

U.S. Department of Labor

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



BRB No. 21-0019

WILMER LLATAS GUEVARA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SOC, LLC)	
)	
and)	DATE ISSUED: 03/25/2021
)	
ALLIED WORLD NATIONAL)	
ASSURANCE COMPANY c/o)	
BROADSPIRE)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney’s Fees and Costs and Order Denying Petitioner’s Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney’s Fees and Costs of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal) Sausalito, California, and David C. Barnett (Barnett, Lerner, Karsen & Frankel, P.A.), Fort Lauderdale, Florida, for Claimant.

Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Stephen R. Henley's Supplemental Decision and Order Awarding Attorney's Fees and Costs and Order Denying Petitioner's Motion for Reconsideration of Supplemental Decision and Order Awarding Attorney's Fees and Costs (2019-LDA-00209) rendered on a claim filed pursuant to 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.* (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 Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Claimant sustained a psychological injury as a result of his exposure to cumulative war-zone hazards during his work in Iraq for Employer. The administrative law judge, by Decision and Order Awarding Benefits dated January 10, 2020, found Claimant entitled to temporary partial disability benefits from November 30, 2016, and medical benefits.

Claimant's counsel filed an attorney's fee petition for work performed before the Office of Administrative Law Judges (OALJ) from December 24, 2018 through March 27, 2020. Counsel initially sought a fee totaling \$60,382.50, representing 124.5 hours of attorney work at an hourly rate of \$485, and \$1,304.87 in costs. Employer filed objections to the fee petition and Counsel filed a reply, which included a revised fee petition that addressed some of Employer's objections. Counsel adjusted his original fee petition to request \$59,583.50, representing 121.3 and 1.6 hours of attorney work at hourly rates of \$485 and \$450 respectively, and .2 hours of paralegal work at an hourly rate of \$165. He also requested an additional \$11,688.50 (24.1 hours of attorney work at \$485 per hour) for time spent replying to Employer's objections. In total, Counsel sought an attorney's fee totaling \$71,272, along with the previously requested costs of \$1,304.87. The administrative law judge approved an attorney's fee for Claimant's counsel, payable by Employer, totaling \$54,070.37, representing 121.3 hours of attorney work at an hourly rate of \$435, plus the requested costs in their entirety.¹ However, he disallowed the entire 24.1 hours Counsel sought for filing his reply brief. The administrative law judge denied Counsel's motion for reconsideration.

On appeal, Claimant's counsel challenges the administrative law judge's denial of all time associated with the filing of his reply to Employer's objections. Employer responds, urging affirmance of the administrative law judge's decision.

¹We affirm the hourly rate awarded, as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

In his Supplemental Decision, the administrative law judge found Counsel's reply brief provided "significantly more detail regarding specific time entries," and Counsel "voluntarily" removed and adjusted some of the requested hours. Supp. Decision and Order at 2. He "reviewed each entry submitted in the initial petition, Employer's objections and Petitioner's explanations in the reply brief," and "[w]ith the detailed clarifications provided in Petitioner's reply brief," found the revised fee request reasonable and necessary as to the compensable hours. *Id.* at 5. However, the administrative law judge disallowed the 24.1 hours Counsel sought for time spent preparing his reply brief because that time "was not necessary under the circumstances, as the Reply could have been avoided had Petitioner been clearer in his original fee petition." *Id.* The administrative law judge stated that "while the explanations provided in the reply brief now fully support the time entries in the initial petition, they should have been included in the initial petition." *Id.*

In his Order denying Claimant's motion for reconsideration, the administrative law judge stated "[t]o be clear," he did not deny the time spent on the reply brief "because Petitioner could have provided his explanations in the initial petition," but rather because it was not among the filings that the administrative law judge originally "authorized" and Counsel otherwise "did not seek, and the court did not sanction, a reply brief to Employer's objections." Order on Recon. at 2. The administrative law judge stated that "the only authorized filings in this matter" were the initial fee petition and Employer's objections.² Thus, he stated any other filings would, under "unambiguous" OALJ Rule 29 C.F.R. §18.33(d), require "the Court's permission," which Counsel had not sought prior to submitting his reply brief. *Id.* The administrative law judge further stated that "while I considered the [reply] brief in determining the efficacy of several of the specific time charges in this case," Counsel "was not entitled to have Employer reimburse him for work product that the Court did not authorize him to submit." *Id.*

Claimant's counsel avers the administrative law judge committed legal error, as his rejection of an attorney's fee for the reply brief is premised on 29 C.F.R. §18.33(d) of the

²In his Decision and Order Awarding Benefits at 22, the administrative law judge stated:

Claimant's counsel shall have thirty (30) days after this decision becomes final to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days from the receipt of such application to file any objections thereto.

OALJ Rules, which is not applicable to this situation.³ Counsel, citing the Benefits Review Board's decision in *Rankins v. Huntington Ingalls Industries, Inc.*, BRB No. 15-0498 (June 20, 2016) (unpub.), states Section 18.33(d) only applies to "a motion filed prior to a hearing" and therefore cannot be used to reject the post-hearing filing of his reply brief.⁴ Counsel additionally contends the administrative law judge's acceptance and use of information contained in the reply brief in this case "forgives" any possible "procedural bars to its filing," and necessarily establishes the compensability of Counsel's work. In response, Employer asserts that regardless of the administrative law judge's citation to Section 18.33(d), Counsel cannot otherwise show the administrative law judge abused his "wide discretion" in disallowing the time spent on his reply brief, having found it necessitated only due to Counsel's own avoidable errors in his original fee petition.

Claimant's counsel's contentions have merit. The regulation the administrative law judge cites to support his rejection of Counsel's reply brief is inapplicable, as that provision pertains only to "*Opposition or other response to a motion filed **prior to hearing***," 29 C.F.R. §18.33(d) (emphasis added). As Counsel maintains, his reply to Employer's objections in this case was not a pre-hearing submission. The administrative law judge, therefore, erred in disallowing Counsel's reply brief on the basis that he did not obtain permission to file the brief. *Id.*

It is well established that a claimant's attorney is entitled to a fee for defending a fee award. *See generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982);

³29 C.F.R. §18.33(d) (emphasis added) states:

(d) *Opposition or other response to a motion filed **prior to hearing***. A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. **Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.**

⁴In *Rankins*, the Board held the administrative law judge erroneously cited Section 18.33(d) in disallowing counsel's response to employer's objections because it was not a pre-hearing submission.

Byrum v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833 (1982). In this respect, the Board awards a fee for a “reasonable” reply to employer’s objections to a fee petition. See, e.g., *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009) (disallowing a portion of the fee requested for work on a reply brief when the response was disproportionate to the objections); see also *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Thus, we vacate the administrative law judge’s denial of the entire 24.1 hours Counsel claimed for preparing his reply to Employer’s objections and remand the case for the administrative law judge to determine whether Counsel is entitled to a reasonable fee for entries relating to the successful defense of his fee petition.⁵ *Bogdon v. Consolidation Coal Co.*, 44 BRBS 121 (2011).

Accordingly, we vacate the administrative law judge’s denial of an attorney’s fee for Counsel’s time preparing his reply brief and remand the case for further consideration consistent with this opinion. In all other respects, we affirm the administrative law judge’s Supplemental Decision and Order Awarding Attorney’s Fees and Costs.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

⁵ We note that the administrative law judge retains discretion to determine whether work is reasonable and necessary.