



BRB No. 17-0337

BRADLEY DILLON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BLACKWATER SECURITY)	
CONSULTING)	DATE ISSUED: <u>Mar. 19, 2018</u>
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

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

Howard S. Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2014-LDA-00254) of Administrative Law Judge Richard M. Clark 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.*, 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. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d

219, 43 BRBS 67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On March 19, 2009, claimant was injured while providing personal protection services in Iraq for employer. The administrative law judge found claimant established compensable scheduled and unscheduled work injuries and awarded claimant disability and medical benefits for his work-related injuries.¹

On August 9, 2016, counsel filed a fee petition for work performed before the administrative law judge. He sought a total fee of \$141,298.12, representing 258.95 hours of his time at an hourly rate of \$450 (\$116,527.50); 15.50 hours of Mr. Ferrin's time at an hourly rate of \$375 (\$5,812.50); 81.60 hours of Mr. Yellin's time at an hourly rate of \$140 (\$11,424); and \$7,534.12 in costs.² Employer objected to the requested hourly rates for Mr. Grossman and Mr. Ferrin, the number of hours billed, and the amount of the claimed costs.

The administrative law judge found that the relevant community for establishing counsel's hourly rates is the Southern District of Florida, as his office is in Palm Beach County, Florida. Order at 3. The administrative law judge found that counsel failed to establish that \$450 and \$375 represent market rates for services performed by him and Mr. Ferrin; however, he found counsel's evidence supported the hourly rate of \$140 for Mr. Yellin's paralegal services. *Id.* at 5-6. Based on the evidence provided by counsel, contemporaneous Longshore/Defense Base Act fee awards for services in the relevant community, and counsel's effective representation in this case, the administrative law judge determined that reasonable hourly rates for counsel and Mr. Ferrin are \$350 and \$300, respectively. *Id.* at 6. The administrative law judge disallowed some of the itemized entries for work by counsel and Mr. Yellin, and also disallowed some of the requested costs. *Id.* at 7-11. Thus, the administrative law judge awarded counsel a fee of \$81,099.72, representing 188.40 hours of Mr. Grossman's time at an hourly rate of \$350, 15.50 hours of Mr. Ferrin's time at an hourly rate of \$300, 27.40 hours of paralegal time at an hourly rate of \$140, and \$6,673.72 in costs. *Id.* at 12.

Counsel appeals the fee award, contending the administrative law judge abused his discretion in disallowing or reducing itemized entries and disallowing some of the costs.

¹ Pursuant to claimant's appeal, the Board modified the administrative law judge's calculation of claimant's wage-earning capacity but affirmed the award in all other respects. *Dillon v. Blackwater Security Consulting*, BRB No. 16-0631 (June 8, 2017). On reconsideration, the Board modified claimant's wage-earning capacity to account for inflation. Order (Nov. 6, 2017).

² These services were rendered between February 2014 and August 2016.

Counsel also appeals the hourly rate awarded for his services and those of Mr. Ferrin.³ Employer did not respond to this appeal.⁴

With respect to the administrative law judge's disallowance or reduction of itemized entries, we have reviewed counsel's contentions and conclude that counsel has not established that the administrative law judge abused his discretion in reducing the requested fee for services he found duplicative, excessive, and clerical. Section 702.132, 20 C.F.R. §702.132, provides that the award of an attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *Loranger v. Stierheim*, 10 F.3d 776, 782 (11th Cir. 1994); *Norman v. Housing Auth.*, 836 F.2d 1292, 1304-1306 (11th Cir. 1988).

The administrative law judge found multiple entries that led him to believe that the services performed by Mr. Yellin duplicated those performed by counsel.⁵ Duplicative tasks are not reasonable or necessary and are properly disallowed. *Norman*, 836 F.2d at 1301; *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). The administrative law judge also disallowed time spent on general tasks and on the post-hearing brief that he deemed excessive. Given his familiarity with the case and the brief, his observation that general tasks included such items as reviewing or preparing short documents, his understanding of counsel's experience and rational inference that not all of the services for which counsel billed were performed by him, it was reasonable for the administrative law judge to reduce this time.⁶ See *Norman*, 836 F.2d at 1304; *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997); *Davenport v. Apex Decorating Company, Inc.*, 18 BRBS 194 (1986); see also *Van Skike v. Director, OWCP*, 557 F.3d 1041, 1048, 43 BRBS 11,

³ We affirm, as unchallenged on appeal, the award of 15.50 hours of time for services rendered by Mr. Ferrin, and the hourly rate award of \$140 to Mr. Yellin for paralegal services. See *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

⁴ Employer filed a motion to dismiss counsel's appeal as untimely filed, which the Board denied in an Order dated July 24, 2017.

⁵ The administrative law judge found that 2.35 hours of duplicative work occurred on June 12 and 27, 2014, November 4, 2014, and April 13, 2015.

⁶ The administrative law judge disallowed as excessive 54.05 hours. Counsel appealed the reduction of only 12.35 hours on general tasks and 9.70 hours on the post-hearing brief; he did not challenge a disallowance of 32 hours for work on the post-hearing brief that the administrative law judge found to be duplicative.

15(CRT) (9th Cir. 2009); *see generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989).

Finally, we also reject counsel's assertion that the administrative law judge erred in reducing time spent on clerical services.⁷ Tasks such as calendaring of deadlines, case organization, drafting correspondence, and responding to discovery requests are clerical unless they require independent legal judgment. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980). Counsel does not challenge the administrative law judge's characterization of the items disallowed as "clerical," and he does not otherwise assert that any of the disallowed tasks required independent legal judgment. Therefore, the administrative law judge acted within his discretion in disallowing this time. *Quintana*, 18 BRBS 254; *Staffile*, 12 BRBS 895. As counsel raises no other challenges to the administrative law judge's reduction in itemized entries, we affirm his findings that counsel is entitled to an award for 188.40 hours for his services, and 27.40 hours for services rendered by Mr. Yellin.

With respect to the reduction in costs, we reject counsel's assertion that the administrative law judge erred in reducing the requested costs by \$736.09.⁸ Pursuant to Section 28(d), the administrative law judge is to assess the necessity and reasonableness of the costs. *See also* 20 C.F.R. §702.135. As part of his fee petition to the administrative law judge, counsel did not offer an explanation as to why the expense of \$495 to videotape Dr. Hodor's examination of claimant was reasonable. On appeal, counsel asserts the videotape had "evidentiary value" as objective evidence of claimant's positive Adson's test, *i.e.*, claimant's pulse abating when lifting his left arm over shoulder height, but fails to explain why he believed such evidence was necessary to establish the existence and/or work-relatedness of claimant's symptoms as two other doctors had previously reported such. JX 10 at 1; JX 17 at 3. Further, contrary to counsel's assertion, the administrative law judge did not rely on this video evidence in finding that claimant's thoracic outlet syndrome is compensable.⁹ The administrative law

⁷ The administrative law judge disallowed 45.95 hours of clerical work performed by Mr. Yellin and 6 hours of clerical work performed by counsel.

⁸ The administrative law judge reduced the requested costs by \$860.40. However, counsel challenges only the disallowance of the \$495 cost to videotape employer's medical examination of claimant and \$241.09 in postage costs.

⁹ Claimant correctly notes that the administrative law judge found the report of employer's expert, Dr. Hodor, to be consistent with the videotape of the examination. However, the administrative law judge found Dr. Hodor's opinion, that claimant's

judge rationally disallowed the \$495 cost because it was not reasonably necessary to establish claimant's entitlement to benefits. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see generally Cahill v. Int'l Terminal Operating Co., Inc.*, 14 BRBS 483 (1981).

Similarly, contrary to counsel's assertion, the administrative law judge acted within his discretion in disallowing, as office overhead, postage costs in the amount of \$241.09. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989) (Order); Order at 12. Counsel's unsupported statement that the costs "were necessary to the claim," fails to establish that the costs are reasonable, necessary, and in excess of what is normally considered overhead. *See generally Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981).

Next, we turn to the administrative law judge's reduction of the requested hourly rates. Counsel contends the administrative law judge improperly disregarded the market rate evidence supporting the requested hourly rates for him and Mr. Ferrin, of \$450 and \$375, respectively, and that the administrative law judge additionally erred in failing to place the burden on employer to show that the rates requested are unreasonable or excessive. In awarding an attorney's fee, the courts have determined that the starting point is the "lodestar," whereby a court multiplies the number of hours reasonably worked by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).¹⁰ "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Loranger*, 10 F.3d at 781 (quoting *Norman*, 836 F.2d at 1299 (citing *Blum v. Stevenson*, 465 U.S. 886, 895-896 (1984))). The party seeking the fee bears the burden of establishing the prevailing rate by showing "satisfactory evidence." The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated that "satisfactory evidence" is "more than the affidavit of the attorney performing the work." *Id.* Instead, a court "is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an

ongoing symptoms were unrelated to the March 2009 injury, to be unpersuasive in light of Dr. Hodor's reasoning. Decision and Order at 35. Further, in crediting the opinion of claimant's expert, Dr. Zaret, that claimant's thoracic outlet syndrome is work-related, the administrative law judge drew no connection between the videotape and the weight assigned to Dr. Zaret's opinion. *Id.* at 33-34.

¹⁰ The Supreme Court admonishes that fee requests should not result in second major litigations. *Hensley*, 461 U.S. at 437.

independent judgment either with or without the aid of witnesses as to value.” *Id.* (quoting *Norman*, 836 F.2d at 1303).

The administrative law judge thoroughly discussed counsel’s market rate evidence and gave detailed reasons for finding it did not support the requested hourly rates.¹¹ With respect to the \$375 hourly rate requested by Mr. Ferrin, the administrative law judge found that the evidence counsel submitted established he was previously awarded \$300 per hour. As counsel’s declaration did not attest to Mr. Ferrin’s legal expertise, areas of practice, skill or reputation in the local community, the administrative law judge rationally found counsel did not establish that the market rate for Mr. Ferrin’s services is \$375 per hour. *Loranger*, 10 F.3d at 781; *Norman*, 836 F.2d at 1299; *see generally Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). Substantial evidence supports the administrative law judge’s finding that counsel’s prior fee awards support an hourly rate of \$300 for Mr. Ferrin’s services, and we affirm that rate. *Loranger*, 10 F.3d at 781; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *see generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011).

With respect to counsel’s requested rate of \$450 per hour, the administrative law judge found that none of the submitted evidence supports such a rate.¹² Order at 5-6. As

¹¹ In support of the \$450 hourly rate requested, counsel submitted an excerpt from “Real Rate Report 2014: The Industry’s Leading Analysis of Law Firm Rates, Trends and Practices” (the Real Rate Report), prior Defense Base Act fee awards in *Stoll v. Apollo, Inc.*, ALJ No. 2014-LDA-00440 (Apr. 8, 2016) (awarding hourly rates of \$450 and \$300 to counsel and Mr. Ferrin, respectively, for 2014-2015 services), and *Pecnik v. Southern Air, Inc.*, ALJ No. 2015-LDA-00064 (Dec. 16, 2015) (awarding hourly rates of \$365 and \$300 to counsel and Mr. Ferrin, respectively, for 2014-2015 services), and his own affidavit. In support of its objection to counsel’s requested hourly rate, employer submitted *Walbeck v. Dyncorp Int’l*, ALJ No. 2014-LDA-00526 (Jan. 22, 2015) (awarding hourly rates of \$350 and \$300 to counsel and Mr. Ferrin, respectively). With respect to the \$375 hourly rate requested for Mr. Ferrin, the only evidence counsel submitted was his own affidavit, in which he attests to Mr. Ferrin’s 34-years in practice, bar memberships, certifications, and “AV” Martindale Hubbell rating. *See generally Loranger*, 10 F.3d at 781 (affidavit of attorney who performed the work insufficient to set market rate).

¹² He found the Real Rate Report is unclear with regard to practice areas and the experience, skill, and reputation of the participating attorneys, and that the reported rates were specific to Miami, rather than to the Southern District of Florida. Order at 4; Fee Petition - EX D; *see Loranger*, 10 F.3d at 781. Further, he found the \$450 hourly rate awarded in *Stoll* less persuasive than the prior awards in *Pecnik* and *Walbeck*, because the rate in *Stoll* was based almost entirely on Judge Solomon’s subjective knowledge of rates

the administrative law judge permissibly found that counsel failed to support the requested hourly rate with evidence of prevailing rates for similar services in the relevant community, he was not bound to accept counsel's claim that \$450 is a reasonable hourly rate for his services. *Loranger*, 10 F.3d at 781; *Norman*, 836 F.2d at 1299; *see generally Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT).

In calculating a reasonable hourly rate for counsel's services, the administrative law judge found that the prior fee awards of \$365 in *Pecnik* and \$350 in *Walbeck*, in conjunction with the hourly rates of \$350.38 and \$325 he awarded other attorneys in *Yunis v. Academi, LLC*, ALJ No. 2015-LDA-00399 (Oct. 27, 2016), and *Abassi v. Mission Essential Personnel*, ALJ No. 2015-LDA-00321 (Oct. 27, 2016), support \$350 as a market-based hourly rate for counsel's services in the Southern District of Florida.¹³ Subsequent to the administrative law judge's fee award in this case, however, the Board vacated the hourly rate awards in *Yunis* and *Abassi* because the administrative law judge did not explain his method of calculation with sufficient specificity to permit the Board's review to determine whether the result reached represented a market rate for lawyers of comparable skill, experience, and reputation. *See Yunis v. Academi, LLC*, BRB No. 17-0058, slip op. at 4 (Sept. 28, 2017); *Abassi v. Mission Essential Personnel*, BRB No. 17-0059, slip op. at 4-5 (Sept. 28, 2017). In addition, the Board held that the administrative law judge's failure to notify the parties of his intent to take official notice of judicial decisions was prejudicial to the claimants. Because the administrative law judge's methodology in this case is based on the vacated awards in *Yunis* and *Abassi*, we are unable to affirm his finding that \$350 represents a market rate for counsel's services. We therefore vacate the hourly rate award and remand the case for further consideration of this issue, consistent with the Board's instructions in *Yunis* and *Abassi*. On remand, the administrative law judge must reassess the evidence, arrive at an hourly rate, and explain how the awarded hourly rate represents a market rate for lawyers of comparable skill, experience, and reputation. *Loranger*, 10 F.3d at 781.

Based on the foregoing, we affirm the fee award of \$4,650 for services rendered by Mr. Ferrin, \$3,836 for services rendered by Mr. Yellin, and \$6,673.72 in costs. We affirm the administrative law judge's finding that counsel is entitled to a fee for 188.40

rather than a market analysis. The administrative law judge also found the statements contained in counsel's affidavit were subjective and uncorroborated. Order at 5-6; *see Loranger*, 10 F.3d at 781.

¹³ In *Yunis* and *Abassi*, the administrative law judge derived base hourly rates of \$350 based on a sampling of eight fee awards from the District Court for the Southern District of Florida.

hours of his services. We vacate the hourly rate of \$350 awarded to counsel and we remand the case for further consideration of counsel's hourly rate.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge