U.S. Department of Labor

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

BRB No. 18-0121

HAMIDULLAH MAKHMOOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MISSION ESSENTIAL PERSONNEL, LLC	)	
	)	DATE ISSUED: 10/03/2018
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.

Howard S. Grossman and Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Alexandra S. Grover and Michelle K. Dougherty (Brown Sims), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2014-LHC-00631) 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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant worked for employer in Afghanistan as a linguist from July 2008 to October 2010, when he voluntarily resigned. Claimant alleged that his working conditions caused a psychological injury. The administrative law judge found that employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a), and he concluded, based on the record evidence as a whole, that claimant did not establish a work-related psychological injury.[1] The administrative law judge rejected employer's contention that claimant's multiple myeloma was an intervening cause of injury terminating his entitlement to compensation for a work-related right knee injury. Claimant is receiving ongoing temporary total disability compensation for his knee injury, based on the maximum statutory rate of $1,295.20. 33 U.S.C. §§906, 908(b).

On May 25, 2017, claimant's counsel, Mr. Grossman, filed a fee petition for work performed before the administrative law judge. He sought a total fee of $109,660.68, representing 177.70 hours of his time at an hourly rate of $450 ($79,965); 2.60 hours of Mr. Ferrin's time at an hourly rate of $375 ($975.00); 46.20 hours of Mr. Thaler's time at an hourly rate of $275 ($12,705); 41.85 hours of paralegal time at an hourly rate of $140 ($13,482), and $10,168.65 in costs.[2] Employer objected to the requested hourly rates, the number of hours billed, and the costs.

The administrative law judge found that the relevant community for establishing counsel's hourly rates is Long Beach, California, and he rejected counsel's contention that the relevant community is where his office is located in Palm Beach County, Florida. Attorney Fee Order (Order) at 3. The administrative law judge determined that counsel failed to establish that the requested hourly rates of $450, $375, $275, and $140 represent market rates for services in the Long Beach market. *Id.* at 6-8. The administrative law judge found that reasonable hourly rates for counsel, Mr. Ferrin, and Mr. Thaler are $350, $300, and $225, respectively, and that the hourly rate for paralegal time is $120. *Id.* at 6-8. Based on claimant's lack of success on the psychological injury claim, the

[1] Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that employer rebutted the Section 20(a) presumption and that claimant did not establish a work-related psychological injury. *Makhmoor v. Mission Essential Personnel, LLC*, BRB No. 17-0339 (Jan. 11, 2018) (unpub.). This case has been appealed to the United States Court of Appeals for the Ninth Circuit.

[2] These services were rendered between January 2014 and May 2017.

administrative law judge reduced by 75 percent all hours requested prior to January 11, 2016, and he reduced by 50 percent all hours claimed after January 11, 2016, when the hearing expanded to include the knee injury claim. *Id*. at 9-11. The administrative law judge disallowed some of the itemized entries for work by counsel and a paralegal,[3] and also disallowed the requested costs of $334.78 for FedEx mailings and $3,488.45 for airfare. *Id*. at 7-11. Thus, the administrative law judge awarded counsel a fee of $34,454.11, representing 61.50 hours at an hourly rate of $350, .55 of an hour at an hourly rate of $300, 22.15 hours at an hourly rate of $225, 12.85 hours of paralegal time at an hourly rate of $120, and $6,238.36 in costs. *Id*. at 16.

On appeal, claimant's counsel challenges the administrative law judge's finding that Long Beach, California, is the relevant community for determining the hourly rates, the specific hourly rates awarded him and Mr. Ferrin,[4] the percentage reductions in the number of hours allowed, and the denial of FedEx and airfare costs. Employer responds that the administrative law judge's attorney's fee award should be affirmed. Counsel filed a reply brief.

RELEVANT COMMUNITY

Counsel contends that Palm Beach County, Florida, is the relevant community for determining the market for his services. Counsel contends that the United States Court of Appeals for the Ninth Circuit, in *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015), advocates for rates "where the litigation took place," and that the majority of litigation occurred via pleadings and drafting motions from his office in Palm Beach. *Shirrod*, 809 F.3d at 1087, 49 BRBS at 96(CRT).

[3] Specifically, the administrative law judge reduced counsel's time by an additional 2.3 hours for excessive billing, Mr. Thaler's time by 3.4 hours for unnecessary time expended on claimant's post-hearing brief, and the paralegal time by 4.3 hours for excessive billing and clerical tasks. *Id*. at 12-14

[4] Counsel summarily challenges the hourly rates awarded Mr. Thaler and the paralegals. *See* Cl. Pet. for Rev. at 8. This contention is inadequately briefed and will not be addressed. *See generally Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997). Accordingly, we affirm the hourly rates awarded of $275 to Mr. Thaler and $120 for the paralegal services. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

The United States 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). It is well established 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.

As this case arises within the jurisdiction of the Ninth Circuit, the determination as to the relevant community is guided by the court's decision in *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT). Discussing the phrase "relevant community," the Ninth Circuit stated:

> In civil litigation, we typically recognize the forum where the district court sits as the "relevant community" for purposes of fee-shifting statutes. *Christensen*, 557 F.3d at 1053; *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). By analogy, a determination of the "relevant community" in Longshore Act cases should focus on the location where the litigation took place. But, because district courts are not involved in cases under the Longshore Act, we must look to other indicia to determine where the litigation took place and, thus, which is the "relevant community." Here, all factors point to Portland as the location of the litigation: Counsel to Shirrod and Pacific Rim maintain their offices in Portland; hearings before Judge Berlin occurred in Portland.

Shirrod, 809 F.3d at 1087, 49 BRBS at 96(CRT). The court further stated:

> Recognizing that the relevant decisionmaker has wide—but not unlimited—discretion when making attorney's-fee awards, *see Kenny A.*, 559 U.S. at 558, we ultimately left it to the BRB, ALJs, and District Directors to determine the "relevant community" and the prevailing market rates in that community, as long as the decisionmaker provides adequate justification. *Christensen*, 557 F.3d at 1055.

Id., 809 F.3d at 1087, 49 BRBS at 95(CRT).

In this case, the administrative law judge fully addressed the parties' contentions and the pertinent facts in terms of the appropriate case law in resolving the "relevant community" issue. He noted that an exception to the focus on where the litigation took place is the "out of town" counsel rule, which allows using rates other than those in the

trial forum if local counsel is unavailable, either because they are unwilling or unable to perform because they lack the expertise to properly handle the case; the party seeking fees bears the burden of demonstrating that this exception applies. *Gates v. Deukmejian*, 987 F.2d 1392, 1404-1406 (9th Cir. 1992); *see also Camacho v. Bridgeport Financial*, 523 F.3d 973 (9th Cir. 2008). The administrative law judge found that there are many competent attorneys in the Long Beach area who regularly handle cases arising under the Act and there was no showing that suitable counsel was unavailable. Order at 3. The administrative law judge also relied on the fact that claimant lives less than 40 miles from Long Beach and that the hearing occurred there. *Id*. Counsel does not challenge these factual findings, which provide "adequate justification" for the administrative law judge's finding that Long Beach is the relevant community, and his finding is in accordance with law. *Shirrod*, 809 F.3d at 1087, 49 BRBS at 96(CRT); *Gates*, 987 F.2d at 1404-1406. Accordingly, counsel has not shown that the administrative law judge abused his discretion in finding, based on the facts of this case, that Long Beach, California, is the relevant community for purposes of determining the proxy market rate for claimant's counsel's services, and we affirm this finding. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

HOURLY RATES

Counsel contends the administrative law judge erred in finding insufficient his market rate evidence for the requested hourly rates of $450 and $375 for him and Mr. Ferrin. Once the administrative law judge determined that Long Beach is the relevant community for determining the hourly rates, the burden was on claimant's counsel to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see also Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT).

In this case, the administrative law judge found that counsel's evidence supporting his requested $450 hourly rate is primarily focused on the South Florida market. Order at 6. The administrative law judge noted counsel's affidavit attesting to his skill and experience, and he found counsel was prepared and effective, but he stated there is no corroborating affidavits from attorneys practicing in Long Beach nor did counsel present any evidence of the hourly rates there. *Id*.

The administrative law judge further found unpersuasive the two fee awards counsel submitted. Specifically, the administrative law judge determined that in *Stoll v. Apollo, Inc.*, 2014-LDA-00440 (Apr. 8, 2016), the administrative law judge based the award of a $450 hourly rate on his personal experience in the South Florida market with little compelling analysis. *Id*. The administrative law judge declined to rely on the hourly rate

of $400 per hour awarded in *Powell v. Dyncorp International*, 2013-LDA-00569, 2014-LDA-00376 (Sep. 2, 2015) because it was uncontested. *Id*.

Regarding Mr. Ferrin's requested hourly rate of $375, the administrative law judge found there is no affidavit attesting to his specific legal expertise, experience, skill, and reputation in the local community, and no independent evidence that he charges clients $375 per hour. *Id*. The administrative law judge concluded that counsel's evidence, therefore, is insufficient to establish his current market rate and that of Mr. Ferrin. *Id*. at 6-7. Contrary to claimant's contention on appeal, the administrative law judge's rejection of this evidence is rational and within his discretion. *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). Accordingly, we affirm the administrative law judge's finding that claimant's counsel did not submit sufficient evidence to establish market rates in Long Beach.

Alternatively, counsel contends that the administrative law judge did not provide a sufficient basis to support the awarded hourly rates of $350 and $300. We agree. The administrative law judge stated that he would "consider fee awards awarded in similar cases to ascertain a reasonable rate." Order at 6. The administrative law judge noted that he awarded counsel $350 in *Dillon v. Blackwater Security Consulting*, 2014-LDA-00254 (Feb. 16, 2017), *vacated and remanded in pert. part and affirmed in part*, BRB No. 17-0337 (Mar. 19, 2018) (unpub.), based on the market rate in the Southern District of Florida. *Id*. The administrative law judge also considered employer's contention that the rate should be $350, which it supported by submitting fee awards in the San Diego market, although the administrative law judge noted that San Diego is not in the Long Beach market and that the attorneys in the matters cited by employer received an hourly rate of $385. *Id*. at 6-7. The administrative law judge ultimately concluded that counsel's hourly rate for the Long Beach market is $350 based on his experience and skill, his conduct at a deposition, which he characterized as "below the ideal and . . . not reflective of a top level litigator," and "my assessment of the market rate." *Id*. at 7. The administrative law judge also found that the $300 hourly rate he awarded Mr. Ferrin in *Dillon* "is the appropriate rate here." *Id*.

In *Shirrod*, the Ninth Circuit reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1087-1988, 49 BRBS 95-96(CRT). Consequently, in *Shirrod*, the court vacated the Board's affirmance of an administrative law judge's fee award, concluding it was erroneous because, even after finding the relevant community to be Portland, Oregon, the administrative law judge

awarded an hourly rate based on state-wide rate information rather than rate information tailored to the Portland community. *Id.*, 809 F.3d at 1088, 49 BRBS 96(CRT).

In this case, the administrative law judge did not consider market rate information tailored to the Long Beach market, as there is no such relevant evidence in the record. The administrative law judge instead considered a fee award from the San Diego market and his award in *Dillon*, which was based on the South Florida market. Moreover, in *Dillon*, the Board vacated the administrative law judge's hourly rate award because the administrative law judge's methodology was based on his vacated awards in *Yunis v. Academi, LLC*, 2015-LDA-00399 (Oct. 27, 2016), and *Abassi v. Mission Essential Personnel*, 2015-LDA-00321 (Oct. 27, 2016). The Board stated that, in *Yunis* and *Abassi*, the administrative law judge did not explain his method of calculation with sufficient specificity to permit the Board to determine whether the result 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). Similarly, in this case, the administrative law judge did not explain how the hourly rate of $350 to counsel is based on an assessment of the Long Beach market rate, or how a $300 hourly rate to Mr. Ferrin, based on *Dillon*, where the relevant community was South Florida, is reflective of the Long Beach market.

Accordingly, we vacate the hourly rates awarded counsel and Mr. Ferrin and remand for the administrative law judge to award market rates in Long Beach for lawyers of comparable skill, experience, and reputation. *Shirrod*, 809 F.3d at 1087-1988, 49 BRBS 95-96(CRT); *see also Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014). Given the absence of any evidence of the market rate in Long Beach, the administrative law judge should afford counsel and employer an opportunity to submit additional evidence of the current market rates in Long Beach for attorneys providing similar services with comparable skill, reputation and experience as counsel and Mr. Ferrin. *See Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

PARTIAL SUCCESS

Claimant argues that the administrative law judge improperly reduced the number of hours related to the unsuccessful psychological injury claim because counsel had already reduced 81.80 hours expended on this basis. Moreover, counsel asserts that the administrative law judge erred because he did not determine the extent of claimant's ultimate success or provide specific reasons for the percentage reductions in the number of hours requested.

Contrary to counsel's contention, the administrative law judge considered the extent of claimant's ultimate success by stating that employer conceded the compensability of the right knee injury after the hearing and that counsel prevailed on the average weekly wage issue. Order at 10; *see also* D & O at 45. The administrative law judge found, however, that any fees incurred prior to January 11, 2016, should be "significantly reduced" because, before that date, employer was voluntarily paying temporary total disability for claimant's right knee injury at the maximum compensation rate. Order at 10. The administrative law judge stated that, although counsel deleted from his fee petition a total of 81.80 hours related to the psychological injury claim, he still sought a fee for 268.35 hours. *Id*. The administrative law judge determined that the number of hours requested before January 11, 2016, should be reduced by 75 percent because the psychological injury issue was the main issue until that date. *Id*. The administrative law judge found that, after January 11, 2016, the contested issues expanded to include the right knee injury claim, "but the psychological claim remained the central focus," and that the knee injury claim "was a relatively minor part of the overall trial." *Id*. Additionally, the administrative law judge found that, "[T]he psychological and knee injury claims were essentially unrelated and involved proof and evidence entirely different from each other." *Id*. Accordingly, the administrative law judge concluded that he would reduce by 50 percent the hours awarded after January 11, 2016. *Id*. at 10-11.

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a plurality of the United States Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988). Where claimant failed to succeed on an unrelated claim, claimant's counsel is not entitled to a fee for work expended on the unsuccessful claim. *Hensley*, 461 U.S. at 435. The Court stated that the fee award should be for an amount that is reasonable in relation to the results obtained, as the degree of success is the most critical factor. *Hensley*, 461 U.S. at 435-437, 440. Therefore, while the Court did not provide a rule or formula for calculating a fee in cases where counsel achieves partial success litigating inter-related issues, the Court did not hold that the lodestar fee is not subject to further reduction in such cases based on the degree of success.

The courts have recognized the broad discretion of the factfinder in assessing the amount of an attorney's fee pursuant to *Hensley* principles. *See, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

In this case, the administrative law judge found that claimant achieved only partial success in the pursuit of his claims. Moreover, counsel does not challenge the administrative law judge's finding that the psychological injury claim was the sole issue in dispute before January 11, 2016, it was the main contested issue thereafter, and the knee and psychological injury claims were unrelated. Accordingly, in addition to the hours counsel voluntarily subtracted from his fee petition, the administrative law judge's finding that a further reduction was warranted because claimant did not prevail on the psychological injury claim is rational and consistent with *Hensley*. The Board has previously affirmed across-the-board reductions where the administrative law judge determined that claimant achieved limited success. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). Under the circumstances of this case, the administrative law judge's decision to reduce the number of hours allowed prior to January 11, 2016, by 75 percent and the number of hours allowed after that date by 50 percent is affirmed, as claimant has not established an abuse of discretion in this regard. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *see also B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Hill*, 32 BRBS 186, 192-193.

COSTS

Claimant's counsel challenges the administrative law judge's denial of $334.78 for FedEx expenses and $3,488.45 for airfare. Counsel asserts that the FedEx and airfare costs are compensable as they were necessary to prosecute the claim, notwithstanding that he purchased airfare to attend formal hearings that were subsequently cancelled.

Contrary to counsel's assertion, the administrative law judge acted within his discretion in disallowing, as office overhead, FedEx costs in the amount of $334.78. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989)); Order at 12. The administrative law judge found that FedEx expenses are generally included in office overhead and that there was no showing "that the expense was exceptional or should not be considered regular overhead." Order at 15. 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).

We agree with counsel, however, that the administrative law judge erred in denying the cost of airfare for hearings cancelled on June 5, 2015, and July 17, 2015, because the only issue for hearing on those dates related to the subsequently-denied psychological claim. *Id*. It is within the administrative law judge's discretion to determine if a cost is reasonable and necessary. 33 U.S.C. §928(d)[5]; *Ezell*, 33 BRBS 19. In *Ezell*, the Board rejected the employer's contention that the administrative law judge should have conducted a *Hensley* partial success analysis to determine the compensability of claimed costs, stating that Section 28(d) "requires analysis of the reasonableness and necessity of the costs incurred by counsel in litigating the case, and no additional analysis is required." *Ezell*, 33 BRBS at 31; *see also Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). Accordingly, the administrative law judge erred by denying the airfare costs on the basis that claimant did not prevail on the psychological injury claim. We vacate the denial of these costs and remand for the administrative law judge to determine the compensability of the claimed costs.

[5] Section 28(d) provides:

> In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be.

33 U.S.C. §928(d).

Accordingly, the administrative law judge's Attorney Fee Order is affirmed in part and vacated in part, and the case is remanded for further proceedings addressing counsel's hourly rates and airfare expenses.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge