U.S. Department of Labor

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

BRB Nos. 22-0451 and 22-0451A

ANTONIO MARTINEZ	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING COMPANY	)	DATE ISSUED: 04/18/2024
	)	
Self-Insured Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of Order Approving Attorney Fee of Marco A. Adame II, District Director, Western District, United States Department of Labor.

Jeffrey M. Winter (Law Office of Jeffrey M. Winter), San Diego, California, for Claimant.

Barry W. Ponticello (England Ponticello & St. Clair), San Diego, California, for Self-Insured Employer.

Eirik Cheverud (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor;

Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and Claimant cross-appeals, District Director Marco A. Adame II's Attorney Fee Order (LS-18303808; LS-18306501) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The amount of an attorney's fee award is discretionary and will not be set aside unless the challenging party shows it 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 (9th Cir. 2007).

Claimant sustained cumulative traumatic injuries to his neck, right shoulder, and right elbow, as well as hearing loss, while working for Employer.[1] He filed a claim for compensation on September 16, 2015. LS-201 Form (Sept. 16, 2015). Employer began paying medical and temporary total disability (TTD) benefits after receiving notice of the claim.[2] LS-206 Form (Feb. 19, 2016). On January 17, 2017, Employer filed an LS-207 Notice of Controversion explaining it had recalculated Claimant's average weekly wage (AWW) under 33 U.S.C. §910(a), to be $1,402.82 with a compensation rate of $935.21. The controversion stated Employer would claim a credit of $3,774.53 for TTD overpayments between February 2016 and January 2017. LS-207 (Jan. 17, 2017).[3]

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant's injury occurred in Vancouver, Washington. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Employer voluntarily paid TTD benefits based on an average weekly wage (AWW) of $1,519.72, resulting in a compensation rate of $1,013.15. LS-206 Form (Feb. 19, 2016).

[3] In its brief, Employer asserts it paid TTD benefits from January 16, 2017, to August 20, 2017, in the amount of $80,862.55. It further states it paid permanent total disability (PTD) benefits from August 21, 2017, until October 31, 2021, despite the claims examiner's recommendation to pay permanent partial disability (PPD) benefits. Emp. Brief at 2. Claimant disputes that Employer paid him PTD benefits because Employer

Claimant and Employer participated in an informal conference on December 19, 2018, and the district director issued recommendations for resolving the controversy.[4] Memorandum of Informal Conference (Dec. 28, 2018). Thereafter, Claimant opted to transfer the case to the Office of Administrative Law Judges (OALJ).

Before the administrative law judge (ALJ), Claimant and Employer disputed AWW and residual wage-earning capacity. At some point, they stipulated to an AWW of $1,460 and a resulting compensation rate of $973.33. After two days of hearings, the parties submitted a proposed settlement agreement pursuant to 33 U.S.C. §908(i) which the ALJ approved on December 20, 2021. ALJ Order Approving Settlement. The agreement requires Employer to pay Claimant $1,738.30 every month for ten years, beginning March 1, 2022, which may be funded as an annuity;[5] medical benefits remained open. *Id.* Also, the agreement reflects Employer's concession that Claimant's counsel "is entitled to a fee

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never applied the required annual cost of living increases under 33 U.S.C. §910(f) and because some of his benefits were due under the schedule for his hearing loss which, by statute, compensates for partial disability. Cl. Brief at 3-4; *see also* 33 U.S.C. §908(c)(13).

[4] The district director's memorandum of recommendations indicates the parties disputed the nature and extent of Claimant's disabilities to scheduled and unscheduled members, AWW, and benefits owed. Memorandum of Informal Conference (Dec. 28, 2018). It also indicates Employer did not dispute the extent of Claimant's hearing impairment, that it had paid disability benefits from August 21, 2017, through at least the date of the conference, December 19, 2018, and that it had submitted a Labor Market Survey showing the availability of suitable alternate employment. The district director's memorandum included the following findings and recommendations: 1) Employer had paid the requested periods of TTD benefits; 2) Employer showed the availability of suitable alternate employment; 3) PTD benefits are due from August 21, 2018, to November 12, 2018; PPD benefits are due from November 13, 2018, to March 17, 2020, for the scheduled injury; 4) PPD benefits are due thereafter based on $509.60 loss of wage-earning capacity for the unscheduled injuries. Notably, the memo referenced Claimant's submission of his 2013 W-2 form which showed annual earnings of $85,237.15 and Employer's LS-206 which showed an AWW of $1,402.52; however, it also stated: "[i]n order to issue recommendations on this matter we would need Claimant's 52 week earnings for the year preceding the injury (9/2014 – 9/2015)." *Id.* So, it appears the district director may not have made a specific recommendation on AWW.

[5] The agreement specifically states: "Commencing 03/01/2022 $1,738.30 every month for 10 years guaranteed" and "[t]he obligation for the periodic payments shown here will be assigned to Pacific Life & Annuity Services Inc." Settlement Application at 3.

under Section 928" though it reserved the right to challenge the amount.[6] Settlement Application at 6.

On December 29, 2021, Claimant's counsel submitted a fee petition seeking $14,131 for work performed before the Office of Workers' Compensation Programs (OWCP), representing $11,660 for 22 hours of attorney time at an hourly rate of $530 for Jeffrey M. Winter, $1,575 for 3.5 hours of attorney time at an hourly rate of $450 for Kim Ellis, and $196 for 1.4 hours of paralegal time at an hourly rate of $140 for Diamela Lacina, plus $700 in costs.[7] Cl. Fee Petition at 13-16. Employer objected to the fee request, asserting Claimant's counsel is not entitled to a fee because, under Section 28(b), 33 U.S.C. §928(b), success is based solely on the difference between the amount awarded and the amount paid, and Claimant did not show he was successful at the OWCP level. Emp. Response to Cl. Fee Petition at 4-5. Claimant's counsel replied to Employer's objections.

In his Order Approving Attorney Fee, the district director rejected both of Employer's arguments. First, he rejected "Argument I" that Claimant's counsel's reasonable fee must be based "solely upon the difference between the amount awarded and the amount tendered or paid." He stated, "this argument is based on circumstances that are not relevant in this case," and summarized it as an "attempt[] to prove unsuccessful prosecution of the claim at the informal level, based on the recommendations of an informal conference, rather than the outcome as a whole…." Order Approving Attorney Fee (Fee Order) at 2. Next, he rejected "Argument II" that Claimant's counsel was only partially successful because the only success was before the ALJ. He reasoned the intent of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), is to reduce fee awards for partial or limited success on claims as a whole, rather than to assess success or failure at differing stages in the litigation

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[6] The clause at page 6 of the Settlement Application states in full:

> Attorney Fees/Costs: Claimant's counsel will submit a fee Petition to Respondent to Review. The parties will meet and confer regarding resolution and if no resolution is reached, a Fee Petition may be submitted to the OALJ for Decision. Respondent does not contest that Claimant's counsel is entitled to a fee under Section 928. Respondent reserves and maintains all defenses as to the amount, particulars and extent of any fee or costs claimed.

[7] Claimant's counsel also petitioned for $79,362.85 in attorney's fees and costs for work performed before the ALJ. The ALJ issued an order holding Claimant's counsel's fee request in abeyance pending the Board's decision in this appeal because the ALJ considered the fee issues presented in the two proceedings to be similar. Order Holding in Abeyance Claimant's Petition for Attorney's Fees and Costs (Nov. 15, 2022).

process. Fee Order at 3. Moreover, the district director determined Claimant's counsel obtained "success" on the claim because the settlement guaranteed ten years of monthly payments that will not terminate even if Claimant were to die during that period. *Id.*; ALJ Order Approving Settlement.

After rejecting Employer's arguments and approving counsel's requested hourly rates, the district director reduced Mr. Winter's hours from 22 to 17.2 and dismissed Ms. Ellis's hours entirely, calling the fee petition entries vague, duplicative, clerical, or consisting of interoffice activity. *Id.* at 11-13. Ultimately, he awarded Claimant's counsel an attorney's fee of $10,012, representing $9,116 for 17.2 hours of attorney time at an hourly rate of $530 for Mr. Winter, 0 hours of attorney time for Ms. Ellis, and $196 for 1.4 hours of paralegal time at an hourly rate of $140 for Ms. Lacina. He also awarded the requested $700 in costs. *Id.* at 13.

Employer appeals the fee award, BRB No. 22-0451, contending Claimant has not shown success before the district director justifying an award under Section 28(b), 33 U.S.C. §928(b). It alleges the settlement amount is less than the amount it was paying voluntarily and pursuant to the informal conference recommendation, so Claimant's counsel is not entitled to any employer-paid fee. Alternatively, if any fee is due, it asserts the fee must be based on partial success and is appropriate only at the OALJ level where the parties stipulated to a higher AWW.[8] Finally, Employer contends the district director erred in accepting Mr. Winter's hourly rate. Counsel responds, urging rejection of Employer's arguments, and Employer filed a reply brief.

Additionally, Claimant's counsel cross-appeals the district director's reduction of attorney hours. BRB No. 22-0451A. Employer responds, urging affirmance, and counsel replied to Employer's response. The Director, Office of Workers' Compensation Programs (Director), responds to both appeals in a consolidated brief; however, the Director addresses only the issue of whether Claimant successfully prosecuted his claim such that his attorney is entitled to a fee under Section 28(b). He urges the Board to reject Employer's arguments. Employer replied to the Director's brief, asserting the Director has misapplied the law.

[8] As is apparent from the pleadings, Employer acknowledges Claimant's counsel had some degree of success before the ALJ because he obtained a stipulated higher AWW for Claimant. Employer asserts that success was short-lived, however, because the stipulated AWW did not become the basis for an award in light of the settlement agreement. Consequently, it asserts any employer-paid fee would be limited.

Section 28(b)

Section 28(b) of the Act, 33 U.S.C. §928(b), applies when an employer voluntarily pays or tenders benefits and then a dispute arises.[9] It states:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] shall set the matter for an informal conference and following such conference the [district director] shall recommend in writing a disposition of the controversy. 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. If a claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fees for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b).

Under this section, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this claim arises, has held that if a claimant successfully obtains additional compensation using the services of an attorney following the informal conference, the employer is responsible for payment of the claimant's attorney's fee. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341 (9th Cir. 1993); *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 882-883 (9th Cir. 1979).[10]

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[9] Employer's LS-206 dated February 19, 2016, indicated it began paying Claimant $1,013.15 per week (based on an AWW of $1,519.72) commencing that day. On January 17, 2017, it filed a Notice of Controversion stating it had recalculated Claimant's AWW to $1,402.82, resulting in a compensation rate of $935.21 and an alleged overpayment of total disability benefits. It continued to pay PPD benefits thereafter.

[10] Although the effect of the decision in *National Steel* was to decrease the amount the claimant was entitled to recover in the form of a 10% assessment on his compensation, he was for the most part successful in otherwise obtaining benefits and thus the court

Entitlement

We first address Employer's contention that Claimant's counsel is not entitled to an employer-paid fee because Claimant's claim was not successful at the district director level. Emp. Brief at 4. Where an attorney is ultimately successful in procuring compensation for a claimant, he is entitled to a fee for all necessary services rendered at each level of the adjudication process, even if he was originally unsuccessful at a particular level. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981); *see also Hensley*, 461 U.S. at 435-436 (fee awards must be assessed based on the litigation as a whole and the overall relief obtained); *In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015) (fee-shifting statutes award attorney's fees based on the context of the action as a whole rather than discrete proceedings) (citing *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015)). Therefore, we reject the notion that there must be success at a particular level of the proceedings to obtain an employer-paid fee for work performed at that level. *Hensley* does not address "success" or "lack of success" at different levels of the proceedings.

The district director correctly explained "[t]he Act does not distinguish success or failure at certain parts of the claim" because success is "determined at the conclusion of the claim." Fee Order at 3. As the outcome, and not the intermediate steps, defines the degree of success for the case as a whole, if a claim is ultimately successful, then counsel is entitled to a reasonable fee for his work at all levels which resulted in that success. *See George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 1536 (D.C. Cir. 1992) ("the Act before us requires on its face a showing of success on the merits before any fee becomes appropriate"). Therefore, we reject Employer's argument that it is not liable for a fee for Claimant's counsel's work before the district director solely due to an alleged lack of success at that particular level.

We next address the district director's determination that Claimant's claim ultimately was successful, and his attorney is entitled to an employer-paid fee at all levels of the proceedings pursuant to *Hole*. Under Section 28(b), a claim is successful if the claimant obtains "additional compensation" in an amount greater than the amount the employer voluntarily paid or tendered. 33 U.S.C. §928(b); *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 1107 (9th Cir. 2003).

In this case, the district director noted Employer's agreement that Claimant's counsel succeeded in increasing Claimant's AWW before the ALJ, resulting in an additional $38.12 to his weekly compensation rate. *Id.* at 2. We note Employer does not

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concluded the claimant was entitled to an employer-paid attorney's fee under Section 28(b).

challenge categorizing the parties' settlement before the ALJ as some degree of "success." Emp. Brief at 5 (the OALJ is where the "global settlement occurred" so it is "the correct level for fees"); *see Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 (1993). In addressing the settlement, the district director also found the fact that the settlement payments are guaranteed and do "not terminate upon death, considering Claimant's age and other medical conditions, provides his family with a monthly income not available with on-going bi-weekly payments; hence, a success." Fee Order at 3. Accordingly, the district director concluded Claimant ultimately succeeded in prosecuting his claim, and Claimant's counsel is entitled to an employer-paid fee for work performed at the district director level in furtherance of that success.[11]

On appeal, despite its concessions that there was some success at the OALJ level, Employer argues there really was not overall success because the $200,000 total amount of the settlement is less than the amount it ultimately would have paid pursuant to the district director's recommendation, a purported $395,366.40 over the same ten-year span. We reject Employer's argument.

Before the ALJ, the parties stipulated to an increased AWW and to periods of total disability and partial disability. Following two hearings, they submitted a settlement application to the ALJ, who approved it, which provided Employer would pay Claimant "$1,738.30 every month for ten years beginning on March 1, 2022." Order Approving Settlement at 2. This amount is guaranteed and is the focus of the district director's determination that, by securing a settlement, Claimant guaranteed he and his family would receive monthly income for ten years regardless of whether he is alive to receive it. *E.P. Paup Co.*, 999 F.2d at 1354 (an inchoate right establishes additional compensation under Section 28(b)). While Employer claims it ultimately would have paid more under the district director's recommendation than it paid under the terms of the settlement, it has not identified any evidence that would allow us to conclude its assertion is anything more than speculation.

More importantly, Employer does not address the crux of the district director's finding that the assured payment of the settlement amount constitutes a success. An employer is not bound to consistently pay any amount voluntarily or pursuant to a district director's recommendation, as neither constitutes a formal award of benefits. *See, e.g., Richardson*, 336 F.3d at 1107 (the employer voluntarily paid benefits before the claimant filed a claim for compensation but declined to pay any benefits within 30 days thereafter);

[11] The parties settled the matter of counsel's entitlement to a fee for his work before the ALJ (although not the amount of that fee), and that agreement is binding on the parties. 33 U.S.C. §908(i); *Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014).

Andrepont v. Murphy Exploration & Prod. Co., 566 F.3d 415 (5th Cir. 2009) (the employer need not accept the district director's recommendation). Further, as the district director implicitly stated, any amount voluntarily paid, or paid under an award following a hearing, would cease upon the termination of the disability, which would include the claimant's death. 33 U.S.C. §908(a), (b), (c)(23), (e) (benefits are paid "during the continuance" of the disability). In this case, the district director explicitly and correctly found the settlement proceeds do not cease before the expiration of ten years, regardless of the continuance of Claimant's disability. Order Approving Settlement at 3.

The district director's finding that the guaranteed payments under the parties' settlement constituted a success for purposes of fee liability is both rational and unchallenged by Employer. We therefore affirm his determination that Claimant's counsel is entitled to an employer-paid fee under Section 28(b) for work performed before the district director based on his ultimate success.[12]

[12] Having affirmed the district director's finding of ultimate success, we also reject Employer's alternative *Hensley* partial success argument where it asserts the fee awarded should reflect "the relationship between the extent of success and the amount of the fee." Emp. Brief at 3. The district director has wide discretion in awarding a fee for work before him. *See generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090 (9th Cir. 2000), *cert. denied*, 523 U.S. 1133 (2000); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). While the amount of benefits is a relevant factor in deciding the amount of a fee, it is not necessarily a determinative one, and there is no requirement that the amount of an attorney's fee must be commensurate with or less than the claimant's compensation award. *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983), *aff'd*, 782 F.2d 513 (5th Cir. 1986) (en banc). The Board has held the amount of an attorney's fee may not be limited by the amount of compensation gained because to do so would drive competent counsel from the field. *Battle v. A. J. Ellis Constr. Co.*, 16 BRBS 329 (1984); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd on other grounds sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752 (7th Cir. 1979); *Kelley v. Handcor, Inc.*, 1 BRBS 319 (1975), *aff'd on other grounds*, 568 F. 2d 143 (9th Cir. 1978). Further, even in cases where there has been partial success and claims may be differentiated, the adjudicator has great discretion in awarding a fee based on the degree of success. *See Berezin v. Cascade Gen., Inc.*, 34 BRBS 163 (2000); *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993). We note that Employer has not suggested a percentage of success or identified fees claimed for work that did not ultimately lead to Claimant's success. Rather, Employer has contended that there was no success at the district director level and, consequently, no fees should be awarded. We also note that Claimant's success included a guarantee of payment that

Hourly Rate

Employer also contends the district director erred in awarding a fee based on an hourly rate of $530 for Mr. Winter. It avers Claimant's counsel presented general and overbroad evidence to justify his hourly rates. Emp. Brief at 9-10. Specifically, it asserts the evidence failed to accurately address fees within the relevant San Diego community and instead considered rates in other municipalities, including Los Angeles and San Francisco where rates are typically higher. *Id.* Employer also questions the supporting declarations, arguing they are self-serving and do not establish whether a paying client has ever, or would ever, pay the requested rates. *Id.* at 10. Employer suggests Mr. Winter's rate should be no greater than $400 per hour to $460 per hour.[13] Emp. Brief at 12. For the following reasons, we disagree.

The Supreme Court of the United States has held the lodestar method, in which the number of hours reasonably expended in preparing and litigating a case is multiplied by a reasonable hourly rate, represents a "reasonable attorney's fee" under federal fee-shifting statutes such as the Longshore Act. *See Perdue v. Kenny A*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992). The Court also has held an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Perdue*, 559 U.S. at 551.

Once the district director accepted the parties' agreement that San Diego, California, is the relevant community for determining counsel's hourly rate, *see* Fee Order at 5, it was Claimant's counsel's burden to produce satisfactory evidence "that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049 (9th Cir. 2009). The factfinder has discretion to determine the prevailing market rate so long as he provides adequate justification for his conclusion. *Shirrod v. Director, OWCP*, 809 F.3d 1082 (9th Cir. 2015).

To meet this burden, Claimant's counsel provided a declaration detailing his Longshore practice experience over the past 34 years. *See* Cl. Fee Petition at 4; Declaration

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applies even in the event of his death. Therefore, Claimant obtained success beyond the specific amount of increase in the average weekly wage.

[13] While Employer initially states it is challenging the "hourly rates" the district director awarded, neither its argument nor its conclusion addresses Ms. Ellis's hourly rate. Emp. Brief at 8-12.

of Jeffrey Winter (Oct. 9, 2021). He also submitted evidence of his accolades and regional and national accomplishments. Declaration of Jeffrey Winter, Ex 2. Further, counsel submitted declarations from Ronald L. Burdge discussing the U.S. Consumer Law Attorney Fee Survey showing San Diego's hourly rate as between $525 and $763, along with letters from attorneys Paul Herman, James McElroy, and Philip Weiss, all supporting an hourly rate between $400 to $700. Cl. Fee Petition, Exs. 3-5, 6-8. Mr. Winter also provided a United States Attorney's Office Attorney's Fees Matrix (USAO Matrix) along with a 2018 Real Rate Report for Partners and Associates (Real Rate Report) in San Diego. Cl. Fee Petition, Exs. 9-10.

The district director reviewed this evidence and determined Claimant's counsel satisfied his burden of proof. Fee Order at 6. Addressing Employer's objections, he analyzed the evidence counsel submitted in its entirety and determined the USAO Matrix, Real Rate Report, and various declarations were sufficient to support Mr. Winter's requested hourly rate. *Id.* He concluded Employer did not proffer any evidence that Mr. Winter's current rate was inaccurate; rather, it provided only older decisions where Mr. Winter was awarded between $400 and $460 per hour. *Id.*

We reject Employer's assertions that Claimant's counsel's rate evidence is general, overbroad, and fails to address fees within the relevant San Diego community. Emp. Brief at 9. A review of the record does not bear out this contention. The charts attached to Mr. Burdge's affidavit address specific median fees for San Diego. *See* Ronald L. Burdge Affidavit, Exs. B, C. Further, those exhibits, including the Real Rate Report, establish Mr. Winter proffered evidence of San Diego rates for lawyers with experience comparable to his, who generally charge a median $648 hourly rate. *See* Cl. Fee Petition, Ex. 10, at 11.

As the district director considered all relevant rate evidence before him and adequately explained his rationale for assessing a proxy market rate, we affirm his hourly rate of $530 for Mr. Winter. *Carter v. Caleb Brett, LLC*, 757 F.3d 866 (9th Cir. 2014); *Holiday v. Newport News Shipbuilding & Dry Dock Co.*, 44 BRBS 67 (2010); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Keith v. Gen. Dynamics Corp.*, 13 BRBS 404 (1981).

Reduction in Hours Claimed

We next address Claimant's cross-appeal challenging the district director's decision to disapprove 4.8 hours of Mr. Winter's attorney time and all of Ms. Ellis's attorney time without explaining why those hours were duplicative, excessive, clerical, unpermitted interoffice activity, or vague. Claimant's counsel also avers the district director's reliance on *Boroski v. Dyncorp Int'l*, BRB No. 10-0438, 2011 WL 1451827 (Mar. 15, 2011), is misplaced because none of the disallowed entries in the present claim involved traditional

clerical duties; rather, they involved important legal activities such as reviewing the case file and preparing legal memoranda to determine the next steps in litigating Claimant's claim.[14] Cl. Cross-Appeal Brief at 10.

As previously stated, fee awards under the Act are calculated by multiplying a reasonably hourly rate by the number of hours reasonably expended. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219 (4th Cir. 2009) *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009). An attorney's work is compensable if the hours claimed are "reasonable" for the "necessary work done" in the case and the fee is commensurate with the degree of success obtained. 20 C.F.R. §702.132(a); *see Hensley*, 461 U.S. at 437. Thus, the factfinder may, within his discretion, disallow a fee for hours found to be duplicative, excessive, or unnecessary and is afforded "considerable deference" in making those determinations. *See generally Tahara*, 511 F.3d at 956. Further, given the factfinder's superior understanding of the underlying litigation, he is in the best position to make this determination. *Id.*; *see also Fox v. Vice*, 563 U.S. 826, 838 (2011). On appeal, counsel bears the burden of proving the district director abused his discretion in reducing the number of hours requested in the fee petition. *Brown v. Marine Terminals Corp.*, 30 BRBS 29, 34 (1996) (en banc).

Counsel has not established the district director abused his discretion in reducing the hours related to Mr. Winter's services. The district director reviewed counsel's itemizations and found several of them redundant and similar to other entries. For instance, the district director found the description of "review file notes" for several entries lacked sufficient explanation to account for the different reviews and, thus, disallowed 1.2 of the total claimed hours spent reviewing the file. Fee Order at 8. In addition, he disallowed 0.8 hour for entries relating to emails communicating about scheduling surgeries and getting hearing aids as being clerical and duplicative of the paralegal hours claimed. Fee Order at 10. He disallowed another 0.9 hour related to an entry titled "review file, records, notes, memo to Wendy" as vague and duplicative. Fee Order at 10-11. Further, he reduced other

[14] *Boroski*, an unpublished Board decision, identified "traditionally clerical" tasks "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…." *Boroski*, slip op. at 5. The district director provided several reasons for finding various entries non-compensable, such as when the entries were vague or redundant. He cited *Boroski* when allowing certain entries as compensable non-clerical work, and when disallowing certain other entries as non-compensable clerical tasks. Fee Order at 8-10, 12. For the reasons discussed herein, we affirm the ALJ's various rationales for disallowing counsel's requested hours, including those relating to vague, redundant, or clerical entries.

entries entitled "review case status" and "research" as vague, lacking purpose, and duplicative of other allowed entries. *Id.*

The district director sufficiently explained his rationale for disallowing Mr. Winter's entries. Given the considerable deference afforded to the factfinder in assessing whether services are reasonable, Claimant's counsel has not demonstrated the district director abused his discretion. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BR3S 231 (1984).

We also affirm the district director's decision to reduce Ms. Ellis's time in its entirety. The district director disallowed all of Ms. Ellis's hours, finding "the entry is vague based on the lack of purpose, inference to interoffice activity, and duplicative to Mr. Winter's file reviews." Fee Order at 12. Contrary to counsel's assertions, the district director reasonably found the entries relating to Ms. Ellis's work are vague and do not explain their purpose or how they relate to the litigation. *Tahara*, 511 F.3d at 956. Counsel bears the burden of showing the fees for the work performed are reasonable and necessary,

and the district director rationally found he did not do so with respect to Ms. Ellis.[15] *Brown*, 30 BRBS at 34.

Accordingly, we affirm the district director's Order Approving Attorney Fee.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[15] As we affirm the district director's denial of Ms. Ellis's time, to the extent Employer may have raised it, we need not address arguments pertaining to Ms. Ellis's hourly rate.