U.S. Department of Labor

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

BRB No. 19-0359

SHAUN GETTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ACADEMI	)	
	)	DATE ISSUED: 07/30/2020
and	)	
	)	
STARR INDEMNITY & LIABILITY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting, in Part, Motion for Attorney's Fees of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman and Callie J. Fixelle (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Thomas E. Lamb (Flicker, Garelick & Associates, LLP), New York, New York, for Employer/Carrier.

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

ROLFE, Administrative Appeals Judge:

Claimant appeals the Order Granting, in Part, Motion for Attorney's Fees (Order) (2018-LDA-00035) of Administrative Law Judge Lauren C. Boucher rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (DBA). 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 applicable law. *See, e.g., Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (11th Cir. 1999).

On December 21, 2018, Claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Administrative Law Judges in this case.[1] Counsel requested $82,863.61, representing 63.2 hours of lead attorney time at an hourly rate of $450 (Grossman), 4.9 hours of associate attorney time at an hourly rate of $275 (Thaler), 191.85 hours of associate attorney time at an hourly rate of $225 (Fixelle), 16.85 hours of paralegal time at an hourly rate of $150, and $7,382.36 in costs. Employer filed objections to the fee petition, challenging the hourly rates, specific time entries, and costs. Claimant's counsel filed a reply to Employer's objections and sought a supplemental fee of $2,892.64 for preparing it. Employer filed a sur-reply.

In her Order, the administrative law judge reduced the hourly rates requested by counsel and reduced or disallowed certain itemized entries and costs. She awarded Claimant's counsel a fee of $64,942.12, representing $60,474.50 for legal services and $4,467.62 in costs, payable by Employer.[2]

Claimant's counsel appeals the administrative law judge's award of an attorney's fee and costs. Employer responds, urging affirmance.[3] Claimant's counsel filed a reply brief.[4]

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[1] On November 16, 2018, the administrative law judge issued an Order Approving Joint Stipulations and Awarding Benefits.

[2] In support of her award of an attorney's fee, the administrative law judge attached to her Order a spreadsheet documenting counsel's requested hours, Employer's objections, and her ruling on those objections.

[3] On March 16, 2020, Employer filed a letter with the Board seeking to stay the present appeal because it has filed a petition for modification of the underlying claim. Claimant has not responded. We deny Employer's motion. Any fee awarded in this matter will not become enforceable until all proceedings are concluded and if Claimant's success changes, Employer can seek revision of the fee award. *See Christensen v. Stevedoring Services of America*, 430 F.3d 1032, 39 BRBS 79(CRT) (9th Cir. 2009); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999).

[4] In his reply, Claimant's counsel asserts the exhibits attached to Employer's response brief should be stricken since they were not submitted to the administrative law judge. We reject counsel's argument with respect to the Order Cancelling Hearing and the

Claimant's counsel first challenges the administrative law judge's reduction in the hourly rates sought for attorney services.[5] He contends the administrative law judge failed to state the basis for her award, and to award "current" rates, and erred in not addressing all of his evidence and in relying on the alleged lack of complexity in setting the hourly rate. We agree and, for the reasons that follow, we vacate the administrative law judge's hourly rate conclusions.

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). The Court has also held an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Perdue*, 559 U.S. at 551. Thus, once the administrative law judge accepted the parties' agreement that southeastern Florida is the relevant community for determining counsel's hourly rate, *see* Order at 4, the burden was on Claimant's counsel 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." *Blum*, 465 U.S. at 896 n.11; *see Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

In support of his hourly rate requests, Claimant's counsel presented: affidavits from each attorney as to their experience and accomplishments; an affidavit of Brett Rivkind, Esq., attesting to Mr. Grossman's "excellent reputation" in the field and his knowledge of the market and Mr. Grossman's hourly rate; the 2016 Florida Bar Survey relating to paralegal rates; an excerpt from the 2016 Real Rate Report relating to attorney rates; and prior DBA cases wherein Mr. Grossman was awarded rates of $400 and $450 per hour. In response, Employer offered the 2012 and 2014 Florida Bar Surveys; the entire 2014 Real Rate Report; and a prior DBA case in which Mr. Grossman was awarded $356 per hour. In his reply brief, Claimant's counsel offered the entire 2016 Florida Bar Survey, highlighting a portion that supported the claimed attorney rates.

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parties' Joint Stipulations as these documents were part of the record in the case on the merits. We strike the "Email Report," which was not presented to the administrative law judge.

[5] We affirm the administrative law judge's award of $120 per hour for services performed by counsel's paralegal as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

After listing the evidence submitted by the parties, the administrative law judge found "the evidence proffered by Petitioner does not support the requested rate(s)." Order at 6. With respect to the 2016 Florida Bar Survey, she found a portion not referenced by counsel reported that just one-fifth of attorneys in the state charged over $350 an hour and 41 percent in the southeastern region charged over $300 per hour. *Id.*

But she did not address the excerpts of the 2016 Real Rate Report counsel submitted for attorney rates. Nor did she address the prior awards or the affidavits counsel submitted, other than to find Employer did not challenge counsels' qualifications (but does challenge their rates) and to generally agree Mr. Grossman "has an experienced practice, provides a high quality of legal representation, and has an established reputation in the field." Order at 6.

The administrative law judge similarly did not address the prior fee award submitted by Employer. She rejected Employer's 2012 and 2014 Bar Surveys because she found they did not cover the time period for the work performed. Order at 6 n.3. She then noted the 2014 Real Rate Report distinguishes by practice area and location, with the third quartile of partners practicing labor and employment law in Miami charging $350 per hour; for associates, the first quartile charging $165, the median charging $200, and the third quartile charging $290. *Id.* at 6.[6]

The administrative law judge then stated she "must also consider the level of complexity involved in this case and Longshore and Defense Base Act cases in general." Order at 6. In this respect, she found, in general, litigation under the Act is relatively straightforward, with presumptions and relaxed procedural rules. Noting there was no hearing in this case and that many facts were undisputed, the administrative law judge concluded a reasonable hourly rate for Mr. Grossman is $400, for Mr. Thaler, $245, which she found higher than the median rate for all labor and employment associates in Miami, and for Ms. Fixelle, $200, the median rate. *Id.* at 7.

[6] The dissent's assertion that the administrative law judge "permissibly gave greatest weight to the 2014 Real Rate Report as the only evidence of record to distinguish by both practice area and geographical location" does not reflect her Order. She does not state (or even imply) she gave the greatest weight to the 2014 Real Rate Report in calculating Mr. Grossman's rate. Instead, she states she "relied" on the 2016 Florida Bar Survey, but rejected the earlier versions submitted by Employer because the 2016 version "is more indicative of the rates charged during the litigation of this case." Order at 6 n.3. How much weight she afforded the 2014 Real Rate Report, or *if* she found it more persuasive than the 2016 Florida Bar Survey in calculating Mr. Grossman's rate, is not actually addressed in the Order.

We cannot affirm the hourly rates awarded. The administrative law judge erred in finding she "must consider" the complexity of the case in determining the hourly rates. Order at 6. Complexity relates to the number of compensable hours, not the hourly rate. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir 2009). Moreover, we cannot ascertain the basis for the rates awarded and thus if -- or how much -- the error of law affected the outcome.

The only hourly rate determination the administrative law judge provided prior to her discussion about the complexity of the case was finding Claimant's counsel is "entitled to an hourly rate above the highest surveyed rate in Florida ($300) and the rates charged by experienced labor and employment partners in southeastern Florida ($350)." Order at 6. The source for either number, however, was not provided. Presumably, the $300 figure refers to her acknowledgement the 2016 Florida Bar Survey establishes it as the "median hourly rate charged by all Florida attorneys[,]" because the $300 figure does not appear anywhere else in her discussion. *Id.* But the parameters of that survey ignore both the stipulated relevant community of southeastern Florida and the experience and skill level of comparable attorneys: the median rate for all attorneys in the State of Florida says next to nothing about the market rate for a Longshore expert with thirty-four years of experience practicing in the Miami area.

Similarly, the $350 figure appears to have been taken from a portion of the 2014 Real Rate Report which, although very generally accounting for practice type and location, does not account for years of experience beyond broadly distinguishing between partners and associates. It is difficult to see how either survey, on its face, could serve as the only baseline for determining the prevailing market rates in the relevant community for these attorneys on this record, particularly given the administrative law judge's failure to address the 2016 Real Rate Report and the Rivkind affidavit specifically attesting to the market and Mr. Grossman's hourly rate. *See, e.g., Blum*, 465 U.S. at 896; *see generally Christensen*, 430 F.3d 1032, 39 BRBS 79(CRT).[7]

[7] Moreover, the administrative law judge's reliance on a portion of the 2016 Florida Bar Survey for Mr. Grossman's rate neither party discussed is unexplained given counsel initially submitted an excerpt of that survey covering paralegal rates and later referenced another portion to support attorney rates. It is not clear why she would rely on the more general survey and ignore the 2016 Real Rate Report excerpt counsel submitted for attorney rates, which more specifically breaks down fees by experience and location. It "provides that as of 2016, in Miami, Florida, attorneys with twenty-one (21) or more years of experience receive: in the first quartile $322 per hour, the median $440 per hour, and third quartile $562.50 per hour." Pet. For Review at 7. Her choice to ignore the 2016 Real Rate Report is particularly problematic because she appears to have at least partially credited Employer's older version of the same Real Rate Report in determining Mr.

The rest of the administrative law judge's market rate analysis focuses solely on her view of the complexity of this case and Longshore practice in general. Order at 6. While her view that neither is particularly complex naturally suggests a reduction in the hourly rate, it is impossible for us to review how it affected her decision because she does not indicate whether she actually lowered the rate -- let alone how much or from what point. *Id.* No further market evaluation is provided: the final determination for the attorneys is simply "based on the foregoing."[8] *Id.* at 7.

Although not articulated in the decision, it is possible the administrative law judge intended to generally reject the evidence submitted by both parties and base the hourly rate on past awards. But even if that is true, the administrative law judge's analysis still would be insufficient. While prior fee awards under the Act may constitute "inferential evidence" of a prevailing market rate, *see Westmoreland Coal Co. v. Cox,* 602 F.3d 276 (4th Cir. 2010); *Stanhope v. Elec. Boat Corp.*, 44 BRBS 107 (2010), the administrative law judge must specifically address the prior fee awards proffered by Claimant's counsel in support of the claimed hourly rates. *See* Order at 6-7. She did not -- other than to simply list the amount. *Id.*

We therefore cannot discern the overall basis for her hourly rate determination nor the impact of her error of law in considering the complexity of the case in that rate. Consequently, we vacate the hourly rate awards to Claimant's counsel and remand the case for further consideration. *See, e.g.*, *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054-55 (9th Cir. 2009) (An awarding court must articulate the basis for the award so that it may be meaningfully reviewed); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980) (Board must reject an award that is arbitrary, or not in accordance

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Grossman's rate and primarily relied on it in determining his associates' rates. Order at 6-7. Nor is it clear why the dissent suggests the administrative law judge had a duty to discuss a portion of the rate report not contemplated by the parties but no duty to discuss the evidence they did submit.

[8] Our dissenting colleague's assertion that the notion the administrative law judge focused on the complexity of the case in determining hourly rate "is belied by her nearly five-page discussion of relevant case law and market rate evidence" is unconvincing. The administrative law judge listed the evidence and the law prior to discussing hourly rate on page 6 of her Order. The entirety of her *hourly rate analysis* is contained in the final paragraph of page 6, and her perception of the lack of complexity of the case is the predominate factor in it.

with the law). On remand, the administrative law judge must delineate the specific evidence on which she relies in arriving at her conclusions.[9]

Claimant's counsel next contends the administrative law judge erred in disallowing a fee for 50.8 hours of travel and deposition time, as well as $2,678.41 in costs associated with that travel, based on a determination that competent counsel was available to Claimant in the New York City area.[10]

Fees for travel time may be awarded where the travel is necessary, reasonable and in excess of that normally considered to be overhead. *See B.H. [Holloway] v. Northrup Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Baumler v. Marinette Marine Corp.*,

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[9] Our dissenting colleague asserts the error in law is harmless because he believes the administrative law judge permissibly rejected all evidence except the 2014 Real Rate Report and then spent the majority of her analysis explaining how the lack of complexity of this case does not justify *increasing* Mr. Grossman's rate. But the order does not so state and that interpretation is not at all implicit on its face; indeed, in our view, it is plainly counter-intuitive. Moreover, the dissent's assertion the administrative law judge rejected excerpts from the 2016 Real Rate Report because it does not distinguish between practice areas is incorrect: the administrative law judge ignored the 2016 Real Rate Report, the Rivkind affidavit portions addressing the market and Mr. Grossman's rate, and the prior fee awards in her analysis. That our colleague found his own reasons to reject the 2016 Real Rate Report and to distinguish the prior fee awards does not clarify the administrative law judge's Order for our review. Indeed, in our view, the majority of the dissent's reasoning is simply absent from the administrative law judge's analysis.

Similarly, the dissent's assertion counsel submitted evidence that would cap Mr. Grossman's rate -- a Miami-area attorney with *thirty-four years of experience* -- at $450 an hour is also incorrect: counsel submitted evidence that he is entitled to a far higher rate. *See, e.g.*, Cl. Pet. for Review at 7 (unaddressed 2016 Rate Report indicating the third quartile of Miami attorney's with *over twenty-one years* of experience charge $562.50 an hour); Cl. Pet. for Review at 9 (unaddressed Rifkin affidavit attesting that market rate for Mr. Grossman ranges from $450 to $750 an hour). That counsel requested $450 an hour does not negate that evidence, establish a market rate ceiling, or determine the permissible range of market rate.

[10] Claimant resides in Monroe, New York, which is approximately 60 miles north of New York City. Counsel's office is located in Boca Raton, Florida. The attorney services and costs at issue involve Ms. Fixelle's travel to New York for depositions and the formal hearing, which was cancelled.

40 BRBS 5 (2006); *Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995). The Board has held that an attorney's travel may be found to be unreasonable where the Claimant retains counsel from outside the area in which he resides despite the availability of competent, experienced counsel within the Claimant's locality. *Baumler*, 40 BRBS at 7; *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982).

In responding to counsel's fee petition, Employer objected to the attorney time and expenses incurred by Ms. Fixelle in traveling between Boca Raton and New York City. *See* n.10, *supra*. Employer asserted competent counsel was available to Claimant in the New York City area; in support of this assertion, Employer presented the names of several attorneys and their internet addresses. In addressing this issue, the administrative law judge found that Employer "provided the names and websites of several attorneys and law firms in the New York City area that specialize in employment law and Defense Base Act cases." *See* Order at 9. She then sustained Employer's objections to the travel time and costs, stating Claimant's counsel:

> has not established that the travel time [requested] is necessitated by a lack of competent counsel in the New York City area. Employer has provided a list of attorneys in the area with experience in Defense Base Act cases. This list, which is certainly not an exhaustive list, is sufficient to establish that there are competent and experienced counsel in New York City. . . . Thus, I conclude that Petitioner's travel was not necessitated by a lack of competent counsel in the area and is better categorized as an anticipated overhead expense associated with representing an out-of-state client. The travel time entries are disallowed.

Id. at 10. Similarly, she disallowed the claimed airfare, hotel, and mileage costs associated with Ms. Fixelle's travel. *Id.* at 10-12.

We reverse the administrative law judge's conclusion that competent local counsel was available to represent Claimant in the New York City area. *See* Order at 9-10. While Employer provided the names and websites of several attorneys and law firms who represent claimants in employment and DBA cases in the New York City area, *see* Emp. Sur-reply at 3-4, the administrative law judge accepted this evidence as establishing the availability of local counsel without making specific findings regarding the extent of these attorneys' experience with the DBA, their competence to represent DBA claimants, or their availability to do so. *See Holloway*, 43 BRBS at 135; *Baumler*, 40 BRBS at 8. The mere presentation of names, websites and telephone numbers of counsel who purportedly provide legal services similar to those provided by Claimant's counsel, without more, is

insufficient to establish the availability and competency of such local counsel. The administrative law judge's finding that local counsel in the New York City area was available is therefore reversed.

On remand, the administrative law judge must address Ms. Fixelle's request for a fee for her actual attendance at the doctors' depositions, as well as for any travel time and costs related to that attendance. Additionally, the administrative law judge must address Employer's contention that Ms. Fixelle's travel was unnecessary as it was undertaken two weeks before the formal hearing was scheduled to take place and at a time when a motion to cancel the hearing, which was ultimately granted, was pending before the administrative law judge.

Finally, Claimant's counsel avers the administrative law judge did not address his supplemental fee petition contained in his January 28, 2019, reply to Employer's objections. We disagree. A review of the spreadsheet attached to the administrative law judge's Order indicates she awarded a fee for counsel's time entries between January 14 and 25, 2019, for preparation of counsel's reply brief. *See* Order at 10; Spreadsheet accompanying Order at 34-36.

Accordingly, we vacate the administrative law judge's hourly rate awards for attorney services, and her disallowance of a fee and expenses for travel. We remand the case for further proceedings in accordance with this opinion. In all other respects, we affirm the administrative law judge's Order Granting, in Part, Motion for Attorney's Fees and Denying Motion to Compel.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues' decisions to deny Employer's motion to stay the appeal and to reverse the administrative law judge's finding that competent local counsel was available to represent Claimant in the New York City area.

On the latter issue, Employer has not challenged the reasonableness of Claimant's decision to hire counsel in Boca Raton, Florida, even though he is a resident of New York. In fact, it readily agreed southeastern Florida is the relevant legal market for determining counsel's hourly rate. While it argues competent local attorneys were available to represent Claimant at depositions in New York, it sets forth no basis for requiring him to hire a second attorney for that purpose. As the majority holds, absent evidence that Claimant's decision to hire counsel in Boca Raton was unreasonable, Employer is liable for counsel's necessary travel time and expenses attending witness depositions in New York. *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006).

However, I respectfully dissent from the majority's decision to vacate the determination Mr. Grossman is entitled to an hourly rate of $400, rather than the $450 he requested. The Board's review authority in this matter is limited, as the administrative law judge is "in the best position to observe firsthand the factors affecting her analysis of counsel's fee award." *Barbera v. Dir., OWCP*, 245 F.3d 282, 289, 35 BRBS 27, 32(CRT) (3d Cir. 2001). Thus, the Board must uphold her award unless Claimant's counsel shows it is arbitrary, capricious, based on an abuse of discretion, or not in accordance with the law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). Because the administrative law judge's analysis of the market rate was well within her discretion and consistent even with the evidence Claimant's counsel offered, I would affirm.

Once the administrative law judge accepted the parties' stipulation that southeastern Florida is the relevant community for determining the hourly rate, Order at 4, counsel had the burden to produce satisfactory evidence "that the request hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). In support of his request for $450 per hour, the administrative law judge observed counsel submitted a 2016 Florida Bar Survey indicating 41 percent of attorneys in southeast Florida charge over $300 per hour and 18 percent of attorneys statewide charge more than $350 per hour (CX C); an excerpt from the 2016 Real Rate Report showing attorneys in Miami with more than 21 years of experience charge $450 per hour (CX D); and three prior Defense Base Act (DBA) cases awarding him $400 or $450 per hour (CX F). Order at 5. She also noted Employer argued for a rate of $356 per hour based on a complete copy of the 2014 Real Rate Report identifying $287.50 as the median hourly rate for labor and

employment partners in Miami, with the top 25 percent charging $350 per hour (EX E); and a previous DBA case where counsel was awarded $356 per hour (EX B). *Id*. at 5-6.

In determining counsel's market rate, the administrative law judge permissibly gave greatest weight to the 2014 Real Rate Report as the only evidence of record to "distinguish by both practice area and geographical location." Order at 6 (citing EX E). While this report identified an hourly rate of $350 per hour for the top 25 percent of labor and employment partners in Miami, she nonetheless found counsel's status as "a partner with extensive experience under the Longshore Act" entitles him to more than that rate. *Id*. at 6-7. She found, however, counsel's requested $450 per hour was not reasonable and thus awarded him $400 per hour. *Id*.

Claimant's counsel essentially asks for a reweighing of the evidence, which the Board is not empowered to do. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). His identification of an excerpt from the 2016 Real Rate Report as justifying his rate of $450 per hour does not establish the administrative law judge abused her discretion in relying on other evidence in the record. Unlike the complete 2014 Real Rate Report she found most probative, the 2016 excerpt counsel submitted does not distinguish between practice areas. Order at 6; *see* EX E; CX D. Similarly, she found the Florida Bar Survey less probative because it is not "indicative of the rates charged by other attorneys practicing labor and employment law," but applies broadly to all attorneys "irrespective of their practice area." Order at 6; *see* CX 7. "On the other hand," she noted, the 2014 Real Rate Report "does distinguish by both practice area and geographical location." Order at 6; *see* EX E. Further, while the bar survey may support a finding of at least $350 for the top 18 percent of attorneys statewide, it does not necessarily require a higher rate, as the administrative law judge found $350 is "the highest category considered in this survey."[11] Order at 6 (citing CX 7 at 8).

Nor does counsel's previous fee award of $450 per hour establish the administrative law judge abused her discretion in awarding him a lower rate. As she observed, two other fee awards *Claimant's counsel* submitted provided a rate of only $400 per hour which is consistent with her award in this case. Order at 5 (citing CX F). Moreover, courts caution against overreliance on prior fee awards where more direct evidence of the market rate is

[11] The majority faults the administrative law judge for discussing data in the 2016 Florida Bar Survey not specifically referenced in counsel's fee petition. That counsel may have attempted to rely on one data point in the survey does not negate the fact that it contains other data relevant to attorney rates in the State of Florida. The administrative law judge therefore had a duty to discuss it. *See generally Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

available.[12] *See Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054, 43 BRBS 6, 8(CRT) (9th Cir. 2009) (courts that "recast fee awards . . . into 'market' rates" engage in "a tautological, self-referential enterprise"); *Farbotko v. Clinton City of New York*, 433 F.3d 204, 208 (2d Cir. 2005) ("'[A] reasonable hourly rate' is not ordinarily ascertained simply by reference to rates awarded in prior cases."); *Dillard v. City of Greensboro*, 213 F.3d 1347, 1355 (11th Cir. 2000) ("[A] court should hesitate to give controlling weight to prior awards, even though they may be relevant.").

Having permissibly credited the 2014 Real Rate Report as the evidence most comparable to counsel's DBA practice, *i.e.*, fees charged by labor and employment partners in southeastern Florida, the administrative law judge did not err in awarding him $400, rather than $450 per hour. That the $400 per hour rate is consistent with counsel's prior fee awards, which Claimant's counsel submitted into the record, further undermines his argument.[13]

The majority's holding that the administrative law judge focused predominantly on complexity of the case to reduce counsel's hourly rate is belied by her nearly five-page discussion of relevant case law and market rate evidence preceding that singular paragraph. *See* Order at 1-6. It is also belied by her actual findings on the issue. She stated the case "did not require legal services above and beyond those available in the relevant market," meaning that the rates she awarded are "sufficient to induce a capable attorney to undertake the representation" of a claimant. *Id.* at 6 (citing *Perdue v. Kenny A.*, 559 U.S. 542, 553 (2010)). In other words, rather than impermissibly reducing counsel's hourly rate, she cited lack of complexity as a reason for declining to give him *more* than what the relevant legal market supports. *Id.*; *see Van Skike v. Director*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th

[12] None of counsel's prior fee awards provide market rate analysis comparable to that performed by the administrative law judge in the present case. The first award for $400 was unopposed and contains no analysis of market rates; the second awarded $400 based on two prior fee awards because counsel did not provide evidence of the relevant market rate; and the third was based solely on the administrative law judge's perception that counsel is comparably skilled to other attorneys who had been awarded $450 per hour based on unopposed fee petitions. *See* CX F.

[13] Similarly, the administrative law judge acted within her discretion in relying on the 2014 Real Rate Report to award associates Thaler and Fixelle hourly rates of $245 and $200, respectively. She found the former deserving of a rate higher ($245) than the median rate charged by labor and employment associates in Miami ($200), based on his experience and accomplishments. She found the latter entitled to the median rate ($200) because she had only recently been admitted to the bar. *Id.*

Cir. 2009) (complexity of the case is not an appropriate factor for determining counsel's hourly rate). Error, if any, in discussing complexity in the context of counsel's hourly rate is therefore harmless. *See Ala. By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984); *see also Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 65-66, 35 BRBS 41, 49(CRT) (2d Cir. 2001).

In sum, the parties submitted evidence that counsel's hourly rate could be anywhere from $350 (top quartile of labor and employment partners in Miami; prior DBA fee award of $356 per hour) to $450 (experienced Miami attorneys in all practice areas; prior DBA fee award). The administrative law judge found Employer's argument that counsel's rate is at the lower end of this range insufficient to adequately compensate him for his services. She rejected counsel's argument that his rate is at the upper end because his market rate evidence encompassed all practice areas, not the more comparable area of labor and employment law. Instead, she selected a rate near the middle of that range ($400) based on the most credible evidence of a $350 hourly rate charged by the top 25 percent of labor and employment partners in Miami, while adding a fourteen percent premium to account for counsel's experience and qualifications.

While the majority may find the 2016 Real Rate Report excerpt probative,[14] the administrative law judge provided a sound rationale for giving greatest weight to the more detailed, complete 2014 Real Rate Report submitted by Employer: It is the only evidence of record to provide market rate information comparable to Claimant's counsel's geographic area (Miami), experience level (top 25 percent of partners), *and* practice area (labor and employment law). Order at 6; *see DiCecca v. Battelle Mem'l Inst.*, BRB No. 15-0504 (Mar. 6, 2017) (awarding same counsel rates based on the Real Rate Report data for the top quartile of labor and employment partners in Miami because it "offers better evidence of market rates by geographic area and specialty"). To the extent she accounted for counsel's "extensive experience" by awarding him an hourly rate higher than the third quartile of labor and employment partners in Miami, the majority's criticism of the 2014

[14] The majority's assertion that the 2016 Real Rate Report excerpt could actually support an hourly rate of $562.50 is of little moment. *See* CX D. First, Claimant's counsel does not even claim his market rate is that high. Second, the 2016 excerpt is not the more detailed evidence envisioned by the majority. It consists of two lines of data containing the average rates charged by partners in Miami, across all practice areas, with either more than 21 years of experience or less than 21 years of experience. *Id.* The range for Miami partners with more than 21 years of experience across all practice areas is between $322.00 in the first quartile and $562.50 in the third quartile. *Id.*

report as insufficient to determine the market rate for an attorney with counsel's qualifications is unavailing. Order at 7.

Claimant's counsel has failed to establish the administrative law judge erred as a matter of law or discretion. As she based her findings on substantial evidence and explained her decision in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A),[15] I would affirm her hourly rate determinations. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) ("If a reviewing court can discern 'what the ALJ did and why he did it,' the duty of explanation is satisfied.").

GREG J. BUZZARD
Administrative Appeals Judge

[15] The Administrative Procedure Act requires that every decision contain "findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).