U.S. Department of Labor

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

BRB Nos. 15-0037, 17-0203, and 24-0003

JEFFREY MCCUE and STEPHANIE FINCH-ROVA (on behalf of ESTATE OF MARGARET MCCUE, widow of STANLEY MCCUE, deceased employee) Claimants-Petitioners v. COLBERG, INCORPORATED and INDUSTRIAL INDEMNITY COMPANY (in liquidation) and CALIFORNIA INSURANCE GUARANTEE ASSOCIATION (CIGA) for INDUSTRIAL INDEMNITY (in liquidation) Employer/Carrier-Respondents	**NOT-PUBLISHED** DATE ISSUED: 05/29/2025 DECISION and ORDER

Appeal of the Attorney Fee Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell LLP), Novato, California, for Claimants.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimants' counsel, John Wallace (Counsel), appeals Administrative Law Judge (ALJ) Richard M. Clark's Attorney Fee Order (2013-LHC-00637) rendered on a claim 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 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, 955-956 (9th Cir. 2007).

Margaret McCue filed a claim for death benefits on July 1, 2009, due to the death of her husband, Stanley McCue (Decedent).[2] Decedent died on July 5, 2007, allegedly

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

[2] At the time Mrs. McCue filed her claim for death benefits, Employer had gone out of business, as had its insurer, Fremont Compensation Group (later known as Industrial Indemnity). On July 20, 2012, California Insurance Guarantee Association (CIGA) filed a notice of controversion on behalf of the defunct Employer and Carrier, and on February 14, 2013, CIGA filed a Pre-Hearing Statement (Form LS-18). However, prior to the formal hearing, CIGA asserted it could not be found liable for death benefits because, *inter alia*, the California Insurance Code (CIC) excluded coverage of Longshore claims. After the parties briefed the issue, ALJ William Dorsey issued an Order Dismissing CIGA on October 9, 2014. Mrs. McCue appealed, and on July 23, 2015, the Benefits Review Board issued an Order dismissing the appeal as interlocutory. 33 U.S.C. §921(b); *McCue v. Colberg, Inc.*, BRB No. 15-0037 (July 23, 2015). Mrs. McCue filed a timely Motion for Reconsideration, which the Board denied on October 22, 2015.

Thereafter, the parties requested that ALJ Dorsey consolidate twelve pending claims involving CIGA, including Mrs. McCue's claim, for the sole purpose of addressing CIGA's motions to dismiss. *See* Transcript of Notice of Case Assignment and Pre-Hearing Conference dated July 14, 2016, at 8-9, 11, 20, 24. Accordingly, on July 20, 2016, ALJ Dorsey issued an Order of Consolidation and Briefing on CIGA Motion to Dismiss, and the parties submitted briefs. On November 15, 2016, ALJ Dorsey dismissed CIGA from all twelve claims and also withdrew the consolidation order.

On November 22, 2016, Mrs. McCue and the other consolidated claimants moved ALJ Dorsey to vacate the provision dissolving the consolidated proceeding. ALJ Dorsey

from lung cancer caused by workplace exposure to inhaled toxins, including asbestos, at Employer's facility during his employment in 1966 through 1968. 33 U.S.C. §909. Following Mrs. McCue's death on May 30, 2017, her children with the Decedent, Claimants Jeffrey McCue and Stephanie Finch-Rova, moved to substitute themselves as parties to assert their mother's death-benefits claim on behalf of her estate. On May 4, 2018, the ALJ granted the motion and substituted them as Claimants.

On March 4, 2022, the parties submitted a Section 8(i) Application for Approval of Agreed Settlement to the ALJ, who issued an Order Approving the Settlement on March 11, 2022.[3] However, the settlement agreement did not resolve attorney's fees and costs.

On August 10, 2022, Counsel filed an itemized fee petition with the ALJ on behalf of the law firm Brayton Purcell, LLP, seeking a total of $468,016.91, consisting of $438,540.50 for 1,036.4 hours billed,[4] and $29,476.41 in costs. The California Insurance

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accepted the motion as a request for reconsideration, which he denied on December 16, 2016. However, on December 9, 2016, Mrs. McCue and the other consolidated claimants had already filed a notice of appeal with the Board. Because the notice was filed while the motion for reconsideration was still before ALJ Dorsey, the Board dismissed the appeal as premature. *McCue, et al. v. CIGA*, BRB Nos. 2017-0120 (Jan. 6, 2017).

Mrs. McCue filed a second Notice of Appeal on January 25, 2017, followed by a Motion to Consolidate on January 30, 2017. On March 16, 2017, the Board granted the motion to consolidate but dismissed the appeals on the grounds that they were untimely filed. *McCue, et al. v. CIGA*, BRB No. 17-0203 (Mar. 16, 2017). Mrs. McCue (along with the rest of the consolidated claimants) filed a Motion for Reconsideration, which the Board granted. *McCue, et al. v. CIGA*, BRB No. 17-0203 (Apr. 17, 2017). However, the Board declined to address the merits of the appeals and instead dismissed them as interlocutory. *Id*. On remand, Mrs. McCue's claim was reassigned to ALJ Clark.

[3] Pursuant to the approved agreement, CIGA and the Special Fund were each ordered to pay $15,000 to Jeffrey McCue and $15,000 to Stephanie Finch-Rova on behalf of the estate of Margaret McCue, widow of Stanley McCue, for a total settlement amount of $60,000. *See* Decision and Order Approving Settlement and Order for Briefing on Attorney Fees and Costs issued March 11, 2022.

[4] The fee petition contains hours billed by twenty-two different timekeepers: two senior partners, two partners, one trial attorney, five associate attorneys, nine paralegals, and three case managers. Fee Petition (Fee Pet.) at 15-16. As support for the requested attorney hourly rates, Counsel submitted Exhibits A through M and declarations from Attorney Gil Purcell, Attorney John Wallace, and Fee Expert John O'Connor, with O'Connor's declaration including Exhibits A through G. Fee Petition Exhibits (FPX) A

Guarantee Association (CIGA) and the Director, Office of Workers' Compensation Programs (Director), filed objections.[5] Counsel replied to CIGA's objections and moved to strike them as untimely.

The ALJ issued an Attorney Fee Order (Fee Order) on September 6, 2023. In all, the ALJ awarded a total of $244,433.40, representing an attorney's fee of $234,469.50 and $9,963.90 in costs. Fee Order at 2, 9. He denied Counsel's motion to strike CIGA's untimely objections, noting Counsel also sought multiple extensions of time to file the fee petition and further delay did not harm Claimants. *Id*. He also denied Counsel's request to hold the Special Fund liable for fees and costs should CIGA be unable to pay, finding no section of the Act permits the Special Fund to be held liable for attorney's fees and costs. *Id*. at 5-6.

As for the requested hourly rates, the ALJ found the San Francisco Bay Area to be the relevant community for purposes of establishing the market rate. Fee Order at 7-8. The ALJ weighed the exhibits and declarations Counsel submitted in support of the fee petition. *Id*. at 9-28. The ALJ rejected CIGA's proposed hourly rates, finding it provided no evidence to support them.[6] *Id*. at 29. Nevertheless, the ALJ found the rates Counsel requested for work performed by two senior partners, one partner, and two associate

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through C included the filing history of the case, a fee schedule, and an itemized list of expenses. Fee Petition Exhibits D through M included: excerpts of Ronald L. Burdge's 2010-2011 U.S. Consumer Law Attorney Fee Survey Report; the 2011 ALM Survey of California Law Firm Economics Standard Hourly Billing Rates as of January 1, 2011; a 2011 Study of the Billing Rates and Billing Practices of Attorneys in Small and Midsize Firms; past Longshore fee orders from 2012 to 2015; the USAO Attorney's Fee Matrix from 2015 to 2021; and the *Laffey* Matrix. Counsel also submitted resumes of the recorded timekeepers. *See* FPXs D-M.

[5] CIGA objected to the hourly rates requested, to 1,061 billed time entries, and to twenty-three itemized costs. (CIGA Obj.). The Director objected to the fee petition to the extent Claimants sought payment of attorney's fees and costs from the Special Fund. (Dir. Obj.).

[6] CIGA argued the senior partners and Counsel should be awarded an hourly rate of $400, all associate attorneys should be awarded an hourly rate of $250, and all paralegals should be awarded an hourly rate of $100. CIGA also maintained the relevant community for purposes of determining a market hourly rate was Claimants' residence in Arizona. Fee Order at 29.

attorneys exceeded the relevant community rates and reduced them accordingly.[7] *Id*. Additionally, the ALJ disallowed 259.30 hours of billed time for work not performed before the Office of Administrative Law Judges (OALJ),[8] 72.75 hours of billed time for work he considered to be clerical in nature,[9] 185.3 hours of billing entries he found excessive, vague, or ambiguous,[10] 2.9 hours billed for interoffice communications,[11] and 4.2 hours billed for travel time. *Id*. at 38-47. Finally, the ALJ reduced Counsel's requested costs by $19,512.51, disallowing the costs for the attorney fee expert, outside legal counsel,[12] and certain travel costs.

Counsel appeals the Fee Order, contending the ALJ erred in assigning little to no weight to most of the proffered hourly rate evidence and in rejecting the requested hourly

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[7] The ALJ reduced Attorney Brayton's requested hourly rate of $950 to $600, Attorney Purcell's requested hourly rate of $750 to $600, Attorney Nevin's requested hourly rate of $650 to $580, Attorney Law's requested hourly rate of $315 to $300, and Attorney Sloniker's requested hourly rate of $450 to $300. Fee Order at 29-33, 35-36.

[8] The ALJ excluded 60.2 hours for work performed before the Office of Workers' Compensation Program (OWCP) (from November 3, 2008, to January 11, 2013) and 199.1 hours for work performed before the Board (on October 31, 2014, November 4 and 5, 2014, from November 7, 2014, to June 23, 2016, and from January 10, 2017, to September 14, 2017). Fee Order at 39-40; *see* FPX B at 1-4, 20-27, 30-33.

[9] The ALJ sustained 178 of CIGA's objections to billing entries he found clerical. Fee Order at 40-41; *see* FPX B at 7, 9-16, 20, 28-29, 34-54, 56-57.

[10] In all, the ALJ sustained 295 of CIGA's objections to billed entries on the grounds they were excessive, vague, and/or ambiguous. Fee Order at 44 n.22; *see* FPX B at 4-20, 27-29, 33-59.

[11] The ALJ overruled CIGA's objections to interoffice communications except where the task was clerical or "performed as part of the firm's internal routine case management," and ultimately disallowed ten billing entries. Fee Order at 46 n. 23; *see* FPX B at 40, 43, 47, 49, 51, 57.

[12] In March 2020, the ALJ became concerned the firm's representation of Claimants and Mrs. McCue constituted a conflict of interest and issued an Order to Show Cause (OSC) requesting Brayton Purcell, LLP, show why no conflict existed and if one did, why the firm should not be disqualified. Brayton Purcell retained outside counsel for both the firm and for Claimants in order to respond to the OSC and included these legal costs – totaling $14,299.55 – in its fee petition. *See* FPX C at 1, 30, 32.

rates for Attorneys Brayton, Purcell, and Nevin. He also asserts the ALJ abused his discretion by denying various billing entries and reducing the number of hours billed for being ambiguous, duplicative, excessive, vague, or clerical in nature. Moreover, he argues the ALJ erred in denying reimbursement of the costs for expert O'Connor's services, for outside counsel's work on the ALJ's Order to Show Cause (OSC), and for certain travel-related costs.[13] Petitioners'/Claimants' Petition and Opening Brief on Appeal (Cls. Brief) at 5-6. Neither Employer nor the Director has responded.

Hourly Rates

Counsel first asserts the ALJ erred in rejecting the hourly rate evidence, particularly the O'Connor declaration, and in reducing the requested hourly rates for Attorneys Brayton, Purcell, and Nevin. An ALJ must consider all relevant rate evidence before him, *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41, 43-44 (2009), and must explain his rationale for assessing an attorney's fee. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 869 (9th Cir. 2014); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053 (9th Cir. 2009); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999). It is within the ALJ's discretion to determine the hourly rates using locality charts, provided he fully considers all relevant evidence, gives specific explanations for his findings, and does not rely on improper factors. *Seachris v. Brady-Hamilton Stevedore Co*., 994 F.3d 1066, 1080 (9th Cir 2021); *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1089 (9th Cir. 2015); *Carter*, 757 F.3d at 869 (discussing the appropriateness of different rates for attorneys with different levels of experience). The burden is on the fee applicant to produce satisfactory evidence showing the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Christensen*, 557 F.3d at 1055; *Van Skike v. Director, OWCP*, 557 F.3d 1041, 1048 (9th Cir. 2009); *see Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010).

We first consider Counsel's argument that the ALJ erred in rejecting the declaration of attorney fee expert O'Connor as support for the requested hourly rates of $950 for Attorney Brayton, $750 for Attorney Purcell, and $650 for Attorney Nevin.[14] Cls. Brief at

[13] We affirm as unchallenged on appeal the ALJ's finding that the San Francisco Bay area is the relevant community for determining the market rates and the ALJ's awarded hourly rates for Attorneys LeRoy, Wallace, Anders, Casilli, and Ghilotti, the paralegals, legal assistants, and support staff members, as well as the remaining costs. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

[14] Although the ALJ also reduced the requested hourly rates for Associate Attorneys Sloniker and Law, Counsel's Petition for Review does not assign any particular error to

6, 22-23, 31-34. In making his assessment, the ALJ considered both the declaration and its exhibits. The ALJ found O'Connor concluded the following: 1) cases under the Longshore Act "are not easy or routine;" 2) attorneys who specialize in a practice area garner higher rates than those who do not; 3) the primary consideration for assessing an hourly rate is years of practice; 4) consumer law hourly rates and rates of practitioners before the California Workers' Compensation Appeals Board (WCAB) are comparable to Longshore hourly rates; 5) an attorney with ten years of experience should "command…at least $650" per hour; and 6) senior partners' hourly rates would likely exceed $700 per hour and perhaps "approach premium rates of $800 to $1,000 per hour." Fee Order at 22. Based on this information, O'Connor opined $650 per hour is reasonable for Attorney Nevin, $750 per hour is reasonable for Attorney Purcell, and $950 per hour is reasonable for Attorney Brayton.[15] *Id.* at 22-23. The ALJ concluded the surveys and reports O'Connor relied upon do not support portions of the declaration or the requested rates for those three attorneys.[16] Fee Order at 31-33. This conclusion is rational.

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these reductions, instead focusing on the hourly rate reductions of Attorneys Brayton, Purcell, and Nevin. As a result, to the extent Counsel is requesting review of the reduction of Sloniker's and Law's hourly rates, we find the issue inadequately briefed and affirm the rates awarded. 20 C.F.R. §802.211(b); *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51, 52 n.1 (2015) (citing *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990)); *Plappert v. Marine Corps. Exch.*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997).

[15] The ALJ acknowledged O'Connor "admitted" $950 per hour "was at the upper bounds of a reasonable rate, but opined a top of the market rate was reasonable for a complex case such as this one." Fee Order at 23.

[16] We affirm the ALJ's rejection of the *Laffey* Matrix, *see* O'Connor Decl., Exs. D, F; *see also* FPX L. The ALJ permissibly found it provided no source, the hourly rates are based on attorneys' time out of law school, and the included explanatory statement provided no description as to who independently updates the matrix. *Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869; Fee Order at 15-16, 25-28. More importantly, it reflects rates in Washington, D.C., not in the San Francisco Bay Area. Fee Order at 15-16, 24-27; *see Prison Legal News v. Schwarzenegger,* 608 F.3d 446, 454 (9th Cir. 2010) (stating that "just because the *Laffey* Matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere, let alone in a legal market [San Francisco Bay Area] 3,000 miles away."); *see also Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 229 (4th Cir. 2009); *Grissom v. The Mills Corp.*, 549 F.3d 313, 322-323 (4th Cir. 2008).

Specifically, the ALJ found the Consumer Law Survey from 2017 to 2018, even when adjusted to 2022 dollars, did not support rates as high as Counsel requested, and this discrepancy undercut O'Connor's statements. Fee Order at 24-25, 32 (citing O'Connor Decl., Ex. C). Similarly, the ALJ rejected O'Connor's opinion that the WCAB Memoranda support a premium rate.[17] Fee Order at 25-26; O'Connor Decl., Ex. E. Finally, the ALJ rejected O'Connor's interpretation of the Real Rate Report for litigation firms in San Francisco. He found the report established litigation partner rates in San Francisco ranged from $392 per hour to $961 per hour in 2021 dollars, with a median hourly rate of $663. Fee Order at 27, 32-33; *see* O'Connor Decl., Ex. G. But he found the report flawed because it did not specify either the type of practice (other than "litigation") or the years of experience and it covered firms located in the city of San Francisco, not in the Bay Area more generally where Counsel's office is located. As a result, he assigned no weight to O'Connor's conclusion that it supports the premium rates. Fee Order at 27-28.

Overall, the ALJ gave O'Connor's declaration "some weight," but with respect to awarding "premium" rates, he found it "unsupported and its shortcomings made [O'Connor's] opinion less compelling and, ultimately, not convincing." Fee Order at 28. Additionally, he questioned O'Connor's use of average rates due to the possibility of skewing, and he was not persuaded O'Connor knew the Brayton Purcell attorneys well enough to "slot them in the market." Fee Order at 28. The ALJ has fully explained his rationale for rejecting O'Connor's declaration, finding it not supportive of awarding premium hourly rates.[18]

The ALJ has discretion to determine whether to award an attorney's requested hourly rates, including whether to base the rates on an average, a median, or a particular percentile from the survey. *Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869; *see generally Eastern Associated Coal Corp. v. Dir., OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 288 (4th

[17] Based on the memoranda, O'Connor concluded, "if a ten-year junior partner was billing at $475, [he] would expect a senior partner of counsels' [sic] experience to exceed $700 hour, and approach premium rates of $800 to $1,000 reserved for the top of the market litigating the most complex matters." O'Connor Decl. at 57. The ALJ rejected this conclusion because O'Connor did not explain why he reached that conclusion, whether the memorandum in question covered the Bay area, or why he used the 2010 Memorandum for the Salinas WCAB, ignored the 2013 Memorandum for the San Francisco WCAB, and adjusted the rates from 2010 to 2018 dollars. Fee Order at 25-26.

[18] Further undercutting O'Connor's opinion, the ALJ correctly explained the complexity of a case is *not* considered in the hourly rate but instead in the hours awarded. Fee Order at 31-32; *see Seachris*, 994 F.3d at 1080; *Van Skike*,557 F.3d at 1048.

Cir. 2010). In weighing the O'Connor declaration as a whole, the ALJ considered how O'Connor's recommended rates analyzed the attorneys' experience, as well as the firm's location, size, and area of legal practice. Fee Order at 28. He found O'Connor's analysis relied heavily on the attorneys' years of experience, but his statements regarding the attorneys were vague and lacked depth. *Id.* Specifically, the ALJ indicated O'Connor did not offer knowledge of Attorney Brayton's skills or expertise but instead reiterated the importance of his years of experience and made only vague laudatory references to his skills.[19] Further, he determined O'Connor's declaration failed to explain the cost-of-living calculations and relied on data that does not reflect regional rates in the relevant community. *Id*. at 28-29, 32-34. As the burden is on Counsel to produce satisfactory evidence "that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation," the ALJ rationally found O'Connor's declaration unpersuasive. *Christensen*, 557 F.3d at 1055; *see Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

Having addressed O'Connor's declaration, the ALJ next considered the exhibits attached to the declaration as evidence in their own right without deferring to O'Connor's interpretation. He found the WCAB information was "persuasive evidence of compensation levels for similar work, especially given that Longshore attorneys sometimes also qualify as WCAB attorneys." Fee Order at 26; *see Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869. In addition, he found the rates contained within the Real Rate Report "are generally informative for determinations based on litigation." *Id.* at 32. In addition to considering the O'Connor exhibits, the ALJ also considered the exhibits attached to the fee petition itself. The ALJ fully explained his rationale for accepting or rejecting various pieces of evidence, and he clearly stated he gave the most weight to the Burdge Survey (because consumer law is generally comparable to Longshore work). He gave limited weight to the other reports. Fee Order at 11, 27, 30-33.

Contrary to Counsel's assertion, the ALJ is not required to *accept* all the fee applicant's rate evidence, even if uncontradicted. *Shirrod*, 809 F.3d at 1087 (decision-maker has discretion to determine prevailing market rate so long as he provides adequate justification). Instead, the ALJ's task is to *consider* the relevant evidence and explain his

[19] While the ALJ recognized O'Connor's opinion that Attorney Brayton is one of the "top plaintiff-side lawyers in the country handling multi-factorial causation issues" and "perhaps the best claimant-side trial lawyer in the Bay Area" and his supervision of the case "meaningfully contributed" to its settlement, Fee Order at 31 (citing O'Connor Decl. at 33), he found O'Connor provided no explanation or basis for these statements, and there was no evidence that O'Connor had any familiarity with the attorneys' work prior to being retained as their fee expert. *Id*. at 31.

rationale for assessing a reasonable attorney's fee within the statutory framework. *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010); *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Carter*, 757 F.3d at 869; *Seachris*, 994 F.3d at 1080; *Shirrod*, 809 F.3d at 1089; *Sherman*, 43 BRBS at 43-44; *Jensen*, 33 BRBS at 101. As the ALJ adequately considered all of Counsel's market rate evidence and explained his rationale for accepting or rejecting that evidence, we reject Counsel's assertion that the ALJ improperly rejected or "degraded" all his rate evidence.[20] Cls. Brief at 49.

Upon deciding which evidence he would consider for rates in Counsel's market, the ALJ looked to the median rates in the surveys and adjusted them for inflation and cost-of-living increases to 2022 dollar amounts.[21] He found rates generally ranged from $493 to $893 for an attorney with more than thirty years of experience. Fee Order at 28-32; *see* FPXs D, E; O'Connor Decl., Exs. C, E, G. He observed the higher rates were for firms in San Francisco proper or San Franciso City, not the Bay Area, were averages rather than median rates, and/or did not specify the attorney's practice area. Fee Order at 32. Of the surveys the ALJ considered, he found the evidence overall did not support awarding Counsel's requested rates, and he awarded Attorney Brayton an hourly rate of $600, indicating it is reasonable and "serves 'rough justice.'"[22] Fee Order at 32; *see Fox v. Vice*, 563 U.S. 826, 838 (2011).

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[20] We reject Counsel's contention that the ALJ ignored evidence of past fee awards in determining the hourly rates. Cls. Brief at 24-26, 33-35; *see* FPXs G, H, I, and J. Rather, the ALJ considered and rejected them as being "too dated." Fee Order at 29. While this reasoning alone is contrary to the Ninth Circuit's reasoning in *Seachris,* 994 F.3d at 1077-1078, and *Christensen*, 557 F.3d at 1055, the ALJ clearly stated even if he adjusted them for inflation, they would not support the requested premium rates. Fee Order at 14, 29.

[21] The ALJ used the increase in the national average weekly wage between various fiscal years, which he found was nearly identical to using the Department of Labor's (DOL's) Bureau of Labor Statistics Consumer Price Index (CPI) calculator, to arrive at the value in 2022 dollars. Fee Order at 11 n.4, 27-28, 30-31.

[22] The ALJ reasonably stated:

> Despite the shortcomings of CIGA's arguments, however, I must "strike a balance between granting sufficient fees to attract qualified counsel and avoiding a windfall to counsel," by "compensate[ing] counsel at the prevailing rate in the community for similar work; no more, no less." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) (cleaned up). Based on the evidence before me from Petitioner, the hourly rates for

Based on their declarations, the ALJ determined Attorneys Brayton and Purcell do comparable work and have similar experience. Fee Order at 33-33. He noted they are both named partners with approximately forty years of experience and possess similar accolades. *Id.*; *see* Brayton and Purcell Decls. Therefore, he found it reasonable to apply the same rate analysis he did for Attorney Brayton to Attorney Purcell, and he awarded Attorney Purcell the same hourly rate of $600. The ALJ found Counsel did not submit sufficient background, experience, or accolades for Attorney Nevin, and therefore used only the surveys of record to assess $580 as a reasonable rate for him as an attorney with twenty-one years of experience.[23] Fee Order at 33. The ALJ's findings are reasonable and supported by the evidence, and thus within his discretion. *Seachris*, 994 F.3d at 1080 (assessing a rate is "a judgment call that the ALJ could reasonably have resolved either way"); *Shirrod*, 809 F.3d at 1089; *Carter*, 757 F.3d at 869. As the ALJ is in the best position to assess the attorney's work in litigation before him, he fully considered the rate evidence before him, the reasons he gave are not improper, and those reasons support his conclusion, we find he did not abuse his wide discretion and thus affirm his hourly rate findings. *Seachris*, 994 F.3d at 1080; *Carter*, 757 F.3d at 869; *Jensen*, 33 BRBS at 101.

Reduction of Hours

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 v. Eckerhart*, 461 U.S. 424, 437 (1983). The factfinder may, within his discretion, disallow a fee for hours found to be duplicative, excessive, or unnecessary, and he is afforded "considerable deference" in making those discretionary determinations. *See Hensley*, 461 U.S. at 437; *Tahara*, 511 F.3d at 956; *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1047 (9th Cir. 2000). Further, given the factfinder's superior understanding of the underlying litigation, he is in the best position to make this determination, and his decision will not be disturbed unless it constitutes an abuse of discretion. *Id.*; *see also Fox*, 563 U.S. at 838. On appeal, the fee applicant bears

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> Attorneys Brayton, Purcell, Nevin, LeRoy and Sloniker exceed the relevant community rates, and should be reduced accordingly.

Fee Order at 29. Although the ALJ mentioned Attorney LeRoy, he presumably meant Attorney Law, as he reduced Law's rate but not LeRoy's. *Id.* at 33-34.

[23] Based on the surveys, the ALJ determined a rate between $550 and $660 is reasonable for a partner with twenty-one years of experience. Fee Order at 33; *see* FPXs D, E; O'Connor Decl., Exs. C, E, G.

the burden of proving the ALJ abused his discretion in reducing the number of hours and awarding less than what was requested in the fee petition. *Brown v. Marine Terminals Corp.*, 30 BRBS 29, 34 (1996) (en banc).

Counsel asserts the ALJ provided no guidance and erred by not explaining every individual reduction of a time entry because it was clerical, duplicative, demonstrated excessive time, or provided a vague or ambiguous description of the task performed. Cls. Brief at 16-17. We are not persuaded, and we reject any contention that the ALJ erred in grouping the disallowed entries by their common objections.[24]

The ALJ considered the entries to determine whether any attorneys billed for clerical work, along with CIGA's objections[25] to many of those entries. Fee Order at 40-41. Specifically, he reviewed the billed time spent requesting records; receiving, scanning, and forwarding filings or emails; formatting documents; organizing exhibits; drafting cover letters; drafting spreadsheets or indices of attorneys who had worked on the case; sending billing inquiries; reviewing invoices; checking or updating contact information; scheduling calls, conferences, and mediations; and issuing records and insurance card requests. *Id*. at 41. He rationally determined none of those clerical tasks required independent legal judgment, and they should have been absorbed into overhead costs. *Id.*; *see Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254, 256, *modified on recon.,* 19 BRBS 52 (1986) (counsel may not bill for purely clerical services as such services are considered part of overhead, even if completed by an attorney or paralegal);); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895, 898-899 (1980); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375, 382 (1979). For example, he denied some billing entries as

[24] We also reject Counsel's assertion that it was erroneous for the ALJ to reduce, rather than disallow, the time in an entry as clerical. First, it does not appear the ALJ partially reduced entries, and second, to the extent he may have done so, many entries included more than one task – block billing – so it would be reasonable for the ALJ to find some of the tasks are clerical while others are not. The goal is "rough justice," not green-eyeshade accounting. *See Fox*, 563 U.S. at 838.

[25] We reject Counsel's argument that the ALJ erred in accepting CIGA's objections which Counsel described as "grossly untimely." Cls. Brief at 26-27. The ALJ acknowledged the objections were late but permissibly accepted and considered them, determining the "delay of a couple of months" in receiving CIGA's objections did not result in any harm or prejudice to Counsel. Indeed, the ALJ noted Counsel himself requested "numerous" filing extensions. Fee Order at 2; *Collins v. Electric Boat Corp*., 45 BRBS 79, 82 (2011) (ALJ has wide discretion in admitting evidence into the record); *McCurley v. Kiewest Co.*, 22 BRBS 115, 118 (1989) (same); *Hughes v. Bethlehem Steel Corp*., 17 BRBS 153, 155 n.1 (1985) (same).

clerical because, though stating the staff person "researched" something, the action instead involved finding a document, a filing, or a calendar item to send to an attorney and did not require independent legal judgment. Fee Order at 41. Therefore, the ALJ permissibly sustained CIGA's objections to billing entries that were clerical and overruled its objections for substantive work requiring independent legal judgment.

We also reject Counsel's argument that the ALJ abused his discretion by denying some billing entries for being "duplicative, excessive, vague or ambiguous." Cls. Brief at 5-6, 8-18. The ALJ found CIGA's objections to allegedly duplicative billing entries largely without merit, but sustained objections to "cumulative time billed for related tasks" that was "often collectively excessive and unjustified by vague billing task descriptions." Fee Order at 42. He sustained CIGA's objections to entries and disallowed hours when Counsel failed to sufficiently describe the task, as he could not assess whether the work was necessary, duplicative, clerical, or excessive. *Id*. at 43 (citing FPX B, Billing Entries 338-339). He noted that including the length of a document did not necessarily justify the time billed when the entries did not sufficiently describe the task performed or otherwise "justify the considerable amount of time expended." *Id*. (citing FPX B, Billing Entry 897). As the ALJ explained his rationale, Counsel has not established the ALJ abused his discretion in reducing these hours. *Brown*, 30 BRBS at 34; *Welch v. Pennzoil Co.*, 23 BRBS 395, 402 (1990); *Berkstresser v. Washington Metro. Area Transit Auth.,* 16 BRBS 231, 236 (1984).

We further reject Counsel's specific challenges to the ALJ's disallowance of hours as excessive for billing entries for work Attorney Wallace performed. Cls. Brief at 10-18. Contrary to Counsel's argument that that ALJ provided "no explanation" for why these disallowances are "unreasonable," the ALJ provided sufficient explanation. *Id*. at 49. He found Attorney Wallace billed more than fifty-six hours on a response to CIGA's motion for non-liability, and approximately twenty-eight hours on the reply. Fee Order at 43. While the ALJ acknowledged these tasks would justify "several hours of work," collectively, he found the amount of time expended unreasonable given the task and reduced the time accordingly. *Id*. (citing FPX B, Billing Entries 369-418). He further noted Attorney Wallace spent about forty-one hours researching and drafting a response to the motion for summary decision from February to March 2020, and another 30.6 hours on a motion for summary decision in October 2020. Fee Order at 44. Considering Attorney Wallace's familiarity with the case, work on prior motions, and described tasks, he found the time billed excessive and reduced it by 6.6 hours. *Id*. (citing FPX B, Billing Entries 888-891, 907-916, 919-920, 925-926, 999-1010). Likewise, the ALJ observed that in June 2021, Attorney Wallace billed almost twenty hours on tasks related to researching and drafting a ten-page motion and accompanying four-page declaration to rejoin CIGA. *Id*. Noting the motion "largely summarize[d] the case history" and "primarily relied on a case in which Attorney Wallace was also lead counsel," the ALJ permissibly found the time billed for this task excessive and reduced the time by 11.7 hours. *Id*. (citing FPX B, Billing

Entries 1052-1063). As the ALJ adequately explained his reductions of hours with examples for billing entries he found were ambiguous, duplicative, or excessive, we affirm his findings.[26] *Hensley*, 461 U.S. at 433; *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194, 197 (1986).

We reject Counsel's argument that the ALJ did not provide adequate information sufficient to assess the scope, extent, and applicable basis for billing entry requests that he reduced or entirely disallowed. Cls. Brief at 16. The ALJ explained he would sustain an objection if he was unable to tell from the entry whether the work was necessary, and he gave examples of such entries. Fee Order at 43. That the ALJ did not address each item individually for the more than one thousand entries does not render his explanation for the reductions or disallowances any less understandable or reviewable. His findings that entries are clerical, duplicative, excessive, vague or ambiguous are valid reasons for reducing or disallowing the time Counsel claimed – and any one of those reasons is sufficient. Further individualized explanations for every entry are not required, especially when the ALJ uses multiple examples to explain his reasoning.[27] The Board will affirm the ALJ's reduction in the number of hours requested if it is adequately explained and reasonable. *Tahara*, 511 F.3d at 956; *Davenport*, 18 BRBS at 197. As the ALJ here provided adequate reasoning for the disallowances and did not abuse his discretion, we affirm his reduction of hours, calculations, and findings.[28] *Fox*, 563 U.S. at 838; *Edwards*

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[26] We reject Counsel's position that the ALJ applied the wrong standard in evaluating the reasonableness of time billed. Cls. Brief at 6, 10-11. An ALJ may properly disallow time charged by an attorney on the basis it is duplicative or excessive. *Tahara*, 511 F.3d at 956; *Davenport*, 18 BRBS at 197. Moreover, considering an ALJ's "superior understanding" of the underlying litigation, he is afforded discretion in determining the amount of a fee award. *Tahara*, 511 F.3d at 956 (quoting *Hensley*, 461 U.S. at 437). Here, as the ALJ gave sufficient explanation of the disallowance, and as Counsel has failed to demonstrate an abuse of discretion, we affirm that disallowance. *Id*. at 956; *see also Gates v. Deukmejian*, 987 F.2d 1392, 1398-1399 (9th Cir. 1992).

[27] Counsel's assertion that the ALJ's fee order runs afoul of *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008), is not persuasive. In *Moreno*, a civil rights case, the court declined to affirm a district court's reduction of a requested fee by 50% when that court did not provide a clear explanation for the reduction. The court stated, however, that the district director could make a blanket 10% reduction. Unlike *Moreno*, the ALJ in this case identified the entries he found to be problematic and discussed relevant examples, thereby providing clear reasoning for the deductions.

[28] We decline to address any other specific disallowances or reduction of hours as Counsel has made only general and sweeping challenges and has not adequately briefed

v. Todd Shipyards Corp., 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993); *Brown*, 30 BRBS at 34; *Welch*, 23 BRBS at 402; *Berkstresser,* 16 BRBS at 236.

Reduction of Costs

Finally, Counsel contends the ALJ erred in not allowing two significant aspects of the requested costs: 1) the $14,299.55 cost incurred for services outside counsel provided to address the ALJ's OSC on an attorney conflict of interest issue[29] and 2) the $5,000 cost for retaining fee expert O'Connor to provide an hourly rate assessment and declaration. Cls. Brief at 39-47; *see* FPX C at 1 (Billing Entries 13-15). Counsel asserts both are reimbursable pursuant to 33 U.S.C. §928(d). We reject Counsel's assertions.

The ALJ found Counsel failed to demonstrate the costs for retaining outside counsel were reasonable and necessary, as Brayton Purcell's own litigation strategies led to the need for outside counsel.[30] Fee Order at 50-51. The ALJ also found Counsel's cited support unpersuasive. Counsel relied upon *Ace Am. Ins. Co. v. Walters*, 2104 U.S. Dist. LEXIS 15883 (S.D. Texas Feb. 7, 2014) to support his reimbursement request, but the ALJ distinguished it as a petition for payment of an appellate co-attorney's fees, not reimbursement for costs associated with retaining outside counsel. Thus, it had little bearing on whether the costs requested were reimbursable. *Id*. at 51. The ALJ concluded the costs incurred in retaining outside counsel to respond to the OSC "are outside of the

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the issues or identified purportedly problematic specific findings. Cls. Brief at 10-15, 19-21; 20 C.F.R. §802.211(b); *see Montoya*, 49 BRBS at 52 n.1 (citing *Collins*, 23 BRBS 227); *Plappert*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13; *see also Morris*, 10 BRBS at 380 ("Although [the] claimant may have made general reference to other fee disallowances, either the item was insufficiently identified or the arguments in regard to them were not developed enough for us to consider them as issues actually raised for our consideration.").

[29] Counsel requested $8,016.05 in costs for the retention of law firm Long & Levit to represent Claimants in the OSC/conflict of interest proceedings, and $6,283.50 in costs for the retention of law firm Joseph, Rogers, & O'Donnell to represent Brayton Purcell, LLP in the OSC/conflict of interest proceedings. FPX C at 1 (Billing Entries 13-14).

[30] The ALJ further found the requested cost of $8,016.05 for outside counsel Long & Levit was unsupported, as invoices only documented costs of $4,271.85 paid to that firm. Fee Order at 51; *see* FPX C at 1, 30.

reasonable and necessary costs contemplated in 33 U.S.C. §928(d)." [31] As the evidence supports the ALJ's conclusion, we affirm his denial of the $14,299.55 fee for outside counsel. [32]

Counsel also argues the ALJ should have ordered reimbursement of the cost for hiring attorney fee expert O'Connor. Cls. Brief at 44-47. We disagree. CIGA should not be held liable for Counsel's attempt to establish the hourly rates he requests. No part of Section 28 allows a claimant's attorney to recover this type of cost. 33 U.S.C. §928(d); *Stevedoring Servs. of Am. v. Price*, 432 F.3d 1112, 1114 n.1 (9th Cir. 2006). Indeed, it is more akin to overhead than to a task Counsel performed for Claimants in this case. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245, 252 (1991) ("The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed."). In addition, Counsel has not identified any law in support of his argument. [33] The ALJ

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[31] Section 28(d) states in part: "In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, *fees and mileage for necessary witnesses attending the hearing at the instance of claimant*. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer…." 33 U.S.C. §928(d) (emphasis added).

[32] We reject Claimant's argument that the ALJ ignored the Board's ruling in *Bradshaw v. J. A. McCarthy Inc.*, 3 BRBS 195, 201-202 (1976). Cls. Brief at 41-43. In *Bradshaw*, the Director appealed the ALJ's denial of a claimant's request for reimbursement of the cost of a hearing transcript, as there was no showing that it was "reasonably required" and there was no statutory support for the charging of such a reimbursement to the employer. *Bradshaw*, 3 BRBS at 201. The Board acknowledged Section 28 of the Act does not expressly allow for reimbursement of an attorney's costs but interpreted the 1972 Amendment to mean Congress intended litigation expenses to be borne by the employer. *Id.* Therefore, the Board held in cases where an attorney's fee is awarded, reasonable and necessary costs and expenses incurred during a proceeding by a claimant may also be assessed against the employer. *Id.* at 202. Accordingly, the Board modified the ALJ's decision and order to allow the transcript cost because it was reasonable and necessary for preparing the claimant's post-hearing brief. *Id.* In this case, the ALJ rationally found the fee expert cost and outside counsel cost for responding to the OSC are neither reasonable nor necessary as contemplated by 33 U.S.C. § 928(d). Fee Order at 50-51.

[33] Counsel's extensive reliance on *Ziegler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003), as support for finding CIGA liable for the cost of the firm's fee expert

properly determined the cost of the fee expert is not compensable and should have been considered overhead. *See Cutaia v. Northeast Stevedoring Co., Inc.*, 12 BRBS 942, 945 (1980) (ALJ has discretion to determine the reasonableness and necessity of an expert's fee, and a substantial reduction must be accompanied by a sufficient explanation); *Lozupone v. Lozupone and Sons*, 12 BRBS 148, 151 (1979) (same); *see also Hensley*, 461 U.S. at 434 ("Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary*." (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)). Therefore, we affirm the ALJ's denial of $5,000 for the cost of Attorney O'Connor's expert services.[34] Fee Order at 50.

Finally, Counsel argues the ALJ improperly disallowed certain travel costs for mileage for travel to the San Francisco airport (in order to fly to Arizona for Mrs. McCue's deposition) and for purchasing a meal while en route. Cls. Brief at 47; *see* FPX C at 2 (Billing Entries 19-20). The ALJ found these costs unreasonable because "[a]s a San Francisco Bay Area based firm, some travel to San Francisco would be expected and built into the firm's overhead." Fee Order at 51. Fees for travel time and reimbursement of travel costs may be awarded where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *See B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.,* 43 BRBS 129, 135 (2009); *Baumler v. Marinette Marine Corp.,* 40 BRBS 5, 7 (2006). As Counsel failed to establish the ALJ abused his discretion in finding this local travel constituted overhead, we affirm his disallowance of these specific travel costs.[35]

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in misplaced. Cls. Brief at 44-46. In *Ziegler*, the United States Court of Appeals for the Seventh Circuit held a claimant could recover costs associated with its medical expert even if that expert did not appear at the formal hearing. Here, however, Counsel is not seeking reimbursement of costs associated with a medical expert. Rather, Counsel requests reimbursement of costs for a fee expert retained after settlement for the purpose of establishing his own fee entitlement.

[34] We affirm as unchallenged on appeal the ALJ's findings regarding the costs for medical experts and other miscellaneous costs. *Scalio*, 41 BRBS at 58; Fee Order at 48, 50-51.

[35] Counsel also requested the Board reverse the ALJ's disallowance of two entries documenting travel time incurred in Arizona. Cls. Brief at 48; *see* FPX B at 8 (Billing Entries 196-197). The ALJ found the travel included an "unexplained detour to Tuba City." Fee Order at 47. Counsel argues this travel time should be compensable because it represented his return to the airport in Flagstaff, Arizona following Mrs. McCue's deposition in Show Low, Arizona, but simply broken up into two legs with a stop in Tuba City. Cls. Brief at 48. Counsel maintains the ALJ "appears" to have been confused about

Counsel's Motion for Leave to File Fee Petition for Work Before the Board

On July 29, 2024, Counsel filed a Motion for Leave to File Petition for Fees Incurred Only Before the BRB and Petition for Fee Incurred Before the Board (BRB Fee Pet.) for work performed during two previous appeals of this claim, BRB Nos. 15-0037 and 17-0203. 20 C.F.R. §802.203. According to Counsel, despite the parties' agreement "that all of the fees and costs sought by Petitioners' attorneys could be presented to and determined" by the ALJ, the ALJ "declined to address fees or costs not incurred while the matter was before the OALJ." BRB Fee Pet. at 3.

Accompanying the motion for leave is an itemized petition documenting work before the Board between November 7, 2014, and June 23, 2016, as well as hours spent preparing the appeal on October 31 and November 4-5, 2014 (BRB No. 15-0037), and between January 10, 2017, and September 14, 2017 (BRB No. 17-0203). BRB Fee Pet., EX 2; *see also* BRB Fee Pet. at 6; Fee Order at 38-40. Counsel requests a total fee of $90,188, representing $120 for 0.2 hour of legal services performed by Attorney Brayton at an hourly rate of $600, $87,350 for 174.70 hours of legal services performed by Attorney Wallace at a rate of $500, $378 for 1.2 hours of legal services performed by Attorney Ghilotti at a rate of $315, and $2,340 for 23.40 hours of legal services performed by Paralegal Norman at a rate of $100. BRB Fee Pet. at 7, 11.

The Board dismissed the initial appeal, BRB No. 15-0037, on July 23, 2015, because it was interlocutory and summarily denied Mrs. McCue's Motion for Reconsideration on October 22, 2015. The Board dismissed Mrs. McCue's second appeal, BRB No. 17-0203, on March 16, 2017, because it was untimely filed. On September 7, 2017, the Board granted Claimants' Motion for Reconsideration but denied the requested relief on the grounds Claimants' appeal was interlocutory. In neither instance did the Board address the

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these entries, having awarded Counsel's requested time for travel for the reverse trip from Flagstaff to Show Low, and therefore "seek[s] to address the matter." *Id*.

The burden was on Counsel to submit a self-sufficient document that would allow the ALJ to assess the reasonableness of the fee request. 20 C.F.R. §702.132; *see Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1107 (9th Cir. 2003) (claimant bears the burden of showing entitlement to an attorney's fee); *see also Hensley*, 461 U.S. at 433 (where documentation is inadequate, the fee award may be reduced). As Counsel did not establish that the ALJ abused his discretion in disallowing specific travel costs on the grounds that Counsel failed to adequately explain their reasonableness and necessity, we affirm the disallowance of these specific entries. *See generally Brinkley v. Dept. of the Army/NAF*, 35 BRBS 60, 64 (2001).

merits of Claimants' appeals. This was not successful work before the Board. However, on March 4, 2022, the parties submitted to the ALJ an Application for Approval of Agreed Settlement Pursuant to 33 U.S.C. 908(i), and on March 11, 2022, the ALJ issued a Decision and Order Approving Settlement. It is well-settled that a settlement constitutes a successful prosecution. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 236-237 (1993); *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 526 (1980).

When a claimant prevails before the ALJ, the Board's regulation requires the claimant's attorney file a fee application with the Board for time incurred before it within sixty days of the ALJ's order. 20 C.F.R. §802.203(c). The Board has the discretion to accept or reject an untimely filed petition. 20 C.F.R. §802.217. As Counsel's motion for leave and fee petition come more than two years after the order establishing Claimant's success, Counsel's petition for a Board fee is untimely, and he failed to provide good reasons to excuse its lateness. Counsel asserts this was a "prolonged and robust litigation," and emphasizes that the fee appeal, which we have now addressed, is still pending and not final, but these are not good reasons for excusing Counsel's untimely fee petition filing. Neither is the ALJ's decision to disregard the parties' purported agreement allowing him to assume jurisdiction and address all fees and costs regardless of the level at which they were incurred, as the Act and regulations clearly limit an ALJ's authority to an award of fees for work performed at the OALJ level. 33 U.S.C §928(c); 20 C.F.R. §702.132; *see Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 8 (2001) (en banc); *Revoir*, 12 BRBS at

526. Therefore, we deny the motion for leave to file out of time, decline to consider Counsel's petition, and deny Counsel's request for a fee for work performed before the Board in 2014 through 2017 for BRB Nos. 15-0037 and 17-0203.[36] 20 C.F.R. §802.217.

Accordingly, we affirm the ALJ's Fee Order and deny a fee for services performed before the Board.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[36] As we have affirmed the ALJ's fee award, Counsel was not successful in this appeal and is not entitled to an employer-paid fee for work before the Board in this appeal. 33 U.S.C. §928(a); 20 C.F.R. §802.203.