U.S. Department of Labor

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

BRB No. 18-0070

PHYLLIS MATTHEWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Aug. 20, 2018
	)	
NAVY EXCHANGE SERVICE COMMAND	)	
	)	
	)	
and	)	
	)	
AS & G CLAIMS ADMINISTRATION, INCORPORATED	)	
	)	
	)	
Employer/Administrator-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Order Awarding Attorney's Fees and Costs and the Order Granting Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul Myers (Dupree Law), Coronado, California, and Lara D. Merrigan (Merrigan Legal), San Rafael, California, for claimant.

William N. Brooks (Law Office of William N. Brooks), Long Beach, California, for employer/administrator.

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

PER CURIAM:

Claimant appeals the Supplemental Order Awarding Attorney's Fees and Costs and the Order Granting Reconsideration (2014-LHC-00999, 01000, 01001) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*,

as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

On March 17, 2017, claimant's counsel, Eric Dupree, filed a petition for attorney's fees and costs totaling $160,167.42, representing 143.5 hours of Dupree's services at $500 per hour, 162.9 hours of Paul Myers's services at $300 per hour, and 160.6 hours of paralegal work at $150 per hour, plus $15,457.42 in costs. Employer filed objections. In his Supplemental Order Awarding Attorney's Fees and Costs (Supp. Order), the administrative law judge reduced the attorney hourly rates to $400 and $250, and denied time that he found was: for clerical work; duplicative; excessive; expended on an unsuccessful claim and two unsuccessful motions; and expended on an unclaimed psychiatric injury. Supp. Order at 5-10. The administrative law judge awarded claimant's counsel a fee of $101,875, representing 123.95 hours at $400 per hour, 125.9 hours at $250 per hour, and 138.8 paralegal hours at $150 per hour, plus costs of $14,838.42. *Id*. at 11. Both parties requested reconsideration. Relevant to this appeal, counsel's objections to the hourly rates awarded and itemized entries disallowed were summarily denied. Order Granting Reconsideration (Order) at 2-4.

On appeal, claimant challenges the hourly rates awarded for attorney work and the reduction of attorney time. Employer responds that the fee award should be affirmed. Claimant filed a reply brief.

The administrative law judge found that San Diego is the relevant community for determining the hourly rates. Supp. Order at 3; *see Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). He stated that three recent administrative law judge fee orders in Longshore Act cases,[1] awarding hourly rates from $400 to $425 for Dupree and $250 to $275 for Myers, were more persuasive than the fee awards claimant's counsel submitted from a district court and the Board. The administrative law judge found that declarations counsel submitted from maritime practitioners, William Dysart and John Hillsman, were "persuasive that the requested rates of $500 and $300 per hour are within the prevailing market rate." Supp. Order at 4. Additionally, the administrative law judge determined that these declarations and counsels' curricula vitae show that Dupree and Myers are "well-qualified." *Id*. The administrative law judge stated, however, that the requested hourly rates are in excess of those awarded in the three Longshore Act cases,

[1] *Grimm v. Vortex Marine*, 2012-LHC-00955 (Dec. 28, 2016); *Alexander v. Nexcom*, 2014-LHC-02014 (Dec. 5, 2016); *Dacaret v. NASSCO*, 2013-LHC-01512 (Jan. 22, 2016).

which, he stated, were decided less than five months prior to issuance of his Supplemental Order. He found that he is not required to make new hourly rate determinations when the prior awarded rates are based on current market conditions. *Id*. at 3-4. Moreover, the administrative law judge reasoned that the case was not "especially difficult or novel." *Id*. at 4. Accordingly, the administrative law judge awarded hourly rates of $400 for Dupree and $250 for Myers. *Id*.

We agree with claimant that the awarded hourly rates cannot be affirmed. The administrative law judge erred in stating that the three Longshore Act decisions to which he gave weight were issued within five months of his May 23, 2017 Supplemental Order, as the *Dacaret* fee award was issued on January 22, 2016, or approximately 16 months beforehand. *See* n.1, supra. Moreover, lack of complexity is not a factor in determining an hourly rate, but is instead relevant to the number of hours awarded. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 1048, 43 BRBS 11, 15(CRT) (9th Cir. 2009); *see also Sherman v. Dep't of the Army/NAF*, 43 BRBS 41 (2009). Contrary to the administrative law judge's finding, the administrative law judges in *Alexander* and *Grimm* did not determine the hourly rates based on then-current market conditions in San Diego and also gave weight, in part, to the lack of complexity of the cases.[2] *See* Employer's Objections at ex. 1 p. 10, ex. 2 pp. 18-21; *see generally Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

We also agree that the administrative law judge did not give an adequate reason for awarding hourly rates based on prior Longshore Act fee awards given that he found claimant's requested hourly rates of $500 and $300 to be "within the prevailing market rate" based on the "persuasive" Dysart and Hillsman affidavits. Supp. Order at 4. An attorney's hourly rate is to be calculated according to the prevailing market rates in the relevant community and "should be in line with [the rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Shirrod*, 809 F.3d at 1086, 49 BRBS at 95(CRT) (internal citations omitted). In *Christensen*, the United States Court of Appeals for the Ninth Circuit stated:

[2] In *Grimm*, the administrative law judge found that claimant's evidence set a market rate, but, based on the lack of complexity and three other 2016 administrative law judge decisions, he awarded hourly rates of $425 and $275. Employer's Objections at ex. 2 pp. 18-21. In *Alexander*, the administrative law judge gave weight to the lack of complexity, and relied on "his own experience and personal knowledge of fee rates and the practice of law." *See* Employer's Objections at ex. 1 p.10.

> the burden [is] on the fee applicant to produce evidence of the relevant market and the rate charged in that market. *In cases in which the applicant has failed to carry this burden*, it may be reasonable for the BRB to look at what ALJs and the BRB had awarded in other LHWCA cases in order to ascertain a reasonable fee.

Christensen, 557 F.3d at 1055, 43 BRBS at 9(CRT) (italics added);[3] *see Blum v. Stenson*, 465 U.S. 886 (1984). Here, the administrative law judge found some of claimant's market rate evidence "persuasive," yet did not rely on it because the rates were higher than counsel has received in other cases. Supp. Order at 4-5. However, as discussed above, the cases the administrative law judge relied on do not provide a basis for market-based hourly rate determinations. Therefore, we vacate the administrative law judge's hourly rate awards for claimant's counsel's work and remand the case for reconsideration of this issue. On remand, the administrative law judge must reevaluate the sufficiency of the parties' evidence to establish prevailing market-based rates for counsel's services, without regard to the complexity of the case, in accordance with law. *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT).

Claimant also avers that the administrative law judge's deduction of attorney time without reviewable explanation is contrary to the Administrative Procedure Act (the APA), 5 U.S.C. §557, and is an abuse of discretion. Claimant contends the administrative law judge erred by adopting employer's objections without sufficient explanation for disallowing time entries that he found were for clerical or unsuccessful work, duplicative, excessive, or unnecessary.

The administrative law judge stated he disallowed 65.45 hours from a total of 467 hours requested for attorney and paralegal time. Supp. Order at 2, 11. In its objections,

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[3] The court also stated:

> Nor do we insist that in every fee award decision the BRB must make new determinations of the relevant community and the reasonable hourly rate. But the BRB must make such determinations with sufficient frequency that it can be confident—and we can be confident in reviewing its decisions—that its fee awards are based on current rather than merely historical market conditions.

Christensen, 557 F.3d at 1055, 43 BRBS at 9(CRT).

employer challenged a total of 161 hours requested by claimant's counsel.[4] The administrative law judge listed only the specific items he disallowed in whole or in part, which resulted in his disallowing 18.1 hours as clerical, 8.7 hours as duplicative, 36.05 hours as excessive, and 14.1 hours as unnecessary or unsuccessful. *Id*. at 5-11.

In *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT), the Ninth Circuit stated:

> This court grants considerable deference to a district court's determination as to what hours are excessive, redundant, or otherwise unnecessary. The district court need only provide a 'concise but clear explanation of its reasons' for reducing the numbers of hours included in the fee award.

Id., 511 F.3d at 955-956, 41 BRBS at 57(CRT) (citations omitted). The court affirmed the district court's reduction of hours it stated were "duplicative" holding that this explanation was "sufficiently concise and clear to conclude that the district court did not abuse its discretion." *Id*. 511 F.3d at 956, 41 BRBS at 57(CRT). In this case, the administrative law judge similarly stated his rationale for disallowing specific entries as clerical, duplicative, excessive, unnecessary or unsuccessful. Supp. Order at 5-10. Moreover, contrary to claimant's contention, the administrative law judge did not wholly adopt employer's objections, but listed only those entries where he found employer's objection had merit. Accordingly, claimant has not met his burden of showing that the administrative law judge violated the APA or abused his discretion.[5] *Tahara*, 511 F.3d at 955-956, 41 BRBS at 57(CRT); *see also Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Claimant further asserts that some of the attorney time disallowed for unnecessary or unsuccessful services is not in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), as she was fully successful in obtaining permanent total disability compensation. Claimant challenges the administrative law judge's disallowance of time expended on

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[4] Employer contested 22.9 hours as clerical, 13.9 hours as duplicative, 98.6 as excessive, and 25.6 as unnecessary.

[5] We also reject counsel's assertion that the Board's decision in *Bell v. SSA Terminals, LLC*, BRB No. 13-0055 (Nov. 26, 2013), stands for the proposition that instructions to paralegals are "clerical" only if the ultimate task to be performed is clerical. We note that *Bell* is an unpublished decision and is not precedential. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Moreover, in that case, the administrative law judge's approval of time for instructing a paralegal to perform tasks the administrative law judge considered non-clerical was not an issue before the Board; the Board addressed only the items disallowed as "clerical."

unsuccessful motions and the compensability of the work pertaining to Dr. Korsh's referral to Dr. Moon for pain treatment. Claimant contends the administrative law judge erroneously disallowed compensable entries related to these physicians, whose opinions regarding claimant's post-surgery work restrictions were integral to the administrative law judge's permanent total disability finding. We disagree.

In *Hensley,* 461 U.S. 421, the Supreme Court stated that if a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, multiplied by a reasonable hourly rate, may result in an excessive award. The Court stated that the most critical factor is the degree of success obtained. *Hensley,* 461 U.S. at 437. The courts have recognized the broad discretion of the factfinder in assessing the amount of an attorney's fee pursuant to *Hensley* principles. *Id.* at 436*; see, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988).

In this case, the administrative law judge disallowed eight hours for time expended on two unsuccessful motions.[6] Claimant concedes that these motions were unsuccessful. Moreover, this time is severable from work on fully successful issues. Thus, we affirm the administrative law judge's denial of the time expended as within his discretion. *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT); *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992).

Claimant also appeals the administrative law judge's denial of 1.7 hours for time related to claimant's unsuccessful attempt to have Dr. Korsh designated as claimant's treating physician.[7] Claimant has not established that the administrative law abused his discretion in this regard. Contrary to claimant's contention, at least one entry specifically refers to the "treating M.D. issue" (Feb. 23, 2012). The vagueness of the other entries referencing Dr. Korsh in the two weeks before this entry do not provide a basis for us to overturn the administrative law judge's permissible conclusion that they also are not compensable. *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT).

[6] Claimant challenges the denial of: 2.7 hours on December 23, 2011, .1 of an hour on January 6, 2012, 1.7 hours on August 23, 2012, 3.8 hours on August 24, 2012, and 1.2 hours on September 18 and 19, 2012.

[7] Claimant challenges the denial of .6 of an hour on February 2, 2012, .2 of an hour on February 13, 2012, .3 of an hour on February 21, 2012, and .6 of an hour on February 23, 2012.

Accordingly, the hourly rates awarded for attorney work are vacated. The case is remanded for the administrative law judge to award market-based rates consistent with law. In all other respects the administrative law judge's Supplemental Order Awarding Attorney's Fees and Costs and the Order Granting Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge