

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40066
Summary Calendar

INGALLS SHIPBUILDING, INC.,

Petitioner,

VERSUS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
and
WILLIE C. BIGGS,

Respondents,

No. 94-40236
Summary Calendar

INGALLS SHIPBUILDING, INC.,

Petitioner,

VERSUS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
and
DARRELL D. BULLOCK,

Respondents,

94-40241
Summary Calendar

INGALLS SHIPBUILDING, INC.,

Petitioner,

VERSUS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
and
AARON C. FAIRLEY,

Respondents.

Petitions for Review of Orders of
the Benefits Review Board
(BRB #91-300)

(January 12, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

In these consolidated petitions for review from the Benefits Review Board ("BRB"), Ingalls Shipbuilding, Inc. ("Ingalls"), challenges the award of attorneys' fees to respondents Willie C. Biggs and Darrell D. Bullock by two administrative law judges ("ALJ's") as affirmed by the BRB. Ingalls also challenges the

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

BRB's award of attorneys' fees to respondent Aaron C. Fairley. Concluding that the BRB erred in upholding Biggs's and Bullock's fee awards and in calculating Fairley's fee award, we grant review, vacate, and remand.

I.

A.

Willie Biggs filed a claim for compensation and medical benefits for occupational hearing loss pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"). Following a hearing, an ALJ awarded benefits for a 0.3% binaural hearing loss.

Ingalls filed a motion for reconsideration, contending that because Biggs was a "retiree," his binaural hearing loss had to be converted to a whole man impairment rating under § 8(c)(23) of the LHWCA, 33 U.S.C. § 908(c)(23), in accordance with Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088 (5th Cir. 1990) ("Ingalls (Fairley)").¹ The ALJ agreed and found that Biggs had suffered a 0% impairment of the whole man. The ALJ determined that

¹ The question presented in the instant case and in Ingalls (Fairley) was how to treat a claimant who discovers a work-related hearing loss after he has retired. Section 8(c)(13) specifically covers hearing loss, while § 8(c)(23) is a provision that covers injuries to retirees in general. Under § 8(c)(23), a claimant receives weekly payments rather than the lump sum payment under § 8(c)(13). Moreover, under § 8(c)(23), the percentage disability is determined as a percentage of disability to the "whole man" as opposed to a percentage of hearing loss. Ingalls (Fairley), 898 F.2d at 1091. This court determined that § 8(c)(23) applied in cases like Biggs's and Fairley's. The Supreme Court, however, overruled this holding in Bath Iron Works v. Director, OWCP, 113 S. Ct. 692 (1993). The Supreme Court's ruling does not affect the whole man determination in Biggs's and Fairley's cases, as both rulings were final orders before the Court issued its decision.

he was entitled to no compensation but awarded future medical benefits, if applicable, under § 7 of the LHWCA, 33 U.S.C. § 907.

Biggs's attorneys submitted a fee petition requesting \$2,763.75 in fees and expenses; Ingalls filed a written objection. The ALJ made an award of \$1,900 based upon 19 hours at a rate of \$100 per hour.

Ingalls then appealed the award to the BRB, contending that as there had not been a successful prosecution of a claim, it was not liable for fees and that the fees awarded were excessive. The BRB, however, refused to consider Ingalls's objection that it was not liable for the fees for lack of a successful prosecution, because Ingalls had raised the argument for the first time on appeal.

Moreover, the BRB held that Ingalls had not raised arguments to the ALJ that the award had to be reduced based upon Biggs's limited success. The BRB also rejected Ingalls's other specific objections, which the BRB determined were properly raised, to the amount of the fee award.

B.

Darrell Bullock was awarded compensation by the ALJ based upon a 0.9% binaural hearing loss amounting to \$484.74. The ALJ awarded fees of \$2,000. Because Bullock originally had sought compensation for a monaural impairment of 5.6%, he appealed to the BRB. Ingalls cross-appealed the fee award. The BRB consolidated the appeal and affirmed the ALJ on the monaural versus binaural issue.

The BRB dismissed Ingalls's claim that the fees were excessive in light of the benefits obtained, because the objection was not raised to the ALJ. Moreover, the BRB determined that Bullock had successfully prosecuted his claim.

Bullock filed a motion for reconsideration in light of Tanner v. Ingalls Shipbuilding, Inc., 2 F.3d 143 (5th Cir. 1993). The BRB modified the prior order and awarded benefits for a 5.6% monaural hearing loss. The compensation totaled \$440.67. This petition for review, on the attorneys' fees issue only, followed.

C.

Fairley and Ingalls agreed, after two hearing tests were completed, that he had suffered a 13.78% binaural hearing loss. Ingalls, prior to hearing, began to pay benefits for the 5% whole man rating, which was the whole man conversion of the 13.78% loss.

The issue at the hearing was whether the loss should be compensated as a whole man impairment or a binaural hearing loss. The ALJ ruled in favor of Fairley and found that the loss should be compensated under § 8(c)(13)(B) as a binaural hearing loss. Payments were made pursuant to this ruling totaling \$5,560.70 in compensation and \$435.60 in interest.

An appeal was taken to the BRB, which affirmed the award but reversed the ALJ's decision to disallow a special assessment under § 14(e) of the LHWCA, 33 U.S.C. § 914(e). Ingalls appealed to this court, which found that benefits should be compensated under the applicable whole man rating. The court also affirmed the § 14(e)

assessment. Ingalls (Fairley), 898 F.2d at 1088. The case was remanded for an entry of a § 8(c)(23) award and an assessment of attorneys' fees, if applicable. The BRB modified the award to reflect the finding of a 5% whole man impairment and affirmed the fee award.

Fairley's counsel submitted a fee petition to the BRB seeking \$5,664.74 in fees and expenses for work done on behalf of Fairley in front of the BRB. Ingalls filed written objections. The BRB awarded the entire fee.

II.

The LHWCA provides for attorneys' fees in two general situations: first, where benefits are not voluntarily paid by the employer to the claimant but are contested in front of an ALJ, see § 28(a) of the LHWCA, 33 U.S.C. § 928(a); and second, where benefits are voluntarily paid, but the claimant successfully acquires greater benefits in a later proceeding, see § 28(b) of the LHWCA, 33 U.S.C. § 928(b). Biggs and Bullock plainly fall under the first provision.

Ingalls correctly notes that § 8(a) provides that fees are warranted following the "successful prosecution" of a claim and that the fee award must be "reasonable." Furthermore, the applicable regulations provide that the ALJ should only approve fees that are "reasonably commensurate with the necessary work done" and that consider "the amount of benefits awarded." 20 C.F.R. § 702.132. This court has also held that fee awards

pursuant to the LHWCA must be tailored to the success obtained. Ingalls Shipbuilding, Inc. v. Director, OWCP ("Ingalls (Baker)"), 991 F.2d 163, 166 n.14 (citing Farrar v. Hobby, 113 S. Ct. 566 (1992); Hensley v. Eckerhart, 461 U.S. 424 (1983); George Hyman Constr. Co. v. Brooks, 963 F.2d 1532 (D.C. Cir. 1992)) .

Generally, the BRB will set aside fee awards only if the challenging party shows that the award is arbitrary, capricious, an abuse of discretion, or not in accordance with law. See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980). This court exercises a very limited review over decisions of the BRB. We examine only whether the BRB "correctly concluded that the ALJ's order was supported by substantial evidence on the record as a whole and is in accordance with law." Ingalls (Baker), 991 F.2d at 165 (quoting Avondale Indus. v. Director, OWCP, 977 F.2d 186, 189 (5th Cir. 1992)). We note, however, that the resolution of the issues of "successful prosecution" in the case of Biggs, and "reasonableness" in the cases of Biggs and Bullock, involves a question of law.

In these instances, the BRB concluded that Ingalls could not pursue the argument that the attorneys' fees were not supported by the awards in the cases because Ingalls had not raised the objection in front of the ALJ. While we agree with Ingalls that the ALJ and the BRB are bound to follow the dictates of the LHWCA and the regulations, we are unable to find any support for the argument that the BRB must independently review the reasonableness of a fee award in a case in which there was no settlement and where

the employer failed to object to the award below.

The BRB consistently has held that employers waive objections not made in front of the ALJ. See, e.g., Clophus v. Amoco Prod. Co., 21 BRBS 261, 265-66 (1988). This court has also refused to consider arguments in an LHWCA situation that were not raised in the administrative proceedings. See Ingalls Shipbuilding, Inc. v. Director, OWCP, 976 F.2d 934, 938 (5th Cir. 1992). See also Ingalls (Fairley), 898 F.2d at 1096 (refusing to address, for the first time on appeal, whether attorneys' fees were due based upon a theory not addressed by the BRB or the ALJ); cf. Texas v. United States, 866 F.2d 1546, 1561 (5th Cir. 1989) (refusing to consider an issue on appeal that the parties did not raise in front of the ICC).

Therefore, despite the apparent dubious nature of these fee awards, we will not address the issue of whether they have been properly tailored to the success achieved by the claimants. Moreover, we also will not address whether Biggs successfully prosecuted a claim as required by § 28(a).

The BRB did address the issue of whether Bullock had successfully prosecuted his claim. The BRB recognized that the ALJ awarded Bullock permanent partial disability compensation, medical benefits, an assessment pursuant to § 14(e), and interest. While we recognize that the amount of compensation was barely a quarter of the amount of attorneys' fees in this case, there is no doubt that there was at least some degree of success on Bullock's part. Ingalls separately argued to the BRB that the fee was "excessive"

in light of that relative success. See, e.g., Farrar, 113 S. Ct. at 574. As noted above, Ingalls failed to argue this point to the ALJ.

Next we address Ingalls's specific objections. It argues that the fee petitions should have been rejected because they contained an "addendum" reflecting unit or incremental billing. The record indicates that this is the first time that Ingalls raises this objection, so we will not address it.

Ingalls also objects to specific time amounts attributed to certain legal tasks, which they contend constitutes "minimum billing." Ingalls correctly notes that we have specifically disapproved this type of billing method. See Ingalls Shipbuilding, Inc. v. Director, OWCP, No. 89-4459 (5th Cir. July 25, 1990) (unpublished). The claimants now argue that the BRB has explicitly declined to follow the holding of this case. See Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245 (1991).

We agree that fee determination is within the discretion of the ALJ and the BRB, but the exercise of that discretion cannot contravene circuit precedent. We acknowledge that the regulations mandate that fee petitions submit time in one-quarter-hour segments. See 20 C.F.R. § 802.203(d)(3). We refuse, however, to interpret this provision to mean that attorneys may complete a task in one-eighth of an hour and then round their time up to one-quarter of an hour. Because claimants essentially acknowledge improper minimum incremental billing, we must remand these two cases for a recalculation of the award.

As to Ingalls's other objections for time spent on specific tasks, we are unable to find that the BRB erred in affirming the ALJ's determinations. While Ingalls may be correct that the attorneys in these cases merely filed "form" pleadings, it is up to the ALJ to evaluate the time submitted by attorneys and to make credibility choices. It certainly would be troubling if attorneys are allowed repeatedly to recoup fixed time "expenses," but we are unwilling to reverse the determinations of the ALJ in this case because of our deferential standard of review.² Thus, we vacate the awards made in the Biggs and Bullock cases and remand for a recalculation of the fees without quarter-hour minimum billing.

III.

Fairley's case differs slightly from Biggs's and Bullock's: Ingalls appeals fees awarded by the BRB to Fairley's attorneys for work done solely at the BRB level. The BRB rejected Ingalls's challenge that the fees were excessive in light of the success obtained in front of the BRB. The BRB noted that additional damages, though slight, were awarded and that the ruling that claimant had a right to a § 14(e) penalty established a precedent for the disposal of other cases involving § 14(e) issues. Ingalls now argues that the BRB erred in considering anything other than the amount of additional money awarded to Fairley by the BRB.

Ingalls claims that § 28(b), which provides for attorneys'

² We note that the ALJ did reduce the fee award from the earlier requests in both cases after Ingalls filed certain written objections.

fees "based solely upon the difference between the amount awarded and the amount tendered or paid . . . in addition to the amount of compensation" in some situations, controls here. We conclude that this case is not strictly controlled by this provision, however.

Section 28(b) applies where an employer has tendered payment without an award pursuant to § 14(a) or § 14(b) and where a subsequent controversy arises over an amount of additional compensation. Such a controversy first must be presented to the deputy commissioner or the BRB, which must recommend a disposition to the controversy. The employer may refuse to accept the recommendation and shall then pay the amount to which it believes the employee is entitled. The statute then indicates:

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.

33 U.S.C. § 928(b).

This is simply not the situation in Fairley's case. The employer paid compensation that the employee accepted. The main controversy centered on whether compensation actually was due under § 28(c)(13) rather than § 28(c)(23). An ALJ ruled that benefits were to be awarded pursuant to § 28(c)(13). The BRB affirmed this ruling and assessed a § 14(e) penalty. We reversed on the § 28(c)(23) issue and remanded. After the BRB issued a decision on remand, it awarded attorneys' fees for work done by Fairley's attorneys in front of the BRB. It is this award that is the

subject of the petition for review.

Because § 28(b) is not controlling in this case, we look to Hensley and Farrar to evaluate Ingalls's claims. As we previously noted, attorneys' fees awards must be tailored to the amount of success obtained. Ingalls (Baker), 991 F.2d at 163.

Fairley's success at the BRB level entailed the "successful" defense of the appeal on the § 28(c)(13) issue (which was eventually overturned by this court), the reversal of the ALJ's decision on the applicability of the § 14(e) penalty resulting in a net financial gain of \$45.41, and the affirmance of the fee award from the ALJ. The BRB, over a dissent, awarded a total of \$5,664.75 to Fairley's attorneys for their work before the BRB.

The Supreme Court has held that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" Farrar, 113 S. Ct. at 574 (quoting Hensley, 461 U.S. at 436). In addition, "if a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Hensley, 461 U.S. at 436.

The BRB acknowledged that Fairley's recovery was very slight in this case, amounting only to the \$45.41 gained from the penalty assessment, and the BRB appeared to agree that the award would not support a large fee. The BRB, however, based its huge fee award upon the precedential effect of this case, specifically noting that the § 14(e) precedent set in Fairley's case extended to countless other cases. This was not a class action lawsuit, however; the

fact that a case has precedential effect does not have an impact on that particular claimant's success in the case.

Here, the BRB's fee award exceeds the financial gain to the claimant by almost 125 times.³ To the extent that the BRB relied upon the precedential nature of the case in its Hensley/Farrar inquiry, its determination cannot stand. We therefore remand to the BRB for a further evaluation of the fee award in light of the principles announced in this opinion.

The petitions for review are GRANTED, and these matters are VACATED and REMANDED for further proceedings consistent with this opinion.

³ We are not holding, as a matter of law, that the BRB may only consider financial gain to the claimant in these cases, but the financial award in this case is the only measurable success this claimant achieved.