



BRB No. 17-0059

MIRIA ABASSI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MISSION ESSENTIAL PERSONNEL	)	DATE ISSUED: <u>Sept. 28, 2017</u>
	)	
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.

Samuel S. Frankel, Jr. (Barnett, Lerner, Karsen & Frankel, P.A.), Ft. Lauderdale, Florida, for claimant.

Robyn A. Leonard and Lisa G. Wilson (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2015-LDA-00321, 00366) 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.* (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). 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. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9<sup>th</sup> Cir. 2007).

The parties settled claimant's claim for bilateral upper extremity injuries and post-traumatic stress disorder sustained as a result of her employment in Afghanistan from August 2011 to December 2012. *See* 33 U.S.C. §908(i). Claimant's counsel, Samuel Frankel, Jr., requested an attorney's fee of \$67,714.04, representing 118.6 hours of his time at a rate of \$450 and 28.5 hours of paralegal time at an hourly rate of \$165, plus \$9,641.54 in costs, for work performed before the administrative law judge. Employer filed objections to the hourly rates claimed, the number of hours billed, and the costs. Employer asserted counsel's hourly rate should be no more than \$400. Claimant's counsel replied to the objections.

In his Attorney Fee Order (Order), the administrative law judge found that, as Mr. Frankel maintains his office in Ft. Lauderdale, Florida, the relevant legal community is the United States District Court for the Southern District of Florida.<sup>1</sup> Order at 3. Mr. Frankel submitted his own affidavit, in which he stated that he charges \$485 per hour for his non-contingent work. Fee Pet. at 24, 32. Mr. Frankel submitted affidavits from three other local attorneys, who attested to Mr. Frankel's qualifications and that the median hourly rate in the community is \$450. The administrative law judge found the affidavit evidence persuasive as to Mr. Frankel's qualifications, but not as to the market rate for his services. Order at 5-6. The administrative law judge found pertinent a fee award to Mr. Frankel, which he submitted to the administrative law judge, in which he was awarded a fee based on an hourly rate of \$400. *Al Awad v. GLS*, 2011-LDA-00532 (Jul. 13, 2012). *Id.* at 4-5. The administrative law judge rejected three other DBA fee awards Mr. Frankel submitted as relevant evidence because in two of the cases counsel's fee petition was uncontested and the third case involved Mr. Frankel's partner, who has practiced longer. *Id.* at 5. The administrative law judge thus concluded the evidence provided by Mr. Frankel is insufficient to establish his market hourly rate. *Id.* at 6.

The administrative law judge then reviewed hourly rates other administrative law judges have awarded counsel's firm in DBA cases arising in the Southern District of Florida. Specifically, the administrative law judge noted a case in which Mr. Frankel was awarded a fee based on an hourly rate of \$330 for work done in 2012. *Roberts v. Dyncorp Int'l*, 2012-LDA-00596 (Nov. 5, 2015), and a \$435 hourly rate awarded to one of Mr. Frankel's partners for work in 2012-13, *Matti v. GLS*, 2012-LDA-00353 (Sept. 18, 2014). Order at 7. The administrative law judge also referenced the hourly rate of \$350.38 he awarded to another of claimant's partners, Barry Lerner, whose fee award was issued on the same day as this case, i.e., *Yunis v. Academi, LLC*, 2015-LDA-00399 (Oct. 27, 2016), appeal pending, No. 17-0058. *Id.* The administrative law judge averaged the hourly rates awarded in *Al Awad*, *Roberts*, *Matti*, and *Yunis*, with the hourly

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<sup>1</sup> This finding is unchallenged and is appropriate. *See generally Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009).

rates awarded in eight fee awards issued by the District Court for the Southern District of Florida in 2015 and 2016 to derive an average hourly rate of \$350.34 for Mr. Frankel's services.<sup>2</sup> *Id.* The administrative law judge further reduced counsel's hourly rate to \$325 based on Mr. Frankel's filing his fee petition five months after the deadline and his reply to employer's objections six weeks after the objections were filed. *Id.* at 8. The administrative law judge awarded Mr. Frankel a total fee of \$49,977.27, including costs.<sup>3</sup>

On appeal, claimant's counsel challenges the administrative law judge's finding that his market hourly rate is \$350.34. He also challenges the additional reduction of his hourly rate to \$325. Employer responds, urging affirmance. Claimant's counsel filed a reply brief.

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 also has 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 Perdue*, 559 U.S. at 551. Once the administrative law judge determined that the Southern District of Florida is the relevant community for determining counsel's hourly rate, the burden fell 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 v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9<sup>th</sup> Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9<sup>th</sup> Cir. 2009).

In this case, the administrative law judge found the affidavits counsel submitted from attorneys Dennis Phillips, Hugo Alvarez, and Armando Paz, Jr., unpersuasive because they are nearly identical to each other and do not explain the basis for stating that \$450 is the median hourly rate in South Florida. Order at 5. The administrative law judge also gave no weight to three fee orders in which Mr. Frankel was awarded an

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<sup>2</sup> The hourly rates awarded in these eight cases range from \$240 to \$475. *See* Order at 6 n.3.

<sup>3</sup> The administrative law judge reduced some of the claimed time; these reductions are not challenged on appeal.

hourly rate of \$450. The administrative law judge found that the hourly rate claimed was unchallenged in two of these cases, while in the third case, the administrative law judge focused his analysis on the qualifications of counsel's partner, David Barnett, who has been licensed to practice longer than Mr. Frankel and has more Longshore and DBA litigation experience. *Id.* at 4. 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 (9<sup>th</sup> Cir. 2011). Accordingly, we affirm the administrative law judge's finding that claimant's counsel did not submit sufficient evidence to establish a market rate.

However, we agree with claimant's counsel that the administrative law judge erred in basing his market rate finding in large part on his selection of eight fee awards issued in 2015 and 2016 by the District Court for the Southern District of Florida. In *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9<sup>th</sup> Cir. 2014), the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, vacated an attorney's fee award because the district court failed to sufficiently explain its rationale for reducing the requested attorney fee by 37 percent, as the court could not review the reasonableness of the fee award. *Carter*, 757 F.3d at 870, 48 BRBS at 23(CRT). The court stated that the awarding court must " 'explain how it arrived at its determination with sufficient specificity to permit an appellate court to determine whether the district court abused its discretion in the way the analysis was undertaken.' " *Id.*, 757 F.3d at 869, 48 BRBS at 22(CRT) (quoting *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9<sup>th</sup> Cir. 2009)).

In this case, the administrative law judge relied on eight cases he selected to represent the market rate for the Southern District of Florida. In his fee Order, the administrative law judge provided the LEXIS citations to these cases and the rates awarded. For some of the cases, the administrative law judge supplied the attorneys' number of years of practice and/or the statute under which the fees were awarded. Order at 6 n.3. However, the administrative law judge did not provide an explanation as to how these cases were chosen from among all fee awards in the relevant time frame, the market analysis provided in each case, and, most importantly, how these cases represent "similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11. Although an administrative law judge may take official notice of judicial decisions, *see 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) (5<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000), the administrative law judge failed to provide notice of his intent to do so. The administrative law judge's summary reliance on these fee awards was prejudicial because he did not allow claimant's counsel an opportunity to challenge the administrative law judge's finding that these cases are relevant to establishing a market

rate. In addition, we note that the administrative law judge's fee award in the *Yunis* case was based in part on the same eight district court cases, and thus the "self-referential" use of this case is improper. *Christensen*, 557 F.3d at 1054, 43 BRBS at 8-9(CRT).

Therefore, we vacate the administrative law judge's hourly rate finding. On remand, the administrative law judge must allow the parties to address the relevance of the district court fee awards chosen by the administrative law judge as well as to submit case support for their positions, if they so choose.<sup>4</sup> In his order on remand, the administrative law judge must provide a sufficient explanation of his market rate determination that allows the Board to review whether his analysis is rational and in accordance with law, in the event the fee award is appealed. *Carter*, 757 F.3d 866, 48 BRBS 21(CRT).

Claimant's counsel also challenges the administrative law judge's additional reduction in the market hourly rate because counsel submitted his attorney's fee petition past the 30-day filing deadline. In his November 24, 2015 decision, the administrative law judge approved the parties' Section 8(i) settlement, and he ordered claimant's counsel to file a fee petition within 30 days. Decision and Order Approving Settlement at 2. Counsel filed his fee petition on May 31, 2016. In his fee award order, the administrative law judge noted that, in addition to the untimely filing of the fee petition, counsel filed his reply to employer's objections six weeks after employer filed its objections. The administrative law found that these late filings "reflects directly on [counsel's] skill and experience and is highly relevant to his hourly rate." Order at 7-8. The administrative law judge found that counsel did not justify the delay, but instead inaccurately argued that there is no time requirement for filing a fee petition. The administrative law judge found that the \$25 per hour reduction in the market hourly rate reflects the general fee awarded to attorneys with counsel's experience as well as that "his legal skill in this particular matter fell below the ideal." *Id.* at 8.

Neither the Act nor the regulations specifies a time period for filing a fee petition with the administrative law judge. 33 U.S.C. §928; 20 C.F.R. §702.132, *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997). Section 702.132(a) of the Act's regulations states that the fee application "shall be filed . . . within the time limits specified by . . . [the] administrative law judge. . . ." See generally *Bankes v. Director, OWCP*, 7 BLR 1-102 (1984), *aff'd*, 765 F.2d 81 (6<sup>th</sup> Cir. 1985). Counsel asserts that any tardiness reduction should have been addressed only in the administrative law judge's lodestar calculation of his hourly rate of \$350.34, and that the administrative law judge, therefore, erred by

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<sup>4</sup> In addition, the administrative law judge should address Mr. Frankel's affidavit that his non-contingent rate is \$485 per hour. See generally *Perdue*, 559 U.S. at 551 (lodestar method intended to produce an award that approximates what counsel would receive from paying clients).

further reducing the hourly rate to \$325. However, “[T]he lodestar method was never intended to be conclusive in all circumstances.” *Perdue*, 559 U.S. at 553. As the administrative law judge imposed a 30-day deadline for filing the fee petition, and counsel’s petition was not filed until over five months after the deadline, counsel has not shown that the administrative law judge abused his discretion in reducing the hourly rate for this reason. *See generally Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4<sup>th</sup> Cir. 2013); *Clark v. Housing Auth. of City of Alma*, 971 F.2d 723 (11<sup>th</sup> Cir. 1992). Therefore, we affirm his decision in this regard.

Accordingly, the administrative law judge’s finding that counsel’s market hourly rate is \$350.34 is vacated, and the case remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge’s Attorney Fee Order is affirmed.

SO ORDERED.

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge