BRB No. 10-0438

BERNARD D. BOROSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE	)	DATE ISSUED: 03/15/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

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

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Denty Cheatham (Cheatham, Palermo & Garrett), Nashville, Tennessee, for claimant.

Roger A. Levy and Stephanie N. Seaman (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees and Costs (2004-LHC-02359) 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.*, as extended by the Defense Base Act, 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

While working in employer's blade shop in Bosnia, claimant was exposed to chemical vapors which, he alleged, caused his significant vision problems and resulted in his inability to perform any work as of April 19, 2002. Claimant sought benefits for permanent total disability, 33 U.S.C. §908(a); employer contested the cause of claimant's eye condition and filed an application for Section 8(f) relief, 33 U.S.C. §908(f). In his initial decision, the administrative law judge found that claimant established that his eye condition is work-related and thus ordered employer to pay claimant benefits for permanent total disability from April 19, 2002. The administrative law judge also denied employer's request for Section 8(f) relief on the ground that the evidence did not establish that claimant's pre-existing eye disorder was manifest to employer.

Employer appealed, challenging the administrative law judge's findings that claimant's genetic eye disorder was aggravated by his working conditions and that it is not entitled to Section 8(f) relief. In its decision, the Board affirmed the administrative law judge's award of benefits, vacated his denial of Section 8(f) relief, and remanded the case for further consideration of that issue. *B.B.* [*Boroski*] *v. Dyncorp International*, BRB No. 08-0550 (Jan. 30, 2009) (unpub). Following the affirmance of the award of benefits, claimant's co-counsel, Denty Cheatham and Joshua Gillelan, filed fee petitions for work performed before the administrative law judge. Specifically, Mr. Cheatham sought an attorney's fee totaling $437,220.37, representing 1,141 hours of work at an hourly rate of $350, 44 hours of travel at an hourly rate of $175,[1] and $30,170.37 in costs. Mr. Gillelan sought an attorney's fee totaling $6,935, representing 14.6 hours at an hourly rate of $475. Employer filed objections to each of the fee petitions, and Mr. Cheatham and Mr. Gillelan replied.

[1]Mr. Cheatham filed fee petitions covering three separate time frames, *i.e.*, for work at the administrative law judge level performed from March 14, 2003, to September 21, 2007, from February 26, 2008 to September 18, 2009, and on February 8, 2010.

In his Supplemental Decision, the administrative law judge reviewed the fee petitions in light of employer's objections; he significantly reduced the hours requested by Mr. Cheatham and completely denied the hours requested by Mr. Gillelan. As a result, the administrative law judge awarded Mr. Cheatham a fee totaling $211,415.49, representing 507.60 hours at an hourly rate of $350, 25.5 hours of travel time at an hourly rate of $175, and $29,292.99 in costs.

On appeal, Mr. Cheatham challenges the administrative law judge's reduction in his requested fee, and Mr. Gillelan challenges the administrative law judge's denial of his fee request in its entirety. Employer responds, urging affirmance of the administrative law judge's decision.[2]

We reject Mr. Cheatham's initial contention that the administrative law judge erred in disallowing time as "excessive" without addressing the particular circumstances of this case, which necessitated an unusually large expenditure of time. The administrative law judge extensively considered the fee petitions of Mr. Cheatham and Mr. Gillelan in terms of counsels' supporting arguments, employer's objections, and counsels' responses to those objections, and issued a 35-page decision on the fee petitions. In addition, the administrative law judge addressed the fee petitions in terms of the applicable regulation at 20 C.F.R. §702.132, case precedent, and the "novelty and difficulty of the questions" involved in this case.[3] Supp. Decision and Order at 29. Moreover, given that the administrative law judge presided over the entirety of these proceedings, he is well aware of the extensive record involved in adjudicating this case.

[2]Employer also argues that addressing the attorney's fee petition at this point serves only to waste judicial resources because employer intends to appeal the Board's affirmance of the award of benefits to claimant; employer notes that until the issue of liability is finally resolved any award of attorney's fees and costs is unenforceable. We reject this contention as it is preferable for the administrative law judge to rule on the attorney's fee petition while the record is before him and the case is fresh in his mind. *See generally Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

[3]Specifically, the administrative law judge found that "while the issue of blindness is fairly novel in Longshore litigation, the ultimate issue as to whether the claimant's employment conditions caused his blindness (*i.e.*, whether he was entitled to the Section 20(a) presumption) is common to most Longshore cases." Supp. Decision and Order at 29.

Mr. Cheatham next argues that the administrative law judge erred in denying as "excessive" 439.75 of the 519.5 hours devoted to various categories of counsel's work on the merits. The administrative law judge extensively outlined the hours requested by counsel and reduced those entries he deemed excessive to an amount of time which the administrative law judge found reasonable given the overall circumstances of the case, taking into account his own experience in presiding over cases arising under the Act. Supp. Decision and Order at 10-25. The administrative law judge found that a number of entries billed for routine matters, such as for work relating to discovery, including preparation of interrogatories and preparation for depositions, were excessive given that the case involved only two issues, *i.e.*, whether claimant's eye condition is work-related and whether employer is entitled to Section 8(f) relief, of which only the first was relevant to claimant's entitlement to benefits under the Act.[4] As the administrative law judge fully considered the necessity of each entry and determined that these entries were, based on his judgment, excessive in light of the overall circumstances of this case, we reject Mr. Cheatham's argument and thus, affirm the administrative law judge's denial of payment for 439.75 hours of work as unnecessary to vindicate claimant's rights to compensation. *See generally Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986).

Mr. Cheatham also argues that the administrative law judge's characterization of 36.15 hours as non-compensable time devoted to clerical duties was erroneous, as these entries involved compensable time spent in "instructing, directing, checking, and requiring corrections of the work of clerical personnel," in organizing and indexing materials, and on telephone calls to claimant, medical experts, and court reporters. The administrative law judge identified a number of entries as involving work which he deemed was clerical in nature and he reduced each entry to reflect an appropriate amount of attorney time to supervise each task.[5] Supp. Decision and Order at 26-29. Review of

[4]For instance, in reducing the hours requested by Mr. Cheatham for preparation of the statement of contested issues from 24.25 to 3 hours, the administrative law judge explained that the total hours requested were excessive; although Mr. Cheatham had been working on the case for at least six months before the Statement of Contested Issues was finished, only two issues were presented for adjudication. Supp. Decision and Order at 14. Similarly, the administrative law judge reduced counsel's request for payment for 182.75 hours spent to prepare and revise claimant's post-hearing brief to payment for 40 hours, rationally finding that an attorney with Mr. Cheatham's experience should require no more than 40 hours to prepare a post-hearing brief.

[5]We note that the administrative law judge did not deny all the time requested for each clerical task. Rather, he reduced the entry to reflect an amount of time which is commensurate with the attorney work expected for each task. Supp. Decision and Order at 26-29.

these entries reveals that they involve traditionally clerical duties such as copying, scanning, organizing, and mailing, emailing or faxing documents, making telephone calls related to scheduling issues, organizing and assembling files, and otherwise arranging for copying work to be performed by Kinkos. The administrative law judge's reductions in the time sought by Mr. Cheatham for these entries, based on the clerical nature of the work performed, are affirmed as the administrative law judge gave rational reasons and there is no abuse of his discretion in this regard. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980).

Mr. Cheatham contends that the administrative law judge erred by reducing as excessive his time and expenses for travel between his office in Nashville, Tennessee, and the location of the hearing, Durham, North Carolina. In 33 U.S.C. §928(d), the Longshore Act makes clear that claimant's attorney is entitled to reimbursement of reasonable travel expenses and to a fee for his travel time where the travel is necessary, reasonable, and in excess of that normally considered to be part of the overhead. *See Brinkley v. Department of the Army/NAF*, 35 BRBS 60, 64 (2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). Mr. Cheatham maintains that the administrative law judge did not consider his valid reasons for driving rather than flying to the hearing, *i.e.*, that he had to transport "seven banker's boxes of documents." We agree.

Pursuant to Section 28(d), the administrative law judge found that Mr. Cheatham's travel between his office in Nashville and the hearing in Durham was reasonable, necessary, and in excess of overhead expenses. Decision and Order at 32. However, he found that counsel's decision to charge 20 hours, or $3,500, roundtrip for the drive from Nashville to Durham was excessive since counsel had previously requested only 1.5 hours, or $262.50, to fly back and forth between those destinations to conduct business related to this case. In reaching this conclusion, the administrative law judge did not address any of the reasons Mr. Cheatham provided for deeming the selected mode of transportation reasonably necessary. *Id.* We must, therefore, vacate the administrative law judge's summary reduction of Mr. Cheatham's travel time request from 20 to 1.5 hours as it is not sufficiently explained, and thus, is arbitrary. On remand, the administrative law judge must reconsider Mr. Cheatham's travel expenses in terms of counsel's contentions and employer's response thereto as to the reasonableness of counsel's decision to drive to Durham.[6]

[6]The administrative law judge's reduction of Mr. Cheatham's mileage expense request of $529.62 for travel to and from the hearing (1,092 miles at a rate of 48.5 cents per mile) to $250 is likewise insufficiently explained and therefore also must be reconsidered by the administrative law judge on remand. 33 U.S.C. §928(d).

Mr. Cheatham also correctly argues that the administrative law judge erred as a matter of law in denying any fee for the time spent preparing the two fee applications. In this case, the administrative law judge, based on the Board's decision in *Sproull v. Stevedoring Services of America*, 28 BRBS 271, 277 (1994), *modified on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997), denied all 26.75 hours requested for preparation of the original and supplemental fee petitions. In *Bogden v. Consolidation Coal Co.*, ___BRBS ____, BRB No. 10-0682 (Jan. 26, 2011) (*en banc*), the Board recently held that "[i]n view of the now well-settled law that it is appropriate to award a reasonable fee for time spent preparing a fee petition in a case arising under the Act, we overrule that portion of *Sproull*, 28 BRBS 271, that holds to the contrary." *Id.*, slip op. at 5. In light of this holding, we vacate the administrative law judge's denial of the 26.75 hours requested for preparation of the original and supplement fee petitions, and we remand the case for a determination of a reasonable fee for this work.

Mr. Cheatham next contends that the administrative law judge erred in significantly reducing the 59.75 hours counsel devoted to responding to employer's objections to the fee applications. The administrative law judge, citing the Board's decision in *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 159 (2009), found that Mr. Cheatham's "voluminous response to the [e]mployer's objections [was] excessive and unnecessary." Decision and Order at 31. He therefore reduced counsel's requested hours for this task from 59.75 to 8 hours. For the reasons discussed in *Beckwith*, 43 BRBS at 158, we affirm the administrative law judge's reduction in the hours requested by counsel to reply to employer's objections and decision to grant counsel 8 hours for this task as the administrative law judge did not abuse his discretion in so doing.

The last contention is that the administrative law judge erred in denying any attorney's fees for Mr. Gillelan's services. In rejecting the two hours requested by Mr. Gillelan for his facilitating the "remand process," the administrative law judge correctly found that claimant's entitlement to benefits was established by the Board's 2009 decision and that the only issue remaining on remand was employer's entitlement to Section 8(f) relief. Decision and Order at 35. Thus, the administrative law judge rationally found that, since claimant would not obtain any additional benefits as a result of the remand proceedings, Mr. Gillelan's services were unnecessary and that an attorney's fee award for work by claimant's appellate counsel is not warranted. *See Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96 (1989) (no fee for work on Section 8(f) issue); *Murphy v. Honeywell, Inc.*, 20 BRBS 68 (1986). Thus, we affirm the administrative law judge's denial of a fee for the two hours at issue.

The administrative law judge also found that since the objections raised by employer to Mr. Cheatham's fee petition are akin to those "routinely made in Longshore cases," it was unnecessary for Mr. Cheatham to consult with another attorney to assist him in responding to those objections. Since the administrative law judge rationally found that Mr. Gillelan's other services are not compensable, he also rationally found that the time requested for his preparing (3.8 hours) and defending (4.5 hours) his own fee petition cannot be granted. As counsel has not shown an abuse of the administrative law judge's discretion in denying this time, his findings regarding these hours and overall conclusion that Mr. Gillelan is not entitled to any attorney's fee for work performed before him in this case are affirmed. *See generally Beckwith*, 43 BRBS at 158.

Accordingly, the administrative law judge's reduction in the requested attorney's fee with regard to the fee and costs sought by Mr. Cheatham to travel between Nashville and Durham and for work associated with the filing of his fee petitions are vacated, and the case is remanded for further consideration of these issues. In all other regards, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and Costs is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge