BRB No. 11-0624

CHRISTOPHER E. FIFER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE REPAIR SERVICES, INCORPORATED	)	DATE ISSUED: 04/05/2012
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorneys' Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Michael J. Perticone (Hardwick & Harris, LLP), Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorneys' Fees (2009-LHC-01197) of Administrative Law Judge Linda S. Chapman 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 law. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

This case is before the Board for the second time. Claimant suffered injuries to his arm, shoulder, and back on October 26, 2007, when he was involved in an automobile accident during the course of his employment. Employer voluntarily paid claimant temporary total disability benefits through January 26, 2009, and claimant filed a claim for additional benefits. The administrative law judge found that claimant cannot return to his usual work as a chassis/container repairman, and she determined that employer did not establish the availability of suitable alternate employment; however, as claimant was working for his family's restaurant, earning $400 per week, the administrative law judge found these earnings represent claimant's post-injury wage-earning capacity. Thus, the administrative law judge awarded claimant temporary total disability benefits from October 27, 2007, through February 22, 2009, when claimant's condition reached maximum medical improvement, permanent total disability benefits from February 23 through March 22, 2009, and ongoing permanent partial disability benefits thereafter. Employer appealed the award, contending the administrative law judge erred in rejecting its evidence of alternate jobs on the open market. BRB No. 10-0449. In a supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of $29,896.50, representing 104.9 hours of work at an hourly rate of $285, plus $2,391.63 in expenses. Employer appealed the award of an attorney's fee. BRB No. 11-0117. The Board consolidated the appeals for decision.

The Board rejected employer's assertion that the administrative law judge erred in rejecting the labor market survey of its vocational expert. Specifically, the Board held it was rational for the administrative law judge to reject those jobs as employer failed to provide sufficient information about the duties of those jobs or compare them with claimant's restrictions. As it concluded the administrative law judge rationally found that claimant is performing necessary work at his family's restaurant, the Board affirmed the administrative law judge's award of benefits based on a residual wage-earning capacity of $400 per week. With respect to the fee award, the Board rejected employer's argument that the administrative law judge erred in failing to reduce specific entries in counsel's fee petition. It also held that counsel presented sufficient evidence to support an hourly rate of $285, and it rejected employer's assertions that the administrative law

judge erred in denying its motion to depose counsel and his "hourly rate witnesses."[1] However, the Board vacated the hourly rate awarded because the administrative law judge did not consider employer's hourly rate evidence, and it remanded the case for the administrative law judge to address all the hourly rate evidence. *Fifer v. Marine Repair Services*, BRB Nos. 10-0449, 11-0117 (March 24, 2011).

On remand, the administrative law judge rejected employer's contention that $200 or $225 is an appropriate hourly rate based on the two fee petitions it submitted from other attorneys in longshore cases contemporaneous with the work counsel performed in this case. The administrative law judge stated that counsel's rate need not be the same or less than that awarded in other cases, as each case is to be judged on its own merits. The administrative law judge determined that, because this case was "vigorously contested" by employer, and it involved extensive preparation and examination of three medical and vocational experts, the success of claimant's representation warranted an hourly rate of $285. Employer appeals the administrative law judge's fee award on remand, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in rejecting the labor market survey from its vocational expert and awarding claimant benefits based on a post-injury wage-earning capacity of $400. Employer also asserts that the Board and the administrative law judge erred in denying its requests to compel counsel to reveal his normal billing rate and to depose counsel and his hourly rate witnesses. These issues were addressed by the Board in its first decision. The resolutions therein constitute the law of the case, as there is no basis for finding that doctrine inapplicable. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 22 BRBS 316 (1989). Therefore, we decline to address employer's contentions.

Employer also contends the administrative law judge erred in awarding an hourly rate of $285 because she again failed to address its hourly rate evidence. In support of his requested rate of $285, claimant's counsel submitted three letters from Baltimore attorneys in three different law firms stating their hourly rates as of July 2010 were $275 and $280, with one contemplating raising his to $285. Employer presented fee petitions from two other Baltimore cases, wherein one attorney requested $200 per hour for work performed in 2010 before a district director and the other requested $225 for work performed before an administrative law judge in 2009. On remand, the administrative law judge acknowledged this evidence specifically. Supp. Decision and Order at 2. She

[1]The Board also noted that the administrative law judge used appropriate factors in assessing the sufficiency of counsel's evidence, citing 20 C.F.R. §702.132 and *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

stated that employer "vigorously contested" this case and that the case involved a lot of work, including deposing three experts, and she concluded:

> I have already found, and the Board has affirmed my finding, that Mr. Perticone met his burden to prove satisfactory specific evidence of an applicable prevailing rate for representation in similar cases in the Baltimore area. . . . I again find that the appropriate hourly rate is $285.00. In doing so, I have considered the fee petitions submitted by Mr. Postol, which do not change my conclusion that, given the particular facts and circumstances of this case, Mr. Perticone's requested fee is reasonable and necessary.

Id.

The Board affirmed the administrative law judge's finding that counsel submitted sufficient evidence to support an award of an hourly rate of $285, *Fifer*, slip op. at 6-7, and the administrative law judge on remand addressed employer's evidence and stated that it does not change her conclusion. Employer has not shown that the administrative law judge abused her discretion in awarding counsel an hourly rate of $285. Accordingly, we affirm the hourly rate awarded by the administrative law judge, as well as the overall fee awarded to claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Claimant's counsel submitted a fee petition for work performed before the Board in the prior appeals, BRB Nos. 10-0449 and 11-0117. 20 C.F.R. §802.203. Counsel requests an attorney's fee of $9,262.50, representing 32.5 hours of work at an hourly rate of $285. Employer objects, making several assertions including that both the hourly rate and the hours requested are excessive.

Initially, we reject employer's assertion that any fee award is premature. Claimant was successful before the administrative law judge, and he defended his award before the Board. 20 C.F.R. §802.203(a). Although the fee award is unenforceable until all appeals are exhausted, it is not premature for the Board to award a fee at this time. *See Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

Employer also argues that counsel's fee petition is incomplete because counsel has not identified his "normal billing rate" that his paying clients pay. We decline to deny a fee on this basis in this case. Counsel has presented sufficient evidence of a prevailing

market rate.[2] *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). Employer also asserts that counsel's requested hourly rate of $285 is excessive. Counsel states that he has been a member of the Maryland Bar since 1983, he has worked in personal injury and industrial-related litigation for 23 years, and he has been a partner in his law firm for 16 years. He attests to significant experience in conducting examinations and cross-examinations of medical and vocational experts, and he establishes an AV rating from Martindale Hubbell since 2003. In support of his requested rate, counsel submits the same three letters he presented to the administrative law judge from Baltimore attorneys in three different law firms stating their hourly rates as of July 2010 were $275 and $280, with one contemplating raising his to $285. Employer submits the same evidence it submitted to the administrative law judge as proof that a lower hourly rate is warranted. That is, its submitted petitions establish that the attorneys sought hourly rates of $200 and $225 for work performed during the same time frame that counsel seeks an hourly rate of $285. While both parties have submitted valid evidence, we determine that counsel's evidence is sufficient to support his request for an hourly rate of $285, as that rate is comparable to the rates requested by colleagues in Baltimore. We reject employer's assertion that its evidence should be given more weight than the letters submitted by counsel.[3] Accordingly, we find that an hourly rate of $285 is reasonable for counsel in this case. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); 20 C.F.R. §802.203(d)(4).

Finally, employer objects to the number of hours requested. Counsel is entitled to a reasonable fee for defending claimant's award on the merits as well as his fee award

[2]However, counsel is reminded that the regulations require that a complete fee petition include "the normal billing rate" for all individuals providing the claimant's legal services. 20 C.F.R. §802.203(d)(4); *see also Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010) (failure to identify normal billing rate and to submit sufficient evidence of market rate required remand to correct defect); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); 20 C.F.R. §702.132.

[3]We reject employer's assertion that the rates in the attorneys' letters may not be used unless the attorneys are deposed. As the Supreme Court has admonished, fee requests should not result in second major litigations. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

below.[4] *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982). With regard to the specific hours requested, counsel engaged in two primary tasks for two appeals: reviewing employer's briefs and writing response briefs. After reviewing the fee petition, we agree with employer that the hours requested are excessive. In particular, we decline to approve all the hours requested for preparing for and drafting the briefs. In this instance, counsel's brief before the Board was substantially similar to the one he filed with the administrative law judge. Indeed, on the merits of claimant's appeal, the brief contained only three or four pages of "new" material, some of which was a summary of the administrative law judge's decision. Accordingly, rather than the 13 hours requested, we approve 6.5 hours related to the brief on the merits. Additionally, we approve 8.0 hours of the 9.25 requested for counsel's response brief on the fee issue, as that brief contained more original material in response to employer's appeal. We reject employer's general contention that the fee request is excessive, and the remaining entries are approved as they are reasonably commensurate with the necessary work performed in defending claimant's awards. 20 C.F.R. §802.203(e). Counsel is entitled to an attorney's fee, payabl by employer, in the amount of $6,911.25, representing 24.25 hours of work at an hourly rate of $285.

[4]Employer challenges the number of hours requested in light of the amount of benefits awarded, stating that *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003), should apply to limit counsel's fee, or that *Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92 (4th Cir. 1993), should apply to deny the fee in its entirety. We reject employer's contentions, as counsel was fully successful in defending claimant's award and his fee award against employer's appeals and is entitled to a fee commensurate with that success.

Accordingly, the administrative law judge's Supplemental Decision and Order is affirmed. BRB No. 11-0624. We award claimant's counsel an attorney's fee of $6,911.25, payable directly to counsel by employer. 20 C.F.R. §802.203(a); BRB Nos. 10-0449, 11-0117.

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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BETTY JEAN HALL
Administrative Appeals Judge