

U.S. Department of Labor

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



BRB No. 22-0297

JIMMIE WARREN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSTELLIS HOLDINGS, LLC)	
)	DATE ISSUED: 11/09/2023
and)	
)	
STARR INDEMNITY & LIABILITY)	
COMPANY c/o GALLAGHER BASSETT)	
SERVICES)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Awarding Attorney’s Fees of Monica F. Markley, Administrative Law Judge, United States Department of Labor.

Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

James L. Azzarello, Jr. (Thomas Quinn, LLP), San Francisco, California for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica F. Markley's Order Awarding Attorney's Fees rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act (2019-LDA-01155), as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.* 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 sustained a neck injury on September 1, 2017, while working for Employer as an Emergency Medical Technician in Afghanistan.¹ CX 1 at 1. On August 31, 2021, the ALJ issued a Decision and Order awarding Claimant temporary total disability benefits from September 20, 2017, to March 3, 2019, permanent total disability benefits from March 4, 2019, to June 16, 2019, and permanent partial disability benefits from June 17, 2019, to the present. ALJ Decision and Order (D&O) at 37-38. Claimant's counsel filed a fee petition on December 3, 2021, seeking a fee of \$79,949.14. This amount represents \$14,557.50 for 32.35 hours at a 2019 hourly rate of \$450 for Howard S. Grossman, \$54,670 for 99.4 hours at a 2020 hourly rate of \$550 for Mr. Grossman, \$6,500 for 20 hours at a 2019 hourly rate of \$325 per hour for co-counsel Scott Thaler, \$375 for 1 hour at a 2020 hourly rate of \$375 for Mr. Thaler, \$165 for 1.1 hours at a 2019 hourly rate of \$150 for paralegal Mr. Adam Yellin, \$882.75 for 5.35 hours at a 2020 hourly rate of \$165 for Mr. Yellin, and \$2,798.89 in costs. Cl. Verified Affidavit and Motion for Attorneys Fees (Cl. Fee Petition) at 7. On January 7, 2022, Employer objected to the fee, arguing the hourly rates were excessive and should be reduced due to the degree of difficulty involved in resolving the claim, the prevailing hourly rate for attorneys in the applicable geographical area, and Claimant's partial success in the case. Emp. Objection to Fee Application at 3-6. Employer also challenged certain time entries. *Id.* at 7.

On March 24, 2022, the ALJ rejected much of the rate evidence Claimant's counsel submitted, relied primarily on prior fee awards, and awarded Claimant's counsel a fee of \$64,523.75 plus costs of \$2,686.32, for a total award of \$67,210.07. Order Awarding Attorney's Fees (Fee Order) at 10-11. The ALJ found \$450 was a reasonable hourly rate for Mr. Grossman's work in both 2019 and 2020, rejecting counsel's assertion that the evidence supports a \$550 hourly rate for work performed in 2020. Because the issues in

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

this claim were not novel or complex, she found Mr. Grossman is not entitled to a rate exceeding \$450 per hour. Fee Order at 4-5. She reduced Mr. Thaler's hourly rate to \$275, concluding his requested rates were excessive based on his limited three to four years of Longshore experience. *Id.* at 5. Similarly, she reduced Mr. Yellin's hourly rate to \$125 based on his experience and qualifications. *Id.* In addition, she disapproved 3.35 of the requested hours – 2.85 hours from Mr. Grossman and 0.5 hours from Mr. Yellin. *Id.* at 6-9. The ALJ also rejected \$112.57 for FedEx fees, finding these costs should be included in overhead expenses and not charged to Employer. *Id.* at 9.

On appeal, Claimant's counsel argues only that the ALJ erred in calculating the respective hourly rates, asserting she erred in rejecting counsel's evidence, relying solely on prior fee awards, and considering case complexity as a factor.² Cl. Brief at 6 (citing *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009)). Employer responds, urging affirmance. Claimant's counsel also filed a reply brief.

The Supreme Court of the United States 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 v. Kenny A ex rel. Winn*, 559 U.S. 542 (2018); *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 agreed with the parties and accepted South Florida as the relevant community for determining counsel's hourly rate, *see* Fee Order at 3-4, 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).

To meet this burden, Claimant's counsel submitted a portion of the 2020 Real Rate Report, affidavits from South Florida attorneys Brett Rivkind and David Prather, and evidence of prior ALJ and Board fee awards to both himself and other attorneys. *See* Cl. Fee Petition Exs. 6 – 13. The ALJ concluded the 2020 Real Rate Report was unpersuasive because Claimant's counsel relied on only the one page of the report highlighting partners' hourly rates from Miami, Florida. Fee Order at 5. She found the portions of the Report

² As counsel does not challenge the ALJ's determinations regarding reductions in compensable hours or costs, we affirm these findings. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

counsel submitted were incomplete because they did not provide any information on rate differences for different practice areas. *Id.* Similarly, she found the attorney affidavits unpersuasive because they lacked any specific data to support their conclusions and were not consistent with prior fee orders awarding lower rates. *Id.* Therefore, she used the remaining prior fee award evidence in arriving at a \$450 hourly rate for Mr. Grossman, noting the rates in those fee awards ranged from \$425 to \$450 per hour and finding the issues involved in this case were not novel or complex enough to warrant a higher rate. *Id.* at 5.

We agree with Claimant's counsel that the ALJ's hourly rate determination for Mr. Grossman cannot be affirmed as it was not sufficiently explained. First, and foremost, the ALJ erred in using complexity as a basis for not awarding Mr. Grossman an hourly rate over \$450 for his work in 2020.³ Case complexity is a factor to be considered in assessing the number of compensable hours but not an attorney's hourly rate. *Van Skike*, 557 F.3d at 1048, 43 BRBS at 15(CRT); *see also Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *Christensen v. Stevedoring Services of Am.*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd sub nom. Stevedoring Services of Am., Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011); *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009).

Further, the remainder of the ALJ's analysis regarding Mr. Grossman's hourly rate is insufficient.⁴ Prior fee awards may provide inferential evidence of a prevailing rate. *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009). In considering that evidence, the ALJ should have considered, but did not, when those fees were awarded and adjusted them as necessary to reflect, generally, current market rates or the rates as of when counsel performed the work. *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).

The ALJ also erred by dismissing the affidavits from attorneys Brett Rivkind and David Prather. Counsel may submit affidavits of other attorneys in the relevant community

³ As the ALJ awarded Mr. Grossman's requested \$450 rate for his work in 2019, we affirm that finding.

⁴ To the extent Claimant's counsel has raised an error in regard to the ALJ's rejection of the portions of the Real Rate Report he submitted, we do not agree with counsel's argument. Counsel submitted an incomplete, segmented report and merely highlighted 2019 Real Rates for Partners in Miami, Florida, with 21 or more years of experience. Cl. Fee Petition at Ex. 6. It was reasonable for the ALJ to conclude this information does not account for practice area and is too general to be relied on.

who are familiar with his skill and experience to support a market rate. *Stanhope v. Elec. Boat Corp.*, 44 BRBS 107 (2010). Mr. Rivkind's affidavit detailed his maritime and longshore experience, noted counsel's experience, offered a range of \$550 to \$750 per hour for attorneys of comparable skill, and stated he paid Mr. Grossman a \$500 hourly rate to perform jury consultancy for various claims. Cl. Fee Petition, Ex. 7. Mr. Prather's affidavit similarly detailed his 25 years of experience in a South Florida law practice, his knowledge of Mr. Grossman's legal reputation, and his familiarity with a \$550 to \$750 hourly rate for comparable attorneys. Cl. Fee Petition at Ex. 8. These affidavits are sufficient evidence to show a prevailing market rate for comparable work, and the ALJ erred in concluding they lacked supporting documentation. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021). As the ALJ used improper factors, we vacate the hourly rate she awarded to Mr. Grossman and remand the case for further consideration.

Next, Claimant's counsel avers the ALJ erred in reducing Mr. Thaler's hourly rate to \$275 because of his limited longshore experience. Cl. Brief at 10. Counsel contends the ALJ abused her discretion by failing to account for his total of 10 years of attorney experience. *Id.* We cannot affirm the ALJ's hourly rate determination for Mr. Thaler. At the outset, she based the \$275 hourly rate on "comparable awards" Claimant's counsel cited but did not identify how she arrived at this rate. Fee Order at 5. She merely concluded \$275 is sufficient based on the hourly rates evidenced in prior awards ranging between \$250 and \$325 per hour. Also, the ALJ summarily dismissed Mr. Thaler's other law experience to conclude he had only three to four years of longshore practice experience. Fee Order at 5. Courts have acknowledged the differences between longshore practice and other types of litigation as it relates to the comparability of market rates in those practice areas. *See Seachris*, 994 F.3d at 1079, 55 BRBS at 7(CRT) (remanding case for ALJ to further explain the reasoning for rejecting commercial litigation evidence when the relevant inquiry is whether commercial litigation hourly rates involve similar services by lawyers of reasonably comparable skill, experience, and reputation). However, the ALJ in this claim neither explained her rationale for rejecting the other areas as incomparable to longshore practice nor explained why Mr. Thaler's work in those other areas of law is irrelevant to or undermines the reasonableness of his requested hourly rate based on his "skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11. Consequently, we also vacate Mr. Thaler's awarded hourly rate and remand for further consideration. *Christensen*, 557 F.3d at 1054-1055, 43 BRBS at 9(CRT).

Finally, Claimant's counsel also challenges the ALJ's hourly rate for Mr. Yellin at \$125 per hour. Cl. Brief at 11. Counsel contends she failed to provide the basis for this finding, particularly in light of evidence showing his extensive experience and prior awards of \$140 and \$150 per hour in 2019 and 2020, the same years he performed the work here. Cl. Brief at 11; Cl. Fee Petition, Ex. 10, Ex. 11. The ALJ gave no distinguishing reason for concluding Mr. Yellin's experience makes \$125 per hour reasonable in this case;

therefore, we also vacate Mr. Yellin's awarded hourly rate and remand for the ALJ to reconsider and fully explain her award. *Christensen*, 557 F.3d at 1054-1055, 43 BRBS at 9(CRT).

On remand, the ALJ must consider all relevant rate evidence, accepting or rejecting it for appropriate reasons. She must delineate the specific evidence and rationale she uses to arrive at her hourly rate conclusions.

Accordingly, we vacate those parts of the ALJ's Order Awarding Attorney's Fees related to Mr. Grossman, Mr. Thaler, and Mr. Yellin's hourly rates, and we remand the case for further consideration consistent with this opinion. In all other respects, we affirm the ALJ's Order Awarding Attorney's Fees.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge