

U.S. Department of Labor

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



BRB No. 23-0208

JERRY W. HILL)
)
 Claimant-Petitioner)
)
 v.)
)
 LOUIS DREYFUS CORPORATION)
)
 and)
)
 ZURICH AMERICAN INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 ILWU-PMA WELFARE PLAN)
)
 Intervenor)

NOT-PUBLISHED

DATE ISSUED: 10/29/2024

DECISION and ORDER

Appeal of the Attorney Fee Order of Stewart F. Alford, Administrative Law Judge, United States Department of Labor

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

Criag Stocker and Samantha E. Kaplan (Schouest, Bamdas, Soshea, BenMaier & Eastham, PLLC), Houston, Texas, for Employer/Carrier.

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

GRESH, Chief Administrative Appeals Judge, and BOGGS, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Steward F. Alford's Attorney Fee Order (2019-LHC-01062) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955-56 (9th Cir. 2007).

Claimant sustained a work-related back injury on May 13, 2016,¹ prompting him, through his attorney Charles Robinowitz (Counsel), to file a claim for benefits against Employer under the Act. In his Decision and Order (D&O), the ALJ awarded Claimant temporary total disability benefits from May 13, 2016, and permanent total disability benefits from August 10, 2017, based on an average weekly wage of \$2,045.56, as well as medical benefits. On April 1, 2022, Counsel filed an itemized fee petition with the ALJ seeking an attorney's fee totaling \$164,484.50 representing \$162,222.75 for 240.33 hours of Counsel's services at \$675 per hour,² \$1,527.75 for 4.85 hours of associate attorney Genavee Stokes-Avery's services at \$315 per hour, \$734 for 4.55 hours of legal assistant services at between rates \$150 and \$175 per hour,³ and \$13,3032.32 in costs.⁴ Declaration

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant's injury occurred in Portland, Oregon. 33 U.S.C. §921(c); see *Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a); Order on Remand at 2; Fee Order at 12.

² In the Declaration he submitted with his fee petition, Counsel requested \$155,013.75 for 229.65 hours of his services at an hourly rate of \$675. Decl. at 20. He also requested \$7,209 for 10.68 hours at an hourly rate of \$675 for time he spent preparing his brief in reply to Employer's objections. Decl. at 4.

³ The fees requested for legal assistant services consisted of \$43.75 for 0.25 hours of Jamie Khan's services at \$175.00 per hour; \$470.25 for 2.85 hours of Jessica L. Edmiston's services at \$165.00 per for hour; \$40.00 for 0.25 hours of Laquesha Rouse's services at \$160.00 per hour; \$105.00 for 0.70 hours of LeeAnn Gauthier's services at \$150.00 per hour; and \$75.00 for 0.50 hours of Jennifer L. Dolphin's services at \$150.00 per hour.

⁴ As support for the requested attorney hourly rates, Counsel submitted: 1) Declaration of Ronald L. Bonaparte, who, based on the 2020 Morones Survey and 2017

of Atty's Fees and Costs (Decl.). Employer objected to Counsel's requested hourly rate and his reliance on the Morones Survey as support for the rate and asserted \$375 is a more reasonable hourly rate. It also objected to the total hours billed. Counsel filed a reply brief, accompanied by a supplemental declaration containing additional exhibits, to which Employer objected.

In his Attorney Fee Order dated February 14, 2023 (Fee Order), the ALJ found Portland, Oregon, is the relevant community for determining hourly rates and that Counsel met his initial burden. Fee Order at 6-7. He awarded Ms. Stokes-Avery an increased hourly rate of \$345, the requested legal assistants' fees, and costs.⁵ *Id.* at 7. But he rejected Counsel's request for a \$675 hourly rate, and instead awarded an hourly rate of \$617. *Id.* at 8-15. He derived the \$617 hourly figure based on the 2017 Oregon State Bar (OSB) Economic Survey rate for an attorney with more than thirty years of experience at the 75th percentile, adjusted for inflation and delay by using the Department of Labor's (DOL's)

Oregon State Bar survey plus "personal observation of market rates," concluded "\$750/hour is a reasonable rate for" Counsel; 2) an excerpt from the 2017 Oregon State Bar (OSB) Economic Survey; 3) 2020 Morones Survey for Commercial Litigation Fees in Portland, Oregon, indicating an hourly rate, as of January 1, 2020, of \$623 for commercial litigators with over thirty years of experience (Counsel states factoring in inflation based on the Consumer Price Index (CPI) and his "over 50 years of experience as an attorney" increases his requested hourly rate to \$675); 4) an order issued by "an experienced Oregon state court trial judge" awarding Counsel an hourly rate of \$500 for work performed in 2018 on a discrimination case under Oregon law, *Scott v. Vigor Marine, LLC*, No. 17-CV-17799 (Or. Cir. Ct. Nov. 28, 2018); and 5) an order in a Longshore case that the United States Court of Appeals for the Ninth Circuit issued, after issuing its decision in *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1080 (9th Cir 2021), awarding Counsel's requested hourly rate of \$550, *Aegis Defense Services, LLC v. Martin*, No. 19-70566 (9th Cir. May 7, 2021). Decl. of Atty's Fees and Costs Exs. A, B, C; Bonaparte Decl. Exs. A, B, C.

⁵ The ALJ found Counsel did not submit sufficient evidence pertaining to Ms. Stokes-Avery's reputation, skills, and experience as an attorney in Longshore cases, and did not explain how the 2018 hourly rate she was awarded in the *Scott* case represented similar work. Fee Order at 7; *see* Pet. Ex B (Decl. at 25). He determined the \$280 median rate for a Portland attorney with seven to nine years of experience from the OSB survey best reflects her hourly rate and then adjusted it for inflation. *Id.*

Consumer Price Index (CPI) Inflationary calculator.⁶ *Id.* at 16-19. The ALJ denied Counsel's Motion to Compel Employer's counsel to submit their billing records.⁷ *Id.* at 21-22. Additionally, pursuant to Employer's objections to some of Counsel's billing entries as either excessive, clerical, or unduly vague, he disapproved 12.91 of the total requested hours. The ALJ awarded Counsel a fee for 230.4 hours of his services, 1.87 hours of Ms. Stokes-Avery's services, and the requested 4.55 hours for the legal assistants' work. *Id.* at 20, 22. Accordingly, the ALJ awarded Counsel a total Employer-paid fee of \$143,603.15, plus \$13,303.02 in costs.⁸ *Id.* at 22.

On appeal, Counsel challenges the awarded \$617 hourly rate and seeks a \$675 hourly rate instead.⁹ He contends the Ninth Circuit's decision awarding him a fee in *Aegis Defense Services, LLC v. Martin*, No. 19-70566 (9th Cir. May 7, 2021), Mr. Bonaparte's declaration, and the Morones Survey support his requested hourly rate. Further, Counsel argues the ALJ erred in finding him entitled to a rate in the 75th percentile of attorneys, instead of the 95th, contending the reasons for the ALJ's placement are irrational. Employer filed a response brief urging affirmance, and Counsel filed a reply brief.

An ALJ must consider all relevant rate evidence before him, *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009), and must explain his rationale for assessing an

⁶ See U.S. BUREAU OF LABOR STATISTICS, *Consumer Price Index News Release* (Dec. 2022), https://www.bls.gov/news.release/archives/cpi_01122023.htm.

⁷ On March 31, 2022, Claimant served several discovery requests on Employer's counsel. See Claimant's Mot. Compel. The requests for production related to Employer's counsel's billing records to support Claimant's fee petition. *Id.* at 2-3. The ALJ denied Claimant's motion to compel because Claimant did not cite to any legal support warranting post-hearing discovery after the discovery period closed. Fee Order at 21-22. Additionally, the ALJ concluded he is able to determine the reasonableness of Claimant's requested fee without reference to Employer's billing records, which are "largely irrelevant." *Id.* at 22. Claimant does not challenge the denial of discovery on appeal.

⁸ The total fee represents the following: \$142,156.80 (230.4 hours x \$617 rate) + \$652.63 (1.87 hours x \$349 rate) + \$793.72 (\$47.23 for .25 hour x \$188.91 rate) + (552.17 for 3.1 hours x \$178.12 rate) + (\$194.32 for 1.2 hours x \$161.93 rate), + \$13,303.02 in costs.

⁹ We affirm, as unchallenged on appeal, the ALJ's findings regarding the relevant community, the total hours approved, the hourly rates and total fees awarded for Ms. Stokes-Avery's and the legal assistants' services, and the total costs awarded. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

attorney's fee. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 869 (9th Cir. 2014); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97, 101 (1999). It is within the ALJ's discretion to determine the appropriate percentile when assessing hourly rates from locality charts provided he fully considers all relevant evidence, gives specific explanations for his findings, and does not rely on improper factors. *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066, 1080 (9th Cir 2021) (placing Counsel in either the 75th or 95th percentile "was a judgment call that the ALJ could reasonably have resolved either way"); *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1089 (9th Cir. 2015); *Carter*, 757 F.3d at 869 (discussing the appropriateness of different rates for attorneys with different levels of experience).

First, we consider Counsel's assertion that the ALJ erred in assigning little weight to the Morones Survey. Counsel maintains the Ninth Circuit in *Seachris*, 994 F.3d at 1079-1080, held that rates charged for commercial litigation must be considered comparable in longshore fee cases and "did not leave room for ALJs to decide, as Judge Alford did, that commercial litigation rates may not apply to longshore claims;" thus, he asserts the ALJ erred in rejecting the Morones Survey. We are not persuaded that the Ninth Circuit's holding precludes an ALJ from finding commercial litigation rates may not apply to longshore claims. While the Ninth Circuit found that the particular distinctions drawn by the ALJ in *Seachris* did not support her rejection of commercial litigation rates, the court's holding was not as broad as Counsel contends. *Id.* Contrary to his argument, the court did not find that, for all requested hours of services, commercial litigation rates must be considered comparable rates in longshore fee cases and preclude any other analysis and determination.¹⁰ *Id.* Consequently, we reject Counsel's argument, and as he raises no other

¹⁰ The Ninth Circuit in *Seachris* noted:

The question is not whether [counsel] qualifies as a commercial litigator; it is whether the rates charged by commercial litigators are relevant comparators—i.e., whether the rates involve "similar services by lawyers of reasonably comparable skill, experience, and reputation."

Seachris, 994 F.3d at 1078 (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984); see Fee Order at 10 n.5. Therefore, it held such evidence was sufficient to meet the attorney's "initial burden of production" establishing the reasonableness of his requested fee. *Seachris*, 994 F.3d at 1077-1080. In this case, the ALJ correctly found Counsel's submission of the commercial litigation rates contained in the Morones Survey "satisfied his initial burden of production." Fee Order at 9. Additionally, the ALJ correctly acknowledged the Ninth Circuit has identified numerous "impermissible reasons to reject commercial litigation rates" based on the facts and circumstances of each case and the ALJ's decision below. Fee Order at 9 (citing *Seachris*, 994 F.3d at 1079-1080 (stating attorney commercial litigation rates can be relevant based on the comparable skills such

issues regarding the ALJ's rejection of the rates in the Morones Survey,¹¹ we affirm the ALJ's determination that \$617 per hour, after an adjustment for inflation, is a reasonable rate for Counsel's services in this case.¹²

attorneys share with longshore attorneys)). Moreover, he also compared the practices of commercial litigation attorneys with longshore attorneys.

¹¹ The ALJ also gave rational reasons for giving the Bonaparte Declaration little weight. He disagreed with Mr. Bonaparte's belief that the Morones Survey is more reliable than the OSB survey and that Counsel requested a rate of \$750 per hour. He also found it "unclear" which attorneys charged \$700 per hour because the names, credentials, and declarations of the surveyed Portland attorneys were not in the record, and he could not evaluate them. Furthermore, the ALJ noted many personal injury and wrongful death attorneys traditionally work on contingency rather than billing by the hour, and there is no private market for attorney's fees under the Act. In addition, he assigned Mr. Bonaparte's declaration little weight because he found that, contrary to Mr. Bonaparte's statement, and based on the record, Counsel does not command an hourly rate equal to the top five percent of attorneys in Portland, Oregon. Fee Order at 8-10, 13-14; Bonaparte Decl. at 6, 9, 10.

¹² Our dissenting colleague raises issues not set forth by Counsel. Whether the ALJ's specific analysis and conclusions as to the comparability of commercial litigation rates and longshore fees passes muster is not before us, as Counsel has not taken specific issue with them, other than dismissing them, in conclusionary statements, as being precluded by the Ninth Circuit decision in *Seachris*. Memorandum in Support of Claimant's Petition for Review (Cl's Br.) at 9-11, 16. Moreover, the ALJ found a variety of other comparability problems in the data found in the Morones Survey with which Counsel has not taken issue.

Based on his review of the record, the ALJ noted and considered the following: 1) the Morones Survey does not distinguish between plaintiff-side and employer-side attorneys; 2) unlike longshore practitioners, the average law firm responding to the survey earns 9% of its revenue from contingent or flat fee billing; 3) the survey's data is based on law firms with approximately fifteen attorneys specializing in commercial litigation, whereas Counsel worked, essentially, as a sole practitioner; 4) commercial litigation in the survey may include areas of commercial law dissimilar to longshore litigation; 5) Counsel's billing records demonstrated he is responsible for approximately 96% of the hours billed, as opposed to an associate or paralegal; and 6) Counsel's level of delegation and firm structure is inconsistent with those of commercial litigation firms in the survey. While the ALJ indicated these factors alone do not disqualify commercial litigation as evidence of a proxy market, he found they establish Counsel's specific practice is not comparable to that found in the Morones Survey. Fee Order at 10-11.

Next, we address Counsel’s challenge to the ALJ’s rejection of his submitted rate evidence. We reject Counsel’s argument that the ALJ erroneously assigned little weight to the Ninth Circuit’s *Aegis* decision that Counsel submitted in support of his hourly rate because the “appellate litigation [in that case] is different from trial court litigation [in this case] in several respects.” Fee Order at 11-12. Contrary to Counsel’s argument, neither *Seachris* nor *Shirrod* mandate an ALJ consider rates awarded at the appellate level in determining a relevant market rate for work performed at the hearing level as in this case. Rather, the Ninth Circuit in *Seachris* indicated an appellate-level fee award “*may* be treated as persuasive authority.” *Seachris*, 994 F.3d at 1066 n.3 (emphasis added). In *Shirrod*, the Ninth Circuit found the ALJ erred in disregarding a Board appellate fee award as “less instructive” than fees awarded for trial or hearing level work, reasoning the decision had relevance to the facts before the ALJ beyond merely showing a previously awarded rate. *Shirrod*, 809 F.3d at 1090-1091 (citing *Christensen v. Stevedoring Servs. of Am.*, 44 BRBS 75 (2010), *aff’d sub nom. Stevedoring Servs. of Am. v. Dir., OWCP*, 445 F. App’x 912 (9th Cir. 2011)). The ALJ gave a valid explanation for his rejection of *Aegis* as evidence of a market rate, and we decline to disturb this finding. *See generally McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

Finally, we reject Counsel’s contention that the ALJ gave irrational reasons for placing him in the 75th percentile. In this case, the ALJ acknowledged Counsel’s

Because those findings are not specifically contested, we affirm them. *Scalio*, 41 BRBS at 58. Similarly, Counsel has not taken issue with the OSB Survey data on which the ALJ based his determination, except to aver that “unlike the Oregon State Bar Economic Survey, [the Morones Survey] uses average rates depending on experience.... The Bar Survey had ratings of top five, 25, 50, and 75 percent ranges. If an attorney is not in the top five percent, the ALJ considered the next level as the top 25 percent. He did not consider any flexibility in that.” Cl’s Br. at 15. Counsel’s bare assertion does not sufficiently raise an issue for the Board to consider. *See* 20 C.F.R. §802.211(b); *see generally Plappert v. Marine Corps Exch.*, 31 BRBS 109, 111 (1997), *aff’g on recon. en banc* 31 BRBS 13, 18 n.4 (1997) (it is not the Board’s job to extrapolate a parties’ argument and conclusion). Thus whether the OBS Survey suffers from similar problems is not in contention here. *Id.*; *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990) (where a party is represented by counsel, mere assignment of error or recitation of favorable evidence is insufficient to invoke Board review); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988) (Board declines to address issues where the party’s brief fails to contain a discussion of the relevant law and evidence supporting its contentions.); *Carnegie v. C&P Telephone Co.*, 19 BRBS 57 (1986) (mere assignment of error without specific arguments and legal citations is insufficient to invoke the Board’s review.).

reputation, skills, and the record before him. Fee Order at 7-9. He assigned Counsel to the 75th percentile because he concluded the procedural history and the record of this case do not demonstrate Counsel could command a rate in the 95th percentile of attorneys. *Id.* at 14, 16. Specifically, he noted Counsel failed to comply with the basic requirements of the Rules of Practice and Procedure and concluded he does not show “the attention to detail one would expect of the top five percent of litigators.”¹³ *Id.* at 14.

The ALJ has broad discretion in assessing an attorney’s position in the locality charts, provided he considers valid factors. *Seachris*, 994 F.3d at 1080; *see Eastern Associated Coal Corp. v. Dir., OWCP [Gosnell]*, 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 288 (4th Cir. 2010). The ALJ permissibly found the factors discussed above directly relate to Counsel’s competence and skill, and that they “exemplif[y] why [Counsel] cannot command a rate at the 95th percentile.” Fee Order at 14. He determined that the “errors and missteps” he noted were not a “one-off problem.” *Id.* at 15. Further, he held Counsel must comply with deadlines, pre-hearing orders, and procedural rules if Counsel wants an ALJ to award him a 95th percentile hourly rate. *Id.* We recognize the ALJ’s wide latitude in addressing these matters and, contrary to Counsel’s suggestion, reiterate he is not compelled to award the 95th percentile rates. *Seachris*, 994 F.3d at 1080; *see Gosnell*, 724 F.3d at 572; *Cox*, 602 F.3d at 288. As the ALJ is in the best position to assess the attorney’s work in litigation before him, and as the reasons the ALJ gave in this case are not improper and support his conclusion, we affirm his finding Counsel is entitled to an hourly rate in the 75th percentile.¹⁴ *Seachris*,

¹³ The ALJ found Counsel improperly submitted additional evidence with his reply brief, failed to seek leave to submit additional evidence pursuant to instructions, did not timely file his fee petition, did not properly seek an extension of time to file his fee petition, and did not “carefully review his submissions” or properly Bates-stamp his fee petition. He also found Claimant’s average weekly wage calculation contained “several basic mathematical errors.” Fee Order at 14-15 (citing D&O at 34, 42).

¹⁴ The ALJ gave controlling weight to the 2017 OSB Survey when awarding Counsel’s hourly rate recognizing that a Portland attorney with more than thirty years of experience billed \$495 per hour at the 75th percentile. Fee Order at 15-16. He further indicated the 2017 OSB Survey data reflects 2016 billing rates, and the litigation in this case occurred between 2017 and 2021. *Id.* To account for inflation and delay, the ALJ adjusted Counsel’s hourly rate to \$617 using DOL’s CPI Inflationary calculator for size class B/C cities in the west region to the beginning of 2023. *Id.* at 16-19. As Counsel does not challenge the validity of, or the propriety of using, the OSB Survey or the ALJ’s inflationary adjustment, we affirm those findings as unchallenged on appeal. *Scalio*, 41 BRBS at 58.

994 F.3d at 1080; *Carter*, 757 F.3d at 869. As the ALJ fully considered the rate evidence before him and adequately explained his rationale for assessing the fee, we affirm the ALJ's awarded hourly rate.¹⁵ *Carter*, 757 F.3d at 869; *Jensen*, 33 BRBS at 101.

Accordingly, we affirm the ALJ's Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision. I would hold the ALJ erred in rejecting the Morones Survey and Mr. Bonaparte's declaration as evidence of Counsel's market rate.

The present appeal bears a striking resemblance to *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066 (9th Cir 2021). There, a case involving this same Counsel, the United States Court of Appeals for the Ninth Circuit held that a different ALJ improperly rejected the Morones Survey's commercial litigation rates as a comparator for Longshore Act work, while including in her analysis rates from the equally or less relevant "plaintiff civil litigation" and "general practitioner" categories in the Oregon State Bar (OSB) Survey. *Seachris*, 994 F.3d at 1079-1080, 1082.

With respect to the Morones Survey, the *Seachris* court acknowledged that there "are differences" between commercial litigation and Longshore Act work, but the reasons the ALJ provided for distinguishing the two markets apply with equal force to the OSB

¹⁵ Although our dissenting colleague would hold that the reasons the ALJ gave did not constitute a rational basis for discrediting commercial litigation rates for the Longshore Act work Counsel performed, as the ALJ's rationale is adequately explained, it is not arbitrary, capricious, does not constitute an abuse of discretion and therefore is in accordance with law. *Tahara*, 511 F.3d at 955-956.

Survey's plaintiff civil litigation rates, which the ALJ credited as supporting a lower market rate. *Id.* at 1079-1080. As the court held, such "selective concerns" are not rational and "do not support the ALJ's methodology." *Id.* The court was "struck in particular by the ALJ's decision to exclude commercial litigation rates while including general practice as a comparator" given that "general practice, by definition, excludes attorneys," like Counsel, who specialize in litigation. *Id.* at 1082.

In the present claim, the ALJ rejected the Morones Survey's commercial litigation rates by providing several reasons that commercial litigation is not comparable to Longshore Act work; he instead credited the OSB Survey's rates for lawyers in "private practice." However, as in *Seachris*, most of the reasons the ALJ provided for rejecting commercial litigation as a comparator seemingly apply with equal force to the OSB Survey's "private practice" data he credited. Both categories "may very well include" rates from attorneys practicing areas of law that are "dissimilar" to Longshore litigation; both may include attorneys "who do not litigate [personal injury or] medical issues at all," both may include practice areas with a "breadth and type of damages" that differ from the [Longshore Act's] rigid disability compensation scheme;" both may include attorneys that employ a different "level of delegation and firm structure;" and neither "distinguish between plaintiff-side and employer-side attorneys." Fee Order at 10-11; *Seachris* at 1079-1080, 1082.

The ALJ's only reason for giving "controlling weight" to the OSB Survey's private practice rates is that under *Shirrod*, when the relevant market is Portland as in this case, the ALJ "must consider" OSB Survey data. Decision and Order at 13, quoting *Burnette v. Fred Wahl Marine Constr.*, BRB No. 20-0137, 2020 WL 5366224, at *2 (DOL Ben. Rev. Bd. Aug. 12, 2020) (unpublished). But to say that an ALJ "must consider" certain evidence is much different than saying he must also give that evidence "controlling weight" particularly when, as here, the Morones Survey rejected by the ALJ also provides Portland-specific data.

In both *Shirrod* and *Seachris*, the Ninth Circuit found the OSB Survey's Portland-specific data is relevant to determining Counsel's market rate, but neither suggested that OSB Survey data is dispositive of the issue. *Shirrod*, 809 F.3d at 1088 (ALJ erred by relying "entirely on data not tailored to Portland, even though reliable information about attorney billing rates in Portland was readily available"); *Seachris*, 994 F.3d at 1080 (ALJ erred in relying on OSB Survey data that was based on practice area while rejecting OSB Survey rates based on years of experience; the latter is "at least relevant"). *Seachris* itself makes clear that even when relevant OSB Survey data exists, other evidence in the record,

including the Morones Survey, may also be relevant to Counsel’s market rate. *Id.* at 1079-1082.

Applying *Seachris*, I would hold that the ALJ’s “selective concerns” about the differences between commercial litigation and Longshore Act work do not constitute a rational basis for discrediting the Morones Survey’s commercial litigation rates while giving “controlling weight” to the OSB Survey’s private practice rates. *Seachris*, 994 F.3d at 1079-1082. The ALJ’s errors, in turn, affected his weighing of Mr. Bonaparte’s declaration, which the ALJ rejected for the same reasons he rejected the Morones Survey. *Id.* at 1078 (ALJ erred by rejecting hourly rate affidavits on the basis that they related to commercial litigation).

I thus would remand the claim for the ALJ to reconsider Counsel’s hourly rate.¹⁶

GREG J. BUZZARD
Administrative Appeals Judge

¹⁶ In a recent unpublished decision in *Horton v. Specialty Finishes, LLC*, BRB No. 23-0443, 2024 WL 3488235, at *8 (June 27, 2024), the Board affirmed this same ALJ’s award of \$466 per hour, as of December 31, 2021, to this same Counsel, based on the ALJ’s crediting of the OSB Survey over the Morones Survey. However, Counsel’s appeal of the hourly rate in that claim focused on the ALJ’s analysis of certain aspects of the OSB Survey: his placement in the 75th percentile and inclusion of “general practice” rates, the latter of which Counsel conceded had little effect on the ALJ’s rate determination in that case. Counsel only generally challenged the ALJ’s exclusion of commercial litigation rates, with no mention of the specific reasons the ALJ gave for rejecting his evidence. *See* Counsel’s Brief in *Horton*. Thus, Counsel’s passing reference to the ALJ’s rejection of the Morones Survey in that case did not sufficiently raise an issue for the Board’s review. His more developed (although still quite general) argument regarding the Morones Survey came too late – in his reply brief. In the present claim, however, Counsel squarely challenges the ALJ’s rejection of the Morones Survey in his opening brief. *See* Counsel’s Brief in *Hill* at 15 (“not applying the Morones Survey” is one of the ALJ’s “principal errors”).