BRB No. 04-0693

WILLIAM O. SCHUKY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KINDER MORGAN COMPANY	)	DATE ISSUED: 07/25/2005
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	ORDER on MOTION for RECONSIDERATION

Claimant has filed a timely motion for reconsideration of the Board's decision in this case, *Schuky v. Kinder Morgan Co*., BRB No. 04-693 (April 15, 2005). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. We deny the motion for reconsideration. In light of claimant's arguments, however, we shall explain our decision in more detail.

Claimant injured his low back in 2001; he returned to work one month later. A dispute arose over claimant's entitlement to benefits, and the case was set for formal hearing in February 2003. Just before the hearing was to occur, claimant's counsel notified the administrative law judge that the case had been settled. In the confirmation letter to employer, claimant's counsel included two chiropractic bills for payment, one of which was for an unrelated shoulder injury. Counsel requested that employer pay both bills. He also asked for transportation costs incurred by claimant in obtaining medical treatment, and he informed employer that claimant would waive his right to additional compensation under Section 14(e) of the Act, 33 U.S.C. §914(e), if these costs were paid. Employer refused to pay these previously undisclosed costs, and thus there was a delay in settling this case.

In June 2003, claimant's counsel sent a letter to employer, enclosing a draft settlement application, presenting employer's options as follows: 1) pay the shoulder expenses and sign and return the agreement; 2) contest the shoulder payment and claimant will add the Section 14(e) additional compensation to the cost of settlement; or 3) request a formal hearing to resolve the issues. Employer's response to this letter was to inform claimant that it would not pay the chiropractic bills voluntarily because the treatment for the alleged shoulder injury was not authorized, payment of chiropractic bills

is limited to treatment for spinal subluxation, and the bills appeared to represent duplicate billing. It then appears that employer negotiated terms with the doctor and that discussions between claimant and employer broke down until December 2003. Ultimately, the parties resolved their differences, and they settled the claim in February 2004.

On February 4, 2004, claimant's counsel filed with the administrative law judge a petition for a fee for the following services rendered from July 16, 2001, through January 31, 2004: 22 hours of attorney time at $250 per hour, six hours of assistant time at $100 per hour, and $90.50 in costs, for a total fee of $6,190.50. Employer filed objections, arguing that the hourly rate and the hours billed were excessive, that claimant was not fully successful, and that claimant injected an unrelated issue and caused a delay in the settlement, making services rendered after February 10, 2003, unnecessary and unreasonable. Claimant's counsel filed a reply brief and a supplemental fee petition requesting an additional $562.50 for time spent on the reply brief "defending his fee."

The administrative law judge explained that this case should have been uncomplicated. He stated that, given claimant's counsel's vast experience, counsel should have known not to include an unrelated issue in the settlement process. Although counsel attempted to explain his actions, the administrative law judge found the explanation "disingenuous," Fee Order at 4, and he found that counsel tied claimant's waiver of a Section 14(e) assessment to the payment of the unrelated shoulder bill. Based on his determination that the case was "straightforward," and giving weight to claimant's counsel's experience, an affidavit of an attorney fee expert submitted with the fee petition, and his own experience with longshore practice in the Portland area, the administrative law judge awarded claimant's counsel a fee based on an hourly rate of $225, deeming that an appropriate rate for services performed in this case in the Portland, Oregon, area. Next, the administrative law judge addressed the hours requested. He found that the case was neither novel nor complex and that it should have settled in February 2003. Because he found that claimant "unreasonably injected the unrelated" shoulder treatment bill into the case and tied payment of that bill to claimant's waiver of additional compensation under Section 14(e), the administrative law judge concluded that all work after February 17, 2003, except for two hours of wind-up services, was unreasonable and unnecessary. Accordingly, he awarded claimant a total fee in the amount of $3,165.50. Fee Order at 3-5; Order Denying M/Recon.

Claimant's counsel appealed, raising two arguments. First, he contended the administrative law judge abused his discretion or was legally incorrect in finding that the case should have settled in February 2003. He also argued that, as he succeeded on the issue of the hourly rate before the administrative law judge, he is entitled to the supplemental fee he requested from the administrative law judge for "defending his fee." The Board rejected counsel's arguments. It held that the administrative law judge did not

abuse his discretion in finding the services performed after February 2003 were unnecessary, as the administrative law judge rationally found that the case should have settled earlier but did not due to counsel's inappropriate insertion of medical benefits for a shoulder injury into this claim for benefits for a back injury. The Board also stated that the administrative law judge is in a unique position of evaluating the effectiveness of counsel and is charged with setting an appropriate billing rate. The Board rejected counsel's argument that the administrative law judge should have awarded him a fee for "defending his fee," stating that counsel had not persuaded the administrative law judge to award a fee based on an hourly rate of $250. *Schuky*, slip op. at 1-3.

Claimant's counsel now asks the Board to reconsider its decision. He argues that the administrative law judge and the Board misunderstood the facts of the case and that there is no basis for stating that he was at fault for including the medical expenses for treatment of claimant's shoulder in the settlement. He also argues that he prevailed on the issue of the hourly rate and is entitled to a fee for work performed in defending an hourly rate over $200. Employer has not responded to the motion. We deny the motion for reconsideration.

Counsel argues that he did not prolong the settlement because there came a point when employer would not settle the claim without a resolution of the shoulder expenses. A review of the correspondence in this case supports the administrative law judge's rational finding that claimant's counsel introduced the issue of the unrelated shoulder expenses into the settlement terms. In three letters in June 2003, counsel tied payment of the shoulder expenses to claimant's demand for a Section 14(e) assessment. In a letter dated June 2, 2003, claimant's counsel sent the application for settlement to employer, stating he was willing to waive the Section 14(e) assessment if employer voluntarily paid the outstanding bill for shoulder treatment. In a letter dated June 12, 2003, claimant's counsel gave employer three options: pay for the shoulder expenses and return the signed settlement, contest the shoulder expenses and add the Section 14(e) assessment to the settlement, or request a formal hearing to resolve the issues. Finally, in a letter dated June 18, 2003, counsel stated that because employer refused to pay for the shoulder treatment, it must add the 10 percent assessment to the settlement. These letters, in conjunction with the original February 2003 letter confirming the settlement, support the administrative law judge's determination that counsel is responsible for preventing the settlement of this claim from occurring in February 2003. Counsel's letter to employer in July 2003, dropping the request for reimbursement of the shoulder expenses, came too late to allow the settlement to proceed as intended.

Thus, there is sufficient evidence in the form of the correspondence between the parties and the administrative law judge to support the administrative law judge's conclusion that it was "disingenuous" for claimant's counsel to state that he did not introduce the unrelated claim and cause the delay in settlement. As the administrative

law judge is charged with evaluating the reasonableness of the requested fee, considering the factors set forth in the Act and the regulations, his determination that the work following the reported settlement in February 2003 was unnecessary and unreasonable is rational in this case. 33 U.S.C. §928; 20 C.F.R. §702.132(a); *see generally National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). Accordingly, we affirm the conclusion that the administrative law judge did not abuse his discretion in denying a fee for the services performed after February 2003. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

Next, counsel argues that he succeeded on the hourly rate issue because he obtained $25 per hour more than the rate employer proposed, and that therefore he is entitled to the supplemental fee he requested for "defending his fee." In this regard, counsel contends the Board did not understand his argument, did not decide the issue, and erred in affirming the administrative law judge's decision. Citing *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982), he argues that there is no legal basis to deny him a fee for "defending his fee." Counsel asserts that he need not be 100 percent victorious in order to be considered the "prevailing party" and entitled to a fee.

Contrary to counsel's assertions, the Board did understand and decide the issue.[1] *See Schuky*, slip op. at 3. The Board stated that counsel was not successful in obtaining the hourly rate he requested. Although he obtained a greater rate than that suggested by employer, he obtained $25 per hour *less* than the amount he requested. The Board's conclusion that the administrative law judge rationally denied the supplemental fee was based on the administrative law judge's specific findings and conclusions. In rendering his decision on the hourly rate, the administrative law judge specifically stated:

> Based on the services in this straightforward case, the experience of Claimant's counsel, the opinion of expert David Markowitz, my experience of Longshore practice in the Portland area, and noting that $225 per hour is the usual billing rate allowed by administrative law judges in the San Francisco Office of Administrative Law Judges for attorneys in Portland, Oregon, and that *nothing in the record warrants a higher rate*, I find that $225.00 is an appropriate hourly rate for the attorney services performed in this case.

[1]The reply brief addressed counsel's reasons for *both* believing that his work was necessary after February 2003, as well as why he should receive the requested hourly rate of $250. His reply did not sway the administrative law judge on either issue.

Fee Order at 3 (emphasis added). In a footnote, the administrative law judge rejected counsel's references in his petitions to a higher hourly rate in other areas of law and in other geographical areas, and he stated that the $225 hourly rate was within the range mentioned by counsel's expert in the affidavit filed in support of the fee petition. *Id.* at n.2. Thus, the administrative law judge properly considered all factors, pursuant to the appropriate law, in determining the amount of claimant's counsel's fee award, and he gave sufficient explanation for his decision to reduce the hourly rate. As we have already explained, he also gave sufficient explanation for denying a fee for any services rendered after February 2003. As counsel's reply brief did not persuade the administrative law judge to award the requested hourly rate, it was within the administrative law judge's discretion to deny the additional fee. Accordingly, we reject counsel's contentions that the Board did not understand or resolve this issue.

Moreover, counsel has misplaced his reliance on *Jarrell*. In *Jarrell*, the Board held that claimant's counsel is entitled to a fee award on appeal where he either successfully defends his fee award, thereby retaining his right to the amount awarded below, or where he appeals a reduction in the fee requested and succeeds in obtaining an increased amount on appeal. *Jarrell*, 14 BRBS at 884. This case does not involve a fee for appellate work, and *Jarrell* is not applicable as counsel's entitlement to a fee is not at issue. The issue is whether the administrative law judge abused his discretion in excluding the hours spent on the reply brief in determining a reasonable fee. When a claimant replies to an employer's objections and persuades the administrative law judge to reject the objections, the work performed on the reply brief is compensable based on the case law stating that time spent preparing a fee petition is compensable. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Since the administrative law judge may award a reasonable fee for time spent preparing the fee petition, it follows he may award time for replying to employer's objections. However, the administrative law judge has discretion in determining the hours to be compensated. Claimant was wholly unsuccessful on one of the two arguments in his reply brief, failing to win any time after February 2003. On the rate issue, counsel requested a rate of $250 per hour, employer countered with $200 per hour, counsel replied with $250 per hour, and the administrative law judge awarded a fee based on a rate of $225 per hour. Thus, counsel's arguments did not persuade the administrative law judge to award the requested rate. Under these circumstances, claimant has not established that the administrative law judge abused his discretion in deciding not to award payment for time spent on the reply brief.

Claimant has not established any error in the Board's affirmance of the administrative law judge's fee award. Accordingly, the motion for reconsideration is denied, and the Board's decision in this case is affirmed in all respects. 20 C.F.R. §802.409.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge