U.S. Department of Labor

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

MICHAEL S. AYERS	)	BRB No. 19-0110
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED: 12/30/2019
	)	
Self-insured Employer-Respondent	)	
	)	
MICHAEL S. AYERS	)	BRB No. 19-0236
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KINDER MORGAN, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Attorney Fee Order on Remand and the Order Denying Reconsideration of Richard M. Clark, and the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judges, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

James McCurdy and Elana L. Charles (Lindsay Hart, LLP), Portland, Oregon, for Jones Stevedoring Company.

Mark K. Conley (Bauer Moynihan & Johnson, LLP), Seattle, Washington, for Kinder Morgan, Incorporated, and Old Republic Insurance Company.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order on Remand and the Order Denying Reconsideration of Administrative Law Judge Richard M. Clark (2011-LHC-01875), and the Decision and Order Awarding Benefits of Administrative Law Judge Jennifer Gee (2016-LHC-00269), rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and 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, 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).

Disability – BRB No. 19-0236

Administrative Law Judge Gee found claimant sustained a work-related foot injury on June 21, 2015, while working for Kinder Morgan, triggering symptoms caused by his bipartite sesamoid or sesamoiditis, and she awarded him benefits for periods of temporary total disability prior to March 7, 2016, when his condition became permanent.[2] Decision and Order at 45, 56-58; 33 U.S.C. §908(b). In addressing claimant's impairment rating for benefits under the schedule, 33 U.S.C. §908(c)(4), Judge Gee found three doctors had rated

[1] In an Order dated March 11, 2019, the Board consolidated BRB Nos. 19-0110 and 19-0236 for purposes of decision. As claimant's counsel has filed a fee petition for work before the Board in BRB Nos. 16-0074 and 18-0154, earlier appeals associated with this case, we will address counsel's fee petition also.

[2] Judge Gee also addressed: responsible employer, medical benefits, mileage costs, and lien rights of the ILWU-PMA Welfare Plan. Claimant filed a motion for reconsideration of the denial of certain mileage costs. Upon employer's payment of those costs, claimant moved that his motion be denied as moot. Judge Gee granted the second motion and denied the motion for reconsideration as moot.

claimant's impairment. Dr. Groman, using the Fifth and Sixth editions of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), and Dr. Bowen, using the Sixth edition, concluded claimant's impairment rating is zero percent. KXs 11 at 78, 22 at 188; JX 52 at 205;[3] *see* Decision and Order at 59-60. Dr. Ballard rated claimant's impairment at seven percent. CXs 17 at 51, 21 at 60; *see* Decision and Order at 60-61. Judge Gee rejected the opinions of Drs. Bowen and Groman finding they lack sufficient detail to be informative or convincing, noting they failed to consider claimant's pain as a factor in their ratings. Decision and Order at 61-62. She rejected Dr. Ballard's rating because he started his analysis with the incorrect diagnosis of a sesamoid fracture or fragmentation.[4] *Id.* at 63-64. She stated:

> Therefore, I conclude that no impairment rating has been established. Since Claimant is the proponent of the rating and bears the burden of proof, the result is that he will not be awarded a scheduled permanent partial disability compensation award because he did not establish any proportionate loss of use. To be clear about the nature of this finding: I am not finding that Claimant has a 0 percent impairment rating; I am finding that there has been a failure of proof in this case because of insufficient evidence.

Decision and Order at 64-65. Claimant appeals the denial of permanent partial disability benefits. Kinder Morgan responds, urging affirmance. BRB No. 19-0236.

Claimant contends Judge Gee erred because she did not credit Dr. Ballard's impairment rating, especially when it is undisputed claimant has permanent limitations due to his work injury. Cl. Br. at 5. If the administrative law judge disagrees with the rating, claimant asserts she must set forth her reasons and then make her own determination because a "default of zero when there is a permanent injury which has occupational and functional significance should be legally incorrect." *Id.* at 6.[5] Claimant also contends

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[3] KX = Kinder Morgan exhibits; JX = Jones Stevedoring exhibits

[4] Judge Gee accepted the explanation that a bipartite sesamoid is by definition "automatically fragmented" and is "a natural variant that produces no impairment[.]" Decision and Order at 63.

[5] To the extent claimant is arguing that he has permanent work restrictions which should be considered in assessing a permanent impairment rating, claimant is mistaken. Claimant's injury is to his foot, a scheduled member. 33 U.S.C. §908(c)(4). The schedule defines the level of compensation to which the injured worker is automatically entitled by virtue of physical impairment to the enumerated body part. Neither work restrictions nor

nothing in the record supports a finding of zero percent impairment. He asserts the 2011 radiologist's report supports Dr. Ballard's opinion as there is "no practical difference in disability between a bipartite sesamoid fracture and a healed fracture." *Id.* at 7.

Awards under the schedule, the exclusive remedy for the permanent partial disability for parts of the body enumerated therein, *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 14 BRBS 363 (1980), are based on the medical ratings of the degree of impairment. The claimant bears the burden of establishing the extent of his disability. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). An administrative law judge is not bound by any particular standard or formula and may base her determination of the extent of disability under the schedule on credible medical opinions and observations as well as on the claimant's testimony regarding his symptoms and the physical effects of his injury. *See, e.g.*, *King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990); *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993). It is a well-established principle that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and is not bound to accept the opinion or theory of any particular medical examiner. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Although the Act does not require impairment ratings to be made pursuant to the AMA *Guides* in this type of case,[6] the administrative law judge may, nevertheless, rely on medical opinions that rate a claimant's impairment under these criteria, as it is a standard medical reference. *See Pisaturo v. Logistec, Inc.*, 49 BRBS 77 (2015); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). The Board may not reweigh the evidence or draw other inferences from the record. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

Claimant asserts Judge Gee must find some degree of impairment because he has permanent effects from his injury, but claimant is mistaken. *See* n.5, *supra*. While Judge Gee may award benefits based on a single doctor's rating or on a reasonable rating different

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loss of wage-earning capacity is factored into a scheduled award. *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

[6] The Act does not require impairment ratings to be based on medical opinions using the criteria of the AMA *Guides* except in compensating hearing loss and voluntary retirees. 33 U.S.C. §§908(c)(13), 908(c)(23), 902(10). Thus, a rating based on the AMA *Guides* is not mandatory in this case.

from one any doctor assessed, the award must be based on credible evidence. *Pisaturo*, 49 BRBS at 81. In this case, she permissibly rejected all three doctors' ratings, finding none of them worthy of any weight due to various failings or omissions. *Id.*; Decision and Order at 62. The administrative law judge provided valid reasons for rejecting the medical opinions assessing claimant's degree of impairment. *Pisaturo*, 49 BRBS at 81. Thus, contrary to claimant's assertion that the administrative law judge found zero percent impairment, she actually determined that claimant failed to satisfy the ultimate burden by proving the extent of his disability. We affirm the administrative law judge's decision.

ALJ's Fee Award – BRB No. 19-0110

Following Administrative Law Judge Clark's January 2015 award of temporary total disability, permanent partial disability, and medical benefits for a wrist injury claimant suffered while working for Jones Stevedoring on December 7, 2010, claimant's counsel filed a fee petition for his services before the Office of Administrative Law Judges (OALJ).[7] Judge Clark found counsel's rate was best determined by his years of experience at the 75th percentile rate of the 2012 Oregon Bar Survey (2012 OBS) for the Portland market in civil litigation and arrived at a base proxy rate of $325 for work in 2011. He then adjusted the rate using the change in the Portland-Salem, Oregon Consumer Price Index (CPI-U) to arrive at the hourly rates for counsel's work performed in subsequent years: $332.47 (2012); $340.79 (2013); $348.97 (2014); and $353.16 (2015). Attorney Fee Order (June 1, 2016) at 12-13. He awarded legal assistant time at an hourly rate of $150 per hour and associate attorney time at $205.17 per hour for work in 2013. *Id.* at 14-15. After addressing the itemized hours and making an across-the-board 10 percent reduction for duplicate work,[8] Judge Clark awarded counsel an employer-paid fee of $59,799.46. *Id.* at 17. Claimant's counsel appealed the fee award to the Board. BRB No. 16-0520.

The Board affirmed the hourly rates; however, it reversed Judge Clark's 10 percent across-the-board reduction because, by implementing both an across-the-board reduction and itemized reductions, he reduced counsel's fee twice for the same reason. *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0520 (Apr. 24, 2017), slip op. at 5-6, *aff'd on recon.* (Aug.

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[7] He sought a total of $80,942.04 in fees and costs, representing 164.15 hours at $425 per hour for his time, .25 hour at $225 per hour for his associate's time, 18.55 hours at $165 for his legal assistant's time, and $8,020 in expenses. Attorney Fee Order (June 1, 2016) at 2.

[8] Judge Clark found: "if [counsel] is already accounting for the time needed to describe his actions in the case for each line item, billing again for re-describing that work in his fee petition is redundant." Attorney Fee Order at 16.

4, 2017). The Board modified the fee to $57,527 for counsel's work and to $65,547.04 in total. *Id.* at 7, 9. The Board also noted Judge Clark did not address counsel's request for a supplemental fee for preparing his reply to Jones Stevedoring's objections, so it remanded the case for him to address the performance of those services.[9] *Id.* at 7. The Board denied counsel's motion to reconsider its affirmance of the awarded hourly rates. Recon. Order (Aug. 4, 2017).[10]

Pursuant to the remand order, Judge Clark considered counsel's supplemental request of $2,235, representing 3 hours of services at $425 per hour and 7 hours at $160 per hour for drafting the reply brief, and found that delegating this task to a legal assistant resulted in billing excessive time. He reduced the legal assistant's time by half but awarded counsel's requested time. Thus, based on the previously-affirmed hourly rates, he awarded an additional fee of $1,584.48, representing 3 hours of services at $353.16 per hour (2015 rate) and 3.5 hours at $150 per hour. Fee Order on Rem. (Aug. 6, 2018) at 7.

During the remand proceedings, instead of briefing the remand issue as Judge Clark had ordered, counsel filed a Second Amended Declaration seeking enhanced fees and costs due to the delay in payment for work before Judge Clark on the merits of this case.[11] Judge Clark found this pleading was not responsive to his Order Following Remand (Nov. 15, 2017), but permitted it to be submitted into the record.[12] Jones Stevedoring did not respond to the amended fee request.

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[9] The Board also denied counsel's request for a fee for work performed before the Board in BRB No. 16-0074 because it had not been informed of any success on remand in that case at the district director level. *Ayers*, BRB No. 16-0520, slip op. at 9.

[10] In an Order dated January 31, 2018, the Board awarded counsel a fee for services performed before the Board in BRB No. 16-0520, despite the remand order, because counsel was successful on appeal (10 percent reduction reversed) and was guaranteed success on remand (fee for services preparing reply brief). The Board awarded the requested 10.8 hours of services at an hourly rate of $450 for a total fee of $4,536.

[11] Counsel had filed an Amended Declaration but amended it again after the Oregon State Bar issued its 2017 Survey of rates.

[12] The Second Amended Declaration is a request for a fee for all work performed before the OALJ, commencing August 16, 2011, and continuing through February 20, 2018, based on current rates, for a fee of $93,715, plus $8,020.04 in costs, and an additional $846.92 for the delayed payment of costs (total: $102,581.96).

Judge Clark stated the Board had not remanded the case for reconsideration of the hourly rates and no extraordinary delay existed such that re-examination of rates or enhancement was warranted.[13] To the extent the declaration included a request for a fee for work performed before him after the Board's remand, he allowed .1 hour for reading employer's offer to settle the reply brief fee request; none of the other post-remand services (totaling 10.85 hours) was necessary to resolve the remand issue, Fee Order on Rem. at 4-5, because the extra time requested related to counsel's attempts to settle *all* outstanding fees and costs, not just fees and costs associated with the underlying issue on remand. With regard to time drafting the fee declaration, Judge Clark awarded .25 hour (out of a total of 4 hours requested) because the majority of the itemized time was not compensable. Using the previously-affirmed 2015 rate and using the change in the CPI-U for Portland-Salem to adjust it for inflation, Judge Clark calculated counsel's 2017 rate to be $375.72 per hour and awarded counsel an additional fee of $131.50. Fee Order on Rem. at 6-7. Thus, he awarded counsel a total additional fee of $1,715.98 on remand.[14] Judge Clark denied counsel's motion for reconsideration. Order Denying Recon (Sept. 18, 2018). Claimant's counsel appeals the fee award. Jones Stevedoring responds, urging affirmance.

Initially, we reject counsel's contentions that Judge Clark erred in calculating the hourly rates in his 2016 fee award, and the Board erred in affirming them. Jones Stevedoring correctly asserts that counsel's attempt to again appeal the 2016 fee award, as well as the Board's affirmance of the award, is unwarranted. The Board affirmed Judge Clark's hourly rate findings based on a timely appeal following his 2016 fee award, and its decision regarding the hourly rates is the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Ravalli v. Pasha Maritime Services,* 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002). Consequently, we reject counsel's hourly rate arguments with respect to the 2016 award and the Board's 2018 affirmance of that award. *Id.*

We also affirm Judge Clark's denial of enhanced fees or costs. The Board issued a remand order for Judge Clark to address counsel's supplemental fee request for work performed preparing his reply to Jones Stevedoring's objections to his fee. Judge Clark issued an Order Following Remand restricting the parties' briefs to the remanded issue. As he stated, counsel's amended fee declaration seeking enhancement did not comply with his

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[13] He noted it had been only three years from the June 2015 reply brief to the August 2018 fee award and counsel's appeal caused part of the delay. Fee Order on Rem. at 3.

[14] Judge Clark noted the rate of $375.72 is higher than if he had used the 2017 Oregon Bar Survey 75th percentile rate ($371.65) that counsel had attached to the declaration. Judge Clark used the 2012 OBS and adjusted the figures using the change in the CPI-U because that is what the Board had affirmed. Fee Order on Rem. at 6 n.9.

Order Following Remand. Judge Clark acted appropriately in limiting the proceedings on remand to addressing counsel's supplemental fee request for services performed preparing his reply brief as the Board had directed. 20 C.F.R. §802.405(a); *see generally Goody v. Thames Valley Steel Corp.*, 31 BRBS 29, *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP,* 131 F.3d 132 (2d Cir. 1997) (on remand administrative law judge addressed a theory the Board directed him to address).

Counsel also contends Judge Clark erred in denying a fee for most of the services rendered post-remand in trying to settle the fee dispute. He asserts it is unreasonable to order the parties to attempt to settle and then to disallow the time expended for doing so. Jones Stevedoring asserts Judge Clark properly denied a fee for all services beyond the scope of the remand order.

Of the services identified in counsel's Second Amended Declaration, Judge Clark found 14.95 hours represented post-remand work: 10.95 hours related to settlement negotiations and 4 hours related to drafting the post-remand portion of the fee petition. Based on his order that the parties try to settle the fees related to preparing the reply brief and on counsel's cover letter stating that settlement negotiations addressed a fee for *all* services in this case, and not just those expended on the reply brief, Judge Clark allowed .1 hour for reading Jones Stevedoring's offer to settle the fee relating to the reply brief.[15] Fee Order on Rem. at 4-5. Similarly, because counsel is entitled to a fee for preparing his fee petition, Judge Clark allowed .25 hour for preparing the fee petition, reasoning that most of the itemized services are not compensable.

Although Judge Clark ordered the parties to attempt to settle the fee issue,[16] it was reasonable for him to disallow time sought in unsuccessful negotiations for *all* outstanding fees – which exceeded the scope of the remand order and may have included work he was

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[15] He disallowed an entry of .25 hour for preparing an email to accept the fee Jones Stevedoring offered for the reply brief work because the email had not been sent and his office had not been informed of any fee settlement. Fee Order on Rem. at 5.

[16] The Order Following Remand (Nov. 15, 2017) at 1, quoting *Ayers*, BRB No. 16-0520 (Apr. 24, 2017), slip op. at 9, states:

> "The case is remanded for the administrative law judge to address counsel's petition for an attorney's fee for the preparation of his brief in reply to employer's objections." [Board's Order], slip op. at 9. I am encouraging the parties to resolve the issue prior to the need to file briefs. If they are unable to do so, each party may file a brief [not to exceed 5 pages].

unaware of or had already addressed.[17] Counsel has not shown Judge Clark abused his discretion; therefore, we affirm his fee award for counsel's post-remand work.[18] *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

Finally, counsel contends Judge Clark erred in disallowing half the time requested for the paralegal's drafting of the reply brief without providing any explanation. Counsel sought $2,235 for services preparing the reply to Jones Stevedoring's objections (3 hours of his time at $425 per hour for revising and finalizing; 7 hours of paralegal time at $150 per hour for drafting). The reply brief was approximately six pages long. Counsel argues that Judge Clark improperly reduced the hours based on how long he thought it would take an experienced attorney to draft it. Citing *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008), counsel asserts that Judge Clark's 50 percent reduction is more than a "haircut" and requires more explanation.[19] Judge Clark explained: "the decision to delegate the task of drafting a brief to a legal assistant likely resulted in excessive time being spent on the reply[,]" and was not an efficient use of time because counsel also had

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[17] It is evident counsel did not seek leave to expand the scope of the issues to be addressed on remand. *See* Fee Order on Rem. at 2.

[18] In any event, settlement negotiations were unsuccessful.

[19] In *Moreno*, the court stated:

> The district court has a greater familiarity with the case than we do, but even the district court cannot tell by a cursory examination which hours are unnecessarily duplicative. Nevertheless, the district court can impose a small reduction, no greater than 10 percent—a "haircut"—based on its exercise of discretion and without a more specific explanation. Here, however, the district court cut the number of hours by 25 percent, and gave no specific explanation as to which fees it thought were duplicative, or why. While we don't require the explanation to be elaborate, it must be clear, and this one isn't. Plaintiff's counsel had already cut her fees by 9 percent, so an additional 25 percent cut would amount to almost one third. The court has discretion to make such an adjustment, but we cannot sustain a cut that substantial unless the district court articulates its reasoning with more specificity. We therefore conclude that the district court's explanation is insufficient to sustain a 25 percent cut based on duplication.

Moreno, 534 F.3d at 1112.

to spend three hours revising what the assistant wrote. Consequently, using his judgment, Judge Clark reduced the assistant's time by half. Fee Order on Rem. at 6-7.[20]

We reject counsel's assertion of error. Judge Clark reasonably found that 10 hours of work by two people on a 6-page reply brief is excessive and, based on his rationale, also duplicative.[21] *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986); 20 C.F.R. §702.132(a); *see also Tahara*, 511 F.3d 950, 41 BRBS 53(CRT) (district court, which has "superior understanding" of the underlying litigation, acted within its discretion in disallowing a fee for hours it found duplicative when it gave sufficient explanation); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Accordingly, as there was no abuse of discretion, we affirm Judge Clark's fee award. *Harmon*, 31 BRBS 45.

Fee for Work before the Board in BRB Nos. 16-0074 and 18-0154

Following claimant's 2015 award of benefits for his wrist injury and subsequent petition for an employer-paid fee for claimant's counsel's work before the district director, counsel appealed the district director's fee award of $2,971.60, plus $53 in costs, and his denial of counsel's motion for reconsideration. The Board vacated the awarded hourly rates and remanded the case to the district director for reconsideration of counsel's delay enhancement request, as well as other market considerations/annual increases to determine counsel's 2015 rate. *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0074 (Sept. 26, 2016). On remand, the district director denied an enhanced fee and recalculated the market rate. He awarded counsel a fee of $3,170.79, which was $146.19 greater than previously awarded and paid. Order on Remand – Attorney's Fees (Nov. 30, 2017).

On appeal, the Board reversed the district director's denial of an enhancement and modified the fee award to reflect counsel's entitlement to a fee for his 2011 work on the merits of the case, based on the calculated 2015 rate, but affirmed the fee award in all other respects. *Ayers v. Jones Stevedoring Co.*, BRB No. 18-0154 (Nov. 16, 2018).[22] For his

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[20] *See also* Fee Order on Rem. at 7 n.12 where Judge Clark questioned, but gave counsel the benefit of the doubt, that he actually spent three hours revising the petition and drafting his own declaration.

[21] Unlike *Moreno*, this case involves a fee for one task, and Judge Clark explained why he thought the requested time was excessive/duplicative.

[22] Although the Board did not show the calculations, counsel's fee for work before the district director appears to be: $3,237.32 for 7.6 hours of services at a rate of $425.97 per hour, plus $105 for .7 hour at a rate of $150 per hour, plus $108.73 for .25 hour at a rate of $434.92 per hour, plus $53 in costs, for a total of $3,504.10. Presuming this is

success on appeal, counsel has filed an itemized fee request for work performed between October 28, 2015, and January 20, 2019, in both appeals of the district director's fee award. Counsel states he voluntarily adjusted his request to account for work on the losing issue by reducing the time he requested in his second appeal, BRB No. 18-0154, by 20 percent. Thus, he requests $4,775, as 100 percent of his time for work on BRB No. 16-0074 (9.55 hours x $500), plus $8,944 as 80 percent of 11.2 hours of his work at $500 per hour and 80 percent of 19.25 hours of his associate's work at $285 per hour, plus 100 percent of .5 hour of his paralegal's work at $150 per hour on BRB No. 18-0154, for an adjusted total of $13,719.[23] Jones Stevedoring filed objections; counsel replied to those objections and submitted a supplemental fee request of $3,270 for work preparing the reply brief.[24] In total, counsel requests a fee of $16,989 for work performed before the Board in two appeals in which he succeeded in increasing the fee awarded for his services performed before the district director by less than $500.

Hourly Rate[25]

Counsel requests hourly rates of $500 for his services, $285 for his associate's services, and $150 for his paralegal's work. Jones Stevedoring objects. In support of his assertion that $500 is a reasonable hourly rate, claimant's counsel submits the 2017 Oregon Bar Survey (2017 OBS), the 2016 Morones Survey, a state court fee award,[26] and the Board's fee award in *Dalton v. Maritime Services Corp.*, BRB Nos. 11-0868 and 14-0189 (Feb. 8, 2019).[27] As the fee petition before us is for work on an appeal of a fee award, no

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correct, this amount is $479.50 greater than the district director originally awarded and Jones Stevedoring originally paid.

[23] His original request totaled $16,221.25.

[24] (5.4 hours x $500) + (2 hours x $285) = $3,270.

[25] There is no dispute Portland, Oregon, is the relevant market. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015).

[26] *Scott v. Vigor Marine, LLC*, Case No. 17CV17799 (Nov. 28, 2018). In *Scott*, the court found that counsel did not meet the burden of showing he was entitled to $640 per hour and awarded him an hourly rate of $500. We reject this evidence, however, because the court stated it used the 2017 OBS for civil litigators at the 75th percentile, but the 75th percentile rate for Portland civil litigation is $350 for both injury and non-injury cases.

[27] In *Dalton*, which involved a fee for services performed on an appeal of the merits of the case, the Board used the 95th percentile of the Portland rates in the 2017 OBS for plaintiff civil litigation (personal injury and non-injury). The Board found the market rates

delay enhancement is applicable. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996);[28] *Christensen v. Stevedoring Services of America,* 44 BRBS 39 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied,* 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011). Therefore, it is appropriate to award a fee for counsel's services at the historic rates. *Anderson*, 91 F.3d at 1325, 30 BRBS 69(CRT).

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). The burden is on the fee applicant to provide evidence to establish that the requested hourly rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *See Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

Based on the 95th percentile for civil litigation in the 2017 OBS, and using the Oregon State Average Weekly Wage (OSAWW) to determine any inflationary increases, as it is a better indicator of Portland inflation than the CPI-U, *see Dalton*, slip op. at 2-3, the Board has awarded counsel a fee for work performed in 2015 at a rate of $450 per hour. *Ayers v. Jones Stevedoring Co.*, BRB No. 16-0520 (Jan. 31, 2018). In *Dalton*, using the 2017 OBS, the Board stated the baseline rate for 2016 was $475 (splitting the difference between the survey rates of $450 and $500). Based on the lack of an increase in the OSAWW, the Board has held this rate steady. *See Dalton*, slip op. at 3. Accordingly, we award counsel a rate of $450 per hour for his 2015 services and a rate of $475 per hour for his subsequent services. These rates are within the ranges of the 2012 OBS and 2017 OBS and represent reasonable market rates for the respective time periods. *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT). Similarly, in accordance with *Dalton*, we award counsel's associate an hourly rate of $235. *Dalton*, slip op. at 3.

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were $500 per hour and $450 per hour, respectively, and awarded counsel a rate of $475 per hour.

[28] In *Anderson*, the court explained that attorneys cannot recover for delay due to appeals of their fee awards, as that would amount to an unauthorized award of interest on a fee award. *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT).

Hours Requested

Ignoring, for the moment, counsel's voluntary 20 percent reduction for services performed on the appeals of the district director's fee award, he requests a fee for 26.15 hours of his time, 21.25 hours of his associate's time, and .5 hour of his paralegal's time.[29] Jones Stevedoring objects to the hours requested (June 29 – August 30, 2018) for drafting and revising the briefs in BRB No. 18-0154 as excessive and/or duplicative, as both counsel and his associate worked on them. Entries for hours of services performed must be sufficiently documented and reasonably commensurate with the necessary work performed before the Board, and a fee request may be reduced if it is excessive in light of the results obtained. 33 U.S.C. §928; *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986); 20 C.F.R. §802.203(e).

The petition and reply briefs in BRB No. 18-0154 were seven and six pages long, respectively, excluding attachments, and involved standard fee appeal issues. We agree with employer that counsel's request for payment for 19.25 hours of his associate's time and six hours of his time to draft and revise the briefs was redundant and excessive.[30] The successful issue addressed in the briefs, delay enhancement, is not a new or novel issue, and counsel addressed the same issue in his earlier appeal. Further, we agree with the administrative law judge's logic in his fee award, Fee Order on Rem. at 7, and we disallow all hours devoted to the brief by counsel's assistant, as the decision to delegate the task resulted in excessive and duplicative time being spent on the briefs. Considering counsel was successful on one of the two issues on appeal, the issue was not novel and had been briefed by counsel previously, and the amount of time was excessive for someone of counsel's experience, we allow 3 hours for his work on the appellate briefs in BRB No. 18-0154.

In addition, with respect to both appeals, we disallow the following items: .25 hour on October 28, 2015, and .25 hour on December 28, 2017, because receiving the district director's orders and deciding to file an appeal is not work before the Board; 1.35 hours on

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[29] We reject Jones Stevedoring's contention that the fee reflects unnecessary work because it is not on claimant's behalf. Counsel is entitled to a fee for establishing or defending his fee. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Clisso v. Elro Coal Co.*, 50 BRBS 13 (2016).

[30] Of the 13 pages, some pages were the case captions/title pages and the service sheets, and some pages were not full.

November 29 and December 1, 2016, because this time related to counsel's initial fee petition which the Board denied; 1.05 hours on February 7, 15, and 19, 2018, because this time is related to failed fee settlement discussions; and .5 hour on January 9, 2019, as that duplicated and exceeded time for the same task on November 15, 2018.[31] We also disallow a portion of the time for the reply brief (February 13 – March 4, 2019) as excessive or duplicative because counsel spent 5.4 hours revising the four-page document his associate spent two hours writing. Because counsel's time was more than double that of his associate for the same task, he did more than "review" the work; we disallow the associate's time. We allow one hour for counsel's work on the fee reply brief, as it added little to the discussion and focused on the *Scott* case which the Board has rejected, n.26, *supra*. *See Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Finally, for all remaining time requested between January 22, 2018, and January 20, 2019, except for .25 hour on August 10, 2018, which we allow, we reduce the time by one-half because counsel was successful only on one of the two issues raised. Therefore, we award counsel an attorney's fee of $5,617.50 for work performed before the Board.[32] 33 U.S.C. §928; 20 C.F.R. §802.203.

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[31] Counsel reported that on "1-19-18" he "Received and briefly read decision and order from Benefits Review Board." Since the Board's decision in BRB 18-0154 was issued November 16, 2018, it appears that "1-19-18" was meant to refer to November 19, 2018.

[32] This amount represents: (5.35 hours x $450) + (.6 hour x $475) = $2,692.50 for BRB No. 16-0074; plus (.5 hour x $150) + (4 hours x $475) = $1,975 for BRB No. 18-0154; plus (2 hours x $475) = $950 on the fee petition for both cases.

Accordingly, we affirm Judge Clark's Attorney Fee Order on Remand and the Order Denying Reconsideration, BRB No. 19-0110, and Judge Gee's Decision and Order Awarding Benefits, BRB No. 19-0236. For work performed before the Board on BRB Nos. 16-0074 and 18-0154, Jones Stevedoring is ordered to pay counsel an attorney's fee of $5,617.50.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge