

BRB No. 11-0733

CHARLES MBULE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EOD TECHNOLOGY, INCORPORATED	)	DATE ISSUED: 07/24/2012
	)	
and	)	
	)	
INSURANCE COMPANY OF THE	)	
STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Tara K. Coughlin, Harrison Township, Michigan, for claimant.

Jennifer J. Nobley (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (2010-LDA-00347) of Administrative Law Judge Daniel A. Sarno, Jr., 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.*, as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.* (the Act). 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, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Claimant, a Ugandan national, was employed as a security guard in Iraq. On July 21, 2007, claimant was hit with a bullet from a gun fired to celebrate an Iraqi soccer match. The bullet punctured claimant's right kidney and lodged near his spinal cord. The parties stipulated that employer has voluntarily paid temporary total disability benefits since July 22, 2007, and that claimant is entitled to ongoing permanent total disability benefits from January 19, 2010. 33 U.S.C. §908(a), (b). A dispute arose as to the medical benefits owed, as claimant's left kidney began failing. The administrative law judge found that claimant's high blood pressure, back and leg pain, paralysis, and kidney disease are all related to the gunshot wound. He awarded claimant reimbursement of out-of-pocket medical expenses, ordered employer to authorize claimant's selected neurosurgeon for surgical and non-surgical treatment, and held employer liable for future medical expenses resulting from the work-related injuries. 33 U.S.C. §907; Decision and Order at 23.

Following the administrative law judge's award, claimant's counsel submitted a fee petition to the administrative law judge. She requested a fee of \$97,812, representing 343.2 hours of work at an hourly rate of \$285, \$13,315.02 in costs, and \$501.74 in postage, for a total of \$111,628.76. Employer filed objections, challenging the hourly rate, the hours, and the costs as being excessive, unnecessary, non-compensable, or duplicative. Counsel responded that her time and fee is reasonable, as employer assumed the risk of overseas litigation costs when it hired a Ugandan national and that the medical issues were not routine, warranting the time and expenses expended.

The administrative law judge determined that the law of the United States Court of Appeals for the Second Circuit applies to this case and that the Second Circuit has held that the relevant community for determining a market hourly rate is where the court sits. The administrative law judge found the relevant community in this case is Newport News, Virginia, because his office is there. Supp. Decision and Order at 3 (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182 (2^d Cir. 2007)). He then determined that \$285 is a reasonable rate for that market, given counsel's experience. Supp. Decision and Order at 3-4. Next, the administrative law judge addressed employer's objections and, in ten single-spaced pages, explained his reasons for accepting or rejecting them. Ultimately, he approved 334.7 hours of services at an hourly rate of \$285, and \$11,484.44 in costs, and he denied the claim for \$501.74 in postage expenses. Thus, the administrative law judge awarded counsel a fee in the amount of \$106,873.94. *Id.* at 15. Employer appeals the fee award, and claimant's counsel responds, urging affirmance.

Employer first contends the administrative law judge erred in using Newport News, Virginia, as the appropriate market. It asserts that claimant is a Ugandan national, his counsel resides and works in Michigan, employer is located in Lenoir City,

Tennessee, its insurer is located in Dallas, Texas, and its counsel is based in San Francisco, California. As there was no oral hearing in this case, and as none of the parties was in Newport News, employer asserts it was not logical to use a prevailing market rate in Newport News.

In *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011), the Board held that the location of the office of the district director who filed the administrative law judge's decision determines the controlling circuit law in DBA cases. In this case, the district director's office is in New York, and the administrative law judge therefore correctly determined that the law of the Second Circuit applies. Thus, as the Second Circuit has stated that the relevant community for determining the market rate for an attorney's fee is that where the forum/court sits, *Arbor Hill*, 522 F.3d 182, and as his office is in Newport News, Virginia, the administrative law judge did not err in concluding that the relevant community for determining the prevailing market rate for counsel's services is Newport News.¹ See *id.*; *McDonald*, 45 BRBS 45. The evidence submitted by counsel and credited by the administrative law judge supports the award of an hourly rate of \$285; therefore, we affirm the administrative law judge's awarded hourly rate. See generally *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010).

Employer also contends the administrative law judge erred in awarding counsel time and costs for traveling to visit claimant in Uganda. It asserts he erred in awarding \$16,929 (59.4 hours x \$285) for her time to travel to and from Uganda and to meet with claimant, and in awarding \$3,039.82 in costs for her flights, four nights in a hotel, food, and various vaccines and medicines.² Employer asserts that meeting with claimant in person was unnecessary, as they had been communicating via email and telephone. Further, employer argues that meeting with claimant was not counsel's primary reason for going to Uganda, as she operates a charity there and dedicated most of her time to that cause. Consequently, employer asserts that the time and costs for the trip should be greatly reduced or denied to account for the personal aspect of the trip.

It is undisputed that, of a 13-day trip, counsel met with claimant for four hours. Nevertheless, fees for travel time may be awarded, and expenses may be reimbursed, if the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001); *Davenport v. Apex*

¹This is not a case in which the "out-of-town" counsel seeks a higher rate than that prevailing in the forum. See *Arbor Hill*, 522 F.3d 182.

²Counsel did not request time or expenses on days she did not meet with claimant.

Decorating Co., Inc., 18 BRBS 194 (1986). Travel expenses to meet with a claimant who is too disabled to travel are compensable when a face-to-face conference is necessary. *Swain v. Bath Iron Works Corp.*, 12 BRBS 170 (1979). The administrative law judge found that claimant was too disabled to travel and that his living in Uganda added to the complexity of the communications. He also found that employer assumed the risk of overseas travel costs by hiring Ugandan nationals and that it was reasonable for counsel to believe an in-person meeting was necessary.³ Supp. Decision and Order at 7-8. As he found the meeting necessary, and as he found that counsel did not bill for any time or costs except those actually related to meeting with claimant, the administrative law judge rejected employer's contention that he should reduce the travel time and costs in proportion to the amount of time spent with claimant versus the charity. Supp. Decision and Order at 7-8, 12. Moreover, as the administrative law judge found that the travel was necessary, it was reasonable to meet with a disabled claimant, and the costs were in excess of that which would be included in normal overhead, his decision to award the travel time and costs was not an abuse of his discretion, is in accordance with law, and is affirmed. *Brinkley*, 35 BRBS 60; *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Employer next argues that the administrative law judge erred in awarding 50.2 hours (\$14,307) for entries stating only "Communications with Client – Privileged." Employer asserts these entries are vague, do not satisfy the Section 702.132(a), 20 C.F.R. §702.132(a), requirement for providing a complete statement of the extent and character of the necessary work, and make it impossible to assess the validity of the charges. Employer asks the Board to strike all the hours or reduce them by half.

The administrative law judge found, overall, that the fee petition entries were very specific. However, in response to employer's objection, the administrative law judge stated that counsel explained that all client-communication entries, except for the two in-person meetings, were related to email communications and that the "general reason" for the communications was to discuss the case. The administrative law judge accepted counsel's explanation and stated that the fee petition is sufficiently detailed to satisfy the regulation. Thus, he awarded the entire 50.2 hours. Supp. Decision and Order at 11. As the administrative law judge specifically addressed employer's objection, accepted counsel's explanation of the entries, and determined that the communications with claimant were to discuss the case, employer has not established that the administrative

³The administrative law judge also stated that such travel was in excess of normal overhead, and he noted that the fact that a face-to-face meeting with a U.S. citizen would cost less has no bearing on whether counsel's meeting with claimant was reasonable. Supp. Decision and Order at 7-8.

law judge's decision was arbitrary, capricious, or was an abuse of discretion. Therefore, we affirm the administrative law judge's award for this time.

With regard to the remaining objections, we conclude employer has not demonstrated that the administrative law judge abused his discretion in awarding a fee for those services. The administrative law judge thoroughly addressed employer's contentions and made reductions where he deemed appropriate, and employer has not established that further reductions are warranted. Specifically, employer has not established that the administrative law judge abused his discretion in awarding a fee for communicating with legal assistants, time spent for medical research or costs spent on medical articles, time spent related to Dr. Borkan's deposition, or time spent drafting various briefs and forms. *See generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds); *Davenport*, 18 BRBS 194. Further, employer has not established that the administrative law judge erred in accepting claimant's brief, despite his initial order to submit simultaneous briefs, in awarding a fee for preparing the fee petition, or in awarding costs for mileage. *See* 33 U.S.C. §928(d); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). Although, as employer argues, this petition for an attorney's fee could have been resolved any number of ways, we are not free to substitute our judgment for that of the administrative law judge. *See generally Fox v. Vice*, 131 S.Ct. 2205 (2011). The administrative law judge rationally found that claimant's success on the merits was significant in that he recovered over \$68,000 for past medical expenses, as well as future medical expenses for his work injuries including those for his kidney problems. The administrative law judge additionally noted that claimant also was awarded neurosurgical care in South Africa, including special travel accommodations and a helper, and that claimant's counsel estimated the awards for future care may range upwards of \$500,000. Employer thus has not demonstrated that the administrative law judge abused his discretion in awarding this fee and, therefore, we affirm the award.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge