

U.S. Department of Labor

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



BRB No. 18-0496

MICHAEL E. LESH)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 05/14/2019
)	
ADVANTAGE FEDERAL RESOURCING)	
)	
and)	
)	
ALLIED WORLD NATIONAL)	
ASSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Attorney Fee Order on Remand of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

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

Michael Marmer (Samuelsen, Gonzalez, Valenzuela & Brown, LLP), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order on Remand (2014-LDA-00715) of Administrative Law Judge Richard M. Clark rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for the second time. After issuance of the administrative law judge's 2015 decision approving the parties' Section 8(i), 33 U.S.C. §908(i), settlement agreement, claimant's counsel filed a fee petition with the administrative law judge. Employer filed objections to which counsel replied. Counsel also filed a supplemental fee petition for time spent reviewing employer's objections. In his Attorney Fee Order, the administrative law judge, inter alia, awarded counsel a proxy rate of \$325 for work in 2011 and adjusted the rate upward using the Consumer Price Index (CPI-U). The administrative law judge awarded a fee of \$31,384.57, for work itemized in the initial fee petition. Claimant's counsel appealed the fee award to the Board.

The Board affirmed the fee awarded to claimant's counsel, but remanded the case for the administrative law judge to address counsel's supplemental fee petition. *Lesh v. Advantage Federal Resourcing*, BRB No. 16-0518 (Apr. 25, 2017) (unpub.).

Counsel's supplemental fee petition itemized 6.25 hours of attorney time performed in 2016. In addition, counsel requested 9.3 hours of attorney time for work performed on remand in 2018. Counsel sought all hours at an hourly rate of \$520. In his Attorney Fee Order on Remand, the administrative law judge based the fee award on the hourly rates affirmed by the Board, denied counsel's request for a delay-enhancement, reduced the hourly rate requested as well as the total number of hours sought, and awarded an additional attorney's fee totaling \$3,961.20.¹

On appeal, claimant's counsel challenges the administrative law judge's award of an attorney's fee. Employer responds, urging affirmance. Claimant's counsel has filed a reply.

Counsel contends the administrative law judge's 2011 proxy rate determination, on which the successive years' rates are based, is not market-based, arbitrary, and not in accordance with law. Counsel challenges the administrative law judge's rejection of his market rate evidence and his assessment that counsel is only in the top 25th percentile of Portland attorneys, despite his lengthy career. Moreover, counsel asserts the administrative law judge's determination of his proxy rate runs afoul of the decisions of the United States

¹ The administrative law judge awarded a fee for 5.75 hours of services in 2016 at an hourly rate of \$360.58 and 4.85 hours of services in 2018 at an hourly rate of \$389.25.

Court of Appeals for the Ninth Circuit in *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015) and *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).² We disagree.

In his Order on Remand, the administrative law judge stated:

The market rates for the various work performed in this matter is not an issue on remand. The proxy rate of \$325 per hour for work performed in 2011 was affirmed by the BRB, and the only issue on remand was the amount of fees Mr. Robinowitz was due for his work on his April 25, 2016 reply brief. [footnote omitted] Therefore, I see no reason to address Mr. Robinowitz's arguments for a reevaluation of his market rate as the market rate approved by the BRB is the law of the case.

Order on Remand at 5. The administrative law judge upwardly adjusted this 2011 proxy rate, based on the CPI-U, to an hourly rate of \$360.58 for 2016 and \$389.25 for 2018. *Id.* at 5 – 6.

The Board addressed counsel's 2011 proxy rate in its previous decision, *see Lesh*, slip op. at 3, and its affirmance of the administrative law judge's award of \$325 per hour for 2011, as consistent with the Ninth Circuit's decisions in *Shirrod* and *Christensen*, constitutes the law of the case. *See, e.g., Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Counsel has not raised any basis for the Board to depart from the law of the case doctrine, which holds that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *See Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). Moreover, counsel has not challenged the administrative law judge's adjustment of the 2011 proxy rate by the use of the CPI-U to account for services performed in 2016 and 2018. Therefore, we reject claimant's contention regarding the 2011 proxy rate.

² In *Christensen*, the court stated that the hourly rate should be based on what comparable attorneys receive for similar services in the attorney's market. In *Shirrod*, the court stated that if a proxy rate is to be determined for a Portland, Oregon attorney, the administrative law judge cannot use state-wide statistics, but must use data tailored to Portland, such as the data in the Oregon Bar Survey.

Counsel additionally challenges the administrative law judge's decision to not award a delay-enhanced fee, contending the Ninth Circuit's decision in *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT), conflicts with the Supreme Court's decision in *Missouri v. Jenkins*, 491 U.S. 274 (1989). Counsel also avers that because he is entitled to seek a supplemental fee if additional success results from an appeal, it follows that that fee should be enhanced. We disagree.

The administrative law judge addressed at length counsel's request for an enhanced fee and, after consideration of the relevant case law, found the 28-month delay in this case neither egregious nor extraordinary. See Order on Remand at 5. A delay enhancement concerns the lapse in time between the performance of the legal services and the award of a fee for those services. *Jenkins*, 491 U.S. 274. Citing *Jenkins*, the Ninth Circuit in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996), articulated the standard regarding adjustments for delays in payment:

[A]ttorney's fees "are to be based on market rates" and such rates are based on the assumption that bills will be paid reasonably promptly; delays in payment thus deprive successful litigants of the market rates. [cite omitted] To make up the difference, losses from delay can be compensated "by the application of current rather than historic rates or otherwise." [cite omitted] Thus . . . there may be some adjustment for the delay, but the method of adjustment is somewhat discretionary; it does not necessarily call for payment of the lawyer's current hourly rate.

Id., 91 F.3d at 1325, 30 BRBS at 68(CRT). In a footnote in *Anderson*, the court further stated:

We note that *Anderson's* lawyers cannot recover for delay due to appeals of the fee award. As *Hobbs* explained, a fee award under the LHWCA is not a final judgment entitled to interest under 28 U.S.C. § 1961 and the Act does not otherwise provide for post-judgment interest; therefore, any enhanced recovery for the extraordinary time of taking an appeal would amount to an award of interest unauthorized by statute. 820 F.2d at 1531.

Id., 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3(CRT). In *Christensen*, the Ninth Circuit cited *Jenkins* and *Anderson* in affirming the Board's decision to not augment a fee request in a case involving a two-year delay, stating that "[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).

We decline counsel’s invitation to hold that the Ninth Circuit’s decision in *Christensen* conflicts with the Supreme Court’s decision in *Jenkins*, nor will we determine the propriety of the *Anderson* footnote. Moreover, contrary to counsel’s statement, the Ninth Circuit in *Christensen* did not mandate an enhancement for delays greater than two years. As counsel has not established reversible error or abuse of discretion in the administrative law judge’s finding that the 28-month delay was not so “egregious or extraordinary” to warrant augmentation to current hourly rates, that finding is affirmed.³ Therefore, we affirm the administrative law judge’s award of \$360.58 per hour for 2016 and \$389.25 per hour for 2018.

Accordingly, the administrative law judge’s Attorney Fee Order on Remand is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

³ In cases where a fee is awarded before all appeals are exhausted, claimant’s attorney is permitted to file for an amended fee award to account for the delay in payment of the fee. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). It does not follow, however, that an augmented fee must be awarded in all circumstances.