

U.S. Department of Labor

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



BRB No. 22-0126

BRYAN A. MILLER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LYNDEN, INCORPORATED)	
)	DATE ISSUED: 03/22/2023
and)	
)	
ACE AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney’s Fees and Costs of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

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

Matthew S. Malouf (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Attorney's Fees and Costs (2019-LHC-00656) 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 December 22, 2020, the ALJ awarded Claimant benefits for his work-related injury. Claimant's counsel, Charles Robinowitz, submitted his fee petition on February 3, 2021, requesting \$50,229.50 in fees, representing \$49,901.50 for 90.73 attorney hours at an hourly rate of \$550, \$64 for .40 paralegal hour at an hourly rate of \$160, and \$264 in costs for work performed before the ALJ between March 2019 and February 2021. Declaration of Attorney Charles Robinowitz in Support of Request for Attorney Fees (Fee Decl.) at 6. Counsel requested "an hourly rate [...] of \$550 as of February 2021." Fee Decl. at 8. Employer objected to the hours requested and counsel's hourly rate. Counsel submitted a reply brief with additional support for his requested fee. The ALJ awarded counsel \$44,004, representing \$43,940 for 87.88 attorney hours at an hourly rate of \$500 and \$64 for 0.4 hour in paralegal hours at an hourly rate of \$160; he also awarded the requested \$264 in costs.

Claimant's counsel appeals the ALJ's fee award, raising three 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; and 3) whether the ALJ abused his discretion in denying inflationary adjustments for the market rate. He asks the Board to modify the awarded hourly rates and hours. Employer responds, urging affirmance, and counsel filed a reply brief. For the reasons stated below, we affirm the ALJ's Attorney Fee Order.

Number of Hours

Counsel appeals the ALJ's disallowance of 2.85 billable attorney hours.¹ He argues this disallowance amounted to more than a 30% reduction for the task and was an abuse of discretion in violation of *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (unexplained large reduction to the overall fee is improper). We reject counsel's assertion because *Moreno* is dissimilar from this case. The ALJ found spending 9.35 hours reviewing "every exhibit and every document in the file" was not reasonable given the record in this matter was "unusually small" with only 47 pages of exhibits and 13 pages of

¹ The ALJ rejected all other objections to the hours requested.

pre-hearing documents. D&O at 7-8; Emp. Br. at 21. The Board will affirm a reduction in the number of hours requested if it is fully explained and reasonable. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). As the ALJ provided adequate reasoning for this reduction, he did not abuse his discretion. Thus, as the ALJ explained the reduction without using improper factors, we affirm the ALJ's determination. *Edwards*, 25 BRBS 49; *Welch*, 23 BRBS 395.

Market Rate and Percentile

Counsel next contends the ALJ's awarded market rate violates established law. He raises three arguments. First, he asserts it was error to reject his market rate evidence without explanation. *See Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021). He then asserts the ALJ should have put him in the 95th percentile instead of the 75th percentile and given him a higher rate based on his 50 years of experience. 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.

Counsel submitted a number of documents to support his requested rate.² The ALJ relied primarily on the Oregon State Bar Economic Survey's (OSB) results based on attorneys' practice categories and years of experience, which the Board has previously affirmed as being valid categories for comparison. D&O at 7, *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 United States Court of Appeals for 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); *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). The Ninth Circuit also has stated 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).

² He submitted a portion of the 2017 Oregon State Bar Economic Survey (OSB), a portion of the 2007 OSB, the 2016 Morones Survey, several court and Board fee awards, a 2009 declaration of attorney Phil Goldsmith, and a 2009 affidavit of David B. Markowitz.

The ALJ considered the OSB, the Morones Survey, and the various fee awards, and found a rate of \$500 per hour, including inflationary adjustments, is reasonable considering counsel's 50 years of experience in Portland. D&O at 7. He placed counsel below the 75th percentile in the chosen practice categories included in the OSB because he found "with over 30 years of experience, adjusting for inflation and considering all of the rate evidence, this is appropriate."³ *Id.* Specifically, the ALJ stated counsel's 50 years of experience are not the only factor to be considered when determining the market rate.⁴ *Id.* The ALJ's D&O explained he found counsel bore his burden of production by submitting hourly rate evidence, and, despite counsel's allegations, he addressed all evidence of record. D&O at 6-8. While the ALJ may not have given equal weight to each piece of evidence, he is not required to do so as he has great discretion in awarding the fee before him. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

With regard to counsel's assertion that the ALJ erred in not placing him in the 95th percentile of attorneys, counsel is mistaken. The 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

³ The ALJ explained:

[t]he Morones Survey places the 2016 median rate for commercial litigators in Portland with 30 or more years of experience at \$525. The Oregon State Bar 2017 Economic Survey found that the median 2016 hourly billing rate for attorneys with over 30 years of experience in Portland was \$425, with a 75th percentile of \$495 and a 95th percentile of \$610. When aggregating by practice area rather than experience, rates ranged from \$200 to \$365 for the median practitioner, \$250 to \$425 for a 75th percentile practitioner, and \$380 to \$540 for a 95th percentile practitioner. I have also considered the balance of the evidence, including the 2007 and 2009 evidence, the \$389 award in *Burnette*, and the \$515 award in *Martin*.

D&O at 7.

⁴ To the extent counsel asserts the ALJ did not consider his 50 years of experience or account for it by awarding a greater fee, the ALJ mentioned counsel's experience numerous times, establishing it was one of the factors he considered. To the extent he asserts the ALJ erred in voicing disagreement with the Ninth Circuit's rules on awarding attorneys' fees and that disagreement somehow artificially limited his (and others') attorneys' fees, we disagree. Despite any frustration with the precedent, the ALJ ultimately conducted a thorough analysis.

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, the ALJ 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); *Obadiaru*, 45 BRBS 17. Thus, as the ALJ explained and reached the percentile classification without using improper factors, we affirm his determination.

Delay Enhancement

Lastly, counsel argues he is entitled to delay enhancement from 2016 through 2021, and the ALJ erred in not adjusting his hourly rate accordingly. In his fee petition before the ALJ, counsel requested an inflation increase of 3% “for 2018, 2019, 2020 and 2021 to date, this would be close to \$550.” Attorney Fee Petition (Fee Pet.) at 9. The ALJ applied the inflation calculator and arrived at an hourly rate of \$500. He stated he placed counsel above the median rate for attorneys with 30 years of experience, above the 75th percentile for attorneys in every practice area when not accounting for experience and above the 95th percentile in other categories. This figure is supported by substantial evidence submitted by counsel.⁵ D&O at 7.

While the rate in effect at the time services were performed may be a reasonable rate, the rate may be enhanced to account for extraordinary delay. *Christensen v.*

⁵ The ALJ specifically relied on the following 2016 rates: \$525 for Morones Survey for median Portland commercial litigators with more than 30 years’ experience, \$425 for the OSB median for attorneys with more than 30 years’ experience, \$380 to \$540 for the 95th percentile by practice area, as well as the 2007 and 2009 evidence and the \$389 award in *Brunette* and the \$515 award in *Martin*. Using the DOL Bureau of Labor Statistics online inflation calculator to adjust for inflation, https://www.bls.gov/data/inflation_calculator.htm, the ALJ arrived at an hourly rate of \$500. He explained: “[e]xperience is not the only factor that contributes to a market rate” and “Petitioner’s competent merits and fee pleadings, his performance at the hearing, and the mostly favorable result in this case establish and support this rate as reflective of Petitioner’s experience and commensurate level of skill.” D&O at 7. Although we need not be “green eyeshade accountants,” and we need only achieve “rough justice” not “auditing perfection,” *Fox v. Vice*, 563 U.S. 826, 838 (2011), our calculations show the average of the ALJ’s figures is approximately \$462. Plugging that into the DOL inflation calculator results in an hourly rate, adjusted for inflation, of \$500.

Stevedoring Services of Am., 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (two years is not an extraordinary delay); *see also Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021) (An “exceptionally protracted” period between when the claim was filed in 2005 and costs were incurred between 2007 and 2016 was a period of five to fourteen years and thus appropriate for a delay enhancement). The ALJ may adjust the fee based on a historical rate to reflect its present value, apply current market rates, or employ any other reasonable means to compensate claimant for the delay. *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). Here, the ALJ stated he accounted for inflation by taking judicial notice of the Department of Labor’s online inflation calculator. D&O at 7 n.3. Given the ALJ has discretion to adjust the fee for inflation, and he did, we affirm his determination. *Allen*, 31 BRBS at 96. In all, we affirm the ALJ’s rate of \$500 per hour, as it is reasonable and is supported by substantial evidence.

Accordingly, we affirm the ALJ’s Decision and Order Awarding Attorney’s Fees and Costs.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge