BRB Nos. 88-3187
and 88-3187A

ARES J. HODA, SR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER
Cross-Petitioner	)	on RECONSIDERATION

Appeals of the Decision and Order, Supplemental Decision and Order Granting Attorney's Fee, and Order Denying Motion of Anthony J. Iacobo, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

DOLDER, Acting Chief Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration of the Board's decision in this case. *Hoda v. Ingalls Shipbuilding, Inc.*, BRB Nos. 88-3187/A (August 4, 1992); 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has not responded to this motion, but has filed a petition for an attorney's fee for worked performed before the Board in connection with the appeals in the case. Employer has filed objections to the fee petition.

Claimant and employer stipulated that claimant was exposed to noise during his employment with employer, resulting in a 6.56 percent binaural impairment. Prior to the case's being referred to the Office of Administrative Law Judges, employer completed payment for the 6.56 percent hearing loss. After the case was referred to the Office of Administrative Law Judges, but prior to the formal hearing, employer agreed to pay claimant interest on past-due benefits.

Following a formal hearing, the administrative law judge determined that employer is not liable for a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), but that claimant is entitled to select his own provider for future medical care.[1] 33 U.S.C. §907. The administrative law judge also held employer liable for an attorney's fee as claimant successfully obtained interest and medical benefits. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of $2,150, noting that employer did not object to the amount requested.

Both claimant and employer appealed to the Board. Claimant contended employer is liable for a Section 14(e) penalty, and employer challenged its liability for and the amount of the attorney's fee award. The Board held employer liable for a Section 14(e) penalty pursuant to *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 182 (1989)(*en banc*), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). With regard to the attorney's fee award, the Board held that the administrative law judge properly held employer liable for the attorney's fee as claimant obtained additional benefits while the case was before the administrative law judge.[2] 33 U.S.C. §928(b). The Board declined to address employer's objections to itemized entries and the hourly rate, noting that employer did not raise the objections below in a timely manner. Thus, the Board affirmed the attorney's fee award. *Hoda*, slip op. at 6-7.

In its motion for reconsideration, employer contends that the Board improperly affirmed the entire attorney's fee award under Section 28(b), as this section provides for an attorney's fee based solely on the difference between the amount voluntarily paid and the amount ultimately awarded.[3] 33 U.S.C. §928(b). Employer further contends that claimant achieved only "partial or limited" success, and that the fee should be reduced to reflect this fact, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

We reject employer's contentions. The Board consistently has held that although the amount

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[1]Employer attempted to direct from whom claimant could obtain future medical services.

[2]Claimant obtained the interest payment from employer and the right to obtain medical services from a physician of his own choosing. By virtue of the Board's decision, claimant obtained a Section 14(e) penalty.

[3]For the reasons stated in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT)(5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), we reject employer's contention that the Board erred in holding it liable for a Section 14(e) penalty.

of benefits awarded is a factor to be considered in awarding an attorney's fee, *see* 20 C.F.R. §702.132(a), the amount of the fee award is not limited to the amount of compensation gained since to do so would drive competent counsel from the field. *See, e.g., Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993). Moreover, we reject employer's contention that claimant achieved only "partial or limited" success before the administrative law judge. Although employer voluntarily paid disability benefits to claimant prior to the case's being referred to the Office of Administrative Law Judges, claimant was required to pursue his claim in order to obtain interest, care from a physician of his own choosing in accordance with 33 U.S.C. §907, and, by virtue of the Board's decision, a Section 14(e) penalty. Thus, claimant ultimately was successful on all claims he pursued, and his success cannot be deemed "partial or limited." *See Rogers v. Ingalls Shipbuilding, Inc.*, __ BRBS __, BRB No. 89-3716 (Aug. 19, 1993)(Brown, J., dissenting); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recons. en banc*, BRBS , BRB Nos. 90-194\A (Feb. 15, 1994). As employer did not timely object before the administrative law judge to the number of hours and hourly rate sought by claimant's counsel, it cannot object now on the ground that the fee sought is excessive in light of claimant's recovery. *Bullock*, 27 BRBS at 94. Thus, we reaffirm the administrative law judge's award of an attorney's fee.

We disagree with our dissenting colleague that the regulation at 20 C.F.R. §702.132(a) conflicts with Section 28(b) of the Act. We note that Section 28(b) provides one means for establishing employer's liability for claimant's attorney's fee in cases in which there is a dispute as to claimant's entitlement to benefits.[4] *See also* 20 C.F.R. §702.134(b). If claimant obtains greater benefits than those tendered or voluntarily paid by employer, employer is liable for "a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid," 33 U.S.C. §928(b), that is, employer is liable for a reasonable fee predicated on the fact that claimant obtained more than that voluntarily offered by employer. Thereafter, in determining the reasonableness of the fee for which employer is liable under Section 28(a) or (b), the regulation at 20 C.F.R. §702.132(a) provides that a "reasonable" fee should account for "the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded...." 20 C.F.R. §702.132(a). Thus, Section 28(b) establishes employer's *liability* for a reasonable fee and Section 702.132(a) provides the criteria for determining the reasonableness of the *amount* of the fee.

[4]Employer may be held liable for a fee only under the provisions of Section 28(a) or 28(b). The last sentence of Section 28(b) states, "In all other cases any claim for legal services shall not be assessed against the employer or carrier." 33 U.S.C. §928(b).

This interpretation is supported by case law. In *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992), the United States Court of Appeals for the District of Columbia Circuit addressed the issue of counsel's entitlement to an attorney's fee when claimant prevails on only some of his claims. The court first held that the Supreme Court's analysis in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) is to be applied in such cases. The court also addressed the language in Section 28(b) that "a reasonable attorney's fee [must be] based solely upon the difference between the amount awarded and the amount tendered or paid...." 33 U.S.C. §928(b). The court stated:

> that once success on an issue is demonstrated, recovery is limited "solely" to *work done* to increase compensation on that particular issue.

Brooks, 963 F.2d at 1537, 25 BRBS at 166 (CRT)(emphasis added). The court did not state that the amount of the fee cannot exceed the difference between the amount voluntarily paid and that ultimately obtained as our colleague suggests; it stated that counsel may receive a fee only for *work* performed to increase the claimant's compensation. *Id.*

Moreover, the United States Court of Appeals for the Ninth Circuit has addressed the relationship between Section 28(b) and the regulation at Section 702.132(a). *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F. 2d 875, 11 BRBS 68 (9th Cir. 1979). In noting the terms of Section 28(b), the court stated that:

> Counsel's efforts in this case were devoted solely to obtaining that difference [between the amount voluntarily paid and that obtained], and we discern no basis for lessening the award merely because National Steel had offered to pay a lesser amount voluntarily. Nor is the award unreasonable because it amounts to 56 percent of the disability benefits National Steel is required to pay... The reasonable fee in a given case will depend upon a number of factors, including the complexity of the issues and the quality of the representation. *See* 20 C.F.R. §702.132.

Id., 606 F.2d at 882, 11 BRBS at 73.[5] *See also Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987). These cases are consistent with the Board's approach. *See, e.g., Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993); *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981). In sum, there is no basis for reducing the fee based on Section 28(b) and as discussed, *supra*, employer did not object below to the requested fee, and it cannot now complain that the fee is unreasonable. The opinion of our dissenting colleague that employer need not raise objections

[5]We note that the Supreme Court has upheld the validity of Section 28 of the Longshore Act, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), and as implemented by 20 C.F.R. §§725.365-725.367. *United States Department of Labor v. Triplett*, U.S. , 110 S.Ct. 1428 (1990). Section 725.366(b) is nearly identical to Section 702.132(a). *See also* 20 C.F.R. §802.203(e) (attorney's fee awards for work performed before the Board).

below in order to preserve the issue for appeal is contrary to longstanding law. *See, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP (Rouse)*, 976 F.2d 934, 26 BRBS 107 (CRT)(5th Cir. 1992)(court will not address issues with regard to Section 14(e), 33 U.S.C. §914(e), not raised below); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1982)(court holds the Board properly refused to address laches issue which was raised for first time on appeal); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989)(employer may not raise coverage issues for the first time on appeal); *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983)(employer may not raise issue of attorney fee liability for the first time on appeal); *Levesque v. Bath Iron Works Corp.*, 13 BRBS 483 (1981), *aff'd mem. sub nom. Levesque v. Director, OWCP*, No. 81-1471 (1st Cir. Dec. 29, 1981)(claimant may not raise an aggravation theory of causation for the first time on appeal); *Moore v. Paycor, Inc.*, 11 BRBS 483 (1979)(entitlement to Section 8(f) relief, 33 U.S.C. §908(f), may not be raised for the first time on appeal).

Claimant's counsel has filed a complete, itemized statement requesting a fee for work performed before the Board in conjunction with his appeal and defense of employer's cross-appeal. 20 C.F.R. §802.203. Counsel requests a fee of $1,304.75 for 10 hours of legal services at an hourly rate of $125, plus photocopying expenses of $54.75. Employer objects to the hourly rate, contending $65 to $70 is more appropriate, and employer contends that time spent on various itemized entries is excessive.

Claimant successfully pursued his appeal and defended against employer's appeal; thus, counsel is entitled to a fee for work performed before the Board. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). After review of counsel's fee petition and employer's objections thereto, we find the requested fee and expenses to be reasonably commensurate with the necessary work done, and we award counsel a fee of $1,304.75 to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §802.409. Claimant's counsel is awarded a fee of $1304.75 for work performed before the Board.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

Although I concur in the denial of employer's motion for reconsideration of the Section 14(e) issue, I respectfully dissent from the decision to reaffirm the attorney's fee award. I would grant employer's motion for reconsideration and would remand the case for the administrative law judge to reconsider the attorney's fee award in light of the plain language of Section 28(b) and the principles espoused in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Employer is correct in urging that the Board improperly affirmed the entire attorney's fee award for $2,150 under Section 28(b), as that section authorizes a fee award "based solely upon the difference between the amount awarded and the amount tendered or paid ... in addition to the amount of compensation."[6] The majority's assertion that Section 28(b) serves only as one means to establish employer's liability for an attorney's fee where there is a dispute as to claimant's entitlement to benefits would render meaningless the specific provision in Section 28(b) pertaining to the amount to be awarded: "a reasonable attorney's fee *based solely upon the difference between the amount awarded and the amount tendered or paid* ...."(emphasis added). The only purpose which these words in Section 28(b) can serve is to offer guidance in determining the amount of the fee award under these circumstances. The majority's interpretation would read the disputed words out of the statute.

In the case at bar, claimant won on appeal the Section 14(e) penalty, entitling him to approximately $130 and after referral to the Office of Administrative Law Judges, claimant was paid interest of $188.12. Thus, as a result of his appeal, claimant received an additional sum of $318.12. Obviously, an attorney's fee which is approximately seven times the award is excessive under the Act.[7]

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[6]33 U.S.C. §928(b) provides in relevant part:

> If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

[7]Furthermore, the majority's reference to claimant's right to obtain a physician of his own choosing is an irrelevant consideration in light of the directive in Section 28(b) to award an attorney's fee based "solely" on the difference in amounts. *See Ingalls Shipbuilding, Inc. v. Director, OWCP (Baker)*, 991 F.2d 163, 166, 27 BRBS 14, 16 (CRT)(5th Cir. 1993).

To support its position, the majority relies upon 20 C.F.R. §702.132(a) which provides for several factors to be considered in awarding a fee, including, but not limited to, "the amount of benefits awarded."[8] The fatal flaw in the majority's reasoning is that it is relying upon a regulation applicable in general to fee awards under the Act, despite the fact that the regulation conflicts with the plain words of the statute in cases where an attorney's fee is sought for work performed in obtaining benefits in excess of those voluntarily paid. Insofar as a regulation conflicts with the plain words of the statute it cannot stand. *See generally Max Sobel Wholesale Liquors v. C.I.R.*, 630 F.2d 670 (9th Cir. 1980); *U.S. v. Coates*, 526 F. Supp 248 (E.D. Cal. 1981). Even if the majority's concern about driving competent counsel from the field were valid, it could not justify contravening the statute as written. When the United States Court of Appeals for the D.C. Circuit rejected a similar argument in *Brooks* it declared that "appeal to policy arguments [are] unavailing ... in light of Congress' declaration of its own policy intentions." *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1537, 25 BRBS 161, 167 (CRT)(D.C. Cir. 1992).

Although the majority relies upon two cases which it asserts supports the attorney's fee award in the case at bar, examination of these cases demonstrates that reliance upon them is entirely misplaced. The majority cites *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), in which the court held that claimant is entitled to an attorney's fee only for work performed on the one issue on which claimant was successful. The court further held that the Benefits Review Board erred in failing to undertake a second-step *Hensley* analysis: that is a determination of whether the success achieved makes the hours reasonably expended a satisfactory basis for making a fee award. *Brooks*, 963 F.2d at 1540, 25 BRBS at 164 (CRT); *see Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). The majority appears to misunderstand *Brooks* when it asserts that the "court did not state that the award of the fee cannot exceed the difference between the award voluntarily paid and that ultimately obtained...." The purpose of the court's remand to the Board was to determine whether an award based upon a reasonable hourly fee multiplied by the number of hours reasonably expended was appropriate in light of the degree of success obtained. I am surprised by the majority's reference to *Brooks* in light of the *Brooks* court's chastisement of the Board for its "utter failure to conduct a second-step *Hensley* review....," which the Board is also rejecting in the case at bar. *Brooks*, 963 F.2d at 1540, 25 BRBS at 172 (CRT). *Hensley* expressly contemplates that some fees will have to be adjusted downward because the level of success achieved does not make the hours reasonably expended a satisfactory basis for a fee award. 461 U.S. at 435-437.

[8] 20 C.F.R. §702.132(a) provides in relevant part:

> Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded....

The majority's reference to *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor,* 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), is also unavailing, since the court in that case approved a fee equal to 56 percent of the sum ultimately won through litigation. That does not support the majority's affirmance of a fee award equal to approximately 700 percent of the amount won through litigation.[9]

Finally, the majority attempts to evade discussion of the second step of the *Hensley* analysis by noting that employer did not timely object to the fee petition below. Employer, however, is not required to do so. Employer did timely appeal the administrative law judge's award of an attorney's fee and has raised appropriate arguments. The responsibility now rests with the Board, in reviewing the administrative law judge's decision, to know and apply the pertinent law, or risk another chastisement from a court of appeals. *See Brooks,* 963 F.2d at 1540, 25 BRBS at 172 (CRT); *see also City of Burlington v. Dague,* __ U.S. ____, 112 S.Ct. 2638 (1992).

In sum, when a fee is properly awarded under Section 28(b), it must be based solely on the difference between the amount awarded and the amount paid. It is at this point that the Supreme Court's decision in *Hensley* offers guidance. Accordingly, I would vacate the administrative law judge's order awarding an attorney's fee and remand the case for reconsideration in light of Section 28(b) and the Court's analysis in *Hensley*, 461 U.S. 424. *See also* dissenting opinion in *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recons. en banc,* BRBS , BRB Nos. 90-194/A (Feb. 15, 1994).

REGINA C. McGRANERY
Administrative Appeals Judge

[9]The majority also cites Board decisions which are consistent with its approach in the case at bar. That is, however, the subject of the D.C. Circuit's criticism of the Board in *Brooks*.