U.S. Department of Labor

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

BRB No. 16-0010

BENJAMIN L. CLAUDE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: July 5, 2016
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Order Awarding Attorney Fees and Costs (2014-LHC-00950) 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a left knee injury while working for employer on August 24, 2008, for which employer voluntarily paid claimant disability and medical benefits. Subsequently, a dispute arose over claimant's entitlement to medical benefits relating to a

prescribed YMCA membership. The administrative law judge, by Decision and Order dated June 29, 2015, found claimant entitled to, and employer liable for, the disputed medical expenses.

Claimant's counsel filed an attorney's fee petition for work performed before the Office of Administrative Law Judges (OALJ) from March 7, 2014 through July 8, 2015. Specifically, counsel sought a total fee of $13,123.20, representing 27.63 hours of attorney work at an hourly rate of $400 and 17.26 hours of legal assistant work at an hourly rate of $120. Employer filed objections to the fee petition and claimant thereafter submitted a reply which the administrative law judge, in his Supplemental Decision and Order, declined to consider. The administrative law judge approved an attorney's fee, payable by employer, totaling $7,001.50, representing 19.62 hours of attorney work at $300 per hour and 11.5 hours of legal assistant work at an hourly rate of $97.

On appeal, claimant's counsel challenges the administrative law judge's refusal to consider his response to employer's objections, as well as reductions made in the requested hourly rate for attorney work and number of hours. Employer responds, urging affirmance of the administrative law judge's attorney's fee award. Counsel has filed a reply brief.

Counsel contends that the administrative law judge erred in refusing to consider his response to employer's objections. Counsel notes that other courts, including the Board, typically allow responses/replies to opposition pleadings.[1]

In this case, the administrative law judge explicitly set out the briefing schedule for any filings relating to a petition for an attorney's fee. In his June 29, 2015 decision, the administrative law judge stated:

> 6. Counsel for Claimant may, not later than 30 days after the date of this Order, submit a fully-supported application for attorney's fees and costs; and
>
> 7. The Employer may, not later than 21 days after receipt of any fee petition, file objections thereto. No reply brief will be authorized or

[1]In support of this contention, counsel cites the Board's regulation at 20 C.F.R. §802.213, Local Rule 7(f)(1) of the United States District Court for the Eastern District of Virginia, as well as the decision of the United States Court of Appeals for the Ninth Circuit in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). These do not directly support counsel's contention that he should be permitted, as a matter of law, to file a reply to employer's objections to the fee petition.

entertained.

Decision and Order Awarding Benefits at 10. Given the administrative law judge's explicit instructions to the parties, and the lack of any regulation or OALJ Rule providing counsel with the right to file a response to employer's objections to the fee petition,[2] the administrative law judge's refusal to consider counsel's reply brief in this case did not constitute an abuse of discretion. Accordingly, the administrative law judge's determination that counsel's "August 7, 2015 response will not be considered," is affirmed.[3]

Counsel next contends that the administrative law judge erred by reducing his requested hourly rate for attorney work from $400 to $300.[4] 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); *see also Newport News Shipbuilding*

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[2]While Section 702.132 of the Act's regulations, which applies to district directors and administrative law judges, addresses the filing of an application for an attorney's fee and its contents, it does not address responsive pleadings. 20 C.F.R. §702.132. The Office of Administrative Law Judge 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. However, the only potentially applicable provision relevant to the issue in this case, i.e., 29 C.F.R. §18.33(d), as written, applies only to responses filed "prior to [the] hearing." Counsel's response to employer's objections in this case was not a pre-hearing submission. *See Rankins v. Huntington Ingalls Industries, Inc.*, BRB No. 15-0498 (June 20, 2016) (unpub.).

[3]We note that counsel should submit his best evidence with his fee petition as he bears the burden to produce satisfactory evidence in support of his requested hourly rate. *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010). Moreover, we note that the administrative law judge's order explicitly instructed counsel to submit "a fully-supported application." Decision and Order Awarding Benefits at 10.

[4]We decline to address counsel's summary challenge to the administrative law judge's award of an hourly rate of $97 for work performed by the "non-attorney support staff," because that issue is inadequately briefed. *See Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). Accordingly, the administrative law judge's finding on that issue is affirmed.

& Dry Dock Co. v. Holiday, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). The Supreme 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 community for similar services by lawyers of comparable skill, experience, and reputation. *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010).

Contrary to counsel's contention, the administrative law judge addressed, and rationally rejected, the evidence counsel submitted in support of his claim to an hourly rate of $400.[5] Specifically, the administrative law judge rejected counsel's reference to the Board's fee award (awarding $350 per hour) in *Green v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0294/A (Mar. 30, 2010) (unpub. Order), as evidence establishing that $400 is a reasonable hourly rate for work at the OALJ level, because in the case on the merits, the Board affirmed the administrative law judge's award of an hourly rate of $300.[6] *Green v. Ceres Marine Terminals*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011). Additionally, the administrative law judge rejected counsel's Consumer Price Index evidence, submitted in support of an increased rate, because counsel did not provide "sufficient evidence that it accurately reflects the actual inflation rate in legal services provided by similarly situated attorneys"

[5]In support of his request for an hourly rate of $400 for attorney work, claimant's counsel submitted evidence of rates he received in prior cases, along with evidence to support an upward adjustment to those figures to reflect current rates. Specifically, counsel submitted, in support of his July 15, 2015 fee petition: 1) a Board Order in *Smith v. Huntington Ingalls Industries, Inc.*, BRB No. 13-0331 (July 18, 2014) (unpub. Order), awarding an hourly rate of $400 to counsel; 2) a Board Order dated March 30, 2010, *Green v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0294/A (Mar. 30, 2010) (unpub. Order), awarding counsel an hourly rate of $350; 3) website citations to the Legal Services Component of the Consumer Price Index, and the Federal Locality Rate; and 4) the Laffey Matrix (2012-2013).

[6]In any event, we reject counsel's use of the Board's Order in *Green*, BRB Nos. 09-0294/A as evidence of his market rate because the claimant's award of benefits was reversed on appeal. *Green v. Ceres Marine Terminals, Inc.*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011). Thus, counsel never received an attorney's fee in that case, and the Board's fee award cannot serve as a basis for setting a market rate. Moreover, the administrative law judge was not required to rely on the Board's award in *Smith*, BRB No. 13-0331, in view of lower, contemporaneous awards in other cases. Moreover, counsel's fee petition in *Smith* was unopposed.

in the relevant geographic area. Supp. Order at 4. The administrative law judge, instead, took "official notice" that counsel's colleague, Mr. Camden,[7] was awarded fees in 2014 at hourly rates of $331 and $300, to find that $300 is the market hourly rate for attorneys in the Hampton Roads area of similar skill and experience to Mr. Camden. Counsel has failed to establish that the administrative law judge's selection of this rate is arbitrary, capricious, not in accordance with law or based on an abuse of discretion. *See Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004) (fee awards in comparable cases may be relied upon to set the market rate). Therefore, we affirm the award of an hourly rate of $300. *See generally Fox v. Vice*, 131 S.Ct. 2005, 2216 (2011); *Cox*, 602 F.3d 276.

Lastly, counsel contends the administrative law judge abused his discretion by reducing ten entries of "review of correspondence" to .1 hour each and by completely rejecting one hour of attorney work on July 28, 2014, and all entries after October 24, 2014, relating to receiving and reviewing client records and involving attorney/client conferences. We reject counsel's contentions.

In this case, the administrative law judge looked at the work performed for each of the ten "review of correspondence" entries, rationally determined that the requested amount of time was excessive in light of the work involved, and reduced those entries.[8] *See generally Gosnell*, 724 F.3d 561. Additionally, the administrative law judge rationally categorized the one hour for compiling the record as clerical, *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980), and furthermore, within his discretion, concluded that the seven entries from October 24, 2014 until June 6, 2015, are excessive.[9] *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th

[7]Mr. Camden and counsel are partners in the firm Montagna Klein Camden, LLP.

[8]Counsel is correct in observing that the regulation governing fee petitions to the Board states that entries should be reported in quarter-hour increments, 20 C.F.R. §802.203(d)(3), that the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, and the Board have each acknowledged that the quarter-hour billing method complies with that provision, and that there is no authority prohibiting this method. *Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). Nonetheless, the Fourth Circuit has also stated that counsel's use of quarter-hour minimum billing does not relieve the adjudicator of ensuring that excessive fees are not awarded. *Gosnell*, 724 F.3d 561.

[9]In this case, the entries in question involve work performed between the date of the formal hearing and the administrative law judge's decision. Counsel did not establish

Cir. 2007); *see also* 20 C.F.R. §702.132(a). Counsel has not demonstrated an abuse of the administrative law judge's discretion, and therefore we reject claimant's assertions of error in the reductions made by the administrative law judge in the requested number of hours. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *see generally Fox* 131 S.Ct. at 2216; *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006). Consequently, we affirm the administrative law judge's reduction in hours and the total fee award for 19.62 hours of attorney work and 11.50 hours of paralegal work. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994).

Accordingly, the administrative law judge's Supplemental Order Awarding Attorney Fees and Costs 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

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to the administrative law judge's satisfaction how repeated entries to "receive and review records" were necessary to the case given that the parties were merely awaiting a decision during this time.