U.S. Department of Labor

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

BRB No. 22-0364

ALBINA BAJRIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLUOR CONOPS LIMITED	)	
	)	DATE ISSUED: 10/23/2023
and	)	
	)	
STARR INDEMNITY AND LIABILITY COMPANY c/o GALLAGHER BASSETT	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees and the Order Denying Reconsideration of Attorney Fee Award of Monica Markley, Administrative Law Judge, United States Department of Labor.

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

Timothy Pedergnana and Vasilios Tzanides (Flicker, Garelick & Associates, LLP), New York, New York, for Employer/Carrier.

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

Claimant appeals the Order Awarding Attorney's Fees and the Order Denying Reconsideration of Attorney Fee Award (2020-LDA-01928) of Administrative Law Judge

(ALJ) Monica Markley rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (DBA).[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. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a native of Bosnia, filed a claim for compensation and medical benefits under the Act alleging a work-related psychological injury from time she spent working for Employer in Afghanistan. Verified Petition in Support of Attorney's Fees and Costs Paid by the Employer/Carrier (Fee Pet.) at 10. Prior to the hearing, the parties reached a Section 8(i) settlement, 33 U.S.C. 908(i), but could not reach agreement on the issue of attorney fees and costs. *Id.*

Claimant's counsel, David C. Barnett, filed a fee petition with the ALJ on January 21, 2022, seeking a total of $59,176.50 in attorney's fees[2] in accordance with Section 28(a) of the Act, 33 U.S.C. §928(a). Fee Pet. at 2, 40. Counsel requested an hourly rate of $500 for himself and attorney Barry R. Lerner, $400 per hour for attorney Chase Zobec, and $165 per hour for paralegal Saray Chavez. *Id.* at 3. Furthermore, counsel requested the ALJ require Employer to produce its own billing records if Employer objected to any of his itemizations as either unnecessary or excessive. *Id.* at 16-19. Employer responded, objecting to a total of 54.2 hours of itemized time entries as being excessive, unnecessary, duplicative, vague, and/or administrative. Employer/Carrier's Objections to Claimant's Counsel's Fee Petition Before the Office of Administrative Law Judges (ER Obj.) at 3-7. In addition, Employer objected to counsel's requested hourly rate, asserting "precedent . . . supports . . . hourly rates that do not exceed $385.00/hour for Claimant's counsel, $320.00 for Claimant's counsel's junior partners, $225.00 for Claimant's counsel's associates, and $125.00 for Claimant's counsel's paralegals." *Id.* at 9-13. On March 7, 2022, Claimant's counsel filed a 26-page reply to Employer's objections, for which he requested an

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

[2] Counsel did not seek any costs.

additional 8.4 hours of fees.[3] Claimant's Reply to Employer/Carrier's Objection to Claimant Counsel's Fee Petition (Cl. Reply).

The ALJ issued an Order Awarding Attorney's Fees (Fee Order) on March 31, 2022. She struck counsel's reply brief, finding he failed to properly request leave to file it. Fee Order at 2, n.1 (citing 29 C.F.R. §18.33(d) as stating reply filings are not allowed unless the ALJ orders otherwise). She found counsel failed to demonstrate entitlement to a market rate of $500 per hour, instead awarding $450 per hour. Fee Order at 4. Likewise, she reduced the rate for Mr. Zobec to $300 per hour, as he only had ten years of experience in Longshore matters and only billed 0.4 hour on this claim. *Id*. She declined to assess a market rate for either Mr. Lerner or Ms. Chavez, as the fee petition failed to include discussion of their professional status and the small amount of time billed for each was disallowed for other reasons.[4] *Id*.

The ALJ thereafter reviewed counsel's itemizations, as well as each of Employer's objections, and reduced counsel's requested fee by 35.6 hours as excessive, unnecessary, clerical, and/or duplicative. Fee Order at 7-16. In addition to reductions based on Employer's objections, the ALJ made 4.6 hours of reductions based on her own review of the itemizations. *Id*. In all, the ALJ awarded fees in the amount of $36,990 for work performed by Mr. Barnett (82.2 hours x $450 per hour) and $120 for work performed by Mr. Zobec (0.4 hour x $300 per hour), for a total award of $37,110. *Id*. at 16.

Claimant's counsel timely sought reconsideration of the ALJ's fee award. Claimant's Motion for Reconsideration of Order Awarding Attorney's Fees (M/Recon.). He pointed out the ALJ's failure to address his request for the production of Employer's billing records and argued the ALJ should have provided him with notice and an opportunity to respond to her *sua sponte* reductions of 4.6 hours of itemizations. M/Recon at 2-3. Further, he maintained the ALJ improperly reduced entries based on speculation, and also requested the ALJ order Employer to "provide a copy of documents prepared by [counsel] which they find objectionable." *Id*. at 3-4. Lastly, counsel requested the ALJ reconsider her denial of time for submission of a reply to Employer's objections. *Id*. at 4.

[3] Counsel indicated he incurred 9.7 total hours of time reviewing Employer's objections and drafting a reply; however, he deducted 1.3 hours from that time, conceding Employer validly objected to 1.3 hours-worth of itemized time entries in his original fee petition. Cl. Reply at 22, 25-26.

[4] Counsel's itemizations included 0.1 hour attributed to Mr. Lerner and 0.1 hour attributed to Ms. Chavez. Fee Order at 6.

The ALJ issued an Order Denying Reconsideration (Recon. Order) on April 21, 2022. She rejected counsel's argument that the billing reductions lacked evidentiary support, finding the burden was on counsel to submit an adequate fee petition. Recon. Order at 2. Furthermore, she declined counsel's request to order Employer to produce its billing records, finding the burden was on counsel to prove entitlement to reasonable fees. *Id*. at 2-3. Finally, she re-emphasized her position that counsel was not permitted to file a reply brief unless the ALJ granted permission for counsel to do so, and therefore refused to reconsider her disallowance of time for counsel's reply to Employer's objections. *Id*. at 3.

Claimant's counsel appeals both orders, claiming the ALJ erred in striking counsel's reply to Employer's objections to his fee petition; calculating his hourly rate; reducing 4.6 hours of itemizations *sua sponte* without giving counsel notice and the opportunity to respond; and denying his request to order Employer to produce its billing records. Petition for Review (PR) at 4. Employer responds, urging affirmance, and counsel submitted a reply.

Counsel's Reply to Employer's Objections

The ALJ relied upon the Office of Administrative Law Judges (OALJ) Rules of Practice and Procedure (OALJ Rules), 20 C.F.R. §18.10 *et seq*., to find a party may file a reply brief only with the ALJ's permission. 29 C.F.R. §18.33(d) ("Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing."). As counsel had not requested permission prior to filing his reply, the ALJ struck it from the record. Fee Order at 1.

Counsel argues the ALJ erred in striking his reply to Employer's objections, and in disallowing time spent on the reply, as the regulation upon which she relied applies to motions "filed prior to a hearing."[5] PR at 9. We agree. The regulation the ALJ cited to

[5] 29 C.F.R. §18.33(d) (emphasis added) states:

> (d) *Opposition or other response to a motion filed* ***prior to hearing***. A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. **Unless the judge**

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

However, the ALJ's refusal to consider counsel's reply to Employer's objections constitutes harmless error, considering her thorough review of both parties' market rate evidence and the itemized fee entries. In his reply brief, Claimant's counsel argued Employer's market rate evidence was insufficient to establish that counsel's requested rate was unreasonable. Cl. Reply at 7-15. Despite refusing to consider Claimant's reply brief, the ALJ came to a similar conclusion, finding the rates Employer relied upon from the *2018 Real Rate Report* and Florida Bar Survey unhelpful as they were not specific to a particular geographic area and failed to differentiate between different practice areas, respectively. Fee Order at 5-6. She also determined the ALJ fee awards upon which Employer relied awarded rates at the lower end of the range of prevailing market rates based on facts distinguishable from the case before her. *Id*. at 5.

The remainder of counsel's reply brief addressed Employer's objections to specific time entries.[6] Cl. Reply at 22. Despite striking counsel's reply brief, she evaluated each entry in terms of the appropriate standard and made reductions for those entries which she determined were not reasonable and necessary, while awarding fees for the remaining entries. Thus, counsel has not established reversible error in the ALJ's refusal to consider the specific arguments he raised in the reply brief. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 956, 41 BRBS 53, 57(CRT) (9th Cir. 2007); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

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directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.

[6] In addition to responding to each individual objection, counsel conceded to a few of Employer's objections to his fee petition and, to account for those hours, agreed to deduct 1.3 hours of time for his reply. Counsel excluded 1.1 hours for duplicative entries, 0.1 hour for an entry that detailed unnecessary work, and 0.1 hour for an entry that detailed administrative work. Exhibit C to Cl. Reply at 1, 3, 8, 17. The ALJ independently disallowed all of these same entries. Fee Order at 9-11, 13-14.

Nevertheless, while the ALJ's failure to consider the arguments in counsel's reply brief to Employer's objections is harmless, her refusal to evaluate counsel's entitlement to fees for time spent on that reply is not. Counsel requested fees for an additional 9.7 hours of time spent reviewing and responding to Employer's objections, minus 1.3 hours to which counsel conceded Employer had properly objected., Cl. Reply at 22, 25-26, and which the ALJ independently disallowed, Fee Order at 9-11, 13-14. It is well established that a claimant's attorney is entitled to a fee for defending a fee award. *See generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982). In this respect, the Board awards a fee for a "reasonable" reply to employer's objections to a fee petition. *See, e.g., Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009) (disallowing a portion of the fee requested for work on a reply brief when the response was disproportionate to the objections); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Here, the ALJ made no determination as to the reasonableness of counsel's reply. Thus, we vacate the ALJ's denial of the entire 9.7 hours[7] counsel claimed for preparing his reply to Employer's objections and remand the case for the ALJ to consider counsel's request for fees for entries relating to the defense of his fee petition.[8] *Bogdon v. Consolidation Coal Co.*, 44 BRBS 121 (2011).

Hourly Rate

Counsel argues the ALJ improperly discredited appellate fee awards submitted as evidence of a market rate and based her decision solely on prior ALJ fee awards. PR at 26-28. Employer argues the awarded rate of $450 per hour is reasonable and should be affirmed. Emp. Response Br. at 16-19.

The Supreme Court of the United States has held the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a

[7] As the ALJ independently disallowed the 1.3 hours counsel conceded should be disallowed, without consideration of the reply brief, this amount should not again be deducted from counsel's request for fees associated with his reply.

[8] The ALJ retains discretion to determine whether work is reasonable and necessary. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds); *Picinich v. Lockheed Shipbuilding Co*., 23 BRBS 128, 130-131 (1989).

federal fee-shifting statute such as the Longshore Act. *See Perdue v. Kenny A*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992). The Court has also held an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Perdue*, 559 U.S. at 551. Once the ALJ accepted the parties' agreement that Fort Lauderdale/Miami/South Florida is the relevant community for determining counsel's hourly rate, *see* Fee Order at 4-5, the burden was on Claimant's 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." *Blum*, 465 U.S. at 896 n.11; *see Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

The ALJ found counsel failed to carry this burden with respect to his requested hourly rate of $500. Fee Order at 4. She relied primarily on both parties' evidence of prior ALJ fee awards to find counsel entitled to a market rate of $450 per hour. *Id.* at 4-6.[9]

[9] Contrary to counsel's contention, the ALJ did not err by specifically rejecting counsel's submitted evidence of one prior Board-awarded rate because "appellate work is significantly different from trial work" and "may justify a higher rate." Fee Order at 4-5. Counsel cites *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066 n.3, 55 BRBS 1, 3 n.3(CRT) (9th Cir. 2021), and *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1089, 49 BRBS 93, 96-97(CRT) (9th Cir. 2015), as requiring the ALJ to consider evidence of fees awarded for appellate work and argues the ALJ's failure to "deviat[e] from that norm" constitutes reversible error. PR at 26-27. However, neither *Seachris* nor *Shirrod* mandate an ALJ consider rates awarded at the appellate level in determining a relevant market rate for work performed at the hearing level. Rather, the Ninth Circuit in *Seachris* indicated an appellate-level fee award "*may* be treated as persuasive authority," *Seachris*, 994 F.3d 1066 n.3, 55 BRBS 1, 3 n.3(CRT) (emphasis added), and in *Shirrod* found the ALJ erred in disregarding a specific BRB fee award as "less instructive" than fees awarded for trial or hearing level work, when the decision had relevance to the facts before him beyond merely showing a previously awarded rate, *Shirrod*, 809 F.3d at 1090-1091, 49 BRBS at 98(CRT) (citing *Christensen v. Stevedoring Servs. of Am.*, 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Servs. of Am. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011)). It is within the ALJ's broad discretion to find ALJ-awarded hourly rates more probative and comparable to the trial or hearing level work performed before her than past awards for appellate-level work, especially considering the Board has recognized "[h]ourly rates for the same attorney can vary from case to case and, within one case, from level to level." *Christensen*, 44 BRBS at 76. The ALJ gave a valid explanation for her rejection of one Board-awarded fee as evidence of a market rate, and we decline to disturb this finding. *See generally McDonald*, 45 BRBS 45.

Although courts caution against summary reliance on prior fee awards where more direct evidence of the market rate is available,[10] the ALJ thoroughly analyzed the market rate evidence under applicable law and provided a rational basis for her proxy market rate determination, which she found supported the prior fee award evidence. *See Shirrod v Director, OWCP*, 809 F.3d 1082, 1089, 49 BRBS 93, 96-97(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 44 BRBS 39, 40, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011). The ALJ found the *2018 Real Rate Report*, which both parties submitted as market rate evidence, demonstrated a range of hourly rates based upon various combinations of geographic location, practice area, and years of experience. Fee Order at 5. Excluding all rates calculated without consideration of geographic location (i.e., Miami),[11] the ALJ found the *2018 Real Rate Report* market rates ranged from $304 to $350 per hour for the bottom 25% percent of practitioners, from $450 to $463 per hour for practitioners in the median range, and from $555 to $631 for the top 25% of practitioners. *Id*. She found the prior ALJ-awarded hourly rates, "which are specific to Longshore work and are more informative on this issue," did not comport with the rates awarded to the top 25% of practitioners, but the awarded rate of $450 per hour fell "squarely" within the range of rates for practitioners at the median level. *Id*.; *Seachris v. Brady Hamilton Stevedore Co*., 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021) (placing counsel in either the 75th or 95th percentile "was a judgment call that the ALJ could reasonably have resolved either way").

As the ALJ considered all relevant rate evidence before her, *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009), and adequately explained her rationale for assessing the fee, we affirm her calculation and determination of the hourly market rate. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014); *Holiday v. Newport*

[10] *See Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054, 43 BRBS 6, 8(CRT) (9th Cir. 2009) (courts that "recast fee awards . . . into 'market' rates" engage in "a tautological, self-referential enterprise"); *Farbotko v. Clinton City of New York*, 433 F.3d 204, 208 (2d Cir. 2005) ("'[A] reasonable hourly rate' is not ordinarily ascertained simply by reference to rates awarded in prior cases."); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 54 BRBS 13, 14-15 (2020).

[11] The ALJ specifically considered the rates partners practicing in Miami earned without regard to practice area, rates partners with over 21 years of experience practicing in Miami earned, and rates general practitioners of employment and labor law practicing in Miami earned. Fee Order at 5.

News Shipbuilding & Dry Dock Co., 44 BRBS 67 (2010); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Keith v. Gen. Dynamics Corp.*, 13 BRBS 404 (1981).[12]

Billing Reductions – Original Fee Request

Counsel contends the ALJ erred in independently disallowing 4.6 hours of itemized time entries, outside of those to which Employer objected, without first allowing him to respond to each alleged deficiency. PR at 14. For support, he relies on several cases purportedly requiring an ALJ to give notice and an opportunity to respond before making *sua sponte* reductions to a fee award.[13] However, in each of the cases counsel cites, the fee award reductions were made pursuant to issues and/or evidence independently introduced into the proceedings by the fact-finder.[14] That is not the case here, where the reductions

[12] We affirm the basis of the hourly rates awarded to Mr. Zobec as unchallenged on appeal. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[13] *Pickett v. Sheridan Health Care Center*, 664 F.3d 632 (7th Cir. 2011); *Vincent v. Commissioner of Social Security*, 651 F.3d 299 (2d Cir. 2011); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *Abassi v. Mission Essential Personnel*, BRB No. 17-0059 (Sept. 28, 2017); and *Yunis v. Academi, LLC*, BRB No. 17-0058 (Sept. 18, 2017).

[14] In *Pickett*, 664 F.3d 632, the lack of notice requiring remand involved an hourly rate reduction due to the presence of a contingency fee agreement, the court's application of evidence neither party submitted in calculating an hourly rate, and a post-opinion decision reversing the award of fees to outside counsel. *Id*. at 652. The United States Court of Appeals for the Seventh Circuit found that "[a]lthough plaintiff had the opportunity to support the requested fee award through briefs and exhibits, plaintiff was deprived of the opportunity to respond to the reasons that the district court ultimately relied on when reducing the fee award." *Id*. at 652-53. In *Vincent*, 651 F.3d 299, the district court significantly reduced attorneys' fees awarded pursuant to the Equal Access to Justice Act (EAJA) following an administrative denial of Social Security Disability benefits due to the claimant's lack of credibility. The district court held the claimant's attorney's failure to develop the administrative record constituted a "special circumstance" warranting a reduction of fees under the EAJA. The United States Court of Appeals for the Second Circuit disagreed, holding "Social Security claimants cannot be penalized with a reduction in attorney's fees for failing to address issues collateral to the disability determination [i.e., credibility] as to which counsel had no notice." *Id*. at 306. In *Baumler*, 40 BRBS 5, the Board held the ALJ erred by raising *sua sponte* the issue of compensability of the claimant's attorney's travel charges, and summarily concluding the counsel's travel was unreasonable, without first providing the claimant the opportunity to present evidence

counsel contests were made pursuant to the ALJ's permissible evaluation of the information he submitted in his fee petition. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). As such, the ALJ's independent reductions of itemized entries do not violate due process but rather comport with her responsibility to award a reasonable fee. 33 U.S.C. §928(a); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). We therefore decline to set aside the ALJ's reductions on those grounds.

We also reject counsel's contention that the ALJ erred by failing to apply a presumption of reasonableness to counsel's itemized time entries and by failing to place the burden on Employer to prove the itemized entries are unreasonable. PR at 16-17. There is no presumption that a fee applicant's itemized time entries are reasonable. Rather, the fee applicant must provide a "complete statement of the extent and character of the necessary work done" and bears the burden of supplying evidence to support the reasonableness of the fee request. *See* 20 C.F.R. §702.132(a). If the ALJ determines the hours claimed are "reasonable" for the "necessary work done" in the case, and the fee is commensurate with the degree of success obtained, then the work is compensable. *Id*.; *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). To reach a reasonable fee, the ALJ has the discretion to disallow hours found to be duplicative, excessive, or unnecessary, and is afforded "considerable deference" in doing so, as she is in the best position to make this determination given her superior understanding of the underlying litigation. *See generally Tahara*, 511 F.3d at956, 41 BRBS at 57(CRT); *see also Fox v. Vice*, 563 U.S. 826, 838 (2011).

The burden of showing an ALJ's award is arbitrary, capricious, or an abuse of discretion is on the party challenging the award, which in this instance is Claimant. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980); *Branda v. Universal Mar. Serv. Corp*., 7 BRBS 546 (1978); *McCue v. Int'l Terminal Operating Co.*, 4 BRBS 235 (1976). The ALJ reduced counsel's time itemizations by 35.6 hours, finding the objectionable entries to be excessive, clerical, and/or duplicative, and sufficiently explained each reduction.[15] *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *Welch*, 23 BRBS 395. Given

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regarding the availability of competent counsel within his geographic location. *Id*. at 7-8. In both *Abassi* and *Yunis*, BRB Nos. 17-0059 and 17-0058, the Board held the ALJ improperly relied on fee awards issued by federal district courts, none of which had been submitted as evidence of a market rate by either party, in calculating counsel's hourly rate.

[15] For instance, the ALJ disallowed all time incurred on July 23, 2020, for "Prep ltr to ALJ encl NOA," as it "appear[ed] to be a cover letter only. There is a separate billing entry for preparing the NOA itself, as such, this letter constitutes clerical work." Fee Order at 7. The AJ disallowed 0.6 hour incurred on November 3, 2020, for "Pre detailed ltr to

the considerable deference afforded the ALJ, counsel has not demonstrated an abuse of discretion with regard to these reductions. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *see generally Fox*, 536 U.S. at 838; *see also Hensley*, 461 U.S. 424; *Baumler*, 40 BRBS 5. Accordingly, we affirm ALJ's reduction of 35.6 hours of itemizations.

Finally, counsel argues the ALJ erred in rejecting his request that she require Employer to produce its own billing records prior to ruling on its objections, in order to lay a foundation of reasonableness. PR at 20-24. Section 27(a) of the Act grants the ALJ broad power to direct and authorize discovery in support of the adjudication process, including the production of documents. *See* 5 U.S.C. §556(c); 20 C.F.R. §§702.338 - 702.341; 29 C.F.R. §18.14 *et. seq.*; *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983); *Lopes George Hyman Constr. Co.*, 13 BRBS 314 (1981); *Sledge v. Sealand Terminals Inc.*, 14 BRBS 334 (1981). The ALJ's discovery power is discretionary, however, and a refusal to issue an order is reversible error only if it is so prejudicial as to result in a denial of due process. *Bonner*, 15 BRBS 321; *Carter v. Gen. Elevator Co.*, 14 BRBS 90 (1981).

Courts have split on the question of whether defense counsel's billing records are relevant to the determination of a prevailing plaintiff's entitlement to attorney fees under various federal fee-shifting statutes. Some circuits have found such information relevant and discoverable when the defense disputed the reasonableness of plaintiff's requested hours, when the underlying litigation was complex, lengthy, or presented novel issues, and/or when there is an absence of alternate evidence regarding the reasonableness of the plaintiff's fee request. *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566 (11th Cir. 1985); *Frommert v. Conkright*, 2016 WL 6093998 (W.D.N.Y. Oct. 19, 2016); *Mendez v. Radec Corp.*, 818 F.Supp.2d 667 (W.D.N.Y. 2011); *Pollard v. E.I. DuPont De Nemours & Co.*, 2004 WL 784489 (W.D. Tenn. Feb. 24, 2004); *Cohen v. Brown Univ.*, 1999 WL 695235 (D.R.I. May 19, 1999); *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 1996 WL 66111 (N.D. Ill. Feb. 13, 1996); *Murray v. Stuckey's Inc.*, 153 F.R.D. 151 (N.D. Iowa 1993). Other courts have acknowledged evidence of a defense counsel's billing records as potentially relevant but have declined to order their production because other evidence of reasonableness was available and/or exclusion served the purpose of avoiding a second major litigation. *Hernandez v. George*, 793 F.2d 264 (10th Cir. 1986); *In re: Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984); *Johnson v. Univ. College of the Univ. of Alabama in Birmingham*, 706 F.2d 1205 (11th

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Clt re upcoming DME, obligation to testing, obligation to be truthful, etc.," finding it both duplicative and excessive because "[c]ounsel previously billed for a detailed letter to Claimant regarding the DME on 10/19/20, and billed for a telephone conference regarding the DME with Claimant on 10/20/20." *Id.* at 9.

Cir. 1983). Notably, courts have generally rejected attempts to obtain defense counsel's billing records as evidence of the prevailing market rate. *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 776 F.2d 646 (7th Cir. 1985). They also typically afford the trial court great deference in either allowing or rejecting their production. *Hernandez*, 793 F.2d 264; *In re: Fine Paper*, 751 F.2d 562; *Johnson*, 706 F.2d 1205; *Pollard*, 2004 WL 784489; *Cohen*, 1999 WL 695235; *Murray*, 153 F.R.D. 151.

Here, the ALJ rejected counsel's request to order the production of defense counsel's billing records, finding the information requested was irrelevant:

> Employer's counsel's billing is not before me and again, the burden to support the fee petition was on Claimant's counsel, not the defense. Furthermore, even if Employer's counsel inappropriately billed for clerical tasks as well, "two wrongs do not make a right," and this fact would do nothing to change the outcome here.

Recon. Order at 3.

The ALJ provided adequate rationale for her denial of counsel's request for production of Employer's counsel's billing records in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), and in consideration of the great deference afforded ALJs in either allowing or rejecting requests for their production. Thus, counsel has failed to show the ALJ's denial of his request for production was so prejudicial as to deny him due process. *Bonner*, 15 BRBS 321; *Carter*, 14 BRBS 90. We therefore affirm the ALJ's decision on the matter.

Accordingly, we vacate those portions of the ALJ's Order Awarding Attorney's Fees and Order Denying Reconsideration of Attorney Fee Award related to the denial of fees for time incurred reviewing and replying to Employer's objections to his original fee

petition and remand this case for further consideration of that limited issue consistent with this opinion. In all other respects, we affirm the ALJ's Order Awarding Attorney's Fees and the Order Denying Reconsideration of Attorney Fee Award.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge