U.S. Department of Labor

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

BRB No. 22-0338

HERBERT KAZIBWE Claimant-Petitioner v. REED INTERNATIONAL, INCORPORATED and SAFETY NATIONAL CASUALTY CORPORATION Employer/Carrier-Respondents	)	DATE ISSUED: 9/29/2023 DECISION and ORDER

Appeal of the Order Awarding Attorney Fees and Costs and Order Denying Reconsideration of Paul C. Johnson, District Chief Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and David C. Barnett (Barnett, Lerner, Karsen, & Frankel, P.A.), Fort Lauderdale, Florida, for Claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals the Order Awarding Attorney Fees and Costs and the Order Denying Reconsideration (2020-LDA-01671) of District Chief Administrative Law Judge (ALJ) Paul C. Johnson 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).[1] 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. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co*., 12 BRBS 272 (1980).

Claimant, who is from Uganda, was working as a security guard for Employer at Bagram Airfield on December 11, 2019, when he allegedly suffered physical and psychological injuries from a blast caused by an improvised explosive device. Verified Petition in Support of Attorney's Fees and Costs Paid by the Employer/Carrier (Fee Pet.) at 10. Claimant retained counsel David C. Barnett in January 2020, and shortly thereafter filed a claim for disability and medical benefits under the Act. *Id.* at 2. Employer controverted the claim in its entirety, and the matter was referred to the Office of Administrative Law Judges (OALJ) on March 19, 2020. *Id.*

The formal hearing was scheduled to take place on July 19, 2021; however, a few weeks before the hearing, the parties agreed to settle Claimant's claim for disability and medical benefits. *See* Order of Remand. Following remand of the claim to the Office of Workers' Compensation Programs (OWCP), the district director issued an order on July 23, 2021, approving the settlement of Claimant's claim for compensation and medical benefits under Section 8(i) of the Act, 33 U.S.C. §908(i), according to which Employer agreed to pay Claimant a lump sum of $80,000. *See* OWCP Order Approving Agreed Settlement. However, the parties could not come to an agreement on the issue of Claimant's counsel's entitlement to attorney fees and costs.

On August 17, 2021, Claimant's counsel submitted a petition to the ALJ seeking attorney fees and costs in accordance with Section 28(a) of the Act, 33 U.S.C. §928(a). Counsel requested a total of $332,145 in fees and costs, as follows: $82,950 in fees for time billed (165.9 hours multiplied by a requested hourly rate of $500), plus a fee enhancement of $248,850 and $345 in costs. Fee Pet. at 1, 46-47. Counsel also requested, in the event

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

Employer objected to any of his itemizations as either unnecessary or excessive, that the ALJ require Employer to produce its own billing records. Fee Pet. at 21-25.

Employer responded, objecting to the requested hourly rate; certain itemizations involving communications with Claimant and motions for summary decision; the request for an enhancement; and lack of compliance with 20 C.F.R. §702.132(a), which requires that a fee petition identify the professional status of all persons who worked on the claim. Employer/Carrier's Objections to Claimant's Attorney's Fee Application at 6-8, 17-18. Counsel filed a reply, in which he addressed Employer's objections to his hourly rate, as well as the time billed for the motions for summary judgment and for communicating with Claimant. Claimant's Response to Employer/Carrier's Fee Objection. He also requested an additional $2,500 in fees for 5 hours spent reviewing and replying to Employer's objections. *Id.* at 15.

The ALJ issued an Order Awarding Attorney Fees and Costs (Fee Order) on January 31, 2022. He found counsel's failure to comply with 20 C.F.R. §702.132(a) precluded entitlement to "an hourly rate award at the top end of the market" and reduced the requested hourly rate of $500 to $385, the midpoint between rates earned by the bottom 25% to 50% of practitioners in the South Florida market. Fee Order at 5. The ALJ then reduced the billed time by 52.2 hours. Fee Order at 6-11. He disallowed 1.9 hours for work performed before the OWCP; 21.7 hours for all work associated with Claimant's emergency motion for summary decision; and 1.9 hours for all time spent reviewing e-mails from Claimant thanking counsel for his services. *Id.* He applied a 75% blanket reduction to all e-mailed communications between counsel and Claimant, excluding any with documents attached, thereby reducing a requested 35.6 hours for that communication to 8.9 allowed hours. *Id.* at 6, 8-11. He declined counsel's request for an enhancement, *id.* at 11, and also disallowed the 5 hours requested for time spent reviewing and replying to Employer's objections to his fee petition, *id.* at 7. In all, the ALJ awarded counsel a fee for 113.7 hours, at an hourly rate of $385, resulting in a fee award of $43,774.50, plus $345 in costs. *Id.* at 11.

Claimant's counsel timely filed a motion for reconsideration of the following issues: the reduction of all hours related to Claimant's emergency motion for summary decision; the 75% blanket reduction of time billed for certain communications with Claimant; and the hourly rate award of $385. Claimant's Motion for Reconsideration of Order Awarding Attorney's Fees and Costs (M/Recon.). Counsel also summarily included a reference to *Perdue v. Kenny A.*, 559 U.S. 542 (2010), as granting the ALJ legal authority to enhance the fee award "should the actions rise to that 'rare and exceptional circumstance' requiring it," but provided no further argument in favor of its application. M/Recon. at 6. The ALJ denied counsel's motion for reconsideration by order issued April 14, 2022. Order Denying Reconsideration (Recon. Order) at 1.

Claimant's counsel appeals both orders, raising the following issues: the calculation of his hourly rate; the 75% blanket reduction of time billed for certain communications with Claimant; the reduction of time billed for work on the emergency motion for summary decision; the denial of time for replying to Employer's fee objections; the ALJ's failure to address his request that Employer produce its billing records before making any reductions for unnecessary and/or excessive hours; and denial of his request for enhancement. Petition for Review (PR) at 4.

Hourly Rate

Counsel argues he should be awarded his requested hourly rate of $500, as it falls below the midpoint of the range of rates which the ALJ credited. PR at 17-18. Counsel further avers the reduction of the market rate to $385 because "some of the tasks billed should have been given to a paralegal or staff member" was an abuse of discretion, irrational, and not in accordance with the law, as an ALJ must respect an attorney's staffing decisions. *Id*. at 20-21 (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008)).

The United States Supreme Court has held 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*, 559 U.S. 542; *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 ALJ accepted the parties' agreement that Fort Lauderdale/South Florida is the relevant community for determining counsel's hourly rate, *see* Fee Order at 4-5, 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).

The ALJ initially reduced Claimant's requested hourly rate because counsel's fee petition did not comply with the regulatory requirement that it contain a description of the professional status of each individual working on the claim. Fee Order at 5 (citing 20 C.F.R. §702.132(a)). The ALJ found all time was billed to Mr. Barnett, even though the emergency motion for summary decision was signed by a different attorney, Chase Zobec. *Id*. at 5, n.5. The ALJ concluded this oversight, whether "sloppy" or "intended to inflate the award of attorney's fees," was unacceptable, and therefore he "decline[d] to award counsel an hourly rate enjoyed by the South Florida market's top earners." *Id*.

Counsel attempted to remedy this perceived oversight in his motion for reconsideration by explaining he voluntarily had redacted work performed by paralegals and support staff, and by including an affidavit from Mr. Zobec affirming the work he did editing, proofreading, and filing was intentionally excluded from the petition. M/Recon at 5-6. The ALJ credited this explanation and even commended counsel for excluding time he believed to be non-compensable. Recon. Order at 2. Nevertheless, he declined to reconsider his awarded hourly rate of $385, as the "dozens of hours of communications contained in the fee petition, and the absence of evidence as to what and how much work was actually performed by paralegal and support staff" precluded him from understanding why "much of the work," including the "more menial communications" with Claimant, was not performed by paralegals or support staff at far lower billing rates. *Id.* at 2-3.

We agree with Claimant's counsel that the ALJ's hourly rate determinations for the attorney services performed in this case cannot be affirmed. At the outset, the usual remedy for a fee request that is incomplete, lacks specificity, or fails in any other way to meet the standards of the regulations is to withhold the fee award until a complete statement is received, not to reduce the hourly rate. *Nat'l Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977); *Stanhope v. Elec. Boat Corp.*, 44 BRBS 107 (2010); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981); *O'Keefe v. Morris Boney, Inc.*, 2 BRBS 363 (1975), *rev'd on other grounds*, 545 F.2d 337, 4 BRBS 563 (3d Cir. 1976).

Further, once counsel provided, and the ALJ accepted, an explanation for the perceived fee petition deficiency, the ALJ erred in justifying the reduced hourly rate for the alternate reason that the work identified could have been performed by paralegals or support staff at a lower rate. The ALJ impermissibly "impose[d] [his] own judgment regarding the best way to operate a law firm," focusing on "whether it would have been cheaper to delegate the work to other attorneys" rather than the "difficulty and skill of the work performed." *Moreno*, 534 F.3d at 1115. Written communications with a client constitute attorney services, and the ALJ abused his discretion in deciding, in hindsight, such communications should have been done by paralegals or support staff. *Zeigler Coal Co. v. Director, OWCP,* 326 F.3d 894 (7th Cir. 2003); *Wood v. Ingalls Shipbuilding, Inc.,* 28 BRBS 156 (1994).[2]

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[2] However, we note that clerical work is subsumed in overhead. Consequently, the ALJ retains discretion to consider, and if appropriate disallow, time entries challenged by Employer as clerical in nature.

Moreover, by reducing the hourly rate due to "menial communications" that could have been performed by support staff, and simultaneously applying a blanket 75% reduction to all such communications for the same reason, the ALJ engaged in impermissible "double-counting." *See Moreno,* 534 F.3d at 1115-16. As explained below, we affirm the ALJ's blanket reduction of time related to Claimant's communications, as counsel has not shown the ALJ abused his discretion in that regard. *See Tahara v. Matson Terminals, Inc.,* 511 F.3d 950, 955-56, 41 BRBS 53, 57(CRT) (9th Cir. 2007). However, the ALJ's additional reliance on these activities by Claimant's attorney to justify reducing the hourly rate for all of counsel's services in this case constitutes an abuse of discretion. *See Moreno,* 534 F.3d at 1115-16.

We therefore vacate the ALJ's hourly rate determination for the attorney services performed in this case and remand for further consideration of the hourly rate issue consistent with applicable law.

Reductions of Hours

An attorney's work is compensable if the hours claimed are "reasonable" for the "necessary work done" in the case and the fee is commensurate with the degree of success obtained. 20 C.F.R. §702.132(a); *see Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Thus, the ALJ may, within his discretion, disallow a fee for hours found to be duplicative, excessive, or unnecessary. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT). An ALJ is afforded "considerable deference" in determining what hours are "excessive, redundant, or otherwise unnecessary." *Id.*, 511 F.3d at 956, 41 BRBS at 57(CRT). Given the ALJ's superior understanding of the underlying litigation, he is in the best position to make this determination. *Id.*; *see also Fox v. Vice*, 563 U.S. 826, 838 (2011).

Counsel argues the ALJ erred in significantly cutting his billed time, as "a winning attorney is presumed to have spent his time reasonably." PR at 25. Counsel challenges the ALJ's application of a 75% blanket reduction of time for certain excessive communications, as well as reductions of time associated with reviewing emails wherein Claimant thanked counsel for his services. Counsel argues Claimant's unfamiliarity with the U.S. legal system, as well as his injury-related PTSD and traumatic brain injury, justifiably led to necessary and repeated communications. *Id.* at 26-27.

We hold counsel has not established the ALJ abused his discretion in reducing these hours. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Berkstresser v. Washington Metro. Area Transit Auth.,* 16 BR3S 231 (1984). Upon review of counsel's itemizations, the ALJ found it "very heavy" on attorney-client communications and "quite light on actual legal work." Fee Order at 6. He noted the itemizations documented Claimant's "constant" and "numerous" requests for updates and conferences, and that counsel had to provide multiple explanations "before it sunk in." *Id.* Nevertheless, the ALJ found these entries "more often

than not excessive, redundant, and unnecessary," particularly "nearly a dozen entries," totaling 1.9 hours of billed time, to review Claimant's emails thanking counsel for his time and work.[3] *Id.* In addition to disallowing the 1.9 hours requested for reviewing thank-you emails, the ALJ applied a 75% reduction to the 35.6 hours billed for communications with Claimant, excluding from that reduction all emails containing documents.[4] *Id.* at 6, 8-11.

The ALJ declined to modify this reduction on reconsideration. He pointed to two examples of excessive and unnecessary time entries[5] and concluded these were "not aberrations; but; rather…[were] well-representative of the communication entries in the fee petition." Recon. Order at 2. Therefore, he concluded his application of a 75% blanket reduction to communications entries that did not involve the sharing of documents reduced the total requested hours by 16% and achieved "rough justice" as opposed to "auditing perfection." *Id.* (quoting *Fox*, 563 U.S. at 838 (2011)).

After reviewing the pertinent information, the ALJ fully explained his reasons for the reductions of time spent communicating with Claimant, including the 75% blanket reduction to certain entries. Given the considerable deference afforded the ALJ, counsel has not demonstrated he abused his discretion with regard to these reductions. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *Welch*, 23 BRBS 395; *Berkstresser,* 16 BR3S 231.; *see also Hensley,* 461 U.S. 424; *Baumler,* 40 BRBS 5. Accordingly, we affirm them.

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[3] The ALJ found it difficult to believe "any client, let alone one experiencing financial hardship like Claimant, would willingly agree to pay his attorney $950 (1.9 hrs. x $500/hr.) to review emails thanking the attorney." Fee Order at 6. Counsel argues this statement represents "objective and obvious legal error in considering Mr. Kazibwe's own poor financial state in determining how much money a theoretical paying client like him would be willing to pay an attorney." PR at 27. While a claimant's financial circumstances are irrelevant when the employer is responsible for the attorney's fees, *Thornton v. Beltway Carpet Serv.*, 16 BRBS 29 (1983), the ALJ did not rely on Claimant's financial status in calculating the overall fee award but, rather, referenced Claimant's financial status to demonstrate the excessive nature of the time entry, and thus committed no error.

[4] 75% of 35.6 hours results in a reduction of 26.7 hours to 8.9 hours allowed for counsel's communications with Claimant.

[5] On April 13, 2021, counsel billed 12 minutes of time for review of an email in which Claimant complained of chest pains, and on June 23, 2021, he billed for an email "rebuffing Claimant's request for a personal loan." Recon. Order at 2.

Counsel argues the ALJ also erred in disallowing 21.7 hours of time related to Claimant's emergency motion for summary judgment, which the ALJ denied as frivolous. Claimant filed the motion in an effort to expedite adjudication of the claim, prior to issuance of the Notice of Docketing triggering the commencement of formal discovery. PR at 31. Counsel maintains formal discovery actually starts with the injury, as the "employer should immediately investigate the case," *id.*, and argues it was not a frivolous motion, but "a reasonable strategic move" to get the claim moving, *id.* at 32-33.

The ALJ disallowed all time associated with this motion, including its preparation, review of Employer's response and the ALJ's denial, and communications to Claimant discussing it, as he found it incredulous counsel filed it "knowing full well the motion's chances of success were non-existent, given that discovery had not yet even commenced." Fee Order at 7. He acknowledged the "common hardship" faced by claimants "while litigation is slowly underway," *id.*, and did not doubt counsel's assertion that he had the best of intentions, Recon Order at 1, but found neither reason justified the filing of an unquestionably meritless motion which only further tied up limited judicial resources. Fee Order at 7. The ALJ also found counsel failed to provide any legal authority warranting issuance of a similar judgment prior to the commencement of formal discovery. Recon. Order at 1-2.

Once again, considering the ALJ's rational explanation for this reduction, we conclude counsel has not established an abuse of discretion, and we affirm the ALJ's disallowance of time associated with the unsuccessful emergency motion for summary decision which the ALJ found frivolous. *Tahara*, 511 F.3d at 956, 41 BRBS at 57(CRT); *Welch*, 23 BRBS 395; *Berkstresser,* 16 BR3S 231.; *see also Hensley,* 461 U.S. 424 (in fee-shifting statutes, an adjudicator may reduce counsel's fee award to account for his client's limited success); *Baumler,* 40 BRBS 5.

Counsel next challenges the ALJ's disallowance of five hours for time spent reviewing and replying to Employer's objections to his original fee petition. PR at 33. He argues not only was he entitled to respond, the ALJ improperly evaluated the reasonableness of that time in hindsight, rather than as of when it was incurred. *Id.* at 33-34 (citing *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981); *Cherry v. Newport News Shipbuilding and Dry Dock CO.*, 8 BRBS 857 (1978).

It is well established that a claimant's attorney is entitled to a reasonable fee for defending a fee award. *See generally Zeigler, OWCP*, 326 F.3d 894; *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009) (disallowing a portion of the fee requested for work on a reply brief when the response was disproportionate to the objections); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). As noted previously, the test to determine the compensability of an attorney's work is whether the hours claimed are "reasonable" for the "necessary work done." *See* 20 C.F.R. §702.132(a).

The ALJ denied all five hours counsel requested for time spent reviewing Employer's objections to his original fee petition and drafting a reply, finding it duplicative and unnecessary because the reply brief was "not at all persuasive and essentially reiterated the same arguments set forth in [counsel's] 47-page brief accompanying the fee petition." Fee Order at 7. However, counsel's reply brief included, *inter alia*, arguments defending his requested hourly rate, an issue we have instructed the ALJ to reconsider on remand. Consequently, the persuasiveness and necessity of counsel's reply regarding the issue of hourly rate has yet to be determined. We therefore vacate the ALJ's denial of the time to reply to Employer's objections and remand for reconsideration of the reasonableness and necessity of that requested time.

Counsel further argues the ALJ erred in failing to address his request that the ALJ require Employer produce its own billing records in order to properly lay a foundation if Employer objected to any of his time entries as excessive or unnecessary. PR at 34-38. In essence, this is a discovery request; counsel is requesting the ALJ exercise his authority to "order discovery of any matter relevant to the subject matter involved in the proceeding." 29 C.F.R. §18.51(a). Counsel initially submitted this request within his original fee petition (Fee Pet. at 21-24); however, the ALJ's Fee Order lacks any mention of it. Although we can assume this silence represents a denial of counsel's request, we are unable to evaluate the reasonableness of the denial absent an explanation from the ALJ.[6] *See v. Washington*

[6] Courts have split on the question of whether defense counsel's billing records are relevant to the determination of a prevailing plaintiff's entitlement to attorney fees under various federal fee-shifting statutes. Some courts have found such information relevant and discoverable when the reasonableness of plaintiff's requested hours was placed into dispute by the defense, when the underlying litigation was complex, lengthy, or presented novel issues, and/or when there is an absence of alternate evidence going to the reasonableness of the plaintiff's fee request. *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566 (11th Cir. 1985); *Frommert v. Conkright*, 2016 WL 6093998 (W.D.N.Y. Oct. 19, 2016); *Mendez v. Radec Corp.*, 818 F.Supp.2d 667 (W.D.N.Y. 2011); *Pollard v. E.I. DuPont De Nemours & Co.*, 2004 WL 784489 (W.D. Tenn. Feb. 24, 2004); *Cohen v. Brown Univ.*, 1999 WL 695235 (D.R.I. May 19, 1999); *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 1996 WL 66111 (N.D. Ill. Feb. 13, 1996); *Murray v. Stuckey's Inc.*, 153 F.R.D. 151 (N.D. Iowa 1993). Other courts have acknowledged evidence of a defense counsel's billing records as potentially relevant but have declined to order their production because there was other evidence of reasonableness available and/or exclusion served the purpose of avoiding a second major litigation. *Hernandez v. George*, 793 F.2d 264 (10th Cir. 1986); *In re: Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984); *Johnson v. Univ. College of the Univ. of Alabama in Birmingham*, 706 F.2d 1205 (11th Cir. 1983). Notably, courts have generally rejected

Metropolitan Area Transit Authority, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). Not only does the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), require the ALJ provide an adequate rationale for his decision, he is also required to inquire into all matters at issue before him, 20 C.F.R. §702.338, and when it comes to fee awards, must provide an explanation sufficient to enable the Board to determine if it accords with law or is arbitrary, capricious, or based on an abuse of discretion. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Devine v. Atl. Container Lines, G.I.E.*, 23 BRBS 280 (1990); *Cabral*, 13 BRBS 97. The ALJ did not address the request at all, and therefore, on remand, he must make the necessary findings as to counsel's request that Employer produce its counsel's billing records.

Enhancement

Counsel argues the ALJ improperly dismissed his request for an enhancement of his fee, as the "Board has a long history of approving fee enhancements where the work done or the result obtained warrants it." PR at 23. Relying on *Perdue*, 559 U.S. 542 (2010),[7]

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attempts to obtain defense counsel's billing records as evidence of the prevailing market rate. *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 776 F.2d 646 (7th Cir. 1985). They also typically afford the trial court great deference in either allowing or rejecting the production. *Hernandez*, 793 F.2d 264; *In re-: Fine Paper*, 751 F.2d 562; *Johnson*, 706 F.2d 1205; *Pollard*, 2004 WL 784489; *Cohen*, 1999 WL 695235; *Murray*, 153 F.R.D. 151.

[7] In *Perdue*, following a civil rights action, the prevailing plaintiffs sought $14 million in attorney's fees, half of which was an enhancement "for superior work and results," and supported by affidavits claiming that the lodestar would be insufficient to induce lawyers of comparable skill and experience to litigate the case. *Perdue*, 559 U.S. at 542, 548. The Court noted enhancements of a lodestar amount could be awarded in rare and exceptional circumstances, although it had admittedly "never sustained an enhancement of a lodestar amount for performance." *Id*. at 552. This is due to a "strong presumption" as to the reasonableness of the lodestar amount, which can only be overcome "in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." *Id*. at 553-554. The Court held superior attorney performance can justify an enhancement, but such circumstances "are indeed 'rare' and 'exceptional,' and require specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'" *Id*. at 554 (quoting *Blum*, 465 U.S. at 897). Circumstances in which enhancement for attorney performance may be justified include when the method for calculating an attorney's hourly rate does not adequately measure that attorney's true market value; when there is an

counsel maintains the ALJ failed to address the factors relevant to determining whether such an enhancement is justified, including superior performance, superior result, whether the standard lodestar will attract competent counsel and/or adequately compensate the practitioner, the outlay of expenses, and the length of delay in payment, if any. PR at 24.

However, in his original fee petition, counsel's justification for his enhancement request was not tied to any alleged superior performance, inadequate lodestar amount, or lengthy delay, in line with *Perdue*. Rather, he requested an enhancement that would quadruple his fees in order to "penalize Employer/Carrier." Fee Pet. at 20. Counsel maintained the litigation of this claim was wholly attributable to Employer/Carrier's "baseless denial," and such "misconduct" constituted a "rare and exceptional" circumstance justifying enhancement under *Perdue*. *Id.* at 12, 20. The ALJ denied the request, finding he lacked legal authority to grant a punitive enhancement, and stated even if he had such authority, he would refrain from providing counsel with "such an extraordinary, unearned windfall." Fee Order at 11.

In arguing for reconsideration of the denial of an enhancement, counsel stated only "while the Court was unaware of the concept of enhancement, pursuant to [*Perdue*], the Court does have discretion to enhance the fee awarded should the actions rise to that 'rare and exceptional circumstance' requiring it." M/Recon. at 6. Except, perhaps, to reiterate Employer's "misconduct" in his description of the facts, he did not otherwise explain how the circumstances of this case and its adjudication reached the *Perdue* standard, and the ALJ did not revisit this issue in his decision on reconsideration.

We agree with the ALJ in that neither *Perdue* nor any of the other caselaw relied upon by counsel supports his request for punitive enhancement of attorney fees. Counsel has failed to show the ALJ's denial of his request for a fee enhancement is arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Muscella*, 12 BRBS 272. We therefore affirm the ALJ's denial of counsel's request for a punitive fee enhancement.

Accordingly, we vacate those portions of the ALJ's Order Awarding Attorney Fees and Costs and Order Denying Reconsideration related to counsel's hourly rate, his request for five hours of fees for time incurred replying to Employer's objections, and his request for the production of Employer's attorney billing records and remand this case for further

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"extraordinary outlay" of expenses and the litigation is "exceptionally protracted;" and when there is an "exceptional delay" in the payment of fees. *Id.* at 554-556.

consideration of those issues consistent with this opinion. In all other respects, we affirm the ALJ's Order Awarding Attorney Fees and Costs and Order Denying Reconsideration.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge