U.S. Department of Labor

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

BRB No. 23-0313

YVETTE FULTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 09/30/2024
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Order Awarding Attorney Fees of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Ralph Rabinowitz, Attorney at Law, PLLC), Norfolk, Virginia, for Claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hendrick, P.C.) Newport News, Virginia, for Employer.

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

PER CURIAM:

Employer appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Order Awarding Attorney Fees (2018-LHC-00081; 2020-LHC-00511) 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. *See Eastern*

Associated Coal Corp. v. Director, OWCP [Gosnell], 724 F.3d 561 (4th Cir. 2013); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219 (4th Cir. 2009).

Claimant sustained a back injury on April 16, 2014, while working as a deck electrician for Employer.[1] Emp. Response Brief to Cl. Petition for Fees, Exh. 4 at 5.[2] Employer began paying temporary total disability benefits (TTD) on July 14, 2014, based on an average weekly wage (AWW) of $890.20 and a compensation rate of $593.47, and it paid that amount until March 27, 2015. CX 7; Exh. 2. On March 5, 2015, Claimant filed a claim for compensation asking Employer to increase his AWW to cover his third-shift differential in pay.[3] EX 3 at 1. In light of this AWW dispute, on March 24, 2015, Claimant requested an informal conference.[4] Exh. 1. On April 20, 2015, an Office of Workers' Compensations Programs (OWCP) claims examiner wrote a letter to Employer explaining her calculations of Claimant's AWW of $723.15 and compensation rate of $482.10. EX 2 at 3-4. Despite this, it appears Employer continued paying TTD benefits based on its calculation. CX 27 at 3; *but see* EX 2 at 6 (Employer calculated overpayment based on the claims' examiner's letter). After receiving the results of a labor market survey, Employer began paying Claimant temporary partial disability (TPD) compensation on June 13, 2016, based on a weekly compensation rate of $303.24. EX 7 at 21; CX 27 at 3; *see* Cxh. 2.

On August 22, 2017, Claimant and Employer attended an informal conference, disputing the nature and extent of Claimant's disability. Claimant sought permanent total disability (PTD) benefits based on an AWW of $723.15 and a compensation rate of

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the injury occurred in Newport News, Virginia. 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).

[2] Cxh and Exh citations reference Claimant's and Employer's exhibits attached to their briefing related to Claimant's counsel's attorney fee. CX and EX reference Claimant's and Employer's exhibits submitted into evidence at the hearing.

[3] In a letter dated March 13, 2025, Employer informed Claimant that its AWW calculation included his overtime and night shift differential in pay. EX 4 at 6. Employer reinstated benefits as of April 2, 2015, at the prior compensation rate. *Id.* at 10.

[4] It appears Claimant asked for an informal conference multiple times on either the AWW issue or other issues such as Claimant's entitlement to surgery or medical treatment. CX 14; EX 4 at 12. There is nothing in the record indicating any informal conference occurred prior to the one on August 22, 2017.

$482.10. Employer denied PTD benefits based on its labor market survey. In a memorandum dated September 8, 2017, the district director recommended Claimant receive the PTD benefits she requested. The memo advised the parties they had 14 days to accept or reject the recommendation. CX 22. Thereafter, Employer stipulated Claimant is entitled to TPD benefits and continued to pay Claimant benefits based on its own calculations and labor market survey. Exh. 11; CX 27 at 3.[5]

Relying on a follow-up labor market survey dated March 5, 2018, Employer reduced payments to $258.15 per week. EX 8 at 2; CX 27 at 3. On March 7, 2019, Claimant and Employer attended another informal conference where the district director reaffirmed the written recommendation that Claimant should be paid PTD compensation based on an AWW of $723.15.[6] CX 53. Claimant accepted the district director's PTD recommendation but now agreed Employer's $890.20 AWW was the correct calculation rather than the district director's calculation of $723.15. CX 54; Exh. 12.[7]

The claim was referred to the Office of Administrative Law Judges (OALJ) on February 14, 2020. Just before the hearing, Employer sent Claimant a letter dated October 23, 2020, in which it "unequivocally offer[ed]," pursuant to *Armor v. Maryland Shipbuilding and Dry Dock Co.*, 19 BRBS 119, 122 (1986),[8] "to pay [TPD and PPD benefits] at the agreed to AWW" of $890.20, "less the median rate of all approved jobs

[5] Claimant maintained she is entitled to PTD benefits. She initially argued her AWW should be $1,243.37, then $909.70, before finally acquiescing to Employer's $890.20 computation. CX 54; Exhs. 1, 6 at 1, 12.

[6] The record contains a letter from the claims examiner dated October 22, 2019, which details both the informal conference from March 7, 2019, and the Memorandum of Informal Conference dated March 13, 2019. CX 53. The March 2019 memorandum does not appear to be in the record.

[7] On October 30, 2019, Employer sought reconsideration of the district director's recommendations, maintaining Claimant is entitled to partial disability benefits, rather than total disability benefits. Exh. 11. Nothing in the record indicates whether the district director addressed this request.

[8] In *Armor*, the Board held that under Section 28(b), a "tender of compensation" without an award does not require an actual proffer of funds. Rather, a written expression that an employer is ready, willing, and able to make compensation payments to a claimant is sufficient to constitute a tender. *Armor* 19 BRBS at 122.

adjusted to the date of injury." Exh. 14. Claimant did not accept the offer, and the ALJ held a telephonic hearing on October 27, 2020.

The ALJ issued his Decision and Order Awarding Benefits (D&O) on December 16, 2022, finding Claimant entitled to TPD compensation from June 1, 2016, through January 22, 2018, and PPD compensation from January 23, 2018, to the present and continuing, based on an AWW of $890.20 and a post-injury wage-earning capacity of $373.55. D&O at 48. Following the ALJ's D&O, Employer paid Claimant $24,988.08 in back-due compensation. *See* Cxh. 2.

On January 10, 2023, Claimant's counsel filed a fee petition, seeking $68,366.94, representing $66,132.00 in attorney fees for 188.95 hours of services performed at an hourly rate of $350, and $2,234.94 in costs.[9] Employer objected to Claimant's counsel's petition, contending he was not entitled to a fee under either Section 28(a) or Section 28(b) of the Act, 33 U.S.C. §928(a), (b). It asserted it is not liable because it began paying Claimant some compensation before Claimant filed her claim, continued to pay benefits, offered to pay TPD and PPD benefits based on an AWW of $890.20, and ultimately prevailed on both the AWW and extent of disability issues before the ALJ. Emp. Objection to Fee Petition at 4, 6, 15-17. Alternatively, Employer argued that if counsel is entitled to a fee, the fee should be reduced due to Claimant's limited success. It also objected to counsel's time entries, asserting they lacked specificity and/or were unnecessary, inappropriate, or excessive in view of Claimant's limited success. Emp. Objection to Fee Petition at 18-60.

The ALJ issued an Order Awarding Attorney Fees (Fee Order) on May 3, 2023. He first determined Section 28(a) does not apply as Employer proved it had paid some compensation on March 29, 2015, within thirty days of being notified of Claimant's claim filed on March 12, 2015. Fee Order at 3. He then found Employer's October 23, 2020, letter represented a "tender" to Claimant under Section 28(b), 33 U.S.C. §928(b), and Claimant's award mirrored Employer's offer letter such that any subsequent work Claimant's counsel performed "achieved no greater award." Fee Order at 5-7.[10]

[9] Claimant filed three separate petitions, seeking a $35,437.50 fee in the first petition, $19,950 fee in the second, and a $10,745 fee in the third. *See* Claimant Second Memorandum in Support of Fee Petition at 5.

[10] The ALJ concluded the October 2020 letter was an "unequivocal offer" to pay greater than the amount the district director recommended after the informal conferences and was equal to "the amount ultimately awarded." Fee Order at 7. The ALJ differentiated between Employer's February 13, 2019, pre-conference position, the October 30, 2019 letter to the district director, and the October 23, 2020 *Armor* letter, noting it offered to pay

Consequently, the ALJ determined Claimant's counsel is not entitled to any fee for work performed after October 23, 2020. *Id.* at 6. However, he awarded Claimant's counsel a fee for work performed before October 23, 2020, because Employer did not indicate it was "ready, willing, and able" to pay PPD benefits until it sent the October 23, 2020, offer letter.[11] *Id.* at 6-7.

Having found counsel entitled to an employer-paid fee, the ALJ awarded his requested $350 hourly rate as reasonable but reduced his hours by 102.55 for services he determined were unreasonable or performed after October 23, 2020. *Id.* at 9-31. Thus, the ALJ awarded Claimant's counsel a fee of $31,454.32, representing $30,240 for 86.4 hours of services performed at an hourly rate of $350, plus $1,214.32 in costs.[12] *Id.* at 32-34.

Employer appeals the fee award, making the same contentions it made below. Specifically, it asserts the ALJ erred by finding Claimant's counsel is entitled to a fee under Section 28(b). Alternatively, if counsel is entitled to a fee, it argues the ALJ failed to reduce the fee request due to Claimant's limited success and failed to consider the fee petition was deficient as a matter of law because the entries were not recorded contemporaneously, it inappropriately shifted Claimant's medical expert fees to Employer,[13] and it contained time entries in excess of the actual work required.[14]

---

both PPD and TPD benefits on October 23, 2020, but offered to pay only TPD benefits in its prior communications. *Id.* at 6-7.

[11] The ALJ stated Employer "unequivocally offered to pay both temporary and partial disability benefits" on October 23, 2020, but despite previously stipulating to an AWW of $890.20 and offering TPD benefits, it made "no mention of willingness to pay" PPD benefits. Fee Order at 7.

[12] In his Fee Order, the ALJ noted he reduced Claimant's counsel's 188.95 claimed hours by 108.55, resulting in a total of 80.4 approved hours. Fee Order at 32. However, he actually reduced counsel's hours by 102.55 hours, which resulted in a total of 86.4 approved hours. *Id.* The ALJ's ultimate award of $30,240 is mathematically correct as he multiplied counsel's hourly rate, $350, by 86.4 hours instead of 80.4 hours.

[13] Employer maintains it should not have to pay for medical reports Claimant sought from Dr. Kerner as they did not aid him in a successful prosecution. Emp. Brief at 19-20.

[14] Employer asserts counsel admitted he takes longer to perform work due to his age. Emp. Brief at 16-19.

Claimant's counsel responds, urging affirmance. Employer filed a reply brief, reiterating its contentions.

Employer first contends the ALJ erred in determining Claimant's counsel is entitled to a fee award under Section 28(b). It asserts Claimant did not satisfy the prerequisites necessary for an employer-paid fee because its offers were equivalent to the ALJ's award, so Claimant did not obtain any additional benefits. As it had asserted an AWW of $890.20 and made payments the entire time, it argues that any payments it made after the ALJ's award were merely adjustments from what the district director's office recommended.[15]

Section 28(b) of the Act may apply when, as here, an employer voluntarily pays or tenders benefits and then a dispute arises.[16] It states in pertinent part:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] shall set the matter for an informal conference and following such conference the [district director] shall recommend in writing a disposition of the controversy. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held the following are strict prerequisites to an employer's liability for an attorney's fee under Section 28(b): (1) the parties attend an informal conference; (2)

---

[15] Employer asserts Claimant's backpay following the ALJ's decision was the result of correcting for the district director's earlier miscalculation rather than due to any work Claimant's counsel performed. It also asserts Claimant ultimately obtained PPD benefits rather than the PTD benefits she sought.

[16] We affirm the ALJ's finding that Claimant is not entitled to an employer-paid attorney's fee under Section 28(a) as it is in accordance with law, *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 316 (4th Cir.), *cert. denied*, 546 U.S. 960 (2005), and is unchallenged on appeal, *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

the district director makes a written recommendation; (3) the employer refuses to accept the written recommendation; and (4) the claimant procures the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *Lincoln v. Director, OWCP*, 744 F.3d 911, 915 (4th Cir. 2014), *cert denied*, 574 U.S. 932 (2014); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 318 (4th Cir. 2005); *see also Pool Co. v. Cooper*, 274 F.3d 173, 186 (5th Cir. 2001). Therefore, Claimant must obtain a greater award than Employer was willing to pay for Section 28(b) to apply. *See Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 128 (4th Cir. 2007).

Initially, the facts in this case establish at least the first three criteria for fee-shifting: (1) informal conferences were held on August 22, 2017, and March 7, 2019, which (2) culminated in the district director's written recommendations that Claimant be paid PTD compensation based on an AWW of $723.15; and (3) Employer refused to accept the recommendation, continuing to pay benefits but arguing Claimant was entitled to TPD, rather than PTD, benefits. The dispute in this case, therefore, is whether the fourth criterion has been met: did Claimant obtain a greater award than what Employer was willing to pay after the written recommendations? While we agree with Employer that the ALJ's analysis under Section 28(b) is flawed, we decline to hold it is not liable for any attorney's fee. Rather, we vacate the ALJ's fee award and remand the case for further consideration of the matter.

In ascertaining whether Claimant's counsel obtained additional benefits for Claimant, the ALJ made several errors in his analysis. First, contrary to the ALJ's statements, Employer's payments constitute evidence that it was "ready, willing, and able" to pay compensation, and those payments are a valid "tender" under Section 28(b). *Hassell*, 477 F.3d at 126; *see Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 1006 (5th Cir. 2000); *Savannah Mach. & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 889-890 (5th Cir. 1981). Therefore, characterizing Employer's October 2020 letter as its first tender offer is incorrect. *See Lincoln*, 744 F.3d at 915 (Section 28(b) is operative when the employer initially pays voluntary compensation, and a subsequent dispute arises about the total amount of compensation due). Because Employer's October 2020 letter is neither the first nor only offer it made, the letter should not be considered a line demarcating Employer's potential fee liability.

Second, the fact that Employer offered and paid TPD benefits instead of PPD benefits following the district director's recommendations is of questionable relevance. Persuasively, the United States Courts of Appeals for the Fifth Circuit, has indicated if the employer tenders voluntary payments, and the amount of weekly benefits would be the same regardless of how the benefits are classified, it is immaterial whether the employer stipulated to temporary or permanent compensation. *FMC Corp. v. Perez*, 128 F.3d 908,

910 (5th Cir. 1997).[17] The ALJ addressed the offers based on the nature of the disability; he did not consider whether the payments would be equal. Similarly, it was incorrect for the ALJ to compare Employer's October 2020 letter, alone, with his ultimate award. The correct comparison is whether Claimant obtained a greater award than what Employer was willing to pay after the written recommendation.[18] *Virginia Int'l Terminals*, 398 F.3d at 318.

Finally, the ALJ never compared his awarded compensation rate with the rate Employer was paying to ascertain whether Claimant obtained additional benefits by virtue of her counsel's services – as the statute requires. Employer consistently asserted Claimant's AWW was $890.20, but it adjusted the compensation rate according to the district director's recommendations as well as its own labor market surveys and wage-earning capacity calculations. CXs 7, 27 at 3; EX 7 at 21; EX 8 at 2; Cxh. 2. The ALJ found only five jobs out of the thirteen jobs listed in Employer's June 2016 labor market survey constituted suitable alternate employment for purposes of calculating Claimant's post-injury wage-earning capacity. D&O at 33-35; EX 7. Ultimately, the ALJ concluded Claimant's retained wage-earning capacity was $373.55, which resulted in Claimant receiving $24,988.08 in back-due compensation. D&O at 48; *See* Cxh. 2.

As the ALJ's analysis contains errors that may affect his conclusion, we vacate the fee award and remand the case for further consideration. *See Hassell*, 477 F.3d at 128 (determining the claimant's counsel was entitled to a fee under Section 28(b) although obtaining compensation at a rate offered by the employer). On remand, the ALJ must determine whether counsel's services resulted in Claimant receiving additional compensation beyond that which Employer tendered or paid.[19]

---

[17] In *Perez*, the Fifth Circuit premised its conclusion about the immateriality of the classification on its finding that the employer did not refuse to pay PTD benefits but made equivalent payments by paying TTD compensation continually through the date of settlement. *Perez*, 128 F.3d at 910.

[18] Although the ALJ deemed Employer's October 2020 offer unequivocal, Employer did not identify a specific compensation rate with which to compare the ultimate amount awarded. As noted above, Employer's October 2020 letter indicated its offer "to pay temporary and permanent partial disability at the agreed to AWW less the median rate of all approved jobs adjusted to the date of injury…." Exh. 14 at 1.

[19] Our dissenting colleague would hold that Claimant obtained greater benefits via the ALJ's award than what Employer was paying or willing to pay when it rejected the district director's two recommendations, and so would affirm the fee the ALJ awarded prior

In the interest of administrative efficiency, we also address Employer's alternative contentions in the event the ALJ awards an employer-paid fee.[20] First, Employer argues any fee should be reduced pursuant to *Hensley v. Eckerhart.* 461 U.S. 424 (1983), based on counsel's lack of success in litigating issues germane to Claimant's claim. Emp. Brief at 15-16. Specifically, Employer contends the ALJ agreed with it on the issues of Claimant's partial disability and AWW; therefore, at most, Claimant obtained a limited degree of success. *Id.*

In *Hensley,* the Supreme Court of the United States defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. The Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434. The Court stated the district court should focus on the significance of the overall relief the plaintiff obtained in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. *Id.* If the plaintiff achieved only partial or limited success, however, the hours expended on litigation multiplied by a reasonable hourly rate may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Id*. at 435-437. Although the ALJ declined to reduce his fee award any further based on Employer's *Hensley* argument, in light of our decision to vacate the fee award, the ALJ must reconsider on remand the application of *Hensley* to any fee he awards. *Hensley*, 461 U.S. at 434; *see Barbara v. Director, OWCP*, 245 F.3d 282, 289 (3d Cir. 2001).

Employer further asserts the ALJ erred by not addressing Claimant's counsel's admissions that the time entries in the fee petition were generated *post facto* and not

---

to Employer's October 2020 offer letter. But it is necessary for the ALJ to reconsider and determine whether counsel's services resulted in Claimant receiving additional compensation beyond that which Employer tendered or paid on remand in the first instance in light of the errors we note in the ALJ's analysis and our clarification of what relevant factors he should properly compare to reach his determination. 20 C.F.R. §802.301(a).

[20] We affirm the ALJ's hourly rate findings as they are not challenged on appeal. *Scalio,* 41 BRBS at 58.

contemporaneously with when the work was performed and that his age renders him unable to work as quickly as he had when he was younger. Emp. Brief at 16, 18-19; Cl. Response Brief at 3-4. As the ALJ did not address either admission, if he determines counsel is entitled to a fee on remand, he must determine whether these factors affect the hours of services he approves.

Finally, Employer contends the ALJ erred by requiring it to pay for reporting fees charged by Dr. Kerner. It contends it should not be liable for Dr. Kerner's medical reports because Dr. Kerner ultimately agreed with Employer and not Claimant by opining Claimant is not totally disabled. Emp. Brief at 19-20. Thus, Employer argues the ALJ's reason for holding it liable for Dr. Kerner's reports as a cost of litigation is illogical. Specifically, the ALJ acknowledged "Dr. Kerner's report failed to establish total disability" but also found it "sufficiently established Claimant's prima facie case of total disability." D&O at 34. However, he also stated Dr. Kerner's report "remained critical information in establishing partial disability." *Id.*

While we agree with Employer that the ALJ's rationale for shifting costs for Dr. Kerner's reports was flawed, we nonetheless concur with his determination that Employer is liable for the costs associated with Dr. Kerner's medical reports. The cost of a physician's testimony is recoverable if the ALJ finds the physician is a necessary witness under Section 28(d). 33 U.S.C. §928(d); *Hernandez v. National Steel & Shipbuilding Co.*, 13 BRBS 147, 150-151 (1980). If such a physician does not testify but prepares a medical report, the cost of the medical report is also recoverable if a claimant is awarded benefits. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194-195 (1984). If the ALJ determines counsel is entitled to an attorney's fee on remand, then Employer also is liable for the reasonable cost of Dr. Kerner's report under Section 28(d). *Hardrick v. Campbel Industries, Inc.*, 12 BRBS 265, 270 (1980).

Accordingly, we vacate the ALJ's Order Awarding Attorney's Fees and remand the case for further consideration consistent with this opinion.

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 to vacate the ALJ's fee award. A claimant's entitlement to an employer-paid fee under Section 28(b) of the Longshore Act is contingent upon several factors: 1) the employer voluntarily paid or offered to pay benefits without an award; 2) a controversy thereafter developed over additional compensation to which the claimant may be entitled; 3) the parties attended an informal conference after which the district director issued a written recommendation; 4) the employer refused to accept the recommendation within fourteen days, and instead paid or offered to pay the claimant any additional benefits it believed she may be entitled; and 5) the claimant, through her attorney, thereafter achieved a greater award than what the employer paid or offered to pay. 33 U.S.C. §928(b); *see Lincoln v. Director, OWCP*, 744 F.3d 911, 915 (4th Cir. 2014), *cert denied*, 574 U.S. 932 (2014); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 318 (4th Cir. 2005); *see also Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 128 (4th Cir. 2007).

The majority concedes that the first four factors have been satisfied but questions the completeness of the ALJ's analysis of the final factor, whether Claimant employed the services of an attorney to achieve compensation greater than what Employer was willing to pay. However, its own summary of the facts establishes that this criterion, too, has been met.

On July 14, 2014, Employer began voluntarily paying Claimant temporary total disability benefits (TTD) at a weekly compensation rate of $593.47. CX 7; Cxh. 2. On June 13, 2016, it reduced its payments to temporary partial disability benefits (TPD) at a compensation rate of $303.24 based on a labor market survey purporting to show suitable alternate employment (SAE). CX 27 at 3; Cxh. 2; *see* EX 7. Following the August 22,

2017 informal conference, the district director recommended Employer pay Claimant permanent total disability (PTD) benefits at a rate of $482.10. EX 2 at 3-4. Rather than accepting the recommendation, Employer continued to pay TPD benefits at a rate of $303.24. CX 27 at 3. On March 5, 2018, it further reduced that amount to $258.15 per week based on SAE identified in another labor market survey. *Id*.; Cxh. 2; *see* EX 8.

Following a second informal conference held on March 7, 2019, the district director stated that the prior recommendation for Employer to pay Claimant $482.10 in PTD benefits "stands." CX 53 at 2. Employer again did not accept this recommendation but instead continued paying Claimant $258.15 in TPD benefits. CX 27 at 3; Cxh. 2. Approximately one year later, after the claim had been referred to the OALJ for a hearing, Employer offered to pay Claimant TPD and PPD benefits at an unspecified compensation rate, to be calculated in significant part by subtracting "the median rate of all approved [SAE] jobs adjusted to the date of injury." Exh. 14. Claimant rejected the offer, and the case proceeded to a hearing on October 27, 2020. The ALJ issued his decision on December 16, 2022, awarding Claimant TPD and PPD benefits, at a weekly compensation rate of approximately $344.40.[21] Decision and Order at 48; Cxh. 2. Thus, in addition to paying Claimant ongoing compensation greater than it was paying when it rejected the district director's recommendations, Employer was also required to pay her $24,988.08 in back compensation to account for its previous underpayments. Cxh. 2.

As these facts reflect, at the time of the first informal conference Employer was paying Claimant benefits at a compensation rate of $303.24. It not only rejected the district director's recommendation to pay $482.10, it subsequently reduced its payments to $258.15. After the second informal conference, Employer rejected the district director's second recommendation that it pay $482.10 and instead continued to pay the lesser amount of $258.15. Finally, following the formal hearing before the ALJ, Claimant was ultimately awarded ongoing compensation at a rate of approximately $344.40, thus increasing her future weekly compensation payments beyond what Employer was paying upon rejection of the first and second recommendations, and entitling her to an additional $24,988.08 in back pay. Claimant therefore unequivocally employed her attorney's services to "achieve

[21] The ALJ found Claimant's AWW is $890.12 and her wage-earning capacity (WEC) from SAE is $373.55. By my calculation, the difference between those two numbers, multiplied by two-thirds, equals a compensation rate of $344.38. *See* Cxh. 2 (reflecting a similar calculation of $344.43).

a greater award than what the employer was willing to pay after [both of the district director's] written recommendation[s]." *Lincoln*, 744 F.3d at 915.

Further, Employer's last-minute offer to pay Claimant benefits at an increased compensation rate came only four days before the October 27, 2020 OALJ hearing – well after the relevant fourteen-day window for accepting or rejecting the district director's two recommendations in 2017 and 2019. 33 U.S.C. §928(b). Thus, even though this eve-of-trial offer is apparently comparable to what Claimant was ultimately awarded at trial, it does not negate Employer's liability under Section 28(b). As the ALJ found, even if Claimant had accepted the offer, her acceptance would have constituted the achievement of an award greater than what Employer was paying or willing to pay when it rejected the district director's two earlier recommendations in 2017 and 2019. *Lincoln*, 744 F.3d at 915; Fee Order at 6, 32.

Nor did the ALJ abuse his discretion in declining to rely on the last-minute settlement offer as a reason to *further* reduce Claimant's attorney fee award by applying an across-the-board cut pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, the Supreme Court held that awards under federal fee-shifting statutes, like Section 28(b), must be commensurate with the "degree of success obtained." *Id.* at 436. If a claimant obtains "excellent results," her attorney "should recover a fully compensatory fee," including "all hours reasonably expended on the litigation." *Id.* at 435. If, however, the claimant achieves "only partial or limited success," awarding counsel a fee based on all hours expended on the litigation may result in an "excessive" award in relation to the success obtained. *Id.* at 436.

As the Supreme Court instructed, ALJs "necessarily" have discretion to determine how best to account for a claimant's limited or partial success, including "identifying specific hours that should be eliminated" or "simply reduc[ing] the award[.]" *Hensley*, 461 at 437. "This [discretion] is appropriate in view of the [trial judge's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* Therefore, the Board should not interfere in the ALJ's decision so long as he "provide[s] a concise but clear explanation of [his] reasons for the fee award" and "make[s] clear that [he] has considered the relationship between the amount of the fee awarded and the results obtained." *Id.*

The ALJ's fee award in this case clearly meets that standard, as he fully considered Employer's arguments regarding Claimant's overall degree of success, including the effect of Employer's last-minute settlement offer. Performing a line-by-line review of counsel's fee petition, the ALJ found that Claimant's counsel is not entitled to a fee for any work performed after Employer made its settlement offer in October 2020. In other words, applying one of the methods contemplated by *Hensley*, the ALJ disallowed the number of

allegedly unsuccessful hours counsel spent litigating the claim after the offer, resulting in a reduction of 40.55 hours of counsel's time, or 21 percent of counsel's total requested hours. Fee Award at 26-32. Combined with other reductions the ALJ made to counsel's hours resulted in a total fee award of $30,240, less than half of the $66,132 counsel requested.

In light of these reductions and Claimant's success – again, achieving significant back pay and an ongoing weekly compensation rate well above what Employer was willing to pay when it rejected the district director's recommendations – the ALJ found any additional reduction in counsel's fees pursuant to *Hensley* would be "excessive and duplicative." Fee Award at 32. Discerning no legal error or abuse of discretion in that finding, I would affirm the ALJ's conclusion that "the lodestar amount [of $30,240] represents a reasonable fee considering the work performed and the level of success obtained in the matter." *Id*. at 33.

I therefore dissent.

GREG J. BUZZARD
Administrative Appeals Judge