U.S. Department of Labor

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

BRB Nos. 19-0140 and 19-0140A

JEANNE JOHNSTON (Widow of ROY JOHNSTON) Claimant-Petitioner Cross-Respondent v. HAYWARD BAKER and KEMPER INSURANCE COMPANY AND LUMBERMAN'S MUTUAL CASUALTY COMPANY Employer/Carrier- Respondents Cross-Petitioners	)	DATE ISSUED: 10/29/2019 DECISION and ORDER

Appeals of the Order Awarding Attorney Fees Under 33 USC 928 of Marco A. Adame II, District Director, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law), Coronado, California, and Lara D. Merrigan (Merrigan Legal), San Rafael, California, for claimant.

Kelly F. Walsh and Mark T. Tufts (Brown Sims), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Order Awarding Attorney Fees Under 33 USC 928 (Case Nos. 18-088086; 18-094194) of District Director Marco A. Adame II rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The fee award of the district director must be affirmed unless it is shown 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 95, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant's husband, the decedent, filed a claim under the Act in December 2005 seeking benefits for cumulative work-related injuries to his neck, back, and knee. Following the decedent's death in September 2009, claimant filed a claim for death benefits, and decedent's estate assumed his claim for benefits arising from his alleged orthopedic injuries. In August 2013, an administrative law judge awarded decedent's estate disability benefits, but denied the death benefits claim on the ground that claimant was not decedent's "widow." On appeal, the Board affirmed the administrative law judge's award of disability benefits, vacated the denial of death benefits, and remanded the case for further proceedings. *Johnston v. Haywood Baker*, 48 BRBS 59 (2014). On remand, the case was assigned to a new administrative law judge who found that claimant was decedent's widow and awarded death benefits.

Thereafter, claimant's counsel filed with the district director a petition for an attorney's fee of $151,645 for services performed between December 2005 and April 2018. The fee requested was for 149 hours of Attorney Eric Dupree's services at $575 per hour, 153.6 hours of Attorney Paul Myers's services at $425 per hour, 4.6 hours of paralegal/law clerk time at $150 per hour, and costs of $6,103.73.

In his Order Awarding Attorney Fees, the district director determined that claimant's counsel provided adequate evidence to support the requested hourly rates. Order at 5 – 8. He accepted a number of employer's objections to the hours claimed and reduced them accordingly. *Id.* at 8 – 15. He also disallowed the $833.33 cost counsel claimed for obtaining a declaration from Mr. Burdge to support his fee petition. Accordingly, the district director awarded claimant's counsel a fee of $135,727.90, representing 131.1 hours at $575 per hour, 128 hours at $425 per hour, 4.5 hours at $150 per hour, and $5,270.40 in costs.

Claimant's counsel appeals the fee award, contending the district director erred in reducing itemized entries and in disallowing the cost of obtaining Mr. Burdge's declaration. Employer filed a response, to which claimant's counsel replied. BRB No. 19-0140. Employer, in its cross-appeal, challenges the hourly rates that the district director awarded. Claimant's counsel filed a response, to which employer replied. BRB No. 19-0140A.

We first address employer's challenge to the awarded hourly rates. The United States Supreme Court has held that the lodestar method, which multiplies a reasonable hourly rate by the number of hours reasonably expended in preparing and litigating the case, is used to arrive at a "reasonable attorney's fee" in fee-shifting statutes such as the Act. *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Id.* at 895. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *See Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n. 11; *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). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that the adjudicator must define the relevant community and consider market rate information tailored to that market. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

Employer contends the relevant legal market is only San Diego, based on the location of counsel's office and claimant's residence. Emp. Br. at 6-7. Before the district director, claimant's counsel argued that San Diego is the relevant legal market. He also identified rates in San Francisco and Los Angeles as "potentially relevant" and "substantially the same" as San Diego. The district director found the San Diego/Los Angeles metropolitan area to be the relevant legal market, noting employer did not object to counsel's representations concerning the relevant legal market. Order at 5 – 6. The district director also noted the case was assigned to the Long Beach district office of the Office of Workers' Compensation Programs and he found, based on his experience, that hourly rates for attorneys are similar in the Los Angeles and San Diego areas.[1] *Id.* As employer did not object below to counsel's claim as to the relevant market(s) and the district director found hourly rates similar in Los Angeles and San Diego, employer has failed to establish error in this finding.

Employer next alleges counsel did not offer sufficient evidence that the requested rates are appropriate for the market. In support of the requested hourly rates of $575 and $425, claimant's counsel submitted their Curricula Vitae and declarations from three attorneys, Mssrs. Hillsman, Naylor, and Gillelan, attesting to the qualifications of counsel and/or that the rates requested represent reasonable market rates. Counsel also submitted

[1] While the district director agreed with claimant's counsel that the Los Angeles market is relevant to this case and similar to San Diego, he disagreed with respect to San Francisco. *See* Order at 5-6.

a declaration from Ronald Burdge, author of the 2015-2016 United States Consumer Law Attorney Fee Survey Report, wherein he opined that counsel's requested rates are supported by his survey because longshore law is comparable to consumer law.

The district director acknowledged employer's objections to counsel's hourly rate requests. He concluded counsel provided adequate evidence of prevailing market rates and that employer did not offer sufficient evidence to substantiate its contentions that the supporting affidavits and Mr. Burdge's declaration should not be considered.[2] *See* Order at 7 – 8. The district director concluded the evidence claimant's counsel submitted "meet[s] the requirements under *Christensen* and *Van Skike*," the affidavits are clear that counsel's experience and reputation are commensurate with the rates requested, and Mr. Burdge's declaration and report is supportive of those rates. *Id.* Thus, the district director awarded counsel the claimed rates.

We affirm. Contrary to employer's assertion, the district director acknowledged that the burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community. *See* Order at 6. He relied on the three attorney declarations addressing counsel's qualifications and rates in San Diego and Los Angeles. Additionally, the credited Burdge declaration states that longshore law is similar to consumer law, such that rates in the Consumer Law Survey provide relevant evidence of rates in the market.[3] The district director permissibly found this evidence adequate to support the requested rates. *Id.* at 6 – 8. Employer has not established error in the district director's findings on this issue as its reference to lower hourly rates awarded in other cases is insufficient to establish an abuse of the district director's discretion. *See generally Christensen*, 557 F.3d at 1043, 43 BRBS at 8(CRT). Moreover, contrary to employer's contention, the complexity of the work or issues in this case is not a market rate factor. *See Van Skike*, 557 F.3d 1041, 43 BRBS 11(CRT).

Employer also contends the district director's use of counsel's current hourly rates for all of his requested services constitutes an improper fee enhancement. We disagree. A delay "enhancement" compensates for the lapse in time between the performance of the

[2] The district director found that employer relied only on previous cases awarding counsel lower rates. *See* Order at 7 – 8.

[3] The district director noted that the Board awarded claimant's counsel the rates of $575 and $400, based in part on the Burdge declaration and the Consumer Law Survey, in its fee award in this case. *See Johnston v. Hayward Baker*, BRB No. 14-0032 (Jan. 24, 2018) (fee order). Counsel also supported his fee petition with reference to this award.

legal services and the award of a fee for those services.[4] *Missouri v. Jenkins*, 491 U.S. 274 (1989).[5] Citing *Jenkins*, the Ninth Circuit in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996), articulated the standard regarding adjustments for delays in payment:

> [A]ttorney's fees "are to be based on market rates" and such rates are based on the assumption that bills will be paid reasonably promptly; delays in payment thus deprive successful litigants of the market rates. [cite omitted] To make up the difference, losses from delay can be compensated "by the application of current rather than historic rates or otherwise." [cite omitted] Thus . . . there may be some adjustment for the delay, but the method of adjustment is somewhat discretionary; it does not necessarily call for payment of the lawyer's current hourly rate.

Id., 91 F.3d at 1324, 30 BRBS at 68(CRT); *see also Modar v. Maritime Services Corp.*, 632 F. App'x 909 (9th Cir. 2015) ("[f]ull compensation requires charging current rates for all work done during the litigation"). Therefore, as the district director has the discretion to award current rates to compensate for delay, we affirm the award, as counsel's services were rendered over a period of approximately 12.5 years.[6] *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT) (enhancement ordered for 14-year delay); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995) (11-year delay); *cf. Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT) (affirming Board's denial of a delay enhancement for "usual" delay of two years).

We next address claimant's counsel's contention the district director erred in reducing many of his itemized entries without addressing each entry individually. We disagree.

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[4] Counsel documented services performed before the district director between December 2005 and April 2018; the district director's Order is dated November 16, 2018.

[5] In this regard, the Court in *Jenkins* stated that "compensation received several years after the services were rendered . . . is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed." 491 U.S. at 283.

[6] While employer states that there is no evidence that this 12-plus year delay "was particularly onerous," *see* Emp. Br. at 14, this period on its face establishes a significant lapse in time between the performance of counsel's services and the issuance of the district director's Order.

Claimant's counsel filed with the district director three fee petitions containing approximately 675 entries. Employer, in response, objected to 138 entries. The district director addressed 68 of employer's objections, and either reduced or disallowed the time sought for each of those entries. He found the time itemized in six entries did not match the work described and he reduced the time by 7 hours. He found 62 entries were for clerical work or work performed before a different jurisdiction and he disallowed 36.2 hours. Order at 8 – 16.

The district director may disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See Tahara*, 511 F.3d 95, 41 BRBS 53(CRT);[7] *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT); 20 C.F.R. §702.132. Relevant to this case, in which claimant's counsel's fee petitions total 59 pages, the Supreme Court has stated that "courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838 (2011).

We reject claimant's counsel's contention that the district director's Order lacks specificity. The district director placed 68 of employer's objections into categories and identified the amount of time, if any, he approved for each category. That the district director did not address each service individually does not render his explanation for the reductions or disallowances any less understandable or reviewable. His findings that several entries are clerical, excessive in that the time requested does not match the description of the service provided, or for services performed before a different jurisdiction, are valid reasons for reducing or disallowing the time counsel claimed; further individualized explanation of every entry is not required.[8] *Fox*, 563 U.S. at 838; *Tahara*, 511 F.3d 95, 41 BRBS 53(CRT) (duplicative); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986) (excessive); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895

[7] In *Tahara*, the court stated that the awarding official is afforded "considerable deference" in determining what hours are "excessive, redundant, or otherwise unnecessary." *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT).

[8] Counsel's assertion that the district director's award runs afoul of *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008), is without merit. In *Moreno*, a civil rights case, the court declined to affirm a district court's reduction of a requested fee by 50 percent when that court did not provide a clear explanation for the reduction. The court stated, however, that the district director could make a blanket 10 percent reduction. Unlike *Moreno*, the district director identified the entries he found to be problematic, and the resulting disallowances and reductions resulted in a 12 percent reduction in lead counsel's hours and a 16.6 percent reduction in associate counsel's hours.

(1980) (clerical). The district director is in the best position to ascertain the nature, reasonableness, and necessity of the work performed before him, and counsel has not established he abused his discretion in reducing the fee. Accordingly, we affirm the fee award. *See Tahara*, 511 F.3d 95, 41 BRBS 53(CRT).

Lastly, we hold the district director did not abuse his discretion in disallowing the $833.33 pro-rated cost of obtaining the Burdge declaration. 33 U.S.C. §928(d); *see generally Stevedoring Services of America v. Price*, 432 F.3d 1112, 1114 n.1, 39 BRBS 85, 86 n.1(CRT) (9th Cir. 2006). Therefore, we affirm the district director's disallowance of this cost and the resultant award of costs of $5,270.40.

Accordingly, the district director's Order Awarding Attorney Fees Under 33 USC 928 is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge