U.S. Department of Labor

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

BRB No. 18-0327

ANGELA C. AGUILAR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/20/2018
NAVY EXCHANGE SERVICE COMMAND	)	
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal) and Steven M. Birnbaum (Law Offices of Steven M. Birnbaum, P.C.), San Rafael, California, for claimant.

David L. Doeling (Aleccia & Mitani), Long Beach, California, for self-insured employer.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2014-LHC-00238) of Administrative Law Judge Jennifer Gee 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. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

The administrative law judge issued a Decision and Order awarding claimant benefits in April 2016; the decision was not appealed. In May 2016, claimant's counsel filed a fee petition with the administrative law judge to which employer filed objections. On August 2, 2016, counsel requested an extension of time to file a reply brief, and on August 19, 2016, counsel notified the administrative law judge that a motion for modification of the award on the merits was forthcoming. Counsel requested the fee proceedings be "indefinitely continued" until modification proceedings were completed. The administrative law judge denied the request, and counsel filed a reply to employer's objections. Fee Order at 2-3.

For work performed before the administrative law judge, counsel requested an employer-paid fee of $45,297, representing 73.15 hours of his time at $525 per hour, and 35.35 hours of paralegal and law clerk time at $195 per hour. He also requested reimbursement of costs in the amount of $3,516.50. In her Fee Order, dated March 19, 2018, the administrative law judge determined that Hawaii is the relevant market. In awarding counsel an hourly rate of $350, she rejected counsel's and employer's rate evidence and instead relied on her decision in *Anderson v. Hawaii Stevedores, Inc.*, 2011-LHC-01015 (Dec. 29, 2016), *recon. denied* (Feb. 3, 2017), *aff'd*, BRB No. 17-0281 (Oct. 31, 2017), *appeal dismissed* 17-73512 (9th Cir. Oct. 29, 2018).[1] She also awarded $100 per hour for paralegal time and $75 per hour for law clerk time. Fee Order at 7-21. Thereafter, she addressed employer's objections to specific itemized entries, reduced the fee by half for limited success pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and awarded counsel an employer-paid fee of $10,880.31. She also denied all costs due to the lack of invoices and receipts supporting the request for reimbursement. *Id.* at 22-35.

[1] The administrative law judge also considered more recent fee decisions from the United States District Court for the District of Hawaii and determined that these cases do not "change the picture of the Hawaii legal market" she identified in *Anderson*.

Claimant's counsel, Steven Birnbaum, appeals the fee award. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responded, urging the Board to reject counsel's Appointments Clause argument. The Director did not address the merits of the fee award. Counsel filed a reply brief.

Initially, counsel contends the administrative law judge's fee award should be vacated because she was not properly appointed under the Appointments Clause of the United States Constitution, Art. II, §2, cl. 2. *See Lucia v. Sec. & Exch. Comm'n*, 138 S.Ct. 2044 (2018). Counsel contends the fee award must be vacated and the case remanded for a properly-appointed administrative law judge to rule on the fee request. Employer and the Director respond that the issue was not timely raised in this case because it was not raised while the case was being decided on the merits or on claimant's pending motion for modification.

We agree that counsel's Appointments Clause challenge must fail. The Act's regulations require that an attorney's fee petition is to be determined by the administrative law judge before whom the services were rendered if she is available to do so. 20 C.F.R. §702.132; *see Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977) (administrative law judge who heard the merits is in the best position to award a fee for the attorney's work). The determination of the amount of an attorney's fee is ancillary to proceedings on the merits of the case. Because counsel failed to challenge the administrative law judge's authority to render a decision on the merits of the case, he cannot now make an Appointments Clause challenge with regard to the fee award.[2] *See generally Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-756 (D.C. Cir. 2009).

Counsel next contends the administrative law judge erred in awarding a fee before addressing the merits of claimant's motion for modification of the initial decision. He asserts that any success on modification will affect claimant's overall success and counsel's entitlement to a fee for work performed in this case. Employer poses that counsel has over $10,000 in hand and would have to return it, with interest, and then await a decision on the motion for modification, leaving him without a fee for an indeterminate amount of time. Further, employer asserts that, even if claimant succeeds on modification, any services previously found to be unsuccessful in the initial case would not automatically "become successful."

[2] The Director correctly disputes counsel's assertion that *Lucia* represented a change in law such that this is the first opportunity to challenge the administrative law judge's authority. *See Freytag v. Comm'r*, 501 U.S. 868 (1991); *Luckern v. Richard Brady & Assoc.*, __ BRBS __, BRB No. 18-0123 (Oct. 30, 2018), slip op. at 3-4, n.3.

As the parties indicate, there is no rule requiring the administrative law judge to wait until modification proceedings are completed before awarding a fee for work performed during the initial proceedings. Indeed, even if the merits of a case are on appeal, the administrative law judge, within her discretion, may or may not issue a fee award. Although any fee award would not be enforceable until all appeals are exhausted and the claimant's success has been quantified, there is no error in taking either course of action. *Zaradnik v. The Dutra Group*, 52 BRBS 23 (2018); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). We reject counsel's argument that the administrative law judge's decision to award a fee based on the fee petition before her was in error because counsel deems it an inefficient use of resources. Counsel has not established that this is a reason for setting aside the fee award. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). This fee award in no way prevents counsel from submitting to the administrative law judge a fee petition for denied services if they contribute to claimant's success in the modification proceedings. 33 U.S.C. §928; *see generally Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

We also reject counsel's contention that the administrative law judge erred in finding Hawaii to be the relevant market in this case.[3] In *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1087, 49 BRBS 93, 96(CRT) (9th Cir. 2015), the Ninth Circuit stated that "a determination of the 'relevant community' in Longshore Act cases should focus on the location where the litigation took place." Specifically:

> Recognizing that the relevant decisionmaker has wide—but not unlimited—discretion when making attorney's-fee awards, *see Kenny A.*, 559 U.S. at 558, we ultimately left it to the BRB, ALJs, and District Directors to determine the "relevant community" and the prevailing market rates in that community, as long as the decisionmaker provides adequate justification. *Christensen*, 557 F.3d at 1055.

Shirrod, 809 F.3d at 1087, 49 BRBS at 95(CRT). The administrative law judge explained that claimant's residence is in Hawaii, her injury and treatment occurred in Hawaii, and the hearing was held in Hawaii. Fee Order at 6. These factors comport with *Shirrod* and provide "adequate justification" for the administrative law judge's finding that Hawaii is

[3] Counsel acknowledges the Board's decisions in *Anderson v. Hawaii Stevedores, Inc.*, BRB No. 17-0281 (Oct. 31, 2017), *appeal dismissed*, No. 17-73512 (9th Cir. Oct. 29, 2018), and *Orpilla v. Hawaii Stevedores, Inc.*, BRB No. 18-0079 (July 24, 2018), *appeal pending*, No. 18-72606 (9th Cir.), and states he is merely preserving the issue for appeal. *See also Martin v. Hawaii Stevedores, Inc.*, BRB Nos. 18-0072/A (Sept. 13, 2018).

the relevant community, and we affirm this finding. *Shirrod*, 809 F.3d at 1087, 49 BRBS at 96(CRT).

Further, contrary to counsel's alternate argument, it is unnecessary to remand this case for the receipt of additional evidence from the parties regarding market rates in Hawaii. *Shirrod* gives the administrative law judge the discretion to resolve the issue, and "adequate justification" for her findings on applicable rates need not be based solely on the parties' evidence. *Shirrod*, 809 F.3d at 1087, 49 BRBS at 95(CRT); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (where applicant has failed his burden, may look to other awards). In this case, the administrative law judge based the awarded rates on fee awards from the United States District Court for the District of Hawaii. She reconsidered the cases she addressed in *Anderson* as well as several issued after *Anderson*. This constitutes "adequate justification." *Shirrod*, 809 F.3d at 1087, 49 BRBS at 95(CRT). Therefore, we affirm the hourly rates awarded by the administrative law judge as they are not challenged on appeal.[4] *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Lastly, counsel contends it was erroneous for the administrative law judge to deny reimbursement of all requested costs due to a lack of receipts and documentation. He asserts there is no requirement under the Act or regulations that he submit documentation supporting his request for the reimbursement of costs, so his fee petition was legally sufficient. 20 C.F.R. §702.132. He asserts that if the administrative law judge was going to hold him to such a strict standard, he should have been asked to provide the required documents before the administrative law judge disallowed the costs.

Employer objected to the request for the reimbursement of costs on the grounds that the request was not supported by receipts, invoices, or other documentation. The administrative law judge stated that counsel did not address this objection in his reply brief and, thus, submitted nothing in support of the request. After acknowledging that the Act and regulations do not specify how costs are to be submitted for reimbursement, 33 U.S.C. §928(d); 20 C.F.R. §§702.132, 702.135, and that local rules in the District of Hawaii require cost requests to be accompanied by receipts and invoices, the administrative law judge stated that attorneys are generally expected to keep "sufficiently organized file[s]" such that "they can provide some documentation of the amount." Fee Order at 34. Nevertheless, counsel's failure to submit receipts after having received notice via employer's objections to the fee petition weighed most heavily in her decision to disallow

[4] Counsel also does not challenge the hours allowed and the *Hensley* reduction. Consequently, these findings are affirmed as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

all costs.[5] *Id.*[6] The reasonableness of costs must be approved by the administrative law judge, 20 C.F.R. §§702.132, 702.135, and she must rule with specificity as to the cost items allowed or disallowed in an attorney's fee application. *Morris v. California Stevedore & Ballast Co.*, 8 BRBS 674 (1978). The administrative law judge has done so; she did not abuse her discretion in requiring documentation to establish the reasonableness of the request for costs. Thus, we affirm the administrative law judge's denial of reimbursement of costs due to lack of supporting documentation.

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[5] She stated:

> As a general matter, anyone seeking payment from another for expenses incurred is reasonably expected to have *something* that makes out what those expenses were. Claimant's Counsel did not produce any evidence in response to Respondent's reasonable request for some documentation, though he had an opportunity to do so in his response to Respondent's objections after failing to do so with his initial fee petition. * * * Claimant's Counsel has provided nothing, despite being given notice of the problem and a full opportunity to remedy the shortcoming. I therefore disallow all of the claimed costs because they are not documented in any way.

Fee Order at 34 (emphasis in original; internal footnote omitted).

[6] Counsel is correct that his fee petition and fee reply brief in this case pre-dated the administrative law judge's *Anderson* fee award and decision on reconsideration, and those decisions could not constitute "notice" to him. *See* Fee Order at 34 n.26. However, in addition to notice from employer's objections, the Board's decision in *Anderson*, affirming the administrative law judge's denial of costs for lack of supporting documentation, pre-dated the administrative law judge's fee award here, but counsel did not attempt to supplement his fee petition with the receipts.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge