U.S. Department of Labor

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

BRB Nos. 17-0332
and 17-0332A

AYOUB AHMED	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL LINGUIST SOLUTIONS	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	DATE ISSUED: Feb. 14, 2018
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Order Awarding Attorney Fees of Marco A. Adame II, District Director, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Jeffrey M. Winter (Law Office of Jeffrey Winter), San Diego, California, for claimant.

Robyn A. Leonard and Lisa G. Wilson (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals, and claimant cross-appeals, the Order Awarding Attorney Fees (Case No. 02-191082) of District Director Marco A. Adame II 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 Defense Base Act, 42 U.S.C. §1651 *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, 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).

On July 29, 2009, claimant sustained an injury to his back while working for employer in Iraq. On November 1, 2009, claimant returned to the United States, whereupon employer commenced paying him temporary total disability benefits. *See* 33 U.S.C. §908(b). On November 17, 2010, claimant filed a claim for work-related back and psychological conditions. In its Notice of Controversion, employer disputed its liability for claimant's alleged psychological condition, but acknowledged that it was continuing to pay claimant temporary total disability benefits. After the claim was transferred to the Office of Administrative Law Judges (OALJ), employer agreed to accept liability for claimant's psychological condition; consequently, on June 29, 2012, the claim was remanded to the district director. In 2015, a dispute arose between the parties regarding the nature and extent of claimant's disability.[1] On January 19, 2016, employer rejected the recommendations contained in the district director's Memorandum of Informal Conference, and the case was referred for a formal hearing to the OALJ. The parties subsequently entered into a settlement agreement which was approved by an administrative law judge on July 27, 2016. Claimant's counsel thereafter submitted a fee petition to the district director requesting $59,649.02 in attorney's fees and costs for work performed between June 23, 2012 and August 2, 2016. Employer filed objections to the fee petition. In his Order Awarding Attorney Fees, the district director awarded claimant's counsel $43,005.25 in attorney's fees and costs.[2] The district director held

[1] Since no compensation order had been issued once this claim was remanded to the district director in 2012, claimant's November 2010 claim remained open and viable. *See Petit v. Electric Boat Corp.*, 41 BRBS 7 (2007).

[2] The amount awarded to claimant's counsel represents: 1) 37.5 hours of services at $410 per hour, and .9 hours of services at $420.25 per hour, for a total of $15,753.23 for lead counsel; 2) 20 hours of services at $335 per hour, for a total of $6,700 for

employer liable for the fee pursuant to Section 28(a) because employer controverted the psychological injury claim in full and refused to pay medical benefits.

On appeal, employer challenges the district director's award of an employer-paid attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). The Director, Office of Workers' Compensation Programs (the Director), filed a brief in support of employer's contention of error. Claimant's counsel responds that the district director correctly held employer liable for his fee. BRB No. 17-0332. In his cross-appeal, claimant's counsel challenges the hourly rate awarded by the district director. BRB No. 17-0332A. Employer did not respond to this appeal.

Employer contends that, as it voluntarily commenced paying claimant temporary total disability and medical benefits for his back claim in November 2009 and accepted liability for claimant's psychological claim on June 22, 2012, Section 28(a) cannot be applied to hold it liable for claimant's attorney's fee during the period of August 2, 2012 through January 18, 2016.[3] In response, claimant asserts that, as employer controverted claimant's November 17, 2010, claim for a work-related stress condition, the district director's award of an employer-paid attorney's fee pursuant to Section 28(a) should be affirmed. For the reasons that follow, we affirm the district director's determination that Section 28(a) applies to this case.[4]

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associate counsel; 3) 21.6 hours of services at $105 per hour, for a total of $2,268 for counsel's paralegal; and 4) $18,284.02 in costs.

[3] Employer concedes that it is liable for claimant's counsel's attorney's fee through August 1, 2012, *see* Emp. Br. at 8, and a that controversy later arose on January 19, 2016, the date on which it rejected the recommendations contained in the Memorandum of Informal Conference.

[4] Section 28(a) states:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of the claim for compensation being filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a).

On the facts presented here, the issue of the applicability of Section 28(a) in this case is controlled by the Board's decision in *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017). In *Taylor*, an administrative law judge denied claimant's counsel an employer-paid attorney's fee under Section 28(a) because employer, although declining to pay disability benefits, had voluntarily commenced the payment of medical benefits within the 30-day period after receiving notice of the claim. The Board, in reversing this finding, agreed with the Director that the term "compensation" in Section 28(a) should be read as "disability and/or medical benefits" and thus, its precise meaning in the phrase "declines to pay any compensation" depends on what benefits are claimed and what benefits the employer paid or declined to pay in each case. *See Taylor*, 51 BRBS at 14. The Board adopted the interpretation of the Director that a claim under the Act may be made up of parts, *i.e.*, disability benefits, death benefits, medical benefits, and that, if any type of benefit is claimed and denied and legal services become necessary to obtain the denied benefit, the claimant is entitled to an employer-paid fee because the employer's denial caused the need for attorney involvement. *Id.* In this regard, the Board stated that,

> if both medical and disability benefits are claimed, and employer pays one but not the other type of benefit, the employer is liable for an attorney's fee if the claimant is later successful in obtaining the denied benefit. To hold otherwise is to reduce the claimant's successfully-obtained benefits, which the employer had denied, by the amount of his attorney's fee.

Id.

In this case, claimant filed on November 17, 2010 a claim seeking benefits for both "back and stress" injuries. *See* DX 4 (Cl. LS-203 Form, Claim for Compensation). Although employer paid claimant benefits for his back injury, it specifically declined to accept claimant's psychological condition as compensable.[5] *See* DX 6 (Emp. January 4, 2011 LS-207 Form, Notice of Controversion). Employer did not accept its liability for claimant's psychological claim until June 22, 2012. *See* DX 8. Thus, on the uncontested facts of this case, claimant's counsel successfully prosecuted the claim, obtaining for claimant benefits for a work-related psychological condition which had been wholly denied by employer after its receipt of the claim for that condition. Employer, therefore, is liable for claimant's attorney's fee pursuant to Section 28(a) of the Act. *Taylor*, 51 BRBS 11. Accordingly, the district director's finding that employer liable for claimant's counsel's fee pursuant to Section 28(a) of the Act is affirmed.

[5] Employer acknowledges on appeal that as a result of claimant's "psych claim in 2010 … a controversy developed over payment of medical benefits for the newly added condition." Emp. Br. at 12.

Employer also contends the district director erred in awarding claimant costs in the amount of $18,284.02. Claimant's counsel, in response, agrees that the costs awarded by the district director were paid by employer pursuant to a settlement agreement reached by the parties regarding his fees for services performed before the administrative law judge.[6] As the parties are in agreement on this issue, we reverse the district director's award of costs in the amount of $18,284.02.

In his appeal, claimant's counsel challenges the hourly rate awarded by the district director for his services. Counsel contends the district director erred in failing to calculate his attorney's fee based on his "current" hourly rate.[7] Claimant's counsel's contentions have merit and, for the reasons that follow, we modify the district director's Order.

Before the district director, claimant's counsel sought an hourly rate of $445 for services performed between August 2, 2012, and January 18, 2016. In response, employer argued that counsel should be awarded an hourly rate no greater than $395. In replying to employer's objections to his requested hourly rate, counsel adjusted a 2015 fee award in which the Board awarded him an hourly rate of $425 by an inflation factor of 2.5 percent to arrive at an hourly rate of $435 for services performed in 2016.

In his Order, the district director averaged the parties' two suggested hourly rates for services performed in 2015, and awarded claimant's counsel an hourly rate of $410 for services performed from 2012 through 2015.[8] Utilizing the 2.5 percent inflation adjustment, the district director awarded counsel an hourly rate of $420.25 for services performed in 2016.[9] *See* Order at 8-9.

In *Modar v. Maritime Services Corp.*, 632 F. App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015), *vacating* BRB No. 13-0319 (Jan. 17, 2014), the district director awarded a fee to counsel in 2012 based upon 2008 hourly rates for services performed in 2004 and 2005, which the Board affirmed. *Modar*, 632 F. App'x at 909, 49 BRBS at 91-91(CRT).

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[6] The administrative law judge approved the parties' fee agreement on September 2, 2016. *See* DX 12.

[7] Counsel does not challenge the number of hours awarded by the district director, or the hourly rates awarded to either his associate counsel or his paralegal.

[8] ($425 + $395) / 2 = $410.

[9] $410 x 1.025 = $420.25.

Stating that it had previously held that "[f]ull compensation *requires charging current rates* for all work done during the litigation," the Ninth Circuit vacated the Board's affirmance and remanded the case, holding that it was erroneous to affirm an award that reflected neither current rates nor present value of historic rates. *Id.* (emphasis in original). In this case, claimant's counsel does not challenge the district director's calculation of an hourly rate of $420.25 for services performed in 2016. In view of *Modar*, we modify the district director's fee award to reflect claimant's counsel's entitlement to an attorney's fee award for services performed between June 23, 2012 and August 2, 2016, based on the awarded 2016 hourly rate of $420.25. *Id.*; *see generally Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

Accordingly, the district director's Order Awarding Attorney Fees is modified to reflect claimant's counsel's entitlement to an award of an attorney's fee of $25,105.60,[10] to be paid directly to counsel by employer, for services performed before the district director.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

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RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

[10] The fee awarded to claimant's counsel represents: 1) 38.4 hours of services at $420.25 per hour, 2) 20 hours of services at $335 per hour, and 3) 21.6 hours of services at $105 per hour, for a total of $2,268, for claimant's paralegal.

I concur in my colleagues' decision to affirm the district director's determination that employer is liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), and to reverse the award of costs.

I respectfully dissent, however, from the majority's decision to modify the district director's fee award to reflect claimant's counsel's entitlement to an attorney's fee for services performed between June 23, 2012 and August 2, 2016, based on his 2016 hourly rate of $420.25. In his Order, the district director rationally awarded counsel the 2015 hourly rate of $410 for services performed in 2012 through 2015, and $420.25 for services performed in 2016. On appeal, counsel does not challenge the accuracy of these awarded rates. Moreover, counsel did not claim a "delay enhancement" in his petition to the district director, and any delay between 2015 and the fee awarded in March 2017 is "ordinary" delay which need not be "enhanced."[11] *See Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (court affirms the Board's conclusion that two years' delay was "ordinary" and did not require a delay enhancement); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009) (claiming current rate does not per se raise issue of delay). Because the district director did not abuse his discretion, and his fee award is consistent with the law, I would affirm the award of an hourly rate of $410 for services performed from 2012 through 2015 and $420.25 for services performed in 2016.

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GREG J. BUZZARD
Administrative Appeals Judge

[11] In his appeal, claimant requests rates beyond the "current rates" at the time the underlying claim was resolved. Specifically, claimant asserts that the fee order should be vacated "for a fee award calculated with rates current *at the time of remand*." Cl. Brief at 4. (emphasis in original). Were the Board to accept this argument, the district director would be required to reopen the record for evidence of counsel's 2018 rates, rather than the 2016 rates originally proposed by counsel. Counsel has not set forth an adequate legal basis for such a holding. *See Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015); *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).