U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0090
and 15-0127

TIMOTHY HEYDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHET MORRISON, INCORPORATED	)	
	)	DATE ISSUED: Feb. 27, 2015
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Motion for Reconsideration of the Benefits Review Board's Decision and Order and Appeal of the Order Awarding Attorney's Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr. (Soileau & Associates, L.L.C.), New Orleans, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant has filed a timely motion for reconsideration of the Board's decision in *Heyden v. Chet Morrison, Inc.*, BRB No. 14-0090 (Oct. 17, 2014) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer responds that claimant's motion should be denied. We grant claimant's motion for reconsideration for the reasons stated herein.

In its decision, the Board vacated the district director's denial of an attorney's fee

for the periods from October 24, 2006 to January 6, 2009, and June 7 to October 15, 2010, and remanded the case to the district director for reconsideration of counsel's entitlement to fees for those periods. Pertinent to claimant's motion for reconsideration, the Board noted that claimant raised, for the first time in his brief in support of his petition for review, arguments pertaining to the administrative law judge's award of an attorney's fee. *Heyden*, slip op. at 3, n.3. The Board declined to address claimant's contentions in this regard, as the Board had not received a notice of appeal, or any document that could be construed as such, of the administrative law judge's fee award within 30 days of the date the administrative law judge's fee order was filed by the district director.[1] *Id.*

Claimant's motion for reconsideration includes copies of his Notice of Appeal of the Administrative Law Judge's Order Awarding Attorney's Fees dated December 12, 2013, and United States Postal Service (USPS) certified mail receipts verifying the mailing of that document to both the Board and the Office of Administrative Law Judges (OALJ) on that date. The certified mail receipts indicate that the mailing was signed for by a representative of the OALJ on December 13, 2013, and by someone at the Department of Labor, though no date of signature/delivery was provided. Nonetheless, the USPS tracking slip shows that it was delivered to the zip code in which the Board has a post office box on December 17, 2013. Claimant has also included a copy of the OALJ Case Tracking System for his case which includes a notation of a "Filing Received" on December 13, 2013, described as "FILING BY CLAIMANT ATTY Isaac Soileau a Notice of Appeal."[2]

A notice of appeal to the Board from a decision or order must be filed within 30 days from the date upon which the decision or order has been filed. *See* 20 C.F.R. §802.205(a); *see also* 33 U.S.C. §921(a). The Board's implementing regulations further establish that, if the notice of appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, the notice of appeal will be considered to have been filed as of the date of mailing and that, if a postmark is not present or legible, a certificate of service and affidavits may be used to establish the mailing date. 20 C.F.R. §802.207(b). Moreover, the Board's regulations provide that a notice of appeal filed with another governmental agency or subdivision of the Department of Labor shall be considered filed with the Board as of the date it was

[1]The Board noted that the only notice of appeal it had received was limited to the district director's two orders and did not challenge the administrative law judge's award of an attorney's fee.

[2]The Office of Administrative Law Judges no longer has any material relating to this claim.

received by that entity, where it is in the interests of justice to do so. 20 C.F.R. §802.207(a)(2). In this case, the administrative law judge's Order Awarding Attorney's Fees was issued on November 15, 2013, and filed by the district director on November 18, 2013. Thus, in order to be timely, claimant's appeal had to be filed by December 18, 2013. 20 C.F.R. §§802.205, 802.221. Claimant has sufficiently established that his appeal of the administrative law judge's fee award was mailed on December 12, 2013, and received by the OALJ, a subdivision of the Department of Labor, on December 13, 2013. His appeal of the administrative law judge's order, therefore, is timely. *Id.* Consequently, we modify our decision in BRB No. 14-0090 to reflect that claimant filed a timely appeal of the administrative law judge's Order Awarding Attorney's Fees.[3] Claimant's appeal of the administrative law judge's November 15, 2013 Order Awarding Attorney's Fees is assigned the Board's docket number, BRB No. 15-0127. Inasmuch as the parties' pleadings in BRB No. 14-0090 fully address claimant's contentions regarding the administrative law judge's fee award,[4] the appeal in BRB No. 15-0127 is fully briefed, and the briefing scheduled is now closed. Accordingly, we now address the merits of claimant's appeal in BRB 15-0127.

Claimant appeals the Order Awarding Attorney's Fees (2011-LHC-02140) of Administrative Law Judge Clement J. Kennington 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (the Act). The attorney's fee award will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant obtained benefits under the Act for work-related injuries to his neck and shoulders via a settlement agreement with employer which was approved by the administrative law judge pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), on June 4, 2013.[5] Claimant's counsel thereafter sought an attorney's fee for services performed

[3]In all other regards, the Board's prior decision is affirmed.

[4]Claimant's petition for review and brief fully address his contentions regarding the administrative law judge's fee order. Employer extensively responded to each of claimant's arguments, see Opposition of Respondents to Claimant's Petition for Review dated May 30, 2014, at 9-21, to which claimant filed a reply and employer a sur-reply.

[5]Pursuant to the parties' agreement, claimant received $200,000 for disability benefits and a Medicare Set Aside to cover the costs of future medical care, and employer

before the administrative law judge totaling $95,944.85, representing 185.2 hours by Isaac H. Soileau, Jr., at an hourly rate of $250, 20.4 hours by Ryan Jurkovic at an hourly rate of $210, and 520.1 hours by paralegal John Helgason at an hourly rate of $80, plus costs and advances of $2,600.61. Employer filed objections to the fee petition.

In his Order Awarding Attorney's Fees, the administrative law judge approved the hourly rates requested by counsel, reduced the number of hours requested for the work of both attorneys and the paralegal, and denied all of the requested expenses. Specifically, the administrative law judge found claimant's counsel entitled to a fee for 98.2 hours of attorney services at an hourly rate of $250, for 6.3 hours of attorney services at an hourly rate of $210, and for 143.2 hours of paralegal services at an hourly rate of $80. Accordingly, the administrative law judge awarded claimant's counsel an attorney's fee, payable by employer, totaling $37,329.

On appeal, claimant's counsel contends he was not given an opportunity to defend his fee petition, alleging that the administrative law judge improperly refused to consider his reply to employer's objections. In his Order, the administrative law judge noted that claimant's counsel filed, on September 18, 2013, a reply to employer's objections but he declined to consider that brief "[s]ince no leave to file such a Reply was sought or granted." Order at 2. Counsel states that he spoke with the administrative law judge's "assistant" on September 4, 2013, regarding his wanting to file an extension of time in which to submit a reply to employer's objections. Counsel faxed a letter to the OALJ on September 13, 2013, requesting an extension of time in which "to file his reply to employer's objection to his fee petition until September 18, 2013," with "no objection from employer." Counsel thereafter filed his reply to employer's objections on September 18, 2013, within the extension period requested.

Claimant's counsel is entitled to reply to employer's objections to his fee petition, though he must exercise discretion in doing so. *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009). It appears that, contrary to the administrative law judge's statement, counsel did seek leave to file a reply to employer's objections, although he arguably did not file a formal petition for that purpose. Any error in the administrative law judge's decision to exclude claimant's reply, however, is harmless given the administrative law judge's meticulous review of the fee petition. The administrative law judge, in this case, did not just reduce the requested fees pursuant to employer's objections. He instead independently evaluated each entry in terms of the appropriate standard and made reductions for those entries which he determined were not reasonable

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assumed liability for unpaid medical treatment and out-of-pocket pharmacy bills amounting to approximately $12,000.

and necessary to the successful prosecution of claimant's longshore claim. Therefore, counsel has not established reversible error in the administrative law judge's refusal to consider his reply to employer's objections.

Counsel next contends that the administrative law judge's reduction of the requested attorney's fee by 61 percent is not reasonable in light of the results achieved by claimant through the efforts of his counsel. Counsel maintains claimant's "significant" success in obtaining a settlement, which included $200,000 for disability benefits, a Medicare Set Aside to cover the costs of future medical care, and employer's assumption of liability for unpaid medical treatment and out-of-pocket pharmacy bills amounting to approximately $12,000, is not indicative of partial or limited success and thus, should not result in the significant reductions made by the administrative law judge. Claimant further contends that the administrative law judge did not analyze the fee petition in light of the criteria of 20 C.F.R. §702.132(a).[6]

The Supreme Court of the United States held in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *See also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-36.

The administrative law judge did not reduce the fee requested in this case based on the degree of claimant's success, which, indeed, was significant. *See* n. 5, *supra*. While the administrative law judge's comprehensive analysis ultimately resulted in a 61 percent reduction in the requested attorney's fee, the administrative law judge provided reasons for each reduction. Specifically, the administrative law judge considered the quality of the representation and recognized that the fee petition contained entries that were for collateral services, such as claimant's Jones Act claim and his potential medical malpractice claim. Thus, the administrative law judge awarded counsel an attorney's fee for those services which the administrative law judge found were reasonably necessary to the success achieved in the pursuit of claimant's claim under the Act. In reaching his determinations, the administrative law judge provided specific reasons for disallowing

[6]This regulation states, inter alia, that the fee "application shall be supported by a complete statement of the extent and character of the necessary work done" and that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded."

entries for work: 1) on collateral services; 2) those which lacked specificity; 3) those which were unnecessary, excessive and/or duplicative; and 4) those which were clerical in nature; and he cited pertinent case law in support of those conclusions. We thus reject counsel's contentions that the administrative law judge did not sufficiently address his fee petition in terms of claimant's success and the appropriate regulations. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

Counsel also raises arguments pertaining to reductions made by the administrative law judge in the hours requested. Specifically, counsel challenges reductions made by the administrative law judge for time allegedly spent on his Jones Act claim, as well as for entries which the administrative law judge found lacked specificity, or were unnecessary, excessive, duplicative and/or clerical in nature. The administrative law judge may, within his discretionary authority, disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); 20 C.F.R. §702.132(a). An administrative law judge is afforded "considerable deference" in determining what hours are "excessive, redundant, or otherwise unnecessary." *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT). Given the administrative law judge's superior understanding of the underlying litigation, he is in the best position to make this determination. *Id.*; *see also Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011).

As noted above, the administrative law judge explained his reasons rationally and fully for disallowing various entries. *See* Order Awarding Attorney's Fees at 3-5; *see generally Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Counsel has not demonstrated an abuse of the administrative law judge's discretion and therefore we reject claimant's assertions of error. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *see generally Fox* 131 S.Ct. at 2216 ("[t]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection."); *see also Hensley*, 461 U.S. at 433 (where documentation is inadequate, fee award may be reduced); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006). Accordingly, we affirm the administrative law judge's award of an attorney's fee.

Counsel lastly contends that the administrative law judge's denial of all the requested costs in this case constitutes an abuse of his discretion. Counsel's fee petition is, as the administrative law judge found, vague in describing the costs for which he seeks reimbursement. In this regard, it merely lists costs, e.g., photocopy charges, postage, records request, copies, and advances, e.g., employment records, filing fee, courier fee, medical records, online legal research, deposition costs, PACER costs, along with the corresponding dollar figures expended for each. The administrative law judge found that

counsel did not provide any invoices or other information concerning the reasonableness and/or necessity of the expenses, or statement as to whether these expenses are related to the Jones Act claim or the Longshore Act claim. As the administrative law judge addressed the requested costs in terms of the appropriate standard, we affirm the administrative law judge's rejection of those costs due to the lack of specificity in the fee petition. 33 U.S.C. §928(d); 20 C.F.R. §702.135.

Accordingly, claimant's motion for reconsideration is granted. The Board's decision in BRB No. 14-0090 is modified to reflect claimant's filing of a timely appeal of the administrative law judge's fee award and that appeal is assigned BRB No. 15-0127. In all other respects, the Board's decision in BRB No. 14-0090 is affirmed. The administrative law judge's Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge