BRB No. 06-0221

JF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PREMIER MOTOR YACHTS CORPORATION (defunct)	)	DATE ISSUED: 09/28/2006
	)	
and	)	
	)	
FREMONT COMPENSATION INSURANCE GROUP (defunct)	)	
	)	
Employer/Carrier	)	DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fees of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Approval of Attorney Fees (Case No. 14-125196) of District Director Karen P. Staats 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 shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Claimant, a boat builder, injured his back while at work on May 13, 1997. Claimant underwent back surgery on September 4, 1997, and on May 29, 1998. Claimant returned to modified work with employer and also began working part-time as a store clerk at a local mini-market. Claimant filed a claim seeking compensation for periods of

total and partial disability. The contested issues presented for adjudication were claimant's average weekly wage, nature and extent of disability and proper method of calculating temporary partial disability compensation.

Administrative Law Judge Alfred Lindeman issued a Decision and Order in this case on August 4, 2000, in which he awarded claimant compensation for periods of temporary total disability, temporary partial disability and for continuing permanent partial disability thereafter. 33 U.S.C. §908(b), (c)(21), (e), (h). Claimant appealed Judge Lindeman's decisions. BRB No. 01-0254. By Order dated January 22, 2001, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for consideration of claimant's newly filed motion for modification. 33 U.S.C. §922; 20 C.F.R. §802.301. The case was assigned to Judge Etchingham, who granted employer's motion for summary decision on claimant's motion for modification. Claimant appealed the denial of his motion for modification, BRB No. 03-0361, and also sought reinstatement of his appeal of Judge Lindeman's decisions. By Board Order dated March 13, 2003, claimant's appeals were consolidated for decision. In a decision issued on February 6, 2004, the Board remanded the case, stating that the administrative law judge erred in failing to address whether claimant's post-injury wage-earning capacity should be adjusted for inflation. The Board affirmed the administrative law judge's average weekly wage determination, which was less than the figure to which claimant argued that he was entitled.

Following the administrative law judge's decision on remand, claimant's counsel filed a fee petition with the district director for services rendered from March 16, 2000, through March 18, 2001, and three dates of service between March 4, 2003 and July 2, 2005, seeking a fee of $3,382.50, representing nine hours of attorney services at a rate of $275 per hour, 2 hours of legal assistant time at $110 per hour, plus 2.5 hours of additional attorney time previously disallowed by the district director at $275 per hour.[1] In a Compensation Order Approval of Attorney Fee, the district director reduced the hourly rate requested to $215 for the attorney services and to $100 for legal assistant time. Compensation Order at 1. She also declined to award a fee for the previously disallowed 2.5 hours. Accordingly, the district director awarded claimant's counsel a fee of $2,135. *Id.* at 2.

Claimant now appeals the district director's fee award, challenging both her reduction of the hourly rates requested, and her decision not to approve the 2.5 hours previously denied.

Initially, claimant contends that the district director erred in reducing the hourly rates

[1] The additional 2.5 hours were previously requested for services rendered from December 15, 1998, through September 3, 2000, and disallowed by the district director in a fee order filed on October 24, 2000. This order does not appear in the record.

sought. Specifically claimant alleges that claimant's attorney's market rate for private clients was $275 per hour, that the hourly rate awarded by the district director was lower than the $235 hourly rate awarded by the administrative law judge on remand, and that the district director's awarded hourly rate of $215 is arbitrary and bears no reasonable relationship to any economic evaluation. We reject claimant's argument. First, the district director is not bound by an administrative law judge's fee award. *See Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981); *see generally Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001). Second, as the district director stated, "[T]he relevant inquiry with regard to hourly rate is not the rate he would charge a private client in an unrelated matter, but rather the criteria listed under the plain language of the Regulations." Compensation Order at 1. Moreover, contrary to claimant's assertions, nowhere does the district director state that she is reducing the requested hourly rate for legal services performed before her because claimant's counsel is not entitled to the same hourly rate as for work performed before an administrative law judge; rather, the district director cites certain tasks as examples of routine legal services in support of issues which were neither complex nor novel. Compensation Order at 1.

The regulation governing fee awards by the district director, 20 C.F.R. §702.132, states, *inter alia*, that "Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. . . ." In the instant case, the district director appropriately considered the complexity of the case in accordance with Section 702.132, as well as the customary rates in the relevant geographic area, in reducing the requested hourly rates.[2] The district director, therefore, appropriately considered the factors enumerated in Section 702.132. Accordingly, we affirm the rates awarded by the district director, as claimant has not shown that the district director abused her discretion in this regard. *See Ross v. Ingalls*, 29 BRBS 42 (1995); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988); *see also Moyer v. Director, OWCP*, 124 F.3d 1378, 34 BRBS 134(CRT)(10th Cir. 1997); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.* 202 F.3d 259 (4th Cir. 1999)(table).

[2] Contrary to claimant's argument on appeal, the decision of the United States Supreme Court in *Blum v. Stenson*, 465 U.S. 886, 896 (1984), supports the principle that the complexity of a case is reflected not only in the number of hours expended but also in a reasonable hourly rate.

Claimant asserts, as he apparently did when the case was before the district director, that following remand claimant's claim was reopened for additional, temporary total disability benefits and possible permanent total disability compensation, and that therefore there was no basis for the district director's reduction of 2.5 hours on the ground of limited success. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the United States Supreme Court generally held that a fee award under a fee-shifting statute, such as Section 28 of the Act, should be for an amount that is reasonable given the results obtained. *Hensley*, 461 U.S at 434-437. In the instant case, the district director reasoned that the reduction from five to 2.5 hours was not based on claimant's lack of success regarding the issue of the extent of disability, but rather on the finding that claimant was successful on the average weekly wage issue by a factor of only about one-half.[3] Therefore, the district director declined to award a fee for the additional 2.5 requested hours. As the district director adequately addressed claimant's objections, and claimant's assertions on appeal are insufficient to meet his burden of proving that the district director abused her discretion in determining the amount of the fee, the district director's attorney's fee award is affirmed.[4] *See O'Kelley*, 34 BRBS 39; s*ee generally Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

[3] The district director elaborated that the $560 average weekly wage upon which the administrative law judge based the award is about 55 percent of the difference between the $664 figure sought by claimant and the $430.34 proposed by employer. Compensation Order at 2. The district director noted that claimant did not appeal the average weekly wage figure and that it has therefore remained at $560.

[4] Claimant states that "[T]his Board must vacate and remand this case for a new determination which also considers the extreme delay in payment." Claimant's Brief on Appeal at 4. It may be appropriate in some instances to compensate counsel for a delay in payment of the fee award. *See Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). However, the above sentence is the only instance where claimant raises the issue of delay. As claimant does not brief this issue at all, we decline to address it.

Accordingly, the district director's Compensation Order Approval of Attorney Fee is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge