U.S. Department of Labor

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

BRB No. 21-0492

SCOTT E. HORTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SPECIALTY FINISHES, LLC	)	DATE ISSUED: 12/29/2022
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and M. Elizabeth Duncan (Law Office of Charles Robinowitz), Portland, Oregon for Claimant.

Robert E. Babcock and James R. Babcock (Babcock Holloway Caldwell & Stires, PC), Lake Oswego, Oregon, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Stewart F. Alford's Attorney Fee Order (2013-LHC-01724) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

On November 16, 2016, ALJ William J. King awarded Claimant benefits for his work-related back injury.[1] Claimant's counsel submitted his fee petition on December 27, 2016, seeking $87,370.40 in fees, representing $82,784.90 for 177.65 attorney hours at an hourly rate of $466, $4,140 for 18.40 associate hours at an hourly rate of $225, and $445.50 for 2.70 legal assistant hours at an hourly rate of $165, and $19,502.13 in costs for work performed before the ALJ between July 2013 and December 2016.[2] Declaration of Attorney Fees and Costs (Fee Decl.) at 21. Counsel requested "at least $466 per hour" for his work before the ALJ. Fee Decl. at 20. Employer objected to the hours and counsel's hourly rate, arguing he is entitled to $48,660.20 in fees and $12,261,58 in costs. Employer Objection (Emp. Obj.) at 26. It did not object to the rates requested for the legal assistant or the associate attorneys. Emp. Obj. 26. Counsel submitted a reply brief with additional support for his requested fee and requested a supplemental fee of $1,984.75 for time spent preparing the reply brief.

In November 2017, ALJ Jennifer Gee issued an order stating ALJ King had left the Office of Administrative Law Judges (OALJ), acknowledging the fee petition is pending, and holding the petition in abeyance until the Benefits Review Board issued a decision resolving an appeal on the merits. The Board affirmed ALJ King's decision on the merits. *Horton v. Specialty Finishes, LLC*, BRB Nos. 17- 0168/A (Nov. 15, 2017), *aff'd and modified*, 770 F. App'x 889 (9th Cir. 2019). Subsequently, in November 2019, the fee petition was reassigned to ALJ Richard Clark upon ALJ Gee's retirement. The case was

[1] On December 14, 2016, ALJ King issued an order granting Claimant's motion for reconsideration to correct a mathematical error in calculating his average weekly wage and wage-earning capacity.

[2] Counsel requested fees totaling $87,370.40 and costs of $19,502.13 but then deducted four hours of work and costs for depositions, bringing his request to $85,506.40 and $19,132.93. Fee Pet. at 13-14.

then reassigned to ALJ Alford (the ALJ).[3] ALJ Alford issued a fee order and awarded counsel $64,357.87 in attorney fees, representing $58,725.72 for 164.65 attorney hours at an hourly rate of $356.67, 1 attorney hour at an hourly rate of $371.65, $4,815 for 21.4 associate hours at an hourly rate of $225, and $445.50 for 2.70 legal assistant hours at an hourly rate of $165, plus $18,828.28 in costs. ALJ Fee Order at 1-2, 14.

Claimant's counsel, Charles Robinowitz, appeals the ALJ's fee award, raising five issues: 1) whether the ALJ erred in rejecting all market rate evidence; 2) whether the ALJ abused his discretion in placing counsel in the 75th percentile of the entire Oregon State Bar in certain areas of law; 3) whether the ALJ abused his discretion denying inflationary adjustments for the market rate; 4) whether the ALJ abused his discretion in not awarding interests on costs; and 5) whether the ALJ erred in denying travel time for depositions and witness conferences. Claimant's Petition (Cl. Pet.) at 4-5. He asks the Board to modify the awarded hourly rates and hours, as well as address the interest on costs issue in accordance with the United States Court of Appeals for the Ninth Circuit's decision in *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir 2021). Employer responds, urging affirmance, and counsel filed a reply brief. For the reasons stated below, we vacate the ALJ's Attorney Fee Order and remand the case for further consideration.

Market Rate and Percentile

Counsel first contends the ALJ's awarded market rate violates established law. He raises three arguments. First, he asserts it was error to reject all of his market rate evidence without explanation. *See Seachris*, 994 F.3d 1066, 55 BRBS 1(CRT). He also asserts the ALJ should have put him in the 95th percentile instead of the 75th percentile. Finally, he contends the ALJ erred in failing to award a delay enhancement to 2021 when he issued the fee award. Employer argues the ALJ provided adequate reasoning for his decision.

The ALJ rejected use of the Oregon State Bar Survey's (OBS) results based on the number of years of attorneys' experience, irrespective of their areas of practice categories, as it accounts for practice categories that do not reflect the type of work longshore attorneys perform. Instead, he relied on the OBS results based on attorneys' practice categories, irrespective of their years of experience, which the Board has previously affirmed as being valid categories for comparison: "plaintiff civil litigation excluding personal injury,

[3] ALJ Alford was assigned the matter of the pending fee petition approximately one year after it had been assigned to ALJ Clark. The ALJ provided no further explanation as to why Judge Clark had not addressed the fee petition. ALJ Fee Order at 2.

plaintiff civil litigation including personal injury, and general litigation." ALJ Fee Order at 6; *see Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011). The Ninth Circuit has stated that basing rates solely on practice categories is a one-dimensional look at rates and that both years of experience and practice categories are relevant considerations. *Seachris*, 994 F.3d at 1080, 55 BRBS at 7-8(CRT). Moreover, the court has specifically approved using an attorney's years of experience. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). The ALJ also rejected use of the Morones Survey because its data is based on law firms with more than five attorneys specializing in commercial litigation, whereas counsel worked, essentially, as a sole practitioner. ALJ Fee Order at 7. But the Ninth Circuit has stated attorney commercial litigation rates can be relevant based on the comparable skills such attorneys share with longshore attorneys. *Seachris*, 994 F.3d at 1078-1080, 55 BRBS at 6-8(CRT). For the reasons in *Seachris* and *Shirrod*, we vacate the ALJ's hourly rate findings and remand the case for him to re-evaluate counsel's rate evidence.

The ALJ also averaged the 75th percentile rates in the chosen practice categories found in the OBS because he found "the record before the undersigned simply does not support placing" counsel in the 95th percentile. ALJ Fee Order at 6. Specifically, the ALJ stated counsel's 40 years of experience does not automatically equate to him being in the top 5% of attorneys, the only relevant evidence is counsel's own declaration whereas there are no other declarations in the record, and the fact that the Ninth Circuit and the Board may have awarded him 95th percentile rates does not mean that he must as well. *Id.* An ALJ has the discretion to determine the appropriate percentile when assessing hourly rates from locality charts so long as he fully considers all relevant evidence, provides specific explanations for his findings, and does not rely on improper factors. *Seachris*, 994 F.3d at 1080, 55 BRBS at 8(CRT) (placing counsel in either the 75th or 95th percentile "was a judgment call that the ALJ could reasonably have resolved either way"). We recognize the ALJ's wide latitude in addressing these matters and, in contrast to counsel's suggestion, reiterate he is not compelled to award the 95th percentile rates. *Id.*; *see generally Eastern Associated Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 288 (4th Cir. 2010). Thus, as the ALJ explained and reached the percentile classification without using improper factors, we affirm the ALJ's determination.

With regards to an inflationary adjustment and/or a delay enhancement, the ALJ agreed an enhancement to account for delay was necessary. Consequently, he adjusted the

proxy rate for inflation, as is reasonable and appropriate.[4] *Seachris*, 994 F.3d at 1078, 55 BRBS at 6(CRT); *see generally Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124 (1986). However, the ALJ applied the enhancement to 2016, the year Claimant was awarded benefits and counsel filed his fee petition. ALJ Fee Order at 8. He declined to extend the enhancement to 2021 when he ordered payment of the fee because "most of the delay since the filing of the fee petition was the result of the OALJ, and Employer should not be penalized for such delay." *Id.*

Counsel contends the ALJ erred in failing to enhance his rates to 2021 rates when the fee was awarded. Cl. Pet. at 17-19 (citing *Missouri v. Jenkins*, 491 U.S. 274, 283 n.6 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS at 69(CRT) (9th Cir. 1996)).[5] Given the fact that this claim was filed in 2013, Claimant was awarded benefits in 2016, the fee petition was filed in 2016, and the fee order was not issued until 2021 for no other reason than an extended delay at the OALJ, these circumstances warrant a delay enhancement. The ALJ erred in not awarding a delay enhancement up to when he issued his fee order in 2021. *Seachris*, 994 F.3d at 1078, 55 BRBS at 6(CRT); *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT). On remand, the ALJ must adjust the proxy rate for inflation to 2021 or calculate the fee using counsel's current rates.[6]

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[4] The ALJ used the Consumer Price Index for All Urban Users (CPI-U) to adjust for inflation instead of the change in the National Average Weekly Wage as counsel sought, stating it is "an appropriate and reasonable measure for adjusting the 2011 proxy rate to current market rates." ALJ Fee Order at 7 (he stated it more accurately reflects the Portland area and the city's cost of living). Counsel does not challenge the ALJ's use of the CPI-U on appeal.

[5] In *Jenkins*, the Supreme Court acknowledged fees paid promptly and fees paid years after the case has resolved are not equivalent. As such, "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of the statute." *Jenkins*, 491 U.S. at 284 (addressing a school desegregation case and the Civil Rights Attorney's Fees Awards Act of 1976). Additionally, although the Ninth Circuit acknowledged a district director would normally have discretion to select the method of enhancement, the *Anderson* court ordered that, in order to prevent further adjudication and delay, the attorney's fee award be calculated based on his current hourly rates.

[6] *Anderson* provides an attorney is not entitled to an enhancement for delay caused by an appeal of the fee award. *Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69(CRT) n.3.

Travel Time

Counsel next contends the ALJ erred in denying him a fee for 4.75 hours of travel time between Portland, Oregon and Vancouver, Washington for depositions and conferences, stating it was not in excess of his overhead.[7] D&O at 9-10. He argues the ALJ erred in relying on *Neeley v. Newport News Shipbuilding & Dry Dock Co*., 19 BRBS 138 (1986), and *Swain v. Bath Iron Works Corp*., 14 BRBS 657 (1982), because they were decided incorrectly. Specifically, he describes the evolution of the Board's decisions on travel time as "unique," asserting they lack a full discussion of why local travel should be considered as overhead and provide no discussion or analysis of other federal fee-shifting statutes. Cl. Pet. At 19. Instead, counsel posits that time incurred travelling locally for a specific claim should not be based on any comparison with office overhead because it is a reasonable and necessary part of pursuing a claimant's claim. To deny it, he states, "automatically diminishes the value of the fee eventually recovered." Cl. Pet. at 20 (quoting *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT) (time preparing a fee petition is compensable). Counsel defines overhead as time spent operating and maintaining a law firm and argues the Board's decisions denying local travel time for work in a particular case as overhead has no legal precedent. *Id*. In response, Employer states there is a long history of denying local travel as overhead since *Neeley*, and there is clear precedent that an attorney cannot shift the costs of running an office to the opposing party. Emp. Br. At 10.

Counsel is entitled to a reasonable attorney's fee following the successful prosecution of a claim under the Act. 33 U.S.C. §928. Travel time is compensable where it is reasonable, necessary, and in excess of that normally considered to be part of overhead.[8] *Swain v. Bath Iron Works Corp*., 14 BRBS 657 (1982); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981); *Lopes v. New Bedford*

[7] Vancouver and Portland are 10 miles apart, and Portland and Vigor Marine are 6.2 miles apart. ALJ Fee Order at 11. Counsel requested 1.50 hours for travel to and from Vancouver on May 22, 2015, for a deposition, 1.50 hours for travel to and from Vancouver on November 4, 2015, for a conference, 1 hour for travel to and from Vigor Marine on November 5, 2015, for a deposition, and .75 hour for travel to and from Vancouver on November 20, 2013, for a conference. Fee Decl. at 3, 8, 10.

[8] The same test applies for travel expenses. *Swain v. Bath Iron Works Corp*., 14 BRBS 657, 666 (1982); *Stillwell v. The Home Indemnity Co.*, 5 BRBS 436 (1977) (citing *Bradshaw v. J. A. McCarthy, Inc.*, 3 BRBS 195 (1976) (reasonable and necessary miscellaneous expenses incurred during the course of a proceeding are recoverable)).

Stevedoring Corp., 12 BRBS 170 (1979).[9] The test is one of reasonableness, and there may be times when travel is reasonable and necessary and times when it is not. *Id.*

The Board's decisions set forth the test which gives the ALJ the discretion to consider the reasonableness and necessity of the travel. There is no hard-and-fast rule that local travel must be categorized as overhead and disapproved. Indeed, in remanding the fee award in *Lopes* for the district director to reconsider "whether travel time … was indeed justified[,]" the Board noted the travel mileage was found reasonable and necessary, so "it would logically follow" that the time spent traveling should be deemed so as well. *Lopes*, 12 BRBS at 177 n.4 (Boston, Massachusetts to New Bedford, Massachusetts). In *Harrod*, the Board modified the ALJ's fee award to reflect the attorney's entitlement to 1.5 hours for travel between Norfolk and Newport News, Virginia to attend the hearing as it "too lengthy to be considered an incidental overhead expense" and was both reasonable and necessary. *Harrod*, 14 BRBS at 593.

Although the Board held in *Swain* that the counsel's travel to meet with an out-of-state claimant was unreasonable because there were competent attorneys in the claimant's locality, it ordered the ALJ on remand to award the attorney a fee for travel time that "would be due to an attorney practicing in claimant's locality" if it "would have exceeded the usual overhead expense of a law practice." *Swain*, 14 BRBS at 667. In *Neeley*, 19 BRBS 138, the Board held travel between Newport News, Virginia and the courthouse in Hampton, Virginia was not in excess of overhead and disallowed it. Similarly, in *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993), the Board affirmed the ALJ's denial of one hour of time for travel between Norfolk and Hampton, Virginia as it was within his discretion to consider it as a normal overhead expense.

As attendance at the depositions and conferences is a reasonable and necessary element in pursuing Claimant's claim, and as all but one entry was for one hour or more of travel time (at least 30 minutes one-way), we vacate the ALJ's denial of the travel time.[10] On remand, the ALJ should address whether the amount of travel time sought is reasonable and necessary. *See Harrod*, 14 BRBS at 593.

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[9] The Board relied on *Brown v. Bethlehem Steel Corp.*, 8 BRBS 1038 (1978), and the Federal Coal Mine Health and Safety Act of 1969, to conclude there may be situations where travel time is reasonable and necessary to pursue a claimant's claim. *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170, 175 (1979).

[10] The entry on November 20, 2013, for travel to and from Vancouver was for .75 hour – half of each of the other requested times to travel to and from that destination.

Interest on Costs

Counsel contends the ALJ erred in denying his request for interest on costs. Counsel contends the Ninth Circuit's decision in *Seachris* made interest on costs appropriate if the period the case has been pending is exceptionally protracted. He urges the Board to apply 26 U.S.C. §6621(a) using the federal mid-term rate as "more realistic" than 28 U.S.C. §1961(a). Cl. Pet. at 25; *see Seachris*, 994 F.3d 1066, 55 BRBS 1(CRT). Noting 28 U.S.C. §1961(a) uses the 52-week Treasury bill rate, Counsel asserts that rate is artificial and not aligned with the current market rate (pointing out that as of November 19, 2021, the 52-week Treasury bill rate was .16 percent). Cl. Pet. a 24. The Board recently addressed counsel's similar arguments in *Wakeley v. Knutson Towboat Co.*, BRB No. 18-0238 (Nov. 30, 2022) (Fee Order), and *Seachris v. Brady-Hamilton Stevedore Co.*, BRB No. 17-0581 (Sept. 30, 2022) (*Seachris* Recon.), slip op. at 8, *aff'g in pert. part on recon. Seachris v. Brady-Hamilton Stevedore Co.*, BRB No. 17-0581 (May 16, 2022) (*Seachris* Order), slip op. at 7-8. In those orders, the Board rejected the employer's arguments regarding the use of 26 U.S.C. §6621(a) and the automatic award of interest on costs awarded by the ALJ.

An attorney or claimant is entitled to an enhanced reimbursement for expenses by awarding interest on the expenses if there are circumstances that satisfy the requirements set forth in *Perdue v. Kenny A.*, 559 U.S. 542 (2010). *Seachris*, 994 F.3d 1066, 55 BRBS 1(CRT). In *Perdue*, the Supreme Court outlined six rules derived from its prior decisions in fee-shifting cases that are applicable when deciding whether interest on costs is necessary: (1) a reasonable fee is a fee sufficient to induce a capable attorney to undertake representation; (2) the lodestar method yields a fee that is presumptively sufficient to obtain the result; (3) enhancements may be awarded in "rare" and "exceptional" circumstances; (4) the lodestar amount includes most, if not all of the relevant factors for determining a reasonable fee; (5) the burden of proving that an enhancement is necessary is on the counsel seeking the fee; and (6) an attorney seeking an enhancement must produce "specific evidence" supporting the award. *Perdue*, 559 U.S. at 550-553. Referencing *Perdue*, the Board explained: "the attorney must have made an 'extraordinary outlay of expenses' and the time between payment and reimbursement, generally the litigation period, must have been 'exceptionally protracted.'" *Wakeley*, slip op. at 3; *Seachris* Order, slip op. at 7; *Seachris* Recon., slip op. at 8. While the ALJ cited *Perdue* regarding use of the lodestar method, he did not discuss or rule on the requested interest on costs. In light of the Ninth Circuit's decision in *Seachris*, and the Board's decisions in *Seachris* and *Wakeley*, the ALJ erred in not doing so.

The resolution of whether interest should be awarded on costs incurred involves fact-specific questions that must be answered based on the circumstances of each case. The office before whom the request is made, here the OALJ, is in the best position to make those determinations. *Seachris* Recon., slip op. at 8. There is long-standing and binding

precedent establishing that the Board does not have authority to award any fee for work performed at the OALJ level. *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (table); *see also Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989). We therefore remand this case to the ALJ for consideration of the issue of interests on costs consistent with Supreme Court's reasoning in *Perdue,* the Ninth Circuit's decision in *Seachris*, and the Board's orders in *Seachris* and *Wakeley*.

Accordingly, we vacate the ALJ's Attorney Fee Order, and remand this case for further consideration consistent with our opinion. In all other respects, we affirm the ALJ's fee order.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge