U.S. Department of Labor

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

BRB No. 14-0158

DONALD E. PALARDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 13, 2015
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Christine Huber (Embry and Neusner), Groton, Connecticut, for claimant.

Jeffrey E. Estey, Jr. (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (2013-LHC-00256) of Administrative Law Judge Daniel F. Sutton 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*. (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. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a voluntary retiree, filed a claim under the Act seeking permanent partial disability compensation for an alleged 17 percent work-related lung impairment and medical benefits for his lung disease. In his Decision and Order, the administrative law judge found claimant established that he suffers from industrial asbestos-related

pleural plaques, asbestosis, and an asbestos-related reduction in expected diffusion capacity. However, the administrative law judge found claimant failed to prove he has a permanent lung impairment that is currently compensable under the Act. *See* 33 U.S.C. §§902(10), 908(c)(23). Consequently, the administrative law judge awarded claimant medical benefits and a nominal award of $1 per week.

Claimant's counsel subsequently filed a petition with the administrative law judge seeking an attorney's fee of $17,281.92, representing 35 hours of attorney services at an hourly rate of $395 per hour; 14.5 hours of paralegal services at $100 per hour; .25 hour of paralegal services at $110 per hour; and expenses of $1,979.42. Employer filed objections, challenging the hourly rate requested for the attorney services and arguing that the fee must be reduced due to claimant's lack of success. The administrative law judge awarded the requested hourly rate of $395 for Mr. Embry; however, he reduced the hourly rate for Ms. Riley to $350 and for Mr. Land to $260. He awarded an hourly rate of $100 for all paralegal services, and he approved all requested hours and expenses. Thus, the administrative law judge awarded claimant's counsel a fee of $16,941.92, payable by employer. Employer appeals the fee award, and claimant responds, urging affirmance.

On appeal, employer challenges the administrative law judge's finding that $395 is the "current maximum prevailing market rate" in Connecticut for attorney services provided under the Act. Employer contends that the evidence submitted by claimant's counsel is insufficient to establish an increase from the previously established maximum prevailing rate of $325 per hour and that the attorneys should not be awarded rates in excess of $325 per hour. Employer also contends the administrative law judge erred in failing to reduce counsel's fee due to claimant's lack of success.

The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act.[1] *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*,

[1] A "reasonable attorney's fee" is calculated in the same manner in all federal fee-shifting statutes, including the Longshore Act. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227 n.8, 43 BRBS 67, 70 n.8(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 662 (6th Cir. 2008); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 159 (2009).

465 U.S. 886 (1984). The Court has also held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895; *see also Kenny A.*, 559 U.S. at 551. The burden falls on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010).

In addressing the hourly rates in his supplemental decision, the administrative law judge relied solely on his prior decision awarding a fee in *Brautigam v. Electric Boat Corp.*, 2013-LHC-01658 (Nov. 15, 2013). He stated that, in Brautigam, he had "determined the prevailing market rate for a highly experienced and skilled senior partner" in Connecticut is $395 per hour, and he set hourly rates of $350 and $260 for junior partners and associate attorneys, respectively. As the parties in this case are represented by the same counsel as in *Brautigam*, the administrative law judge used those approved rates. Supp. Decision and Order at 3.

We agree with employer that the administrative law judge inappropriately relied on *Brautigam*; subsequent to the issuance of the administrative law judge's supplemental order in this case, the Board vacated the administrative law judge's hourly rate award in *Brautigam*. *Brautigam v. Electric Boat Corp.*, BRB No. 14-0066 (Aug. 15, 2014). In *Brautigam*, the Board explained that the administrative law judge's reliance on the unpublished Board order in *Kelly v. Electric Boat Corp.*, BRB Nos. 12-0518/A (July 30, 2013), was misplaced, as *Kelly* involved an unchallenged fee petition. Accordingly, while the Board noted the hourly rate requested by the claimant's attorney, it merely addressed whether the overall fee requested was "reasonably commensurate with the necessary work done." As the Board did not address in *Kelly* the prevailing market rate in Connecticut, the administrative law judge's reliance on *Kelly* could not be affirmed. Consequently, the administrative law judge's reliance on *Brautigam* here cannot be affirmed. Therefore, for the reasons set forth in *Brautigam*, we vacate the administrative law judge's finding that $395 is the prevailing maximum market rate for attorney services in Connecticut, and we remand the case for the administrative law judge to determine the appropriate hourly rates for claimant's attorneys. It is claimant's counsel's burden to submit satisfactory, specific evidence of the prevailing market rates in the relevant community. *See Eastern Associated Coal Corp. v. Director, OWCP*, 724 F.3d 561 (4th Cir. 2013); *Stanhope*, 44 BRBS 107. On remand, the administrative law judge should

address all relevant evidence in determining the prevailing market rate for comparable attorneys in Connecticut.[2]

Next, employer contends the administrative law judge erred in failing to account for claimant's limited success in awarding a fee. Employer avers that, while claimant succeeded in obtaining medical benefits and a *de minimis* award of $1 per week, he was not successful in obtaining permanent partial disability benefits for his work-related lung condition.

The Supreme Court has held 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 the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *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 435-436. The courts have recognized the broad discretion of the fact-finder 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); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

The administrative law judge considered and rejected employer's contention that that the fee must be reduced on the basis of claimant's limited success. He found that claimant's disability and medical claims are interrelated and based on a common core of facts regarding the cause of claimant's lung conditions. Supp. Decision and Order at 4. He also found that the overall relief obtained by claimant is not insignificant in relation to the relatively modest total of hours expended by his attorneys. *Id.* at 5. Thus, the administrative law judge concluded that, while the attorney hours expended may have been fewer had claimant's attorneys abandoned any claim for disability benefits, the claim was not frivolous and imposing a limited-success reduction in this case, where the litigation was conducted efficiently, would operate as an "inappropriate disincentive to aggressive advocacy on behalf" of longshore claimants. *Id.* Consequently, the

[2] The administrative law judge may, within his discretion, allow counsel an opportunity to submit additional market evidence supporting the requested hourly rate of $395, or he may apply a standardized adjustment to the *Davis v. Electric Boat Corp.*, 2009-LHC-01268 (Jan. 3, 2011), rate of $325 to account for increases in the cost of living. *See Stanhope*, 44 BRBS 107; *Christensen v. Stevedoring Services of America, Inc.*, 44 BRBS 39 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 455 F.App'x 912 (9th Cir. 2011); *Brautigam*, slip op. at 4.

administrative law judge concluded he would not reduce the fee due to any limited success. *Id.* As the claims for medical benefits and disability benefits are based on a common core of facts; claimant was awarded both medical benefits and a nominal disability award; and the administrative law judge rationally found that claimant's overall success is significant in relation to the number of hours spent on this case, employer has not established that the administrative law judge abused his discretion in determining that a limited-success reduction is not warranted. Therefore, we reject employer's contention. *See Hensley*, 461 U.S. 424; *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT).

Accordingly, we vacate the hourly rates awarded by the administrative law judge and remand the case for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Supplemental Decision and 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