U.S. Department of Labor

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

BRB No. 15-0098

JAMES J. OXFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 29, 2016
JONES STEVEDORING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Attorney Fee Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

James McCurdy and Gavin W. Bruce (Lindsay Hart, LLP), Portland, Oregon, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2010-LHC-00519, 02187) of Administrative Law Judge Christopher Larsen 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, based on an abuse of discretion or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

In a Decision and Order dated May 3, 2013, Administrative Law Judge Pulver awarded claimant ongoing total disability and medical benefits commencing March 25, 2007, for neck and back injuries claimant sustained in a work injury on March 20,

2007.[1] Claimant's counsel subsequently filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges (OALJ) from February 18, 2010 to June 10, 2013. Counsel sought a fee of $66,861.83, representing 128.50 hours of attorney services at $450 per hour and 33.75 hours of legal assistant services at $165 per hour, and costs of $3,468.08. Employer filed objections to counsel's fee petition. Judge Pulver retired before addressing the fee petition, and the case was assigned to Administrative Law Judge Larsen. In light of the reassignment, on August 11, 2014, claimant's counsel filed a supplemental declaration which included a brief and copies of supporting cases. He also included a request for a supplemental fee of $112.50 for preparing the supplemental pleading. Employer objected to counsel's filing this document. On October 22, 2014, claimant's counsel submitted a copy of a fee decision issued on September 24, 2014, by the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, to further support his requested hourly rate.

Judge Larsen (the administrative law judge) reduced the hourly rates for attorney time to $350 and for legal assistant time to $150. He disallowed 4 of the 5.5 hours requested for preparation of counsel's fee petition. The administrative law judge also rejected counsel's supplemental filings and the fee requested therefor. The administrative law judge awarded counsel an attorney's fee and costs totaling $51,948.58, payable by employer. Attorney Fee Order at 7, 10.[2] Claimant's counsel appeals the fee award, challenging the hourly rate awarded for his services, the rejection of his supplemental filings, and the disallowance of 4 hours for preparation of the fee petition. Employer responds, urging affirmance, and counsel filed a reply brief.[3]

We shall address counsel's second argument first. Counsel contends the administrative law judge erred in refusing to consider, and in not awarding a fee for, his supplemental filings. Specifically, counsel argues that, as the party bearing the burden of

[1] The ILWU-PMA was granted a lien against claimant's disability compensation, 33 U.S.C. §917, and employer was ordered to repay the ILWU-PMA for the medical benefits it had paid claimant. Employer was awarded relief from continuing compensation liability pursuant to 33 U.S.C. §908(f).

[2] The administrative law judge also awarded an attorney's fee and costs of $16,364.15 to counsel for the ILWU-PMA, payable by employer. Attorney Fee Order at 8-10. Employer's motion to withdraw its appeal of this award was granted by Board Order dated April 9, 2015.

[3] As no party challenges the hourly rate awarded for legal assistant services, it is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

supporting his fee request, he must be permitted to submit decisions in support of his fee petition that were issued after his initial fee petition was filed.

The administrative law judge declined to consider both the August and October 2014 submissions. With regard to the August supplement, the administrative law judge sustained employer's objection and stated that,

> [n]o Order in this case allowed for the filing of a Supplemental Declaration. We hardly avoid a second major litigation when the parties are free to "supplement" their attorney-fee pleadings whenever they please.

Attorney Fee Order at 7. With regard to the October 2014 filing, the administrative law judge sustained employer's objection in a footnote, stating that counsel's submission was untimely. He noted, however, that even if he had considered the supplemental filing, the Ninth Circuit case attached thereto did not support the claimed hourly rate of $450.[4] *Id.* at 4 n.4.

Citing Rule 28(j) of the Federal Rules of Appellate Procedure (FRAP), counsel asserts he is entitled to file supplemental pleadings to support his fee petition.[5] We disagree. The FRAP apply to appellate proceedings before the United States circuit courts of appeals and do not apply to administrative proceedings before the administrative law judge. The administrative law judge is not bound by technical rules of evidence or procedure, *see* 33 U.S.C. §923(a), but as the Act and its regulations do not address supplemental filings in support of a fee petition before the administrative law judge, it is the OALJ Rules of Practice and Procedure that may be used to fill the gap – not the FRAP. *See generally Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002); 20 C.F.R. §§702.338, 702.339; 29 C.F.R. §18.10 (2015). The OALJ

[4] Counsel submitted the Ninth Circuit's affirmance of a fee award in *Petitt v. Sause Brothers*, No. 12-70740 (9th Cir. Sept. 24, 2014) (appeal of BRB No. 11-0351), as support for his requested hourly rate of $450. He submitted it shortly after its issuance by the court. In any event, the administrative law judge recognized that the work in that case was performed in 2012-2013, as was some of the work in this case, yet the award was for a lower hourly rate than counsel seeks here. The administrative law judge also noted that the Ninth Circuit has awarded counsel an hourly rate of $400, not $450, in the last three years. Attorney Fee Order at 3 n.4.

[5] Rule 28(j) permits the filing of supplemental authorities with a statement limited to 350 words if the authority was brought to a party's attention after the briefs had been filed or oral argument had been held. The opposing party is permitted a similarly prompt but limited response. Fed. R. App. P. 28(j).

Rules also incorporate the Federal Rules of Civil Procedure (FRCP) in situations not covered by applicable statutory or regulatory provisions. *See Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993) (explaining the interaction among the Act, the OALJ Rules, and the FRCP).

Section 702.132 of the Act's regulations, which applies to district directors and administrative law judges, addresses only the filing of an application for an attorney's fee and its contents. 20 C.F.R. §702.132. Specifically, Section 702.132(a) provides that a fee application is to be "complete." 20 C.F.R. §702.132(a). It does not address additional filings.[6] Thus, this gap may be filled by the OALJ Rules.

The OALJ Rules do not address applications for attorneys' fees specifically; they do address motions, and, inherently, a fee petition is a motion to order the award of an attorney's fee. At the time of the administrative law judge's fee award, Rule 18.6 was in effect. 29 C.F.R. §18.6 (2014). That section addressed motions and requests and stated that any application for an order must be made by a motion. Subsection (b) permitted answers to motions within 10 days; however, "[u]nless the administrative law judge provide[d] otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed." 29 C.F.R. §18.6(b) (2014); *see also* 29 C.F.R. §18.33(c)(4), (d) (2015).[7]

In this case, Judge Pulver granted counsel 30 days within which to file a fee petition, and he allowed employer 15 days thereafter in which to respond with objections. Decision and Order at 36. As it is undisputed that counsel did not request or obtain leave from either administrative law judge prior to filing any of his supplemental briefs/documents, it was within the administrative law judge's discretion to refuse to consider those documents in this case.[8] We reject counsel's contention of error, as he has

[6] The Board's regulation, which addresses the filing of a fee application and permits "[a]ny party [to] respond to the application within 10 days of receipt of the application," 20 C.F.R. §802.203(g), does not address additional filings related to the fee petition. Further, the Board's regulation which permits the filing of responses to motions makes no reference to replies to the responses. 20 C.F.R. §802.219. Any subsequent filings would be at the Board's discretion. 20 C.F.R. §802.215.

[7] New Rule 18.33(c)(4), (d), also provides for the filing of responses to motions and states that no further filings will be permitted unless the administrative law judge directs otherwise.

[8] This is especially appropriate in situations involving attorney's fees where, as the administrative law judge noted, the Supreme Court of the United States has admonished

not shown an abuse of the administrative law judge's discretion, and we affirm the administrative law judge's rejection of the August 2014 and October 2014 supplemental filings.[9] *See Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

Counsel also challenges the administrative law judge's awarded hourly rate, asserting he erred in rejecting counsel's evidence. Counsel contends the administrative law judge did not explain why $350 per hour is a reasonable market rate and failed to recognize that counsel's evidence supports a rate of $450 per hour, or, at least, something greater than $350 per hour. Counsel contends the administrative law judge erred in finding that commercial and anti-trust litigation work is not comparable to longshore work, and he asserts the administrative law judge must address the Oregon Bar Survey. Counsel also contends it was erroneous for the administrative law judge to deny his request for a delay enhancement.

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. *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*, 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 relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Shirrod v. Director, OWCP*, ___ F.3d ___, 2015 WL 9583573, No. 13-70613 (9th Cir. Dec. 31, 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

In this case, the administrative law judge found that claimant's counsel did not satisfy his burden of showing entitlement to an hourly rate of $450, as he did not submit

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attorneys from turning the fee request into a major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

[9] Although the administrative law judge denied the October 2014 filing for being "untimely," we acknowledge that counsel's attempt to apprise the administrative law judge of a recent Ninth Circuit opinion was made within a reasonable time after the court issued its decision. Nevertheless, the administrative law judge reviewed the case and found it did not support counsel's hourly rate request. *See* n. 4, *supra*.

evidence, other than his own statements which the administrative law judge found insufficient alone,[10] directly supportive of an hourly rate of $450.[11] Attorney Fee Order at 4-6. The administrative law judge rejected the Goldsmith declaration because it does not expressly support the request for $450 per hour, *id.* at 3 n.2, and he rejected the Markowitz declaration and the Morones survey because he found that commercial litigation is not analogous to longshore work. *Id.* at 5. The rejection of this evidence is rational and within the administrative law judge's discretion, and thus we reject counsel's assertions of error. *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (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).

Upon finding that counsel did not satisfy his burden of showing entitlement to an hourly rate of $450, the administrative law judge identified two prior longshore cases which appear to have influenced his hourly rate award. Attorney Fee Order at 5; *Modar v. Maritime Services Corp.*, BRB No. 13-0319 (Jan. 17, 2014), *vacated and remanded*, ___ F.App'x ___ , 2015 WL 8058298, No. 14-70667 (9th Cir. Oct. 16, 2015); *Conner v. Sealift, Inc.*, 2010-LHC-02011 (Dec. 27, 2011), *aff'd*, BRB Nos. 13-0341/A (Mar. 14, 2014).[12] The administrative law judge cited *Modar* in which the Board affirmed a district director's order granting counsel a rate of $391.83 per hour for work in 2011, and *Conner* in which the Board affirmed an administrative law judge's award of a rate of $340 per hour for counsel's work in 2009-2011. While the administrative law judge's reliance on prior longshore cases is not, per se, improper, *see Christensen*, 557 F.3d at 1055, 43

[10] *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984) (emphasis added) ("The burden is on the fee applicant to produce satisfactory evidence – *in addition to* the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.").

[11] The administrative law judge found that counsel "approache[d] his task here as if he were conducting a negotiation, demanding an hourly rate higher than the evidence will directly support, and arguing the evidence instead establishes a minimum rate the court must exceed." Attorney Fee Order at 4. Counsel repeats this contention on appeal, contending the administrative law judge should use his evidence to establish a base rate, which should then be adjusted upward by an inflation factor to reach $450 per hour.

[12] In *Conner*, the parties reached a settlement on the attorney's fee while the case was on appeal to the Ninth Circuit. *Conner v. Sealift, Inc.*, No. 14-71385 (9th Cir. Dec. 30, 2014).

BRBS at 9(CRT), a recent decision by the Ninth Circuit makes it impossible for us to affirm the administrative law judge's fee award in this case.

The Ninth Circuit recently reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 2015 WL 9583573 at *4, slip op. at 10-13. Consequently, the court vacated the Board's affirmance of an administrative law judge's fee award. The administrative law judge, having found the relevant community to be Portland, erred in awarding an hourly rate derived from state-wide rate information rather than on rate information tailored to the relevant community. The Ninth Circuit held that, when the relevant market is identified as Portland, the results of the Oregon Bar Survey must be addressed when setting a proxy hourly rate because it provides "attorney's fee information specific to . . . Portland." *Id.* at *4, slip op. at 12-13. Additionally, relying on the Board's precedent in *Christensen*, the Ninth Circuit held in *Shirrod* that, unless proven otherwise, reported rates for state workers' compensation attorneys are not representative of a market rate and cannot be used to determine a proxy market rate for attorneys under the Longshore Act because state workers' compensation rates are generally capped by state law and, thus, are artificially low. *Id.* at *5-7, slip op. at 16-20; *Christensen*, 44 BRBS at 40.

A review of Judge Gee's decision in *Conner* reveals that she incorporated state workers' compensation rates into her proxy rate calculation. *Conner*, slip op. at 13. Thus, to the extent the administrative law judge relied on *Conner*, his fee award cannot stand.[13] *Shirrod*, 2015 WL 9583573 at *7, slip op. at 17. Further, in light of *Shirrod* and of the fact that the relevant community for ascertaining a prevailing market rate in this case was implicitly found to be Portland, the administrative law judge erred in not addressing fee data from the Oregon State Bar Economic Survey. *Id.* at *5, slip op. at 14. Thus, we vacate the administrative law judge's fee award, and we remand the case to him for further consideration.

[13] It is unclear the extent to which the administrative law judge relied on either *Conner* or *Modar* to render his own decision on an hourly rate as he did not fully explain his calculation. *See* Attorney Fee Order at 5. With respect to the *Modar* decision, the Ninth Circuit vacated the Board's affirmance of the district director's fee award, stating that it was erroneous to affirm an award that reflected neither current rates nor present value. *Modar v. Maritime Services Corp.*, __ F.App'x __, 2015 WL 8058298, No. 14-70667 (9th Cir. Oct. 16, 2015), *vacating* BRB No. 13-0319 (Jan. 17, 2014). Thus, to the extent the hourly rate affirmed in *Modar*, which was later deemed erroneous, influenced the administrative law judge's proxy rate here, that reliance is also misplaced.

Counsel also appeals the administrative law judge's denial of his request for an enhanced fee due to the delayed payment of his fee. He asserts the services were performed between 2010 and 2013 and that an enhancement for the delayed payment of the fee is necessary.[14] The administrative law judge summarily stated that entitlement to enhancement has not been established. Attorney Fee Order at 6. In light of the Ninth Circuit's recent decision in *Modar*, the administrative law judge must address counsel's request by determining whether there has been a delay in payment of the fee which warrants an award based on current rates or present value. *Modar*, 2015 WL 8058298 at *1, slip op. at 2-3; *see also Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT) (affirming Board's conclusion that two years' delay was "ordinary" and thus did not warrant enhanced fee).

Lastly, counsel appeals the administrative law judge's disallowance of 4 of the 5.5 hours claimed for preparation of the fee petition. Counsel is entitled to a reasonable fee for the preparation of his fee petition.[15] *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Bogden v. Consolidation Coal Co.*, 44 BRBS 121 (2011) (en banc). The administrative law judge found the fee petition and its attachments in this case to be "strikingly similar" to those in another case the administrative law judge was assigned concurrently, and that the claimed time of 5.5 hours was thus excessive. Attorney Fee Order at 6-7. He awarded a fee for 1.5 hours, finding that such was sufficient for the work reasonably expended in this case.[16] Counsel has failed to establish that the administrative law judge abused his discretion in reducing excessive time entries. *See Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); *Beckwith*, 43 BRBS 156. Therefore, we affirm the administrative law judge's award of a fee for 1.5 hours for preparation of the fee petition.

[14] The issue of a delay enhancement concerns the lapse in time between the performance of the legal services and the award of a fee for those service. *Missouri v. Jenkins*, 491 U.S. 274 (1989).

[15] We note that the administrative law judge erroneously cited the Black Lung regulation at 20 C.F.R. §725.366(b) rather than the Longshore regulation at 20 C.F.R. §702.132, which is silent as to a fee for the preparation of a fee petition.

[16] The administrative law judge allowed all time requested for the fee petition in the other case, *Ochoa v. Jones Stevedoring*, 2011-LHC-00623.

Accordingly, we vacate the administrative law judge's award of an hourly rate of $350 for attorney services, and we remand the case for reconsideration of this issue in accordance with this decision. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge