U.S. Department of Labor

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

BRB Nos. 18-0159
and 18-0159A

TUFA IUVALE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
COASTAL MARINE SERVICES	)	DATE ISSUED: 12/13/2018
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Order Awarding Fees of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Jeffrey Winter (Law Office of Jeffrey M. Winter), San Diego, California, and Lara D. Merrigan (Merrigan Legal), San Rafael, California, for claimant.

Renee C. St. Clair (England Ponticello & St. Clair), San Diego, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Order Awarding Fees (2015-LHC-01737) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, 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) (9th Cir. 2007).

This case arises out of a December 9, 2011 work accident in which claimant suffered injuries to his spine, shoulders and neck. Employer voluntarily paid two weeks of temporary total disability benefits but then controverted claimant's right to further compensation. The parties eventually reached a settlement under Section 8(i) of the Act, 33 U.S.C. §908(i), resolving claimant's claim for a lump sum payment of $50,000, which the administrative law judge approved on November 22, 2016. Order Approving Proposed Settlement.

Thereafter, counsel filed a petition for an attorney's fee, requesting a total of $31,654.49, comprising 42.6 hours of his work at an hourly rate of $445, 20.5 hours of work at an hourly rate of $365 for his associate, 25.9 hours of work at an hourly rate of $125 for his paralegal, and costs of $2,236.49. Employer objected to the fee petition.

The administrative law judge found claimant's counsel entitled to an attorney's fee payable by employer pursuant to Section 28(a), 33 U.S.C. §928(a). The administrative law judge found that Section 28(a) applies because employer did not pay any compensation after January 20, 2012, when claimant filed his claim. The administrative law judge further found that claimant successfully prosecuted the claim because the settlement gave claimant "a cash payment to compensate wage loss and to pay for future medical care on account of the alleged injury." Order Awarding Fees at 3.

The administrative law judge determined that San Diego is the relevant community to determine the hourly rate and that counsel did not establish his entitlement to the requested hourly rate of $445. He instead relied on the past fee award to claimant's counsel in *Zumwalt v. National Steel & Shipbuilding Co.*, OALJ No. 2011-LHC-00806, 01935 (Attorney Fee Order) (Sept. 20, 2016).[1] Order Awarding Fees at 5-8. The administrative law judge noted that counsel submitted much of the same evidence supporting his hourly rate as he had in *Zumwalt* and found that the analysis he used in *Zumwalt* to arrive at the hourly rate was still current. *See id.* at 7-8. He used the percentage increase in the

[1] The parties' appeals to the Board in *Zumwalt* were dismissed as untimely filed. *Zumwalt v. National Steel & Shipbuilding Co.*, 52 BRBS 17 (2018).

Consumer Price Index for San Diego to arrive at the appropriate hourly rate adjusted for inflation, starting with the hourly rate of $385 for 2014 that he established in *Zumwalt*. *See id.* at 9. He also awarded 2014 hourly rates of $250 for associate counsel and $110 for the paralegal's work.

The administrative law judge rejected employer's argument that there should be an across-the-board reduction in the award for "limited success." He found that there was nothing disproportionate about the total fee claimed in the case when compared to the $50,000 in compensation claimant received. Order Awarding Fees at 10.

The administrative law judge reviewed employer's objections to the hours billed and disallowed some time as being for clerical tasks or otherwise excessive or unreasonable. He approved a total of 39.6 hours of Mr. Winter's time, 20.5 hours of Ms. Ellis's time, and 20.4 hours of paralegal time. Order Awarding Fees at 14. He also awarded $2,115.71 in costs. *See id.* at 13. The administrative law judge thus ordered employer to pay $25,019.91 in an attorney's fee and costs. *See id.* at 14.

Employer appeals the fee award, arguing that claimant's counsel did not successfully prosecute the claim and, in the alternative, that the administrative law judge erred in not applying an across-the-board reduction in the fee to account for claimant's limited success. Claimant filed a response, disputing employer's arguments. Employer filed a reply brief.

Claimant filed a cross-appeal, contending the administrative law judge erred in using the rate awarded in the previous case, *Zumwalt*, and also in awarding year-by-year rates as opposed to the current hourly rate for all services. Employer filed a response, asserting the administrative law judge acted within his discretion in awarding a scaled hourly rate. Claimant filed a reply brief.

Section 28(a) of the Act provides that an employer is liable for a reasonable attorney's fee if there has been a "successful prosecution" of the claim. 33 U.S.C. §928(a); 20 C.F.R. §702.132; *A.M. v. Electric Boat Corp.*, 42 BRBS 30 (2008). Employer contends that claimant failed to successfully prosecute the claim because the settlement agreement stated that the degree of impairment and claimant's entitlement to future medical care was in dispute and that a cash payment under a settlement agreement is not per se sufficient to establish a successful prosecution.

Contrary to employer's argument, the administrative law judge properly found that the payment due under the parties' settlement agreement was sufficient to establish successful prosecution of the claim for purposes of Section 28(a), thereby entitling claimant's counsel to an attorney's fee payable by employer. The United States Court of

Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that a claimant "successfully prosecutes" his claim if he obtains "some actual relief that 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1106, 37 BRBS 80, 82(CRT) (9th Cir. 2003). This standard requires only that claimant gain something of "substance," i.e., something "that causes the defendant's behavior to change for the benefit of the plaintiff." *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT). In addition, the Board has stated that the language of Section 28(a) does not require a formal order or any particular procedure, only "claimant's success in obtaining benefits previously denied." *See Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004).

There is no dispute that employer stopped paying any compensation to claimant after December 23, 2011. Claimant thereafter filed a claim and utilized the services of counsel in order to secure the settlement agreement which resulted in employer's agreeing to pay $50,000 to claimant. Because the settlement caused employer to pay compensation to claimant which it previously refused to pay, there was a successful prosecution of the claim and counsel is entitled to an attorney's fee payable by employer. The administrative law judge's finding that employer is liable for an attorney's fee pursuant to Section 28(a) is therefore affirmed.

Employer next assigns error to the administrative law judge's refusal to impose an across-the-board reduction in the fee due to the limited success achieved compared to the total value of claimant's claims had they been fully successful. The administrative law judge cited *Bywaters v. U.S.*, 670 F.3d 1221 (Fed. Cir. 2012), for the proposition that adjustment for the level of success is appropriate only in unusual circumstances, which he did not find in this case.[2] He also found that there was "nothing disproportionate about total fees and costs [he would] award on this case when compared to the $50,000 in compensation Claimant received," and accordingly rejected employer's contention. Order Awarding Fees at 10.

Employer's contention that it was error for the administrative law judge to not apply an across-the-board reduction to the attorney's fees is without merit. An administrative

[2] The administrative law judge erroneously stated that *Bywaters* was a Ninth Circuit case and suggested that consideration of the level of success applies only in unusual cases. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983) (stating that the extent of a plaintiff's success is a crucial factor in determining the amount of an attorney's fee). This error is harmless, however, in view of the administrative law judge's finding that the fees requested were not disproportionate to the success achieved.

law judge has broad discretion in assessing a reasonable attorney's fee. *See B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009). The amount of benefits awarded is a relevant factor in the fee determination. 20 C.F.R. §702.132. The United States Supreme Court has stated that in considering the level of success obtained, a district court "necessarily has discretion in making this equitable judgment," and "[t]here is no precise rule or formula for making these determinations." *Hensley v. Eckerhart*, 461 U.S. 424, 436-437 (1983). The administrative law judge's conclusion that the attorney's fee is not disproportionate to the compensation award is rational and within his discretion and is therefore affirmed. *See, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

Claimant challenges the calculation of the hourly rate, assigning error to the administrative law judge's reliance on his analysis in a previous case, *Zumwalt v. National Steel & Shipbuilding Co.*, OALJ Nos. 2011-LHC-00806, 01935 (Sept. 20, 2016). The administrative law judge found that counsel did not establish entitlement to his requested hourly rate of $445 and, after considering the evidence submitted by counsel and employer, concluded that the hourly rate he found to be appropriate for counsel in *Zumwalt* is still valid. Order Awarding Fees at 5-6. He therefore relied on *Zumwalt* for the starting hourly rate of $385 for 2014 and adjusted the rate up or down for the years from 2012 to 2017, pursuant to the changes in the Consumer Price Index, resulting in hourly rates ranging from $373 to $409.

A reasonable attorney's fee is to be calculated according to prevailing market rates in the relevant community. *Blum*, 465 U.S. at 895. It is claimant's counsel's burden to produce sufficient evidence of the relevant market and the rate charged in that market. *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009); *see also Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

The Ninth Circuit has held that a new determination of the hourly rate is not required in every case but must be made "with sufficient frequency that [the administrative law judge] can be confident—and [the appellate court] can be confident in reviewing [his] decisions—that [his] fee awards are based on current rather than merely historical market conditions." *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). In this case, the administrative law judge noted that the parties provided some of the same evidence he reviewed in *Zumwalt*, and also provided additional evidence. Order Awarding Fees at 6-9. The administrative law judge found that claimant's counsel's evidence is consistent with the market rate awarded in *Zumwalt* and that employer's evidence shows that the *Zumwalt* rate was "roughly correct." *Id.* at 9 (citing *Fox v. Vice*, 563 U.S. 826, 838 (2011) ("The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection.")). He thoroughly reviewed the evidence and claimant has not established that

the use of the market rate established in *Zumwalt* for 2014 is arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT). We therefore affirm the calculation of the market rate starting at a rate of $385 for 2014.[3]

Claimant next contends that the administrative law judge erred in using a tiered hourly rate approach as opposed to awarding his current hourly rate for all services. In response, employer argues that the issue of an enhancement in the fee to reflect delay in payment was waived because it was not raised before the administrative law judge and, even if it was not waived, claimant has not shown that there was an excessive delay to justify enhancing the hourly rate.

Enhancement for a delay in payment of an attorney's fee is appropriate for fee awards under Section 28 of the Act. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996) (citing *Missouri v. Jenkins*, 491 U.S. 274 (1989)). The Ninth Circuit has stated that "the method of adjustment [awarding current rates or historic rates adjusted to reflect present values] is somewhat discretionary; it does not necessarily call for payment of the lawyer's current hourly rate." *Anderson*, 91 F.3d at 1324, 30 BRBS at 68(CRT).

In this case, the administrative law judge found that the appropriate hourly rate for counsel's work started at a base hourly rate of $385 for work performed in 2014. He applied the percentage change in the Consumer Price Index to adjust the hourly rate for each year in which work was performed from 2012 to 2017 to arrive at an hourly rate for each year ranging from $373 in 2012 to $409 in 2017. Order Awarding Fees at 9.

Contrary to employer's assertion, this issue is properly before the Board. While counsel did not specifically argue before the administrative law judge that he should receive his current hourly rate to account for delay in payment of the fee, his attorney's fee petition requested an hourly rate of $445, which he declared to be his "present hourly rate." In addition, counsel is entitled to appeal any adverse findings of the administrative law judge. *See* 20 C.F.R. §802.201. We will therefore address counsel's argument on the merits.

Counsel cites *Modar v. Mar. Serv. Corp.*, 632 F. App'x 909, 49 BRBS 91(CRT) (9th Cir. 2015), for the proposition that he should have been awarded his current hourly

[3] The administrative law judge's determinations of an hourly rate of $250 for claimant's associate counsel and $110 for his paralegal are not challenged on appeal and are also affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

rate for all the work done in the litigation.[4] Counsel's argument is unavailing as he failed to show that the administrative law judge abused his discretion on the facts of this case. In *Christensen*, the Ninth Circuit held that it was not an abuse of discretion to deny a delay enhancement because "[t]he two-year delay complained of by Petitioners is not so egregious or extraordinary as to require a delay enhancement." 557 F.3d at 1056, 43 BRBS at 10(CRT). In this case, counsel filed his fee petition in 2016 for work performed between 2012 and 2016, but the majority of counsel's work took place in 2016 for which he was awarded 2016 rates. The administrative law judge awarded an attorney's fee in December 2017.[5] We conclude that the delay in this case falls within the range of what is considered ordinary delay and it was within the administrative law judge's discretion not to enhance the fee for the delay. *Christensen*, 557 F.3d at 1056, 43 BRBS at 10(CRT). The administrative law judge's award of a fee based on the hourly rate for the year in which the work was performed is affirmed.

[4] In *Modar*, the district director awarded a delay enhancement that, in 2012, awarded 2008 rates for services performed in 2004 and 2005, which the Board affirmed. The Ninth Circuit, in a non-precedential decision, vacated the Board's affirmance, holding it was erroneous to affirm an award that reflected neither current rates nor the present value of historical rates. *But see Hardman v. Marine Terminals Corp.*, No. 17-73370 (9th Cir. Nov. 19, 2018) (affirming Board's affirmance of the district director's decision not to augment the rates for 2013 and 2014 up to market rates for 2016, even though the rates for 2007 to 2011 were so increased).

[5] Counsel was awarded fees for 3.8 hours of work in 2012, .2 of an hour in 2014, 7.1 hours in 2015, and 28.5 hours in 2016. Order Awarding Fees at 14.

Accordingly, the administrative law judge's Order Awarding Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge