U.S. Department of Labor

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

BRB No. 15-0162

BARON SEABROOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	DATE ISSUED: Oct. 28, 2015
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney Fees of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Attorney Fees (2015-LHC-00249) of Administrative Law Judge Dana Rosen 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 it is 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).

Claimant sustained a work-related injury while employed by employer on May 14, 2014. After claimant's claim was transferred to the Office of Administrative Law Judges, the parties reached an agreement. Consequently, in an Order issued on January 9,

2015, the administrative law judge remanded the case to the district director for appropriate action.

Claimant's counsel subsequently filed a petition seeking an attorney's fee of $948, representing 1.77 hours of attorney work at an hourly rate of $400 and 2 hours of paralegal work at an hourly rate of $120, for work before the administrative law judge. The administrative law judge reduced the hourly rates and number of hours requested for both attorney and paralegal work, and approved an attorney's fee, payable by employer, totaling $516.60, representing 1.53 hours of attorney work at $300 per hour and .64 hours of paralegal work at $90 per hour.

On appeal, claimant's counsel challenges the administrative law judge's reduction of his requested hourly rates and itemized entries. Employer responds, urging affirmance of the administrative law judge's decision. Claimant's counsel filed a reply brief.[1]

We agree with claimant's counsel that the administrative law judge's reduction in the hourly rates and itemized entries cannot be affirmed. For the reasons that follow, we vacate the administrative law judge's award of an attorney's fee to claimant's counsel and remand the case for further consideration.

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). The 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).

In support of his request for hourly rates of $400 for attorney work and $120 for paralegal work, claimant's counsel submitted evidence of rates he and his paralegals

[1] On October 15, 2015, claimant's counsel filed a second reply brief asserting that his contentions on appeal are supported by the recent decision of the Board in *Glass v. Huntington Ingalls Industries, Inc.*, BRB No. 15-0076 (Sept. 23, 2015) (unpub.). Claimant's second reply brief is accepted. 20 C.F.R. §802.215.

received in prior cases, along with evidence to support an upward adjustment to those figures to reflect current rates. Specifically, counsel submitted to the administrative law judge: 1) 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 for attorney work and an hourly rate of $150 for paralegal work; 2) an administrative law judge decision, issued in 2012, awarding counsel hourly rates of $315 for attorney work and $95 for paralegal work; 3) an administrative law judge decision, issued in 2013, awarding counsel hourly rates of $324 for attorney work and $95 for paralegal work; and 4) charts listing the Legal Services Component of the Consumer Price Index (CPI), Lawyer (2009-2013), Legal Services Component of CPI, Paralegal (2009-2013), the Federal Locality Rate Adjusted CPI, Lawyer (2009-2013), and the Laffey Matrix (2003-2013). Employer did not file any objections to counsel's fee petition.

In addressing counsel's requested hourly rates, the administrative law judge did not address the administrative law judge fee awards submitted by claimant's counsel in support of his fee request; rather, the administrative law judge noted only that claimant's counsel cited "cases before the Benefits Review Board approving a rate of $350.00 per hour," and that counsel relied on the Laffey matrix and increases in the federal locality pay rate and Consumer Price Index to upwardly adjust that rate. *See* Decision and Order at 3. The administrative law judge found, however, that this evidence did not correlate to a change in the market for legal services in claimant's counsel's locale, and that, moreover, counsel did not introduce any affidavits from other counsel in the area or other evidence that would support his requested hourly rate of $400. *Id*. The administrative law judge, relying on "experience and the administrative record," found that hourly rates of $300 for attorney work and $90 for paralegal work are "the prevailing rate[s]" in claimant's counsel's locale. *Id*. The administrative law judge, however, did not identify what, in her "experience or the administrative record," led her to conclude that these hourly rates are the prevailing rates in the relevant area. *Id*. In particular, the administrative law judge was not presented with any evidence awarding those rates, nor did she cite any other cases awarding those rates. Thus, we are unable to assess the basis for the administrative law judge's findings. Consequently, we conclude that, at present, the fee award cannot be affirmed. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT), *Finnegan v. Director, OWCP*, 69 F.3d 1039, 1041, 29 BRBS 121, 122-123(CRT) (9th Cir. 1995).

Moreover, the administrative law judge did not provide a sufficient basis for rejecting counsel's evidence. Prior fee awards may constitute "inferential evidence" of a prevailing market rate in cases arising under the Act. *Eastern Associated Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561 (4th Cir. 2013); *Cox*, 602 F.3d at 290; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Newport News Shipbuilding & Dry Dock v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *Stanhope*, 44 BRBS 107. Additionally, contrary to the administrative law judge's suggestion, affidavits of other attorneys are not "required" to set the prevailing market rate. *Cox*, 602 F.3d at 289-290 (the court, citing

Robinson v. Equifax Information Services, L.L.C., 560 F.3d 235, 245 (4th Cir. 2009), "recognized a range of sources" that could provide evidence to support an hourly rate determination: 1) evidence of fees the attorney received in the past; 2) affidavits of other local attorneys who are familiar with the applicant's skills and the type of work in the relevant community; and/or 3) evidence of rates awarded in other administrative proceedings of similar complexity). Furthermore, the rate should be based on current, rather than historical, market conditions. *See generally Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *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). Thus, counsel's evidence of rates he previously received for work in the Hampton Roads area, which was not considered by the administrative law judge, may constitute sufficient evidence of a prevailing market rate.[2] *Gosnell*, 724 F.3d at 572-574. In view of the absence of evidence to support the administrative law judge's rate determinations and her erroneous rejection of counsel's evidence for lack of supporting affidavits, we vacate her hourly rate determinations and remand the case for further consideration of this issue. On remand, the administrative law judge must reconsider counsel's evidence of fee awards in other cases and provide the specific basis for her conclusions regarding the market rate for the services of counsel and paralegals. *Gosnell*, 724 F.3d 561; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Brown*, 376 F.3d 245, 38 BRBS 37(CRT).

Counsel also challenges the administrative law judge's finding that his fee petition lacks specificity and is vague, and her consequent reduction or disallowance of itemized entries. The administrative law judge found that counsel's fee petition lacks specificity so as to allow her to determine whether the activity "further[ed] the claim." *See* Decision and Order at 4. Stating that the usual remedy for an incomplete or non-specific fee request is to withhold a fee until a complete statement is received, the administrative law judge nonetheless disallowed in their entirety two entries, on December 10 and December 22, 2014, which documented a "conference with client" by counsel's paralegal, stating that these two entries are "vague, lack specificity, and are random time entries." *Id.* at 5. The administrative law judge also reduced each of counsel's two telephone call entries and his paralegal's three telephone call entries, for which counsel sought .25 hour each, to .13 hour, stating that "[i]ncremental billing is not an accurate indication of time

[2] We reject, however, counsel's use of the Board's Order in *Green v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0294/A (Mar. 30, 2010) (unpub. Order), as evidence of his market rate because the claimant's award of benefits in that case 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.

expended" and "[w]ithout more description why it took 15 minutes for every phone call by counsel and his paralegal, these entries will be reduced to .13 each."[3] *Id*.

It was within the discretionary authority of the administrative law judge to find that claimant's counsel's fee petition lacked specificity. *See generally Sullivan v. St. John's Shipping Co.*, 36 BRBS 127 (2002); *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994). As acknowledged by the administrative law judge, however, the usual remedy for a fee petition that is incomplete, lacks specificity, or fails to meet the standards of the regulation at 20 C.F.R. §702.132, is to withhold a fee award until a complete, adequate statement is provided. *Nat'l Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977); *Carter v. General Elevator Co.*, 14 BRBS 90 (1981). If counsel fails to correct the deficiency, the administrative law judge may disallow the entries at issue. *Hudson*, 28 BRBS 334.

In this case, there is no evidence that counsel's paralegal did not meet with claimant on the dates indicated. Thus, it was unreasonable for the administrative law judge to completely deny the time requested without giving claimant's counsel an opportunity to address the administrative law judge's concerns regarding the entries.[4] Accordingly, we vacate the administrative law judge's denial of a fee for one hour claimed for counsel's two conferences with claimant, as well as the reduction in the fee sought for telephone calls. On remand, the administrative law judge must allow claimant's counsel an opportunity to address her concerns regarding the lack of specificity of these entries.

[3] 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). The regulation governing fee petitions to district directors and administrative law judges is silent on this matter. 20 C.F.R. §702.132.

[4] The administrative law judge seems not to have considered that the conferences and telephone calls took place in the 10 days before the parties reached an agreement to resolve the claim.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration consistent with this opinion.[5]

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge

[5] We decline counsel's request that the Board approve an hourly rate of $200 for the services performed by his paralegal "KAM." Counsel's fee petition to the administrative law judge does not document any work performed by this person, and counsel has not submitted a fee petition for work performed before the Board in this appeal.