U.S. Department of Labor

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

BRB No. 16-0279

LARRY PURCELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 5, 2017
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Melissa Riley (Embry and Neusner), Groton, Connecticut, for claimant.

Mark P. McKenney (McKenny Quigley Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (2014-LHC-01738, 01739) of Administrative Law Judge Colleen A. Geraghty 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for employer from 1976 to 1990, primarily in the STO Department, the function of which is to test the integrity of mechanical systems onboard submarines. Claimant testified that he was exposed to asbestos, dust and fumes during the course of his employment. Tr. at 42-48. He sought compensation under Section 8(c)(23), 33 U.S.C. §908(c)(23), as a voluntary retiree, and medical benefits for

asbestosis, chronic obstructive pulmonary disease (COPD) and laryngeal cancer. 33 U.S.C. §907.

In her decision, the administrative law judge found, based on the record evidence as a whole, that claimant did not establish work-related asbestosis, COPD or laryngeal cancer. Decision and Order at 17-24. The administrative law judge found that claimant established that he has pleural thickening attributable to exposure to asbestos at employer's facility. The administrative law judge awarded claimant medical benefits, consisting solely of monitoring this condition. *Id*. at 24.

Claimant's counsel subsequently submitted a petition to the administrative law judge, requesting an attorney's fee of $37,762.50, plus costs of $7,922. In her Supplemental Decision, the administrative law judge reduced the hourly rate for Stephen Embry to $358 and for Melissa Riley to $318, pursuant to the rates found applicable to these attorneys in *Brautigam v. Electric Boat Corp.*, 2013-LHC-01658 (Apr. 9, 2015), and thereby reduced the lodestar fee request from $37,762.50 to $30,161.50. The administrative law judge next addressed the amount of an appropriate fee in light of the level of success achieved, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The administrative law judge agreed with employer that a reduction of approximately 50 percent from the reduced fee of $30,161.50 is a reasonable fee award given the degree of success. Accordingly, she awarded claimant's counsel a fee of $15,080.75, plus costs of $7,922, payable by employer. Supplemental Decision and Order at 3.

On appeal, claimant contends the administrative law judge erred by making a 50 percent across-the-board reduction in the attorney's fee based on claimant's limited success in this case. Employer responds, urging affirmance.

In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover an attorney's fee under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434. This analysis applies to fee awards under the Act. *See 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. 1988), *cert. denied*, 488 U.S. 997 (1988). Where the plaintiff failed to succeed on an unrelated claim, the plaintiff's counsel is not entitled to a fee for work expended on the unsuccessful claim. *Hensley*, 461 U.S. at 435. Where, as here, the claims involve a

common core of facts and are based on related legal theories, the Court stated that the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, *i.e.*, the lodestar figure, may result in an excessive award. The Court stated that the fee award should be for an amount that is reasonable in relation to the results obtained, as the degree of success is the most critical factor.[1] *Hensley*, 461 U.S. at 435-437, 440. Therefore, while the Court did not provide a rule or formula for calculating a fee in cases where counsel achieves partial success litigating inter-related issues, the Court clearly did not hold that in such cases the lodestar fee is not subject to further reduction based on the degree of success. Moreover, courts have recognized the broad discretion of the factfinder in assessing the amount of an attorney's fee pursuant to *Hensley* principles. *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 her supplemental decision, the administrative law judge found that, while claimant sought compensation for permanent partial disability pursuant to Section 8(c)(23) and medical benefits for asbestosis, COPD and laryngeal cancer, he did not establish that any of these conditions are related to his employment. Supplemental Decision and Order at 3. The administrative law judge found that claimant established only that he has work-related pleural thickening and that, as claimant has no functional impairment from this condition, he is not entitled to compensation pursuant to Section 8(c)(23). The administrative law judge thus limited claimant to an award of medical benefits for monitoring the pleural thickening. The administrative law judge found that claimant, therefore, was "minimally successful," as "the majority of his claim … was denied." *Id*. Based on these findings, the administrative law judge reduced the fee by 50 percent from $30,161.50 to $15,080.75. *Id*.

The administrative law judge's finding that a reduced fee is warranted in this case is rational and consistent with *Hensley*. Moreover, the Board has previously affirmed across-the-board reductions where the administrative law judge determines that a claimant has achieved only limited success in cases involving interrelated claims. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999) (50 percent reduction in an attorney's fee

[1] We reject claimant's contention that where the issues litigated are inextricably linked and non-severable the lodestar fee may be reduced only when the relief obtained is de minimis - "generally a victory in name only." Cl. Br. at 8. In *Hensley*, the Court stated that a reduced fee award may be appropriate in cases where the relief obtained is significant, as claimant alleges herein, but limited in comparison to the scope of the litigation as a whole. *Hensley v. Eckerhart*, 461 U.S. 424, 439-440 (1983).

is reasonable given claimant's limited success in establishing causation and entitlement to medical benefits, but not disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999) (90 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing entitlement to medical benefits, but not temporary total disability benefits); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (75 percent reduction in attorney's fee is reasonable given claimant's failure to succeed in the prosecution of his primary claim for permanent total and partial disability compensation). Under the circumstances of this case, the administrative law judge's decision to reduce the lodestar fee of $30,161.50 by 50 percent is affirmed, as claimant has not established an abuse of discretion in this regard. *Barbera*, 245 F.3d 282, 35 BRBS 27(CRT). Claimant does not challenge any other aspect of the fee award. Therefore, we affirm the administrative law judge's award of an attorney's fee and costs of $23,002.75, payable by employer.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

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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GREG J. BUZZARD
Administrative Appeals Judge