

U.S. Department of Labor

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



BRB No. 18-0316

JOHN NEWCOMER)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 01/25/2019
)	
DYNCORP INTERNATIONAL, LLC)	
)	
and)	
)	
CONTINENTAL INSURANCE)	
COMPANY/CNA INTERNATIONAL)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

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

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2011-LDA-00658/00659) of Administrative Law Judge Jennifer Gee rendered on claims 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 it is shown by the challenging party to be arbitrary, capricious, based on 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).

Claimant worked for employer in Iraq as a police advisor. On March 9, 2005, he sustained injuries to his face, legs, right arm, wrist, and fingers when a bomb detonated outside his office. Following the administrative law judge's Decision and Order in 2015 awarding claimant periods of total and partial disability benefits and medical benefits, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges (OALJ). The administrative law judge deferred ruling on the attorney's fee petition until after the Board resolved claimant's appeal of her 2015 decision. The Board issued its decision on November 9, 2016, wherein it modified the administrative law judge's award of permanent total disability benefits from January 10 through March 16, 2006, to reflect the fiscal year 2006 maximum compensation rate of \$1,073.64, and affirmed the administrative law judge's decision in all other respects. *Newcomer v. DynCorp Int'l*, BRB No. 16-0051 (Nov. 9, 2016) (unpub).

Claimant's counsel thereafter filed with the administrative law judge amended fee petitions on March 22 and April 26, 2017. In total, counsel requested a fee of \$148,218.69, representing 211.95 hours of attorney time at an hourly rate of \$468, 24.7 hours of associate attorney time at an hourly rate of \$225, 15.85 hours of paralegal time at an hourly rate of \$175, .25 hours of legal assistant time at an hourly rate of \$110, and \$35,997.65 in costs. Included in counsel's fee petitions were a request for a delay enhancement. Employer filed objections to counsel's fee petitions. In her Attorney Fee Order dated March 20, 2018, the administrative law judge reduced the requested hourly rate for lead attorney work, granted, in part, counsel's request for a delay enhancement, and disallowed or reduced certain itemized entries and costs. She approved an attorney's fee totaling \$102,590.07, payable by employer.¹

On appeal, claimant's counsel challenges the administrative law judge's award of an attorney's fee and costs. Employer did not file a response brief.

¹The administrative law judge's award represents 195.88 hours of lead attorney time at \$345.58 per hour, 14.975 hours of associate attorney time at \$225 per hour, 15.60 hours of paralegal time at \$175 per hour, and .25 hours of legal assistant time at \$110 per hour, plus \$28,770.98 in costs.

Claimant's counsel contends the administrative law judge did not provide a valid basis for rejecting all of the evidence he submitted in support of his requested hourly rate of \$468. Counsel also contends the administrative law judge had no basis in the record to support her finding that counsel's market rate as of December 31, 2011, was \$317.92. He asserts that the administrative law judge's decision to place counsel only in the top quartile instead of the top five percent of all attorneys in Portland, Oregon, regardless of experience, had no basis and that her inclusion of general litigation rates in the calculation of the 2011 proxy market rate fails to otherwise account for counsel's significant experience specializing in Longshore claims. Counsel further contends that the administrative law judge had no basis to reject the hourly rates of \$425 awarded him by the United States Court of Appeals for the Ninth Circuit in 2014 or \$460 awarded him by the Board in 2016.

The Supreme Court of the United States 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). It is well established 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. The burden is 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*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 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); *see Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010); *see also Blum*, 465 U.S. at 896 n.11.

As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by the court's decision in *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT), which 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*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). The Ninth Circuit held that when the relevant market is identified as Portland, as here, the results of the Oregon Bar Survey (OBS) should be addressed when it is necessary to set a proxy hourly rate, as it provides information on attorney fees specific to Portland. *Id.*

We reject counsel's contentions with respect to the awarded hourly rate. The administrative law judge provided a thorough analysis of the market rate evidence offered by counsel under applicable law and set forth a rational basis for her proxy market rate

determination. *See Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). The administrative law judge addressed and rationally rejected the evidence submitted by counsel in support of his requested hourly rate of \$468, and counsel has not established an abuse of the administrative law judge's discretion in this regard.² Attorney Fee Order at 3-28; *see Christensen v. Stevedoring Services of America*, 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*, 445 F. App'x 912 (9th Cir. 2011). The administrative law judge then permissibly looked to six recent fee awards to counsel, which were based on data from the 2012 OBS, to formulate counsel's proxy market rate. *See Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (Tribunals need not re-analyze the hourly rate issue in every case, provided the analysis occurs with sufficient regularity to reflect current market rates). As the \$317.92 hourly rate awarded represents a reasonable weighted average of the rates established by the 2012 OBS in the three practice areas the administrative law judge rationally found relevant,³ *see Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 44 BRBS at 40, claimant's counsel has failed to establish she abused her discretion.⁴ *See* Attorney Fee Order at 52-53; *see generally Fox v. Vice*, 563 U.S. 826, 45 BRBS 41(CRT) (2011); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). We, therefore, affirm the administrative law judge's findings that the 2011 proxy market rate for counsel is \$317.92 per hour and that the 2015 proxy rate, adjusted for inflation, is \$345.58.

²*See Nelson v. ICTSI Oregon, Inc.*, 743 F. App'x 120 (9th Cir. 2018), *aff'g* BRB No. 16-0517 (Aug. 18, 2017) (unpub.), wherein the court found that the administrative law judge permissibly discounted counsel's evidence of commercial litigation rates.

³The administrative law judge relied on the weighted averages in the 75th percentile of documented rates for plaintiff civil litigation/personal injury, plaintiff civil litigation/non-personal injury, and plaintiff general civil litigation cases in Portland, Oregon, to calculate a proxy market rate for counsel's services in this case. Attorney Fee Order at 54. *See also Nelson, supra*, wherein the court found no abuse of discretion in the administrative law judge's use of the 2012 OBS to calculate counsel's hourly rate and the placement of counsel at the 75th percentile rate. *See also Hardman v. Marine Terminals Corp.*, No. 17-73370, 2018 WL 6040665 (9th Cir. Nov. 19, 2018), *aff'g* BRB No. 17-0097 (Oct. 18, 2017) (unpub.).

⁴The Board affirmed the proxy hourly rate determinations in the cases cited by the administrative law judge: *Nelson, supra*; *Lesh*, BRB No. 16-0518; *Ayers*, BRB No. 16-0250; *Seachris*, BRB No. 17-0581; *Wakeley*, BRB No. 18-0238; and *Ochoa*, BRB No. 18-0246.

Counsel next asserts the administrative law judge erred in not awarding a delay enhancement for the entirety of his work in this case. Counsel, citing *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table), maintains that the administrative law judge's decision to deny an enhancement for delays caused by the appeal in this case to the Board is legally incorrect.⁵

The issue of a delay enhancement concerns the lapse in time between when the legal services were performed and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989). The tribunal awarding an attorney's fee has considerable discretion in selecting a reasonable method to compensate for the delay. *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). Findings in this regard are reviewed under an abuse of discretion standard. *See Anderson*, 91 F.3d at 1325, 30 BRBS at 68-69(CRT).

The administrative law judge found that the delay from the time counsel first performed services for claimant in 2011 until he filed his initial fee petition in 2015 warranted an enhanced hourly rate but that the subsequent delay from 2015 through the issuance of her Attorney Fee Order in 2018, due to claimant's "almost entirely unsuccessful appeal" of her decision on the merits to the Board, did not warrant any additional enhancement. Attorney Fee Order at 26. The administrative law judge found that as a result of the appeal to the Board, which revealed "a simple error on [the administrative law judge's] part that could have easily been corrected in a motion for reconsideration or errata motion," claimant recouped an additional \$246, plus interest.⁶ Attorney Fee Order at 26. The administrative law judge noted that on all other contentions claimant did not prevail. *Id.* Absent the appeal, the administrative law judge found that she would have issued a fee

⁵In *Parks*, the delay in payment of the fee was caused by the employer's successful procedural appeal to the United States Court of Appeals for the Fourth Circuit, which remanded the case. On remand, the administrative law judge awarded benefits again and the Board affirmed. The Board rejected the employer's contention that a delay enhancement was inappropriate due to its successful appeal to the court. The Board stated that a delay enhancement is not punitive, but is intended to reflect the reality of the time value of money. *See generally Parks*, 32 BRBS at 97.

⁶Based on the delay from claimant's appeal, which resulted in an additional \$246 for his client, counsel increased his fee request before the OALJ by more than \$8,300, i.e., the difference between fees for 251.65 hours of work at \$435 per hour as requested in 2015, or \$468 per hour as requested in 2017. *See Counsel's Fee Petitions* dated October 30, 2015 and March 22, 2017.

award on counsel's 2015 petition sometime in mid-2016, based on the 2015 rates counsel sought at that time.

The administrative law judge adequately explained her rationale for denying counsel's request for an enhanced hourly rate for the delay from 2015 to 2018 and permissibly awarded counsel a blended enhancement in order to account for the delay in the payment of counsel's fee.⁷ The administrative law judge awarded counsel the 2015 rate of \$345.48 for all of the services performed in this case as that figure "adequately compensates the delay in the normal processing of this case but avoids over-compensating a delay occasioned by Claimant's unsuccessful appeal." Attorney Fee Order at 26. The administrative law judge thus provided a rational basis for the denial of a fee enhancement from 2015 to 2018 and counsel has not shown it to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT) (affirming Board's finding that two years' delay was "ordinary" and did not require delay enhancement). Consequently, we affirm the administrative law judge's hourly rate awards.

Counsel also contends that the administrative law judge erred in reducing the hours allowed for preparing and defending the fee petition. Counsel is entitled to recover a reasonable fee for time spent preparing and defending a fee petition. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009). In determining the compensability of an attorney's work, an administrative law judge should consider whether the hours claimed are "reasonable" for the "necessary work done" and the fee award is commensurate with the degree of success obtained. 20 C.F.R. §702.132(a). An administrative law judge has the discretion to disallow a fee for work that is duplicative, excessive, or unnecessary. *See Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); *see Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT) (hours not "reasonably expended" on the fee petition may be excluded from the time claimed for preparation of the application).

Finding that counsel's fee petition in this case, "with very minor changes, is identical to the fee petition[s]" he filed in two prior cases, the administrative law judge sustained in part employer's objection to the time spent by counsel in preparing and defending his fee petition. Attorney Fee Order at 36. Accordingly, the administrative law judge reduced the number of hours for preparation of the fee petition by half and thus awarded counsel a total of 4.5 hours for this work. The administrative law judge also reduced, by half, the total number of hours billed by counsel and his associate to prepare their reply to employer's objections because that document "achieved only limited

⁷Counsel has not cited any precedent for his position that a delay enhancement is an all or nothing proposition, nor has he shown that his largely unsuccessful appeal resulted in extraordinary delay.

success.” *Id.* The administrative law judge thus reduced counsel’s requested time by .5 hours and that of his associate by 5.375 hours, on this task. Counsel has not established an abuse of discretion in this regard. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). Therefore, we affirm the administrative law judge’s reductions relating to counsel’s fee petition and the defense thereof.

Counsel also contends the administrative law judge erred in reducing the costs associated with the vocational expert hired on claimant’s behalf in this case, Scott Stipe. Counsel further contends the administrative law judge erred by not awarding compensation for the delay in the payment of costs.

The administrative law judge addressed at length the compensability of the costs of Mr. Stipe’s work and found that while it was proper for claimant to procure a vocational consultant and for the vocational consultant to do significant work on the case, it was not “reasonable or necessary, however, [for claimant] to spend almost \$22,000 on a vocational expert.” Attorney Fee Order at 39. She therefore upheld employer’s objection and reduced by one-third the requested cost and ordered employer to pay counsel \$14,453.33 for the vocational work performed by Mr. Stipe. She further ordered that the reduction of \$7,226.67 is chargeable to counsel, not claimant. As the administrative law judge fully explained her rationale, and counsel has not established that the administrative law judge abused her discretion in reducing the expert witness fee in this case, we affirm the reduction of costs related to the vocational expert’s services. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

Moreover, we reject counsel’s contention that he is to be recompensed for the delay in employer’s payment of the awarded costs. Counsel has not cited any law supportive of his contention.⁸ Consequently, counsel has failed to establish that the administrative law judge erred in denying his request for an enhancement on the award of costs.

⁸The two administrative law judge decisions cited by counsel in support of his contention are devoid of any legal basis for the award of a delay enhancement on the awards of costs.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge