BRB No. 10-0387

HEIDI EBERLY-SHERMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF ARMY/NAF	)	DATE ISSUED: 10/05/2010
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Attorney Fee Order After Remand and the Order Denying Claimant's Counsel's Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order After Remand and the Order Denying Claimant's Counsel's Motion for Reconsideration (2007-LHC-00231) of Administrative Law Judge Gerald M. Etchingham 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 Nonappropriated Funds Instrumentalities Act, 5 U.S.C. §5171 *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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). This case is before the Board for the second time.

Claimant injured her head and neck on October 20, 2000, during the course of her employment. The administrative law judge awarded claimant medical benefits and various periods of disability benefits. Nearly $60,000 in medical bills remained unpaid

after this order issued, and claimant requested another hearing. The parties agreed to a settlement, which was approved by the administrative law judge. 33 U.S.C. §908(i). Claimant's counsel subsequently requested a fee for work performed before the administrative law judge. After reviewing the fee petition, the administrative law judge found that counsel failed to establish a normal billing rate or a suitable proxy rate, and he relied on his own experience and knowledge of rates in longshore cases to arrive at a rate of $275 per hour, declining to modify the hourly rate because of the overall lack of complexity of the case and the quality of representation. Absent any evidence supporting the request for $120 per hour for the legal assistant's work, the administrative law judge awarded an hourly rate of $110 for this work. Counsel appealed this decision, contending the administrative law judge erred in disregarding the evidence submitted to show market hourly rates and in arbitrarily determining an hourly rate for attorney work.

In its initial decision, the Board noted that the administrative law judge provided a detailed analysis of the evidence proffered by counsel to establish a prevailing market rate. *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009). However, because the administrative law judge exclusively relied on contemporaneous longshore cases to set the hourly rate, the Board vacated the fee award and remanded for further consideration consistent with *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). *Sherman*, 43 BRBS at 44.[1]

On remand, the administrative law judge found that an appropriate hourly rate for counsel's services in this case is $309 and that an appropriate hourly rate for the legal assistant services performed in this case is $110. Thus, the administrative law judge awarded claimant's counsel a fee of $13,076.25, representing 41.25 hours of legal services at the hourly rate of $309 and 3 hours of legal assistant services at the hourly rate of $110. Claimant filed a motion for reconsideration. The administrative law judge declined to consider the late submission of the 2009 *Small Firm Economic Survey*, finding that it fails to provide details on hourly rates in specific practice areas, and he thus denied claimant's motion for reconsideration.

[1] The Board's decision also addressed a fee award of the district director and remanded that award as well. The current appeal involves only the administrative law judge's fee award on remand.

On appeal, claimant challenges the administrative law judge's hourly rate determinations on remand. Employer responds, urging affirmance of the fee award. Claimant has filed a reply brief.

Claimant objects to the hourly rates awarded by the administrative law judge for attorney and legal assistant work. In *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), involving an appeal of fees awarded by the Board, the Ninth Circuit stated that the definition of a "reasonable attorney's fee" is the same for all federal fee-shifting statutes, *Christensen*, 557 F.3d at 1052, 43 BRBS at 7(CRT) *citing City of Burlington v. Dague*, 505 U.S. 557 (1992), and that most fee-shifting awards are calculated using the lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT). The Ninth Circuit held that the Board erred in limiting the relevant community rates to those awarded in longshore cases in a geographic region. The court stated that the Board "must define the relevant community more broadly than simply [as] fee awards under the [Act.]" *Christensen*, 557 F.3d at 1055, 43 BRBS at 8-9(CRT). Thus, a "reasonable" hourly rate must reflect the rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *See Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39 (2010), *recon. denied*, ___ BRBS ___, BRB No. 03-0302 (Sept. 23, 2010). This analysis applies as well to attorney's fee awards issued by administrative law judges and district directors. *Van Skike*, 557 F.3d at 1046-1047, 43 BRBS at 13-14(CRT).

In this case, counsel submitted as evidence to support the requested hourly rate of $400 his resume and estimation of the value of his services in non-longshore cases, the 2008 Morones Survey of commercial litigation rates in the Portland area, affidavits from William B. Crow, Phil Goldsmith and David Markowitz, and a fee award based on an hourly rate of $325 in *Valentine v. Equifax*, 543 F.Supp. 2d 1232 (D.Or. 2008). The administrative law judge found that the Morones Survey represents the hourly rates of an elite sub-group of commercial litigators and is, therefore, insufficient to establish a proxy rate for a fee award under the Act. The administrative law judge found that Mr. Crow, a commercial litigator, is unqualified to gauge the market rate for claimant's counsel's services because he is unfamiliar with the basics of longshore litigation. The administrative law judge found that Mr. Goldsmith and Mr. Markowitz did not provide any examples of an hourly rate approaching $350 to $400 charged by an attorney engaged in work similar to that of claimant's counsel. The administrative law judge found unpersuasive the hourly rate awarded in *Valentine*, as he did not credit counsel's subjective assertion that his trial skills are comparable to the attorney in that case, with whom the administrative law judge was unfamiliar. The administrative law judge also stated it is unclear that the skills employed in *Valentine* are comparable to those required

in this case. Finally, in the absence of any corroborating evidence, the administrative law judge found that counsel's assertion that he has averaged $325 to $400 per hour in non-longshore cases cannot serve to establish that the requested rate of $400 is reasonable.

The administrative law judge found that he must estimate the value of counsel's services in the Portland, Oregon, market, since claimant's counsel did not establish a normal billing rate or suitable proxy therefor. The administrative law judge stated that he would rely on data from the 2007 edition of *The Survey of Law Firm Economics*, which measures skills similar to those used in longshore claims, and factors specific to this claim, such as counsel's years of experience, geographic location, and overall ability. The administrative law judge averaged the hourly rates provided in the survey for attorneys who practice in the areas of employment, maritime, personal injury, and workers' compensation law, and the hourly rate charged by lawyers, like counsel, who have more than thirty-one years of experience. Based on this survey data, the administrative law judge found that the average proxy market rate is $266.60. The administrative law judge then adjusted the hourly rate to the upper quartile rate of $309 to account for counsel's expertise, which, he stated, is well above average. The administrative law judge rejected claimant's contention that the hourly rate should be enhanced to reflect that his practice is in the Portland area, rather than using statewide rates.

Counsel contends that the administrative law judge erred by determining his hourly rate based on the average rates reported in statewide data, rather than using a method that focuses solely on the average rates in Portland, Oregon, where counsel practices. The administrative law judge rejected this argument and found that the 2007 Oregon State Bar Survey shows that the discrepancy between Portland area rates and Oregon statewide rates is not uniform. The administrative law judge found that while this survey states that the hourly billing rate for personal injury attorneys and attorneys with more than thirty-one years of experience is greater in the Portland area than statewide, the rate charged by workers' compensation attorneys is lower in Portland than the statewide average. The administrative law judge, therefore, concluded that such variations do not support increasing the hourly rate above $309.

In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court held that "reasonable fees" should be calculated according to the "prevailing market rates in the relevant community." The *Christensen* court stated that the relevant community is generally the forum where the district court sits. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT) *citing Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008). In this case, the district court is located in Portland, Oregon, and its jurisdiction includes the entire state of Oregon. Counsel's office is located in the city of Portland. Thus, the appropriate community in this case could reasonably be found to be the state of Oregon, the greater

Portland metropolitan area, or the city of Portland. *See Christensen*, 43 BRBS at 146. In the absence of counsel's production of satisfactory evidence to establish a reasonable hourly rate, the administrative law judge acted within his discretion to determine counsel's hourly rate based on statewide data contained in *The Survey of Law Firm Economics*. The administrative law judge rationally found that this statewide survey best establishes a proxy rate for claimant's counsel's services since it measured the hourly rates charged by lawyers employing legal skills most comparable to those required in longshore practice. Therefore, we affirm the administrative law judge's reliance on the statewide data contained in *The Survey of Law Firm Economics* to determine a reasonable hourly rate. *See Van Skike*, 557 F.3d at 1044 n.2, 1045, 43 BRBS at 12 n.2, 13(CRT); *see also Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT).

Counsel next argues that the administrative law judge erred by including the average rates charged by workers' compensation attorneys in calculating the proxy market rate. Counsel asserts that the upper-quartile hourly rate of $200 for workers' compensation attorneys in *The Survey of Law Firm Economics* does not reflect a market-based rate, citing a statement from the 2009 Small Law Firm Economic Survey. We reject claimant's contention that the administrative law judge erred. The statement cited merely notes that workers' compensation attorneys report lower hourly rates. It does not give a reason for that fact, and the administrative law judge could rationally find that workers' compensation rates should be included because this category of work requires skills similar to those employed in longshore claims. Moreover, contrary to counsel's contention, the administrative law judge did not focus solely on the rates received in workers' compensation cases, but considered the standard hourly rates for the practice of employment, maritime, personal injury and workers' compensation law. The administrative law judge is afforded considerable discretion in determining factors relevant to a market rate in a given case, *see generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 42 BRBS 25(CRT) (6th Cir. 2008), and is not bound by the Board's determinations in other cases. *See Christensen*, 44 BRBS at 40-41.

Counsel also contends the administrative law judge erred by adjusting his proxy hourly market rate only to that applicable to attorneys in the "upper quartile." Counsel argues that the affidavits of Mr. Crow, Mr. Goldsmith, and Mr. Markowitz establish that he is entitled to the proxy rate for attorneys whose abilities are rated as within the top five percent of all lawyers. The administrative law judge found that counsel's legal expertise is well above average based on his graduating from a prestigious law school, clerking for a federal judge, and arguing hundreds of cases, including several successful appeals to the Ninth Circuit. Order at 8. The administrative law judge found that the quality of counsel's representation in this case met but did not significantly exceed his expectations for an attorney of counsel's many years of experience. The administrative law judge

noted that this finding justifies awarding counsel the proxy rate for attorneys in the upper quartile, rather than the higher rate for attorneys in the ninth decile. *Id*.

We reject claimant's contention of error. Section 702.132, 20 C.F.R. §702.132, provides, *inter alia*, that the fee award shall account for the quality of counsel's representation. In this case, the administrative law judge rationally rejected the attorney affidavits claimant provided because Mr. Crow, Mr. Goldsmith, and Mr. Markowitz were unfamiliar with the hourly rates charged by attorneys performing work similar to counsel's actual practice. *See B&G Mining*, 522 F.3d 657, 42 BRBS 25(CRT). Moreover, the administrative law judge's reliance on his own evaluation of counsel's expertise in this case to find that counsel is entitled to a rate received by attorneys in the upper quartile is reasonable, within his discretion, and in accordance with law. *See Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT). As counsel has not established that the administrative law judge abused his discretion in setting the hourly rate at $309, we affirm the administrative law judge's finding.

Counsel also contends that the administrative law judge erred in awarding a rate of $110 per hour rate for legal assistant work. The administrative law judge rejected Mr. Goldsmith's deposition testimony and the unsigned affidavit of Serena Morones that an hourly rate of $150 is appropriate for legal assistant services. The administrative law judge rationally found that the evidence offered by claimant's counsel does not establish that a rate of $150 is reasonably commensurate with the services provided in this case. Based on the factors in 20 C.F.R. §702.132(a) and his knowledge of longshore practice, the administrative law judge found an hourly rate of $110 for legal assistant services is appropriate in this case. Order at 9. We affirm this determination as the administrative law judge adequately addressed the relevant factors and counsel has not shown that the administrative law judge abused his discretion.

Counsel further avers that the administrative law judge erred in not compensating counsel for delay in the payment of his requested fee. We reject this contention. The administrative law judge found that counsel did not offer any support to justify such an enhancement in this case, noting that the Ninth Circuit upheld the Board's decision not to award an enhancement for a two-year delay in *Christensen*. Order at 9, *citing Christensen*, 557 F.3d at 1056, 41 BRBS at 10(CRT). We affirm the finding that the delay in payment in this case is not so egregious or extraordinary as to require a delay enhancement. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

Accordingly, the administrative law judge's Attorney Fee Order After Remand and the Order Denying Claimant's Counsel's Motion for Reconsideration are 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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BETTY JEAN HALL
Administrative Appeals Judge