U.S. Department of Labor

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

BRB No. 16-0243

HERNAN DACARET	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 25, 2017
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Order Awarding Attorney's Fees and Costs of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

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

Renee C. St. Clair and Barry W. Ponticello (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Order Awarding Attorney's Fees and Costs (2013-LHC-01512) 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.* (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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant worked for employer as a welder and suffered a work-related injury on October 15, 2001. Employer voluntarily paid claimant benefits for various periods. Thereafter, a dispute arose between the parties and this case was forwarded to the administrative law judge. On June 5, 2015, the administrative law judge awarded claimant additional benefits. Decision and Order at 69-70. On August 10, 2015, he denied claimant's motion for reconsideration on issues involving claimant's average weekly wage and entitlement to annual cost-of-living adjustments to claimant's permanent total disability benefits. Order on Recon. at 4-5; *see* 33 U.S.C. §910(a), (f). Claimant appealed the administrative law judge's decisions to the Board. The Board modified two periods of temporary total disability to reflect claimant's entitlement to permanent total disability benefits, held that claimant is entitled to Section 10(f), 33 U.S.C. §910(f), adjustments during all periods of permanent total disability, vacated the average weekly wage calculation, and remanded the case for the administrative law judge to recalculate claimant's average weekly wage using Section 10(a) of the Act, 33 U.S.C. §910(a). In all other respects, the Board affirmed the administrative law judge's decision. *Dacaret v. National Steel & Shipbuilding Co.*, BRB No. 15-0467 (July 7, 2016) (Buzzard, J., concurring and dissenting).

Meanwhile, on September 10, 2015, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge. He requested a total fee of $77,049.21, representing 56 hours of services by Mr. Dupree at an hourly rate of $500, 136.5 hours of services by Mr. Myers at an hourly rate of $300, and 24 hours of paralegal services at an hourly rate of $150. Counsel also requested reimbursement of $4,499.21 in costs. Employer filed objections. The administrative law judge determined that San Diego, California, is the relevant market and awarded hourly rates of $400, $250, and $150, respectively. He then addressed the specific time entries and awarded a fee for 46.9 hours of services by Mr. Dupree, 81.3 hours of services by Mr. Myers, and 11.6 hours of paralegal services. He approved $3,736.57 in costs. Supp. Order at 3, 6, 22-23.

Claimant's counsel appeals the administrative law judge's fee award. He contends the fee award should be vacated because, by virtue of the successful appeal, claimant will obtain greater success on remand. He also challenges the reductions in itemized entries for their lack of specificity, stating it was improper for the administrative law judge to give generic reasons for reducing the entries. Counsel contends the administrative law judge erred in finding certain entries "clerical," "excessive," or "duplicative," without further explanation. Employer responds, urging affirmance of the fee award. Claimant's counsel filed a reply brief.

We reject claimant's contention that the administrative law judge's Supplemental Order lacks sufficient specificity. The administrative law judge separated employer's

objections into categories and clearly identified the amount of time he approved for each entry. That he grouped the entries by category and did not address each service individually does not render his explanation for the reduction any less understandable or reviewable. Reducing entries because they are "clerical," "excessive," "duplicative," etc., are valid reasons for reducing or disallowing the time claimed by counsel; further individualized explanation of every entry is not necessary.[1] *Tahara*, 511 F.3d 95, 41 BRBS 53(CRT) (duplicative); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986) (excessive); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980) (clerical); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979) (clerical). The administrative law judge is in the best position to ascertain the reasonableness and necessity of work performed before him, and counsel has not established that the administrative law judge abused his discretion in reducing the fee. Accordingly, we reject counsel's contentions that the administrative law judge erred in reducing the fee for items deemed clerical,[2] excessive,[3] duplicative,[4] or unrelated to the claim.[5] *Tahara*, 511

[1] The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that when a district court significantly reduces a fee request, it must explain with sufficient specificity its reasons for the reduction. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014); *see* No. C11-1472, 2015 WL 1938431 (N.D. Cal. Apr. 28, 2015) (decision after remand). In *Carter*, the district court initially determined that a fee request of over $22,000 was not warranted where a claimant received only $3,000 in benefits, and it summarily awarded a fee for 35 hours of services based on a blended hourly rate. *Carter v. Caleb Brett, LLC*, C-11-1472 RS, 2012 WL 12878358 (N.D. Cal. July 24, 2012), *vacated and remanded*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014). As the administrative law judge in this case addressed each entry of counsel's fee petition, gave a reason for the reduction, and painstakingly identified the amount approved, it cannot be said that he did not comply with *Carter*.

[2] We reject counsel's assertion that the Board's decision in *Bell v. SSA Terminals, LLC*, BRB No. 13-0055 (Nov. 26, 2013), stands for the proposition that instructions to paralegals are "clerical" only if the ultimate task to be performed is clerical. We note that *Bell* is an unpublished decision and is not precedential. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Moreover, in that case, the administrative law judge's approval of time for instructing a paralegal to perform tasks the administrative law judge considered non-clerical was not an issue before the Board; the Board addressed only the items disallowed as "clerical."

[3] Counsel has not shown that the administrative law judge abused his discretion in reducing the time claimed for the post-hearing brief. Contrary to counsel's assertion that the hours were "capped" at 20, the administrative law judge addressed each entry

F.3d 95, 41 BRBS 53(CRT). We also reject the assertion that counsel should receive a fee for items related to the Section 8(f), 33 U.S.C. §908(f), issue. *Shaw v. Todd Shipyards Corp.*, 23 BRBS 96 (1989); *Berkstresser v. Washington Metro. Area Transit Authority*, 16 BRBS 231 (1984). The reductions in the entries under the categories designated as "Attorney Conferences" and "Entries with Multiple Objections" are also sufficiently explained, as the administrative law judge stated that the former were either duplicative or unnecessary and the latter were disapproved for two or more of the above reasons, all of which are valid reasons for disapproval.[6] As the Supreme Court stated, courts should not "become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838 (2011). As claimant's counsel has failed to establish that the administrative law judge abused his discretion in reducing the fee, we affirm the reductions on these bases.

Finally, claimant's counsel contends the administrative law judge's fee award should be vacated because claimant was successful on appeal and will be awarded greater benefits on remand. 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

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involving the post-hearing brief, and the reductions resulted in his approving 20 hours for this service.

[4] We reject counsel's assertion that the administrative law judge erred in disapproving tasks he considered duplicative, including attorney conferences. Counsel's argument appears to be that it is permissible for more than one attorney to work on a case, and it is reasonable for them to confer; therefore, all the time requested should be approved because counsel is in charge of staffing. The reasonableness of the fee claimed is for the administrative law judge to address, and counsel has not shown that the administrative law judge abused his discretion in reducing the fee for tasks he concluded duplicated other services.

[5] Counsel is not entitled to a fee for work performed in a state workers' compensation claim. *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982). If any of that work was also used in pursuing the federal claim, *Roach v. New York Protective Covering*, 16 BRBS 114 (1984), it should have been made clear in the fee petition for the administrative law judge.

[6] That counsel finds it impossible to tell which of multiple tasks in an individual entry was the reason for the reduction, as employer states, is due to counsel's use of block billing. Further, counsel's various explanations of why individual entries are billable should have been presented to the administrative law judge in the first instance if there was a question of clarity.

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).

In this case, the administrative law judge disapproved time spent on claims related to claimant's pulmonary and urinary conditions, as they were unsuccessful and unrelated to the successful orthopedic claims involved in this case. These findings were not disturbed on appeal. Accordingly, we reject counsel's assertion that these reductions should be reconsidered on remand.[7] *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). However, as the administrative law judge also reduced the fee for services related to claimant's motion for reconsideration, which was unsuccessful initially but became "successful" upon the issuance of the Board's decision on appeal, *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*), we must vacate that portion of his fee award and remand the case for further consideration. On remand, the administrative law judge should reconsider the fee for services related to claimant's motion for reconsideration in light of claimant's success on appeal and any related success when the case on the merits is decided on remand.[8] *B.H.* [*Holloway*] *v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Stratton*, 35 BRBS 1.

[7] The administrative law judge very clearly stated that he approved certain tasks involving the non-orthopedic conditions as they affected the issue of suitable alternate employment. Supp. Order at 12.

[8] To the extent the fee for other tasks in this case was reduced due to claimant's initial lack of success on the issues involving average weekly wage, Section 10(f), and two periods of permanent total disability, the administrative law judge should reconsider the fee awarded for them as well.

Accordingly, the administrative law judge's Supplemental Order Awarding Attorney's Fees and Costs is vacated with respect to any fee reductions due to claimant's initial lack of success on reconsideration, and the case is remanded for the administrative law judge to reconsider the issue consistent with this opinion. In all other respects, the administrative law judge's Supplemental Order Awarding Attorney's Fees and Costs is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge