determine the cost of the hearing aids. Claimant urges the Board to hold that Mr. Gillespie established the reasonable and customary charge, $6,500, for hearing aids in the area where the service will be provided. Employer contends that the administrative law judge improperly found that the "actual cost" referenced in the South Carolina fee schedule was the cost to claimant plus 20 percent. Employer contends that the proper interpretation of the fee schedule provides that the dispenser of the hearing aids is entitled to his actual cost plus 20 percent.

We need not address the contentions concerning the proper interpretation of the South Carolina fee schedule, as the administrative law judge, on the facts of this case, erred in looking to any fee schedule for the cost of the hearing aids. The parties did not contest the cost of each of the two types of recommended hearing aids, but disagreed over which pair would be appropriate for claimant. Pursuant to Section 702.413, the use of fee schedules is appropriate when there is a dispute about the prevailing community rate of a given medical service or supply. *See Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). In this case, there was no such dispute and thus, resort to a fee schedule is not necessary. Rather, Mr. Cohen stated that the cost of the awarded hearing aids is $2,500. Cl. Ex. 1. As we have affirmed the administrative law judge's finding that the Phonak hearing aids are necessary and a reasonable treatment for claimant's hearing loss, we modify the administrative law judge's award to reflect employer's liability for the actual cost of the hearing aids to claimant, $2,500, as stated by Mr. Cohen.

Employer also appeals the administrative law judge's award of an attorney's fee to be paid by employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Employer contends that as it paid some compensation to claimant within 30 days of notice of the claim, it cannot be held liable for claimant's fee under Section 28(a). Moreover, as there was no informal conference in this case, employer contends that it is not liable for claimant's counsel's fee pursuant to Section 28(b). The Director has filed a response brief, urging affirmance of the administrative law judge's finding that employer is liable for claimant's attorney's fee pursuant to Section 28(a). The Director contends that the administrative law judge properly found that the $1 payment was not in contemplation of the payment of benefits, but was instead "nothing more than a transparent attempt by the Employer to evade liability for attorney's fees…." Director's Brief at 4. The Director notes that this conclusion is supported by the fact that employer paid the sum of $1 two weeks after controverting the claim.

Section 28 of the Act provides the authority for awarding attorney's fees under the Act. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director, it declines to pay any compensation.[4] 33 U.S.C. §928(a); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Virginia. Int'l Terminals, Inc. v. Edwards,* 398 F.3d 3313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). In this case, claimant filed a claim for a work-related binaural hearing loss on August 3, 2007. Employer became aware of claimant's injury on August 13 and filed a Notice of Controversion on August 21. Emp. Ex. 4. The district director sent employer written notice of the claim on September 6, 2007, as required by Section 19(b) of the Act, 33 U.S.C. §919(b). Also on September 6, employer voluntarily paid claimant the amount of $1 and stated on its LS-208 form that the $1 was "paid per section 28(b)." Emp. Ex. 3. Employer made no additional voluntary payments to claimant in connection with his injury, and continued to contest the claim.

The administrative law judge found that employer contested claimant's right to compensation by filing a notice of controversion before the expiration of the thirty-day period in Section 28(a) and that the $1 did not represent an intent to pay compensation. Thus, the administrative law judge found employer liable for claimant's attorney's fee pursuant to Section 28(a).[5] Supplemental Decision and Order Awarding Attorney's Fees and Costs at 5-6. We affirm the administrative law judge's finding that employer's payment of $1 does not preclude the applicability of Section 28(a), as the administrative law judge rationally found that employer's payment of $1 was merely an attempt to avoid

[4] Section 28(a), 33 U.S.C. §928(a), states in relevant part:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier….

[5] The administrative law judge also found that, contrary to employer's contention, Section 28(b) is inapplicable as that section requires "payment of compensation without an award pursuant to section 14(a) and 14(b) of this Act." The administrative law judge found that the one-time payment of one dollar is not the equivalent of a first installment pursuant to Section 14(a), (b), and that payments did not continue. Supplemental Decision and Order at 5.

fee liability rather than the payment of compensation for claimant's injury. As employer did not pay claimant any compensation within the meaning of Section 28(a) of the Act and in fact controverted the claim prior to receiving notice of the claim, the administrative law judge properly held employer liable for claimant's attorney's fee pursuant to Section 28(a).[6] *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

Employer also contends that the administrative law judge erred in awarding claimant's attorney a fee based on the hourly rate of $300. In response to employer's objections to claimant's request for an attorney's fee, claimant's counsel provided a number of cases in which he had been awarded a fee at the hourly rate of $300 by other administrative law judges and the Board. The administrative law judge considered these cases as well as the proficient service provided by counsel in this case and concluded that the $300 hourly rate is warranted. We affirm the administrative law judge's award of an hourly rate of $300 as it rational, consistent with applicable law, and not an abuse of his discretion. *See generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, ___ F.3d ___, Nos. 08-1129, 08-1122, 2009 WL 5126220 (4th Cir. Dec. 29, 2009).

We also reject employer's contention that time spent by the paralegals cannot be reimbursed as professional time as claimant's counsel did not establish their credentials. Employer cites no case law or provision of the Act or regulations that requires an attorney to establish the credentials of his support staff. Section 702.132 requires that the professional status of the person performing the work be identified, which was done in the fee application. 20 C.F.R. §702.132. As employer contends, only the initials of the support staff were used, but the application identifies the workers as paralegals.

Lastly, employer contends that the administrative law judge erred in failing to reduce the amount of the fee award due to claimant's limited success. The United States Supreme Court has held that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C.

[6] Moreover, as the Director contends, employer paid claimant $1 on the same day that the notice of the claim was sent by the district director to employer. As there is no evidence that employer received the notice the day it was mailed, employer's payment was not made during the 30 day period following its *receipt* of the formal claim. *See Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

The administrative law judge found that employer contested claimant's entitlement to benefits for hearing loss and to hearing aids, and that although claimant had asserted a greater hearing loss and requested a more expensive hearing aid, claimant successfully established entitled to compensation benefits, interest, and medical benefits. Thus, he declined to reduce the fee award on the basis of limited success. Supplemental Decision and Order Awarding Attorney's Fees and Costs at 7. We hold that employer has not established that the administrative law judge abused his discretion in his consideration of the degree of claimant's success pursuant to *Hensley*, and therefore affirm his finding. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2002).

Claimant's counsel has requested an attorney's fee for services performed before the Board in defense of employer's appeal regarding the attorney's fee awarded by the administrative law judge. Counsel for claimant has submitted a petition for an attorney's fee seeking $600, representing one hour of legal services at the hourly rate of $300, and two hours of law clerk services at the hourly rate of $150. Employer objects to time spent by the law clerk as the only identifier is the initials "KAM." As discussed previously, there is no regulation that counsel fully identify his staff by name, and the fee petition indicates that this person is a law clerk (or paralegal as identified in the original fee petition). Moreover, contrary to employer's contention, this staff member was billed at the hourly rate of $150, not $300. As counsel has successfully defended claimant's award of an attorney's fee against employer's appeal, and as the overall fee is reasonable and commensurate with the necessary work performed, we grant counsel a fee in the amount of $600 for work in response to employer's supplemental appeal. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's award is modified to reflect employer's liability for hearing aids at a cost of $2,500. In all other respects, the administrative law judge's Decision and Order and Supplemental Decision and Order are affirmed. Claimant's counsel is awarded a fee of $600 for work performed in response to employer's supplemental appeal, to be paid directly to counsel by employer.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge