

U.S. Department of Labor

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



BRB No. 19-0007

MARVIN D. WILSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 07/03/2019
MANTECH INTERNATIONAL)	
CORPORATION)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Attorney Fee Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

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

Chase H. Zobec (Schouest, Bamdas, Soshea & Ben Maier, P.L.L.C.), Boca Raton, Florida, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order of Administrative Law Judge Richard M. Clark (2015-LDA-00587) rendered on a claim filed pursuant to 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 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).

After employer withdrew its controversion of the claim, the administrative law judge remanded this case to the Office of Workers' Compensation Programs (OWCP) on July 28, 2016. Claimant's counsel filed a fee petition on October 11, 2016, for services before the administrative law judge, to which employer filed objections and claimant filed a reply. Claimant's counsel sought a fee of \$34,001.50, representing 53 hours of services by lead counsel at \$466 per hour, 39.5 hours of associate counsel time at \$225 per hour, and 2.6 hours of paralegal time at \$160 per hour, plus \$1,222.32 in costs.

The administrative law judge based his hourly rate determinations on his fee award in *Ayers v. Jones-Stevedoring Co.*, 2011-LHC-01875 (June 1, 2016), *aff'd in pert. part*, BRB No. 16-0520 (Apr. 24, 2017), *recon. denied*, (Aug. 5, 2017) (unpub.), and the hourly rate determinations of other administrative law judges in cases involving claimant's counsel.¹ He found these decisions provide a reliable and thorough analysis of counsel's current market rate and he need not engage in a repeat analysis. Attorney Fee Order at 8. Accordingly, the administrative law judge found that lead counsel's rates are \$353.16 for 2015 and \$360.58 for 2016, associate counsel's rates are \$212.62 for 2015 and \$217.09 for 2016, and the paralegal hourly rate is \$150. *Id.* at 9-10. He denied claimant's counsel's request for a delay enhancement and disallowed some of the requested hours. *Id.* at 9, 12-14. He awarded claimant's counsel a fee of \$24,260.58, representing 6.25 hours at \$353.16 per hour, 41.1 hours at \$360.58 per hour, 1.65 hours at \$212.62 per hour, 24.45 hours at \$217.45 per hour, and 2.35 hours at \$150 per hour, plus \$1,222.32 in costs.

On appeal, claimant's counsel challenges the administrative law judge's hourly rate determinations, his denial of an enhancement for delay in payment of the fee, and his reduction of time expended on certain motions and on a reply to employer's objections to the fee petition. Employer responds, urging affirmance. Counsel has filed a reply brief.

¹The administrative law judge relied on *Serbinovich v. Gunderson, Inc.*, 2013-LHC-01372 (Aug. 2, 2018), *aff'd*, BRB No. 18-0596 (June 12, 2019); *Seachris v. Brady-Hamilton Stevedore Co.*, 2007-LHC-01747 (Jan. 19, 2017), *aff'd in pert. part*, BRB No. 17-0581 (May 7, 2018) (unpub.), *appeal pending*, No. 18-71807 (9th Cir.); and *Ochoa v. Jones Stevedoring Co.*, 2011-LHC-00623 (Aug. 23, 2016), *recon. denied*, (Oct. 31, 2016), *aff'd in pert. part*, BRB No. 17-0085 (July 27, 2017) (unpub.), *appeal pending*, No. 18-70067 (9th Cir.).

Claimant's counsel raises hourly rate contentions that are the same as those raised and addressed by the Board in *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0520 (Apr. 24, 2017) (unpub.).² In *Ayers*, the Board affirmed the administrative law judge's proxy hourly rates based on the 2012 Oregon State Bar Economic Survey (2012 OBS),³ stating that they are rational and in accordance with law, i.e., *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015) (use of OBS to set proxy rate); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (adjudicator need not engage in a new market analysis in every case); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009). Consequently, the Board affirmed the adjusted hourly rates awarded by the administrative law judge. *Ayers*, slip op. at 5. For the reasons stated in *Ayers*, slip op. at 2-5, we reject claimant's contentions.

We further reject counsel's contentions that the administrative law judge erred in not affording him an opportunity to submit additional evidence to support his rates and in setting the proxy rate with respect to plaintiff personal injury and plaintiff civil litigation rates. The administrative law judge was not required to afford claimant's counsel an opportunity to submit additional evidence, as he permissibly relied on counsel's submission of survey data from the 2012 OBS. *See Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). Moreover, the administrative law judge did not abuse his discretion in relying on the 2012 OBS categories of plaintiff personal injury and plaintiff civil litigation. *See, e.g., Nelson v. ICTSI Oregon, Inc.*, 743 F. App'x 120 (9th Cir. 2018), *aff'g* BRB No. 16-0517 (Aug. 18, 2017) (unpub.) (no abuse of discretion in the administrative law judge's use of the 2012 OBS data solely from the practice area of plaintiff personal injury); *see also Hardman v. Marine Terminals Corp.*, 758 F. App'x 586 (9th Cir. 2018), *aff'g* BRB No. 17-0097 (Oct. 18, 2017) (unpub.).

Claimant's counsel next avers the administrative law judge erred in awarding him 2015 rates for work performed in 2015, and 2016 rates for work performed in 2016. He

²These contentions concern the administrative law judge's rejection of counsel's market rate evidence, the use of the 75th percentile rate from the 2012 Oregon State Bar Economic Survey for lead counsel's rate, the alleged impropriety of discounting lead counsel's years of experience, and the rates awarded for the work of his associate counsel and paralegal.

³The Board stated that, having rejecting counsel's evidence in support of the requested hourly rates, the administrative law judge correctly looked to the 2012 OBS to set the proxy market rate for the services provided by counsel and his associate. *Ayers*, slip op. at 3 (citing *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015)).

asserts he is entitled to a delay enhancement because the administrative law judge's fee award was not issued until August 29, 2018. He contends this is a sufficiently lengthy period to require an enhancement for delay.

The issue of a delay enhancement concerns the lapse in time between the performance of legal services and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). The administrative law judge acknowledged this principle but found the delay in this case "is not so great as to mandate a delay enhancement." Attorney Fee Order at 9 (citing *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)).⁴ Claimant has not shown the administrative law judge's decision in this matter to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. Consequently, we affirm the administrative law judge's hourly rate awards.

Claimant's counsel next challenges the administrative law judge's reduction in time expended on motions and a reply to employer's objections to his fee petition. Counsel contends that all time expended in opposition to employer's motion to compel, on his motion to reinstate benefits, and his motion opposing remand was reasonable and necessary because his efforts were related to employer's suspension of compensation after claimant did not attend a defense medical examination (DME) and its denial of compensation for permanent total disability. Counsel also avers the administrative law judge erred by not adequately explaining his reduction of 5.4 hours for time expended in replying to employer's 25 pages of objections to the fee petition.

The tests applied to the compensability of the attorney's work are whether the hours claimed are "reasonable" for the "necessary work done" in the case and the fee award is commensurate with the degree of success obtained. *See* 20 C.F.R. §702.132(a); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Thus, the administrative law judge may, within his discretionary authority, disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). An administrative law judge is afforded "considerable deference" in determining what hours are "excessive, redundant, or otherwise unnecessary." *Id.*, 511 F.3d at 956, 41 BRBS at 57(CRT).

The administrative law judge permissibly denied time expended for responding to employer's motion to compel claimant to attend a DME and on claimant's motion to reinstate benefits, as these motions were not necessary to claimant's obtaining benefits.

⁴The administrative law judge cited cases where an enhancement for egregious delay was required. *See* Attorney Fee Order at 9.

Attorney Fee Order at 12-14. He permissibly found unreasonable and unjustified counsel's insistence that, before claimant would attend the DME, employer must first reinstate benefits and pay mileage costs. He also permissibly determined that claimant's motion to reinstate benefits sought relief that legally could not be granted and thus was unnecessary. *Id.* at 13. The administrative law judge permissibly denied time expended opposing employer's motion to remand the case to the OWCP, because such is required by the regulations when there are no outstanding issues before the Office of Administrative Law Judges. *Id.*; 20 C.F.R. §§702.315, 702.351. Finally, claimant has not shown an abuse of discretion by the administrative law judge in reducing as excessive 5.4 hours of the 10.75 hours requested for drafting a reply to employer's objections to counsel's fee petition. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). Therefore, we affirm the disallowance of 5.65 hours of lead counsel's services and 13.4 hours of associate counsel's services.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge