U.S. Department of Labor

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

BRB No. 17-0248

PHYLLIS MATHEWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	
	)	
	)	DATE ISSUED: Feb. 15, 2018
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree, Coronado, California, for claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for self-insured employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2011-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). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time this case is before the Board. The basic facts are not in dispute. On May 8, 2008, claimant sustained bilateral thumb injuries while working for employer. She returned to work on June 9, 2009.[1] On June 13, 2009, she sustained a lower back injury while lifting boxes at work. Claimant sought and received medical treatment for her back injury, and she attempted to work within her physical restrictions on four occasions. After each attempt, claimant stated that she was unable to perform her employment duties; she last worked for employer on April 22, 2010, and underwent back surgery on July 10, 2010. Claimant filed claims for both the thumb and back injuries.

On January 9, 2015, the administrative law judge issued a Decision and Order in which he found both injuries to be compensable. With regard to the May 9, 2008 bilateral thumb injury, the administrative law judge found that claimant's thumb conditions reached maximum medical improvement on May 10, 2010, and that she is entitled to 78 consecutive weeks of permanent partial disability benefits under the schedule, commencing on May 10, 2010, and running through November 8, 2011. With regard to the June 13, 2009 back injury, the administrative law judge found that light-duty work, within claimant's restrictions and paying her usual wages, was available at employer's exchange each time she returned to work and continued to be available until February 22, 2012, when Dr. Korsch increased claimant's permanent restrictions. As employer did not establish the availability of suitable alternate employment after this date, the administrative law judge awarded claimant continuing permanent total disability benefits beginning February 22, 2012.

Pursuant to claimant's appeal and employer's cross-appeal, the Board vacated the administrative law judge's finding that suitable alternate employment continued to exist at employer's exchange through February 2012, but affirmed the administrative law judge's decision in all other respects. *Mathews v. Navy Exch. Serv. Command*, BRB Nos. 15-0180 and 15-0180A (Feb. 17, 2016) (unpub.). Although the Board affirmed the administrative law judge's reliance on the testimony of claimant's supervisors to find that

[1] Claimant underwent surgery on her right thumb on July 31, 2008, and on her left thumb on November 13, 2008.

employer established the availability of suitable alternate employment at its facility during relevant periods, the Board vacated his finding that suitable employment continued to be available through February 22, 2012, as he did not address evidence that employer could not accommodate claimant's April 28, 2010 physical restrictions, or the effects of claimant's July 2010 back surgeries and attendant increase in restrictions. *Id.*, slip op. at 8.

On remand, the administrative law judge found that suitable alternate employment at employer's exchange ceased to exist on April 28, 2010. Accordingly, the administrative law judge modified his prior order to reflect that claimant's entitlement to continuing permanent total disability benefits for her unscheduled back injury commenced on April 28, 2010, rather than February 22, 2012. The administrative law judge also stated, "[e]mployer is entitled to a credit on the above award for all compensation previously paid," and "the [d]istrict [d]irector shall make all calculations necessary to effect this Decision and Order on Remand." Decision and Order on Remand at 10. Although this order arguably resulted in overlapping awards of total and partial disability benefits for claimant's unscheduled and scheduled injuries, the administrative law judge did not provide further findings regarding claimant's right to concurrent awards or how employer's credit was to be calculated.

On January 27, 2017, the district director issued a letter to the parties setting forth and explaining the calculation of benefits. The district director observed that employer had paid all benefits in accordance with the administrative law judge's initial Decision and Order, including the permanent partial disability awards under the schedule which ran from May 10, 2010 through November 8, 2011. However, as the administrative law judge's order on remand modified claimant's award of continuing permanent total disability benefits for her back injury to commence on April 28, 2010, the district director inferred that the scheduled award was to be suspended for the duration of the total disability award.[2] Thus, as employer had "advanced" compensation payments on the scheduled injuries, the district director credited these payments against the permanent total disability compensation owed on claimant's back injury. The district director explained that:

[2] As a general rule, an injured worker cannot receive concurrent awards of total and partial disability benefits; where a scheduled award overlaps with an unscheduled award for total disability, the scheduled award is suspended during the period of total disability and resumes once the disability is no longer total. *See, e.g., Fenske v. Serv. Employees Int'l, Inc.*, 835 F.3d 978, 50 BRBS 71(CRT) (9th Cir. 2016); *Bogden v. Consolidation Coal Co.*, 44 BRBS 43, 45 (2010).

> If Judge Johnson did not intend to give credit for all compensation that was previously paid, then these figures would be different, but his order reads that all prior payments are a credit to the employer/carrier.

District Director Letter (Jan. 27, 2017) at 3.

On appeal, claimant challenges the district director's calculation of employer's liability under the administrative law judge's order and award to employer of a credit for all compensation previously paid. Specifically, claimant contends the administrative law judge erred in failing to direct how the credit was to be applied and that credit for payments made on one claim cannot be applied to compensation due for an unrelated injury. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant that employer is not entitled to credit benefits paid on the thumb injury claims against benefits due on the back injury claim, and that the case should be remanded for the administrative law judge to clarify his order regarding any applicable credit due employer.

We agree with claimant and the Director that the administrative law judge erroneously awarded employer a credit for "all compensation previously paid," as a credit for payments made for claimant's scheduled injuries against benefits due for claimant's subsequent, unrelated back injury is not in accordance with law. Section 14(j) of the Act provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j). In *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993), the Board held that Section 14(j) may not be applied to credit advance payments of compensation for a prior injury against payments due for a subsequent, unrelated work injury, because the plain language of Section 14 as a whole references only a single injury. *Id*. at 223; *see also Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.*, 35 BRBS 112 (2001), *aff'd,* 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002) (employer may not credit excess disability benefits against liability for death benefits). As claimant notes, the Board has applied *Vinson* to a case with similar facts. *See Wiggins v. Huntington Ingalls, Inc.*, 50 BRBS 169(UBD), BRB Nos. 15-0350/A/B (Sept. 20, 2016) (unpub.) (reversing award of a Section 14(j) credit because the injury for which the employer advanced compensation differed from that for which benefits were due).[3]

[3] In *Wiggins*, the claimant suffered successive work injuries and the employer fully paid the scheduled award prior to the issuance of an overlapping total disability award for a subsequent non-scheduled injury. The Board clarified that the inapplicability

Consequently, as the administrative law judge's award of a credit to employer for "all compensation previously paid," and the district director's calculation of the credit due employer, are not in accordance with law, we vacate them. *Vinson*, 27 BRBS 220. We remand the case to the administrative law judge for findings regarding the amount of the credit to which employer is entitled, consistent with *Vinson*.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in the prior appeals, BRB Nos. 15-0180/A. Counsel seeks a fee of $26,640, representing 81.80 hours at an hourly rate of $300 for the work of Paul Myers and 4.20 hours at an hourly rate of $500 for the work of Eric Dupree. Employer objects to the hourly rates and number of hours requested. Counsel replied, withdrawing the request for .20 hours ($60) of Myers's services on March 2, 2017, and filed a supplemental fee petition for 10.30 hours of Myers's time at an hourly rate of $300 ($3,090) and .20 hour of Dupree's time at an hourly rate of $500 ($100) for preparing the reply. Thus, counsel seeks a total fee of $29,770 for work performed before the Board in the prior appeals.

With respect to the hourly rates, the United States Supreme Court has held that an attorney's reasonable hourly rate in a fee-shifting statute is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that a "reasonable" hourly rate must reflect the rate: (1) that prevails in the "community" (2) for "similar" services (3) by an attorney of "reasonably comparable skill, experience, and reputation." *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 1055, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *see also Christensen v. Stevedoring Services of America*, 43 BRBS 145, 146 (2009), *modified in part on recon.*, 44 BRBS 39, *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); 20 C.F.R. §802.204(d)(4).

In this case, both counsel and employer agree that the relevant geographic market is San Diego, where counsel maintains his office and the hearing was held. Fee Pet. at 5;

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of Section 14(j) did not render claimant entitled to concurrent partial and total disability awards. The Board explained that, although the administrative law judge found the claimant was not entitled to concurrent total and partial disability awards, both injuries were separately and fully compensable; therefore, in the hindsight afforded by the subsequent claim's overlapping award, the "employer's payment of the scheduled awards must be viewed as having been made prematurely." *Wiggins*, 50 BRBS at 174(UBD), slip op. at 10.

Obj. at 2. Thus, counsel must establish that the rates requested, $300 per hour for Myers's services and $500 per hour for Dupree's services, represent market rates for similar services in the San Diego market. *Christensen*, 557 F.3d at 1053, 43 BRBS at 8(CRT); *see Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

In support of the claimed hourly rates, counsel submitted the resumes of Myers and Dupree; prior fee awards issued by the Board,[4] Ninth Circuit,[5] and United States District Court of Northern California;[6] an excerpt from the 2008 Survey of Law Firm Economics published by Altman & Weil (Altman-Weil Survey);[7] an excerpt from the 2013-14 United States Consumer Law Attorney Fee Survey Report, authored by Ronald L. Burdge, Esq., (Consumer Law Survey);[8] and declarations from Attorneys Dysart, Hillsman, and Gillelan, attesting to the qualifications of claimant's counsel and the reasonableness of the requested rates. Employer responds that the requested rates are excessive and not in line with those prevailing in the San Diego community. Employer points out that recent hourly rate awards for counsel's services in the San Diego market ranged from $250-$300 for Myers and from $400-$450 for Dupree.[9] Thus, employer

[4] Counsel submitted *Grimm v. Vortex Marine Constr.*, BRB No. 14-0323 (Nov. 29, 2016) (unpub. Order), and *Fenske v. Serv. Employees Int'l,* BRB No. 13-0559 (Sept. 30, 2014) (unpub. Order), awarding Myers and Dupree hourly rates of $300 and $450 for their respective services in the San Diego market in 2013-2015. Fee Exs. 3, 5.

[5] Counsel submitted *Nasser v. Director, OWCP*, No. 09-70706 (9th Cir. Oct. 25, 2011), awarding Myers and Dupree hourly rates of $250 and $450, respectively, for their services rendered in 2009-2010 in the Southern California market. Fee Ex. 6.

[6] Counsel submitted *Carter v. Caleb Brett*, No. C 11-1472 RS, 2015 WL 1938431 (N.D. Cal. Apr. 28, 2015) (order after remand), awarding Myers and Dupree hourly rates of $300 and $500 for their respective services in 2011-2012. Fee Ex. 4.

[7] The excerpt provided indicates that the upper quartile average hourly billing rate for attorneys with 31, or more, years of experience was $539 in Los Angeles and $653 in San Francisco. Fee Ex. 10.

[8] The excerpt provided indicates that the average billing rates for consumer law attorneys with 31, or more, years of experience was $560 in Los Angeles and $558 in San Francisco. Fee Ex. 11.

[9] Employer submitted the prior fee awards in *Alexander v. Navy Exch. Serv. Command*, Case No. 2014-LHC-02014 (Dec. 5, 2016) (awarding Myers $275 per hour and Dupree $400 per hour), and *Grimm v. Vortex Marine Constr.*, Case Nos. 2012-LHC-00955, 00957, and 2016-LHC-01155, 01156 (Dec. 28, 2016) (awarding Myers $275 per

suggests that hourly rates of $275 and $425 are appropriate for Myers and Dupree, "given the rather straightforward nature of the issues raised on appeal." Obj. at 3.

We find that counsel has presented satisfactory evidence to establish market rates in San Diego of $300 for Myers and $450 for Dupree as the Board recently awarded counsel these rates for services they rendered in 2015.[10] Fee Pet. Ex 3; *Grimm v. Vortex Marine Constr.*, BRB No. 14-0323 (Nov. 29, 2016) (unpub. Order). Employer's reference to lower awards and assertion that this case lacked complexity does not refute this evidence. *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009) (complexity is not a market rate factor).

With respect to the number of hours billed, we agree with employer that .80 hour of Myers's time billed on June 12, 2015, is duplicative of Dupree's services on the same date. We disallow the time billed by Myers. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007). Additionally, we disallow, as excessive, half of the remaining 45.10 hours billed by Myers and 2.90 hours billed by Dupree for counsel's appellate brief,[11] i.e., we disallow 22.55 hours of Myers's time and 1.45 hours of Dupree's time. *See Hensley v. Eckerhart*, 461 U.S. 424, 435-436 (1983); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91, 94 (1999). We similarly disallow, as excessive, 8.95 hours of time Myers billed on July 21-29, 2015, for preparing counsel's reply to employer's

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hour and Dupree $425 per hour and referencing prior awards to Myers of $250 per hour and Dupree of $400 per hour.) Obj. Exs. 1-2.

[10] With regard to counsel's request of $500 per hour for Dupree's services, we note the fee evidence submitted shows he received $450 per hour in San Diego and $500 per hour in the San Francisco area for services rendered in 2015. The difference in hourly rate awards belies Attorney Hillsman's statement that market rates for attorney services are similar in San Diego, San Francisco, and Los Angeles. Consequently, we reject counsel's reliance on the fee awarded by a federal court in the San Francisco area as well as the billing data reported for San Francisco and Los Angeles in the Altman-Weil and Consumer Law Surveys. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

[11] Between April 13 and June 15, 2015, Myers billed 45.90 hours (which includes the .80 hour of duplicative time) and Dupree billed 2.90 hours of time for their appellate brief. Of the 17 pages counsel dedicated to challenging the administrative law judge's findings regarding the availability of suitable alternate employment, less than three pages concern his failure to consider relevant evidence, which was counsel's only meritorious contention. *See Hensley v. Eckerhart*, 461 U.S. 424, 435-436 (1983).

objections.[12] *See Hensley*, 461 U.S. at 435-436; *Fagan*, 33 BRBS at 94. We disallow, as clerical, 1 hour of time billed by Myers on March 10-11, 2015, to resolve his concerns regarding the validity of claimant's cross-appeal.[13] *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980). We disallow the .20 hour Myers billed on March 2, 2017, for "client walk-in and discuss appeal issues and possible settlement with client and Dupree," as counsel concedes this service does not relate to the prior appeal before the Board. Similarly, we disallow the .30 hour Myers billed on March 10, 2017, for the entry: "consider possible impact of subsequent appeal of concurrent bens issue on fee claim, note to file re same." Although counsel clarified in his response to employer's objection that the issue concerned "whether or not the new appeal tolled the deadline for fees on the prior appeal," the significance of counsel's assertion is unclear. The Board issued its prior decision on February 17, 2016; the described tasks are not wind-up services; and, they are not related to the preparation of or work defending counsel's fee for services. *See* 20 C.F.R. §802.203(d); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006). We reject employer's remaining objections, as we find the remaining time claimed on the initial fee petition to be reasonably commensurate with the necessary work done on this appeal.[14] 20 C.F.R. §802.203(e). Thus, we award an attorney's fee of $15,637.50 for the work itemized in the initial fee petition.[15]

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[12] Myers billed 17.90 hours of time to prepare his reply, less than two pages of which pertain to the administrative law judge's failure to consider relevant evidence.

[13] Resolution of counsel's concerns turned on verifying whether employer filed its appeal, a task which does not require independent legal judgment. Further, although this 1 hour is block-billed and includes time spent reviewing the Board's acknowledgement of claimant's appeal, time for this service is duplicative of the .20 hours Myers billed on March 23, 2015, for the same service. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007). We thus disallow the entire 1.0 hour of time billed on March 10-11, 2015.

[14] In so doing, we reject employer's assertion that the Supreme Court's decision in *Baker Botts, L.L.P. v. ASARCO, L.L.C.*, 135 S.Ct. 2158 (2015) precludes an award of an attorney's fee for time spent litigating the fee petition under the Act. *See Vortex Marine Constr. v. Grimm*, 878 F.3d 709 (9th Cir. 2017); *Clisso v. Elro Coal Co.*, 50 BRBS 13 (2016).

[15] (48 hours x $300/hour = $14,400) + (2.75 hours x $450/hour = $1,237.50) = $15,637.50.

With respect to counsel's supplemental fee petition, we disallow fees for clerical services and entries that were excessively billed.[16] We award a fee of $1,980.00, representing 6.60 hours of services rendered by Myers at his hourly rate of $300.

Accordingly, we vacate the administrative law judge's award of a credit to employer for all compensation previously paid and the district director's calculation of this credit. We remand the case to the administrative law judge to enter any credit award consistent with *Vinson*. We award claimant's counsel an attorney fee of $17,617.50 for work in BRB Nos. 15-0180/A, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

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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JONATHAN ROLFE
Administrative Appeals Judge

[16] With respect to Dupree, we disallow, as excessive, .20 hours of time billed on March 27, 2017, to review the objections and instruct Myers on the reply brief. Dupree did not work on the reply brief.

With respect to Myers, we disallow, as clerical, .30 hours of time billed on March 29, 2017, to review Board rules and calendar the fee reply. Additionally, we disallow, as excessive, the following time entries for April 4, 2017: 2.50 hours to finalize the reply brief; .10 hour to review time records for the supplemental fee petition; and .80 hour to prepare the supplemental fee petition.