U.S. Department of Labor

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

BRB Nos. 23-0358, 23-0435
and 23-0435A

FELIPE RUCOBO	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	**NOT-PUBLISHED**
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING COMPANY	)	DATE ISSUED: 03/04/2025
	)	
Self-Insured Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Attorney's Fees and Costs of Evan H. Nordby, Administrative Law Judge, United States Department of Labor, and the Order Approving Attorney Fees and Costs of Marco A. Adame II, District Director, United States Department of Labor.

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

Barry W. Ponticello and Samuel A. Eggleton (England Ponticello & St. Clair), San Diego, California, for Self-insured Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Attorney's Fees and Costs (2021-LHC-00157 and 2021-LHC-00308), and

also appeals, and Claimant cross-appeals, District Director Marco A. Adame II's Order Approving Attorney Fee (OWCP Nos. 18-300869 and 18-302914) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).[1] 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 injuries to his left and right knees as a result of an April 23, 2014 accident,[2] and alleged cumulative traumatic bilateral injuries to his upper extremities, as well as a binaural hearing loss, on April 9, 2015, all relating to his work as a pipe welder for Employer.[3] CX 1. He stopped working for Employer in April 2015, purportedly because of the work-related left knee injury, and apparently has not returned to regular, consistent work. Thereafter, he filed separate claims seeking benefits for the 2014 and 2015 injuries.[4] *Id.* Employer paid medical benefits and periods of temporary and permanent disability benefits relating to the 2014 injuries,[5] CXs 3, 28, but it advised Claimant via a May 12, 2015 letter entitled "Notice Regarding Delay of Workers' Compensation Benefit" (2015 Delay Notice) that there would be a delay in its providing

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[1] By order dated September 27, 2023, the Benefits Review Board (BRB) granted the parties' joint request and consolidated these three appeals for purposes of a decision. *See* 20 C.F.R. §802.104(a).

[2] Claimant had left knee surgery on July 2, 2014, and thereafter received treatment for both knees. His left knee condition was deemed permanent and stationary on June 8, 2015, and his right knee condition was likewise so designated around February 2019. CX 22.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injuries in California. 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).

[4] Claimant filed both claims in 2015. He amended the left knee injury claim on July 13, 2016, to include the right knee injury as sequalae to the original left knee injury.

[5] Per the parties' settlement agreement, for the April 23, 2014 injury, Employer paid Claimant periods of "temporary disability" totaling $157,843.19 and "advanced [him] permanent partial disability" totaling $103,476.51. Application for Approval of Agreed Settlement 908(i) dated Aug. 22, 2022 (Settlement Agreement), at 2-3.

any benefits for the 2015 injuries (upper extremity and hearing loss) until it could ascertain whether those injuries arose out of and in the course of his employment. Subsequently, Employer paid temporary disability benefits relating to those 2015 injuries.[6] CX 3; *see also* Settlement Agreement at 2-3. Claimant, however, sought additional disability and medical benefits, and the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Prior to the hearing, the parties reached a Section 8(i) settlement, 33 U.S.C. 908(i), regarding Claimant's work-related lumbar spine,[7] bilateral knees, bilateral upper extremities, and binaural hearing loss injuries, but did not reach an agreement on the issue of attorney's fees and costs.

On August 30, 2022, the ALJ issued a decision approving the parties' Section 8(i) settlement agreement, which he found resolved "all existing disputes between all parties, except attorney's fees and costs."[8] Decision and Order Approving Section 8(i) Settlement at 1. He ordered the parties "to meet and confer in a good-faith attempt to settle" the attorney's fee issue, and he ordered Claimant to file either a fully supported stipulated fee order or a fee petition by September 29, 2022. *Id.*

Claimant's counsel, Jeffrey M. Winter (Counsel), ultimately submitted amended itemized fee petitions to both the ALJ and the Office of Workers' Compensation Programs (OWCP).[9] His amended fee petition to the ALJ requested $46,914.50 in fees and $10,523 in costs,[10] Amended OALJ Fee Petition (OALJ Fee Pet.) at 1, 23, and his amended OWCP

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[6] For the April 9, 2015 upper extremity and hearing loss injuries, Employer paid Claimant a total of $20,727.69 in temporary disability benefits. Settlement Agreement at 3.

[7] Claimant previously sustained "a specific [work-related] lumbar spine injury" on October 15, 2013. Settlement Agreement at 2.

[8] The settlement also left open Section 7 medical benefits, 33 U.S.C. §907, for future treatment of Claimant's lumbar spine, bilateral knees, bilateral upper extremities (hands and arms only), and binaural hearing loss. Decision and Order Approving Section 8(i) Settlement at 1.

[9] Counsel's initial fee petitions were amended to transfer the hours expended by attorney Kim Ellis and certain costs from the OALJ fee petition to the OWCP fee petition, as well as to add "four time entries in 2017" to the OALJ fee petition that "were mistakenly added to the OWCP level [fee] petition."

[10] Counsel sought a fee before OALJ at the following rates: $556 per hour for 81 hours of his attorney services; $150 per hour for 9.1 hours of legal assistant services by

fee petition requested $33,373.80 in fees and $6,324.20 in costs,[11] Amended OWCP Fee Petition (OWCP Fee Pet.) at 1, 20. Employer filed objections to Counsel's fee petitions at both adjudicatory levels challenging outright his requests for fees under Section 28(a) of the Act, 33 U.S.C. §928(a), and, alternatively, for a reduction to account for Claimant's limited success. It also challenged aspects of Counsel's requested hourly rates as unreasonable; various time entries as duplicative, vague, clerical, or excessive; and certain costs as not compensable. Counsel filed a reply to Employer's objections and requested an additional fee for 0.5 hour of time spent preparing the reply.

On May 8, 2023, the ALJ issued a Decision and Order Awarding Attorney's Fees and Costs (ALJ Fee Order). He first determined Claimant satisfied the requirements of Section 28(a) and, therefore, is entitled to an Employer-paid attorney's fee under that provision. ALJ Fee Order at 3. Next, he granted Counsel's requested hourly rates, finding them commensurate with those in the San Diego, California, community. *Id.* at 6-12. He then rejected Employer's request for a reduction based on Claimant's limited success, reduced certain time entries because he found they were either clerical in nature or represented work performed at the OWCP level, and disallowed $331 for "internal photocopy costs." *Id.* at 4-5, 13-20, 21. Consequently, the ALJ awarded Claimant's counsel an attorney's fee, payable by Employer in the amount of $56,021.70, representing $44,313.20 for Mr. Winter's work (79.7 hours x $556 per hour), $1,516.50 for paralegal work performed by Ms. Lacina (7.5 hours x $150) and Ms. Cardenas (2.9 hours x $135), and $10,192 in costs. *Id.* at 21.

In his Order Approving Attorney Fees and Costs dated August 7, 2023 (DD Fee Order), the district director similarly rejected Employer's contentions that Section 28(a) is inapplicable and that any award should be significantly reduced based on Claimant having only achieved partial success. DD Fee Order at 3-4. He next granted the hourly rates requested for work performed by Counsel and his paralegal, Ms. Lacina, but reduced Ms. Ellis's hourly rate from $470 to $235 per hour. *Id.* at 4-11. Additionally, he reduced Mr. Winter's hours from 43.3 to 35.5, Ms. Ellis's hours from 18.7 to 3.5, and Ms. Lacina's hours from 3.4 to 2.8, finding the corresponding fee petition entries to be excessive, clerical, or representative of work performed on Claimant's "unsuccessful challenge" to

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Diamela Lacina; and $135 per hour for 3.8 hours of legal assistant services by Heidi Cardenas. Amended OALJ Fee Petition (OALJ Fee Pet.) at 10-23.

[11] Counsel's requested fee before OWCP included $556 per hour for 43.3 hours of his work; $470 per hour for 18.7 hours of attorney work by Kim Ellis; and $150 per hour for 3.4 hours of legal assistant services by Ms. Lacina. Amended OWCP Fee Petition (Fee Pet.) at 10-23.

Employer's motion to compel. *Id.* at 11-22. He also excluded $334.20 in copying costs as constituting office overhead. *Id.* at 22. Ultimately, the district director awarded Claimant's counsel an attorney's fee of $26,955.50, representing $19,738 for Mr. Winter's work (35.5 hours x $556 per hour), $822.50 for Ms. Ellis's work (3.5 hours at $235 per hour), $420 for Ms. Lacina's work (2.8 hours x $150), and $5,975 in costs. *Id.* at 13, 22.

On appeal, Employer challenges the ALJ's findings that Claimant satisfied the requirements for an Employer-paid attorney's fee under Section 28(a) and that Claimant otherwise successfully prosecuted his claim for permanent total disability benefits. Claimant did not file a response brief. BRB No. 23-0358. Employer similarly appeals the district director's finding that Section 28(a) applies. Claimant responds, urging affirmance of the district director's application of Section 28(a).[12] Employer filed a reply brief, reiterating its position. BRB No. 23-0435. In his cross-appeal, Claimant asserts the district director erred in reducing Ms. Ellis's requested hourly rate, as well as the requested hours and costs. BRB No. 23-0435A.

BRB No. 23-0358

Employer contends the ALJ misconstrued its 2015 Delay Notice as a refusal to pay any compensation and therefore incorrectly found Section 28(a) applicable.[13] It maintains it never denied benefits in this case because it was already paying Claimant temporary total disability benefits when it first received formal notice of the claim for the 2015 work injuries. Additionally, Employer states it scheduled Section 7 medical evaluations on the same date that the 2015 Delay Notice was issued, which exhibits its intent to pay, rather than deny, reasonable and necessary medical benefits relating to the 2015 work injuries.[14] Because it was actively providing Claimant with disability compensation and there was no denial of medical benefits following the issuance of a formal notice, Employer asserts it

[12] Alternatively, Claimant submits that if the Board holds Section 28(a) inapplicable under the circumstances of this case, any error in the district director's use of that provision in awarding an Employer-paid attorney's fee is harmless as he is nevertheless entitled to an attorney's fee under Section 28(b), 33 U.S.C. §928(b), albeit after remand to the district director to increase the fee award given his arguments on cross-appeal.

[13] Employer repeatedly maintains it is undisputed that it provided Claimant benefits within thirty days of having received noticed of the claim filed for the 2014 work-related injuries and, therefore, the only remaining dispute concerns the 2015 injury.

[14] Employer further states that while it issued a May 2015 Delay Notice indicating it required an investigation period, this notice under California Labor Code 5402(c) mandated its authorization for medical treatment of Claimant's injuries up to $10,000.

was error for the ALJ to interpret the 2015 Delay Notice as Employer "declining to pay benefits" as that term is used in Section 28(a).

Section 28(a) of the Act provides:

> If the employer or carrier *declines to pay any compensation* on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee . . . .

33 U.S.C. §928(a) (emphasis added). A prerequisite for an employer's liability under Section 28(a) is that it refused to pay "any compensation" within thirty days of its receipt of the notice of the claim from the district director. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1105 (9th Cir. 2003);[15] *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). The Board has held that the exact meaning of the phrase "declines to pay any compensation" depends on what benefits were claimed and what benefits the employer paid or declined to pay so that whatever is claimed, denied, and successfully prosecuted determines the employer's liability for an attorney's fee. *Billman v. Huntington Ingalls Indus., Inc.*, 51 BRBS 23, 26 (2017) (citing *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11, 14 (2017)). More specifically, the Board stated that "[i]f any type of benefit is denied and legal services are necessary to obtain the denied benefit, the claimant is entitled to an employer-paid fee because the employer's denial caused the need for attorney involvement." *Taylor*, 51 BRBS at 14.

The ALJ found Employer's 2015 Delay Notice "memorializes [Employer's] nonpayment of benefits and controversion of liability for compensation" relating to

[15] An employer's inaction during the 30-day period has been held to constitute a "decline to pay" and its voluntary payment of benefits after the 30-day period expires does not prevent application of Section 28(a). *Richardson*, 336 F.3d at 1105; *see also Day v. James Marine, Inc.*, 518 F.3d 411, 414 (6th Cir. 2008) (describing the "decline to pay" element as "the employer must decline to pay compensation *or allow 30 days to lapse without paying compensation*") (emphasis added).

Claimant's claim for his 2015 work-related injuries.[16] ALJ Fee Order at 3. He recognized that although Employer did not file a notice of controversion, its letter constitutes a refusal "to pay any compensation" within the meaning of Section 28(a), thereby rendering that provision applicable, particularly because Claimant then utilized "the services of an attorney to prosecute his claim." *Id.* In reaching this conclusion, the ALJ found Employer's ongoing payment of temporary total disability benefits for the 2014 work injury at the time it received notice of the 2015 claim, and thus whether payment of compensation for both the 2014 and 2015 work injuries presented a risk of double recovery, essentially irrelevant for purposes of determining whether Employer refused "to pay any compensation" as contemplated in Section 28(a). *Id.*

From the record, Employer "did not pay any compensation" relating specifically to the 2015 claim within the requisite thirty-day window of Section 28(a). As the ALJ found, the quoted language from Employer's 2015 Delay Notice indicates it declined to pay any compensation relating to the April 9, 2015 injuries "because [it] needed to ascertain AOE/COE (arising out of and in the course of employment)." ALJ Fee Order at 3. This finding is supported by the declaration of Employer's claims adjuster, Daniel Hoshina, dated October 28, 2022. Employer's Objection Exhibit (EOX) F. In his declaration, he stated Claimant was examined by Dr. Goodman on June 7, 2015, and again on April 23, 2018, for the hearing loss claim and that "[f]ollowing Dr. Goodman's reporting, the hearing claim was accepted [by Employer] as industrial and benefits [were] provided." *Id.* at 2. Mr. Hoshina similarly stated Dr. Serocki "evaluated the claims asserted [by Claimant] as to the upper extremities" resulting in Dr. Serocki's April 4, 2016 report, in which he opined Claimant's "bilateral carpel tunnel" was an "industrial injury" and recommended Claimant undergo a "bilateral carpal tunnel decompression." *Id.* Mr. Hoshina stated Employer "authorized treatment after obtaining the Serocki evaluation."[17] *Id.* Consequently, we affirm the ALJ's finding that Employer did not pay any compensation relating to the 2015 claim within the thirty-day time frame as Section 28(a) requires. Nevertheless, the inquiry regarding Employer's liability for attorney's fees under Section 28(a) in this case does not end there.

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[16] We note that, as the ALJ correctly found, the complete 2015 Delay Notice is absent from the record; rather, the ALJ relied on only that part of the agreement Employer quoted in its objections to the fee petition.

[17] The settlement agreement, however, explicitly states that "[o]n April 9, 2015, Claimant sustained a specific injury to his bilateral upper extremities (bilateral arms and hands-carpal tunnel), as well as binaural hearing loss, of which medical treatment and disability benefits were provided." *Id.*

It is a longstanding principle under the Act that a claimant may not concurrently receive a scheduled permanent partial disability award for one injury and a total disability award for another injury, as a claimant cannot receive compensation greater than that for total disability – he cannot be more than totally disabled. *See Fenske v. Serv. Employees Int'l, Inc.*, 835 F.3d 978, 981-982 (9th Cir. 2016); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273, 274-277 (9th Cir. 1956); *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111, 113 n.4 (2010); *Stinson v. Bath Iron Works Co.,* 41 BRBS 97, 98 (2007); *Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 235 n.4 (1985); *Rathke v. Lockheed Shipbuilding & Constr. Co.,* 16 BRBS 77, 78 (1984); *Tisdale v. Owens-Corning Fiber Glass Co.,* 13 BRBS 167, 171-172 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP,* 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983). The Board has held that, in a case in which a claimant sustains two injuries, one of which is totally disabling and the other which would result in a scheduled award, the claimant can receive scheduled benefits only where he is able to show that the permanently partially disabling injury occurred prior to the onset of total disability. *Id.* Under such specific circumstances, the claimant may recover scheduled benefits accruing between the onset of partial disability and the onset of total disability. *See Stinson,* 41 BRBS at 98-99; *Rathke,* 16 BRBS at 79 n.2; *Mahar,* 13 BRBS at 606; *Tisdale,* 13 BRBS at 170-172. The record in this case, however, does not contain any allegation, let alone any medical evidence, that Claimant's bilateral upper extremity and/or hearing loss injuries predated the onset of his total disability resulting from the 2014 work-related knee injuries, i.e., prior to Employer's voluntary payment of temporary total disability benefits from April 9, 2015.

Instead, the record includes evidence demonstrating Employer was paying Claimant temporary total disability benefits, albeit related exclusively to the claim for Claimant's 2014 injuries, at the time it received notice of Claimant's claim for his 2015 injuries. First, Employer's LS-206 Payment of Compensation Without Award dated April 21, 2015, and LS-208 Notices of Payment dated June 11, 2019, and June 29, 2021, document its voluntary payment of temporary total disability benefits to Claimant relating to the 2014 injury from April 9, 2015, through June 21, 2015, with the date of the first payment being made on April 21, 2015. CXs 3, 28. Second, Mr. Hoshina stated "Claimant was being paid temporary disability benefits for the April 23, 2014 injury when the April 9, 2015 claim was filed." EOX F at 2. He specified Employer "therefore was already paying the compensation rate and thus did not make double indemnity payments within the thirty days of the April 9, 2015, claim's notice." *Id.* Third, the parties' Section 8(i), 33 U.S.C. §908(i), settlement agreement acknowledges Employer paid Claimant "temporary disability"

benefits for several periods for his April 2014 injury, including from "April 10, 2015 through June 21, 2015."[18] Settlement Agreement at 2.

Contrary to the ALJ's statement, because of this chronology, Employer's payment of temporary total disability benefits during the thirty-day window relating to the claim for the 2015 injuries may be relevant to the "decline to pay any compensation" analysis under Section 28(a), as Claimant cannot receive compensation under the Act greater than that for total disability. *See Fenske*, 835 F.3d at 981-982; *Rupert*, 239 F.2d at 274-277; *Thornton*, 44 BRBS at 113 n.4 (2010); *Stinson,* 41 BRBS at 98. In finding that Section 28(a) applies, the ALJ focused solely on Employer's failure to pay any disability compensation as: 1) he relied on Employer's notice advising Claimant as to "the status of disability benefits for your workers' compensation injury on [April 9, 2015];" and 2) he did not address Employer's contention, which it raised below, that its scheduling of medical appointments within thirty days of the claim exhibited its intent to pay, rather than decline, medical benefits relating to the 2015 claim. ALJ Fee Order at 3; *see also* Emp's OALJ Fee Objections at 5. Ultimately, the analysis requires findings of fact which are beyond our authority to render. *See generally* 20 C.F.R. §802.301; *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1146 (9th Cir. 1991). At the very least, instead of finding it irrelevant, the ALJ should have fully considered Employer's argument that its voluntary payment of temporary total disability benefits for Claimant's claim involving his 2014 left and right knee injuries during the relevant period for purposes of Section 28(a) qualified as payment of some compensation for purposes of his second claim seeking benefits for his 2015 cumulative traumatic bilateral upper extremity and binaural hearing loss injuries. For this reason, we must vacate the ALJ's finding that Employer refused "to pay any compensation" within the meaning of Section 28(a).

Employer alternatively asserts Claimant did not establish a successful prosecution of his complete claim at the OALJ level. It contends the sole issue before the ALJ involved whether Claimant was entitled to permanent total disability benefits. Furthermore, it states Claimant did not succeed on this entitlement theory because all of Claimant's claims were resolved in the parties' Section 8(i) settlement, by allowing Employer to merely continue paying the permanent partial disability benefits it owed for the 2015 scheduled injuries,

[18] Although the settlement merely refers to Employer's payment to Claimant as "temporary disability," it is evident these payments represented temporary total disability benefits during the outlined periods of time. In this regard, the delineated dates represent approximately 185 weeks, which when multiplied by the agreed upon compensation rate of $853.05, results in total compensation paid of $157,843.19, which is the total amount the parties agreed Employer paid Claimant in temporary benefits for the 2014 injuries.

Employer maintains Claimant did not succeed on this entitlement theory.[19] Therefore, it avers the ALJ erred by not denying or at least significantly reducing Counsel's requested fee pursuant to *Hensley v. Eckerhart*. 461 U.S. 424 (1983), based on Counsel's lack of success in litigating issues germane to Claimant's 2015 claim. Last, Employer contends the ALJ erred by awarding fees for work performed on Claimant's unsuccessful motion to compel and unsuccessful attempt to file an interlocutory appeal. In the interests of administrative efficiency, we address these contentions.

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this claim arises, has defined "successful prosecution" as follows:

> While a party need not obtain monetary relief to prevail for purposes of … fee-shifting statutes, he must obtain some actual relief that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Succeeding on an issue alone is insufficient; even obtaining declaratory judgment will not result in the award of fees, unless it causes the defendant's behavior to change for the benefit of the plaintiff.

Richardson, 336 F.3d at 1006 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992) (citations omitted)); *see also Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239, 245 (1988), *aff'd*, 920 F.2d 558 (9th Cir. 1990). If a claimant achieves only partial or limited success, however, the Supreme Court of the United States has held that a fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.[20] Nevertheless, if counsel obtains an "excellent" result for his client, the fee award

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[19] Employer states this is exemplified by the fact the agreement did not contemplate wage loss, which is irrelevant for purposes of scheduled awards.

[20] The Court created a two-prong test focusing on the following questions: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Hensley*, 461 U.S. at 434. It stated the district court should focus on the significance of the overall relief the plaintiff obtained in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. *Id.* If the plaintiff achieved only partial or limited success, however, the hours expended on litigation multiplied by a reasonable hourly rate may result in an excessive award. Therefore, the fee award should be an amount that is reasonable in relation to the results obtained. *Id*. at 435-437.

should not be reduced simply because he failed to prevail on every contention raised. *Id.* at 435.

The ALJ found that pursuant to the Section 8(i) settlement, Claimant received $100,000 in additional disability compensation, plus open medical costs, which he concluded establishes a successful prosecution. He rejected Employer's request for a 75% across-the-board fee reduction under *Hensley*, 461 U.S. at 435-436, because, in contrast to Employer's contention, he found Claimant obtained more than just partial success. In this regard, he found Claimant's settlement addressed his 2013 lumbar spine injury, his 2014 (as amended in 2016) left and right knee injuries, and his 2015 bilateral upper extremity and hearing loss injuries; it only excluded his shoulder and cervical spine complaints. Thus, the ALJ found "the majority and most central of Claimant's claims were successful." ALJ Fee Order at 4. Consequently, exercising his discretion, the ALJ declined to make any fee reduction for partial success.

It is evident from the parties' Section 8(i) settlement that Claimant, having utilized the services of an attorney, achieved success in the prosecution of his claim. In this regard, the agreement, although noting Employer voluntarily paid Claimant benefits relating to the 2014 and 2015 claims, unequivocally stated: Employer had not paid any permanent partial disability benefits relating to Claimant's 2015 scheduled injuries; Claimant asserted additional compensation is owed; the parties acknowledged "there is a dispute as to compensation, medical care, and attorney's fees;"[21] and "the parties acknowledge" Employer's payment to Claimant of $100,000 "resolves any and all issues of past and future temporary disability, temporary and partial disability, permanent partial disability, and permanent total disability claims that may exist."[22] Settlement Agreement at 2-3, 5, 6. We therefore affirm the ALJ's finding that Claimant successfully prosecuted his claim, as Employer has not established the ALJ abused his discretion in finding Claimant obtained actual relief via the parties' settlement. *Richardson*, 336 F.3d at 1006; *Kinnes v. General Dynamics Corp.*, 25 BRBS 311, 315 (1992).

Employer's limited success/*Hensley* argument, however, has merit. As Employer asserts, a primary issue before the ALJ involved Claimant's entitlement to permanent total

[21] As previously noted, however, the parties agreed future medical treatment "is to be left open" for Claimant's lumbar spine, bilateral knees, bilateral upper extremities, and binaural hearing loss injuries. Settlement Agreement at 4.

[22] Given the specific language employed by the parties, we reject Employer's assertion that the settlement resolved only Employer's remaining payment of permanent partial disability benefits under the schedule.

disability benefits. In all three of his pre-hearing statements, dated May 26, 2021, October 27, 2021, and May 19, 2022, Claimant uniformly articulated that as a result of his 2014 and 2015 injuries which have all "reached MMI [maximum medical improvement]," he is "unable to return to his usual and customary work as a welder," he "has not found work within his restrictions [and] therefore he is totally disabled."[23] In particular, he stated he was seeking ongoing permanent total disability benefits from March 27, 2020, as well as scheduled awards for his bilateral upper extremity and hearing loss injuries based on specific impairment ratings. The agreement acknowledged "a dispute exists as to whether Claimant could have continued in his usual and customary capacity after achieving MMI status for each alleged part of the body," but that vocational expert opinions "established multiple alternative occupations for which Claimant is qualified based on education, experience, physical capacity, age, and other factors." Settlement Agreement at 4. Thus, "the parties agree that the settlement adequately resolves any and all issued related to future employability." *Id.* This concession, in conjunction with the fact that Claimant's potential entitlement to permanent total disability benefits far exceeds the amount of the settlement, strongly suggests, as Employer asserts, that Claimant achieved partial or limited success. The ALJ's conclusion that "the majority and most central of Claimant's claims were successful" is therefore suspect. Consequently, we vacate the ALJ's rejection of Employer's argument that Claimant obtained partial success and remand this case for further consideration of this contention. *See generally Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13, 15-16 (2020).

BRB No. 23-0435

Employer contends the district director's attorney's fee award is, much like the ALJ's fee award, contrary to law because Claimant did not establish the Section 28(a) pre-requisites for entitlement to an employer-paid attorney's fee. Employer reiterates that it provided Claimant temporary total disability benefits from April 9, 2015, through October 5, 2015, as well as during other various periods thereafter, which undisputedly establishes it was paying Claimant disability benefits throughout the pertinent thirty-day window. It also similarly argues the district director erroneously rejected its request for an across-the-board reduction in Counsel's fee relating due to his limited success.

As the ALJ did, the district director found Section 28(a) applicable because he found Employer's 2015 Denial Letter "memorializes nonpayment of benefits and refusal to pay within the meaning of Section 928(a)" and Claimant thereafter utilized the services of an

[23] Among the disputed facts Claimant listed was "whether [suitable alternate employment] has been shown, retroactively and into the future, [and] the need for present and future medical care as outlined by his treating physicians."

attorney to prosecute his claim. DD Fee Order at 3. The district director, however, did not address the impact, if any, of Employer's paying temporary total disability benefits at the time it received notice of Claimant's claim for his 2015 injuries would have on the "decline to pay any compensation" issue pertaining to the applicability of Section 28(a). For the same reasons expressed above regarding the ALJ's fee order, we vacate the district director's finding that Section 28(a) applies; we also vacate his rejection of Employer's limited success argument and remand this case for further consideration of those issues.[24]

BRB No. 23-0435A

Claimant's Counsel also challenges the district director's fee award. He contends the district director erred in reducing Ms. Ellis's requested hourly rate, as well as his and Ms. Ellis's requested hours, and in denying $334.20 in copying costs.[25] Employer did not file a response to Counsel's cross-appeal.

Initially, Counsel contends the district director's awarding an hourly rate of $235 to Ms. Ellis is a clear abuse of discretion given the requested hourly rate of $470 is fully supported by the underlying documentation Counsel submitted in this case. We agree the $235 per hour award cannot stand.

When requesting a fee, Claimant's Counsel must submit a complete fee petition with an hourly breakdown of time spent, professional status of the person performing the work, and the hourly billing rate of each person. 20 C.F.R. §702.132. Counsel, as the fee applicant, bears the burden of proof in establishing the reasonableness of his requested hourly rate. *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009). Reasonable attorney's fees are to be calculated according to the prevailing market rates and should include fees attorneys could obtain in other types of cases. *Christensen*, 557 F.3d at 1053. The adjudicator must consider all relevant rate evidence before him, *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41,44 (2009), and he must explain his rationale for assessing the fee. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 869 (9th Cir. 2014); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999). The Ninth Circuit has

[24] On remand, the district director should also consider, as suggested by Counsel in his response brief, whether Employer's alleged failure to act within thirty days of its receipt of Claimant's amended July 2016 claim to include a left knee injury reflects its intent to "decline to pay" any compensation for purposes of Section 28(a). *See generally Richardson*, 336 F.3d at 1105; *Day*, 518 F.3d at 414.

[25] We affirm the district director's awarded hourly rate and hours granted for Ms. Lacina and the hourly rate for Mr. Winter as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

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 v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 1080 (9th Cir. 2021). Moreover, the court has specifically approved consideration of an attorney's years of experience. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1086 (9th Cir. 2015); *Christensen*, 557 F.3d at 1053.

The district director, having determined San Diego, California, is the relevant community, set out the evidence and the parties' contentions regarding Ms. Ellis's requested hourly rate. OWCP Fee Order at 9-10. He found the declarations and surveys presented were submitted on behalf of Mr. Winter, not Ms. Ellis, and the only support of her purported skill, experience, and reputation is her own declaration and curriculum vitae. However, he found the screen shot of the 2018 Real Rates Report for Partner and Associates (2018 RRR), Q3 2018, establishes the median rate for a non-litigation associate is $235 per hour and concluded that "[i]n reviewing the evidence and the arguments, $235 per hour for Ms. Ellis is supported." *Id.* at 10.

The district director's blanket statement that the declarations and surveys were submitted on behalf of Mr. Winter and not Ms. Ellis is an inaccurate assessment of the evidence. While many of the exhibits are exclusive to Mr. Winter's hourly rate,[26] others provide adequate information in support of Counsel's requested hourly rate for Ms. Ellis - or at the very least support a rate above the $235 per hour the district director awarded her in this case. In this regard, Mr. Winter explicitly stated in his October 9, 2021 declaration that "[t]he current hourly rate charged for work performed by attorney Kim Ellis is $450." Fee Exhibit (FX) 1 at 2. Additionally, while Ronald Burdge's statement reflects he was "asked" and explicitly rendered his opinion as to a "reasonable hourly rate for attorney Winter," FX 3 at 1, 21, it also stated he considered Ms. Ellis's "years in practice and current hourly billable rate" as delineated by Mr. Winter and recognized the United States Consumer Law Attorney Fee Survey Reports for 2017-2018 and for 2019-2020 established a median hourly rate of $525 for attorneys in "the San Diego greater metropolitan area." *Id.* at 20-21. Similarly, the United States Attorney's Office Attorney's Fees Matrix (USAO Matrix) and the 2018 RRR each predominantly document hourly rates for associate

[26] The district director correctly observed that Ms. Ellis's declaration does not explicitly state her hourly rate. He also correctly found the submitted statements of James E. McElroy, Philip E. Weiss, and Timothy L. Brictson exclusively address Mr. Winter's requested hourly rate, FXs 5, 8, and the decisions in *Shah v. Worldwide Language Resources, Inc.*, No. 16-72307 (9th Cir. Oct. 4, 2018) (Order), and *Iuvale v. Coastal Marine Services*, BRB Nos. 18-0159/A (June 25, 2019), make no reference to Ms. Ellis.

attorneys more than the $235 hourly rate the district director awarded. EXs 9,[27] 10.[28] Furthermore, Counsel's exhibits contain two BRB decisions documenting an hourly rate of $260 awarded to Ms. Ellis at the OALJ level. FXs 11, 12. Consequently, we vacate the district director's reduction of the hourly rate for Ms. Ellis to $235 because, as noted above, it does not reflect a complete consideration of all the evidence Counsel submitted.[29] *Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1086; *Christensen*, 557 F.3d at 1053; *Sherman*, 43 BRBS at 44. On remand, the district director must fully consider all evidence relevant to Ms. Ellis's requested hourly rate and explain his rationale for the conclusion he reaches. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 869 (9th Cir. 2014); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999).

Counsel next asserts the district director erroneously and arbitrarily reduced his time entries by 7.7 hours. He maintains the district director erred in deciding the responsibility for determining which medical records should be included as trial exhibits is "clerical" as he believes the selection of medical records and tabbing the records for inclusion in the exhibits is work best left for the attorney of record. Additionally, Counsel asserts the district director inappropriately "attacked and arbitrarily reduced" Ms. Ellis's requested

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[27] The USAO Matrix lists hourly rates for attorneys, like Ms. Ellis, with 21-30 years of experience practicing law as follows: $530 per hour for 2015-2016; $543 per hour for 2016-2017; and $563 per hour for 2017-2018. EX 9.

[28] The district director apparently relied exclusively on a "screen shot" in Counsel's fee petition purportedly taken from the 2018 RRR; but he acknowledged, however, that that information "was not found in the exhibits provided." OWCP Fee Order at 11. The 2018 RRR shows a Q3 2018 median hourly rate of $225 and a mean hourly rate of $299 for associate attorneys in San Diego, California. FX 10 at 7. It also shows hourly rates for non-litigation associates in the Employment and Labor general practice area ranging respectively from $310 to $401 (median) and from $325 to $447 (mean) and in other practice areas (e.g. Corporate, Environmental, Finance and Securities) ranging from $308 to $630 (median) and $364 to $626 (mean). FX 10.

[29] Moreover, as Counsel suggests, the district director's decision to grant Ms. Ellis an hourly rate of $235 appears suspect given that he has previously awarded her $385 per hour. Cl's P/R at 5; *see also generally Hernandez v. Nat'l Steel & Shipbuilding Co.*, BRB No. 21-0350 (June 23, 2022).

hours by 7 hours for tasks performed on March 2 and 3, 2020, which he found were either vague, excessive, interoffice activity, or block billing.[30]

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 his services. The district director reviewed Counsel's itemized time entries and found several lacked sufficient descriptions, were clerical, or were like other entries. For instance, the district director disallowed 4.3 hours he found vague or insufficiently explained.[31] DD Fee Order at 8. In addition, he disallowed 1.8 hours for entries largely relating to letter review and scheduling emails to OWCP as being clerical. *Id.* at 10. He also disallowed another 1.4 hours related to three entries he deemed duplicative.[32] *Id.* at 10-11. Further, he disallowed .1 hour to review the OALJ Order Approving settlement as work not performed before the OWCP. *Id.* In terms of Ms. Ellis's work, the district director reduced the March 2 and 3, 2020 entries each by 4 hours because he found they were block-billing, vague, unsupported, and/or interoffice activity. *Id.* at 19.

[30] Counsel does not appeal the district director's disallowance of 7.2 hours of Ms. Ellis's work on "an unsuccessful motion." Cl's P/R at 21.

[31] As the district director found, the entries relating to these reductions only generally referenced a "review" of records, files and/or exhibits. OWCP Fee Order at 11-20; OWCP Fee Pet. at 9-16.

[32] The district director found certain entries generally described as "Case Assessment" and "Review" repetitious of other similarly described entries. OWCP Fee Order at 12, 16, 18; OWCP Fee Pet. at 9-16.

The district director sufficiently explained his rationale for disallowing Mr. Winter's and Ms. Ellis's time 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 therefore reject Counsel's contentions and affirm the district director's findings as to the hours awarded to Mr. Winter (35.5) and Ms. Ellis (3.5).

Accordingly, we vacate the ALJ's Decision and Order Awarding Attorney's Fees and Costs and the district director's Order Approving Attorney Fees and Costs and remand this case for reconsideration by each factfinder consistent with this opinion. In all other respects, we affirm the fee awards.[33]

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[33] We reject Counsel's assertion that the Board's decision in *Cahill v. Int'l Terminal Operating, Inc.*, 14 BRBS 483 (1981), requires us to modify the district director's awarded costs to include the $334.20 in copying expenses the district director disallowed as overhead. The Board has held the issue of whether photocopying expenses are excludable as part of the attorney's overhead or compensable as necessary and reasonable expenses is solely within the discretion of the office awarding the fee. *Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989) (Order). We affirm the district director's denial of $334.20 in costs associated with a Knox Copy Service as "part of overhead and costs of doing business," OWCP Fee Order at 22, as Counsel has not established the district director abused his discretion in this regard. *Tahara*, 511 F.3d at 952; *see also Brown*, 30 BRBS at 34.