

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0154

MICHAEL S. AYERS)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 11/16/2018
)	
JONES STEVEDORING COMPANY)	
)	
and)	
)	
RED SHIELD INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order on Remand-Attorney’s Fees of R. Todd Bruininks, District Director, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

James McCurdy and Elana L. Charles (Lindsay Hart, LLP), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order on Remand-Attorney’s Fees of District Director R. Todd Bruininks (Case No. 14-154563) 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). 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, based on an abuse

of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

This case is before the Board for the second time.¹ Following the issuance of a Decision and Order in 2015 in which claimant was awarded compensation benefits under the Act, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Workers' Compensation Programs (OWCP). Counsel requested a fee of \$3,480, representing 7.8 hours of attorney time at an hourly rate of \$425 and one hour of legal assistant time at an hourly rate of \$165, plus \$53.00 in costs.² Employer filed objections to counsel's fee petition.

In his Order on Attorney's Fees issued on November 30, 2017, the district director reduced the requested hourly rates to \$392 for attorney services and to \$150 for legal assistant services for work performed in 2011. The district director used the 2014 and 2015 locality pay rate increases for federal employees, specifically one percent each year for Portland, Oregon, to award counsel an hourly rate of \$396 for work performed in 2015.³ The district director awarded counsel a fee of \$2,971.60.

Claimant's counsel appealed the district director's fee award. The Board vacated the district director's denial of a delay enhancement and remanded the case for him to reconsider the hourly rates in view of the decision of the United States Courts of Appeals for the Ninth Circuit in *Modar v. Maritime Services Corp.*, 632 F. App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015).⁴ *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0074, slip op. at 3-4 (Sep. 26, 2016) (unpub.). The Board also vacated the district director's reliance on the percentage increase in federal employees' locality pay to calculate counsel's 2015 hourly rate because that method is not market-based, and remanded for the district director to use market-based factors. *Id.*, slip op. at 4.

¹ In addition, claimant appealed the administrative law judge's fee award. *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0520 (Apr. 24, 2017).

² The 7.8 hours of attorney time consisted of 6.05 hours of services performed before the OWCP from February 25 to July 14, 2011, and 1.75 hours for the preparation of his fee petition between May 9 and 11, 2015.

³ The district director stated that no increase was applicable for FY 2011 through FY 2013 due to the freeze in federal employees' locality pay during those years.

⁴ The Director, Office of Workers' Compensation Programs, urged this result.

On remand, the district director denied a delay enhancement. He stated that this case is distinguishable from *Modar* because the delay here was only four years from the time services were performed in 2011 until counsel was awarded an attorney's fee in 2015, and this delay was due to counsel's decision to wait until the claim was concluded before the Office of Administrative Law Judges (OALJ) before submitting his fee petition to the OWCP. Order on Remand-Attorney Fees (Order) at 4-5. The district director used the Department of Labor's Bureau of Labor Statistics Consumer Price Index (CPI) for Portland-Salem, Oregon, to determine counsel's 2015 hourly rate of \$425.97, which he extrapolated from counsel's 2011 hourly rate of \$392. *Id.* at 6. The district director also denied a fee for 2.25 hours counsel expended in December 2016 to write a letter to the district director addressing the issue on which the case was remanded and one-half hour expended in January 2017 for a reply to employer's response to the letter. *Id.* at 6-7. The district director awarded counsel a fee of \$3,170.79, representing 6.05 hours in 2011 at \$392 an hour and .7 of an hour for paralegal services at \$150 an hour, 1.25 hours in 2015 at \$425.97 an hour, and .25 of an hour in 2016 at \$434.92 an hour.⁵ *Id.* at 7.

On appeal, claimant's counsel challenges the denial of a delay enhancement and the denial of a fee for the 2.75 hours expended in December 2016 and January 2017. Employer responds that counsel's contentions are meritless. Claimant filed a reply brief.

In his Order on Remand, the district director stated that *Modar* is not a precedential decision and did not provide guidance on the issue of the circumstances under which a delay enhancement is appropriate. The district director stated that this case is distinguishable from *Modar* because the delay was four years from the time services were performed in 2011 and an attorney's fee was awarded in 2015 and the delay was due to claimant's counsel's decision to wait until the claim was concluded before the OALJ before submitting his fee petition to the OWCP. Order at 4-5. The district director determined that the delay in this case is also distinguishable from *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996), and *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995), as the delay in those cases was 14 and 11 years, respectively. The district director also cited *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), for the proposition that a four year delay is not so egregious or extraordinary that a delay enhancement is required. Order at 4-5; *see Christensen*, 557 F.3d at 1051-1052, 1055-1056, 43 BRBS at 6-7, 9-10(CRT). In

⁵ The district director awarded claimant's counsel an additional fee of \$660.25 for 1.55 hours expended in 2015, comprising 1.25 hours for the preparation of his fee petition and .3 of an hour expended on a motion for reconsideration. Order at 6.

conclusion, the district director reiterated that the four-year delay was due to counsel's decision to wait to submit his fee petition, this delay was neither egregious nor extraordinary, and thus counsel is not entitled to a delay enhancement. Order at 5.

The issue of a delay enhancement concerns the lapse in time between when the legal services were performed and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989). The Supreme Court stated that “enhancement for delay in payment is, where appropriate, part of a ‘reasonable attorney’s fee.’” *Id.*, 491 U.S. at 274. The Ninth Circuit, in whose jurisdiction this case arises, has held that the precepts of *Jenkins* are applicable to the Act’s fee-shifting scheme. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). In *Modar*, 632 F. App’x 909, 49 BRBS 91(CRT), *vacating* BRB No. 13-0319 (Jan. 17, 2014), the court applied *Jenkins* and *Anderson*. In that case, the district director awarded a delay enhancement that, in 2012, awarded 2008 rates for services performed in 2004 and 2005, which the Board affirmed. *Modar*, 632 F. App’x at 909, 49 BRBS at 91-92(CRT). Stating that it had previously held that “[f]ull compensation *requires charging current rates* for all work done during the litigation,” the Ninth Circuit vacated the Board’s affirmance and remanded the case, holding that it was erroneous to affirm an award that reflected neither current rates nor present value of historic rates. *Id.* (emphasis in original) (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994)).

Although *Modar* itself is unpublished and thus not binding precedent, it is consistent with published precedent in fee-shifting statutes. For example, in *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1992), the Ninth Circuit affirmed a delay enhancement for a three-year delay. Moreover, we reject the district director’s determination that claimant’s counsel was responsible for the four-year delay because he did not submit his fee petition until after the claim was fully adjudicated before the OALJ. It was reasonable for counsel to wait to submit his fee petition until full success on the merits was ascertained and a fee award against employer would be final and enforceable.⁶ *See, e.g., Zaradnik v. The Dutra Group*, 52 BRBS 23 (2018); *see also Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999). In view of case precedent, the four-year delay in payment of the fee, the invalidity of the district director’s reasoning, and having remanded once for the district director to address this issue, we now reverse the district director’s denial of a delay enhancement, and we modify the fee award to reflect claimant’s counsel’s

⁶ The administrative law judge’s order on reconsideration was dated February 23, 2015, and counsel filed his fee petition with the district director on May 13, 2015, noting that the “case has concluded.”

entitlement to an attorney's fee award for services performed in 2011 based on the awarded 2015 hourly rate of \$425.97.⁷

Claimant's counsel also challenges the district director's denial of a fee for 2.75 hours expended on remand for preparing a memorandum to the district director and a reply letter to employer's response. Claimant's counsel avers it was reasonable to advocate what the district director should determine on remand.

In his Order, the district director stated that the memorandum included counsel's contention that he should use the Oregon state average weekly wage for determining his 2015 market-based rate, his objection to using the CPI, and an unpublished Board decision. Order at 6. The district director determined that the Board's remand decision in this case provided the necessary information for reconsideration on remand and that counsel's letter was unsolicited and unnecessary. *Id.* The district director thus denied a fee for the 2.75 hours. *Id.*

We affirm the denial of this time. Claimant's counsel was wholly unsuccessful on the contention raised in the letter, as the district director instead utilized the increase in the CPI to determine counsel's 2015 hourly rate. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983). Moreover, the district director did not abuse his discretion in denying time for unsolicited pleadings.

⁷ Claimant's counsel does not challenge the district director's calculation of a 2015 hourly rate of \$425.97. We reject claimant's assertion that the Board "probably" should direct the district director to apply 2018 rates to his 2011 services. Cl. Pet. for Rev. at 5. Counsel is not entitled to an enhanced fee for delay caused by fee appeals. *Anderson*, 91 F.3d 1325 n.3, 30 BRBS at 69 n.3(CRT). In his reply brief, counsel avers that this footnote in *Anderson* is contradicted by language in the body of the decision stating that counsel should be awarded a fee based on his current rates at the time the Ninth Circuit issued its decision, and the claimant's fee appeal in *Anderson* had resulted in an additional delay of four years. Cl. Reply Br. at 3. We are not at liberty to disregard the court's statement that a delay enhancement is not appropriate on these facts.

Accordingly, we reverse the district director's denial of an enhancement for delay, and we modify his order to award claimant's counsel an hourly rate of \$425.97 for services rendered in 2011. In all other respects, the district director's Order on Remand-Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge