

U.S. Department of Labor

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



BRB No. 23-0343

MAURICE HENDRICKS)
)
 Claimant)
)
 ERIC A. DUPREE)
 (Former counsel for Claimant))
)
 Petitioner)
)
 v.)
) DATE ISSUED: 09/19/2024
 TRAPAC, LLC)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the May 19, 2023 Attorney Fee Order of Stewart F. Alford,
Administrative Law Judge, United States Department of Labor

Inga L. Parsons (Inga Parsons Law), Pinedale, Wyoming, for Petitioner Eric
A. Dupree and Dupree Law Wyo, LLC.¹

William N. Brooks II (Law Offices of William N. Brooks), Long Beach,
California, for Employer/Carrier.

¹ Claimant's counsel, Eric A. Dupree, the petitioner in this case, retained counsel,
Inga L. Parsons, to represent him in this appeal of the ALJ's fee award.

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

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

Claimant's former counsel, Eric A. Dupree, appeals Administrative Law Judge (ALJ) Steward F. Alford's May 19, 2023 Attorney Fee Order (2018-LHC-01614) 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, 955-956 (9th Cir. 2007). This case is before the Benefits Review Board for the second time.

Claimant sustained a work-related back injury on January 6, 2016,² prompting him, through attorney Eric A. Dupree (Counsel), to file a claim for benefits against Employer under the Act.³ In his Decision and Order dated February 14, 2020 (D&O), the ALJ awarded Claimant permanent total disability benefits from March 28, 2018, based on an average weekly wage of \$2,190, as well as medical benefits. On June 1, 2020, Counsel filed an itemized fee petition with the ALJ seeking an attorney's fee totaling \$216,235.26, representing \$138,330 for 190.8 hours of his services at \$725 per hour, \$42,817.50 for 86.5 hours of Paul Myers's services at \$495 per hour, \$665 for 1.9 hours of Paul LaZarr's services at \$350 per hour, and \$16,230 for 108.2 hours of paralegal/law clerk time at \$150 per hour, plus costs of \$18,192.76. Fee Petition Ex. 14. Employer filed objections to Counsel's requested hourly rate, the total hours billed, and the total requested costs.

² This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant's injury occurred in Oakland, California. 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.

³ Claimant was represented by Edward Bull III in a civil lawsuit against the Port of Oakland, which resulted in a net settlement payment to Claimant of \$611,251.31, plus \$140,000 to be held in trust for future medical treatment related to the work injury. The ALJ subsequently found Employer entitled to a credit, pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g), for the total amount of the settlement, \$751,251.31, as an offset to its liability for Claimant's disability and medical treatment.

Counsel filed a reply brief, accompanied by additional exhibits and declarations, to which Employer objected.

In his initial February 19, 2021 Attorney Fee Order (Fee Order), the ALJ declined to accept much of the evidence Counsel submitted with his reply brief. Fee Order at 4-5. He then reduced the requested hourly rates, the number of hours, and costs, awarding a total fee of \$120,470.30 plus \$14,424.20 in costs, payable by Employer. *Id.* at 5-16. Pertinent to the issues raised in this appeal, the ALJ awarded Counsel’s fee based on a rate of \$531 per hour.⁴ *Id.* at 15. He also denied Counsel’s request for travel-related fees and costs, totaling 15 hours of “billable travel time” and \$3,768.56 in travel expenses. *Id.* at 12-13. Finally, the ALJ denied all time relating to the third-party state court action, representing 30.3 hours of Counsel’s time and .4 hour of Mr. Myers’s time because it is “not recoverable in the Longshore matter.” *Id.* at 15.

On July 29, 2022, pursuant to Claimant’s counsel’s appeal of the ALJ’s initial fee award, the Board affirmed that San Francisco is the relevant geographic market, held certain evidence submitted with Counsel’s reply brief was properly excluded, affirmed the denial of travel time between San Diego and San Francisco, and upheld the exclusion of hours billed related only to the third-party state claim. *Hendricks v. Trapac LLC*, BRB No. 21-0348, slip op. at 3, 5, 9, 10 (Jul. 29, 2022) (unpub.). The Board also affirmed, as unchallenged, the hourly rates and time for work performed by attorneys LaZarr and Myers and the paralegal. *Id.* at 5 n.5. Moreover, the Board affirmed the ALJ’s use of the Consumer Law Survey Report to derive hourly rates. *Id.* However, the Board vacated the ALJ’s award of an hourly rate of \$531 as being inadequately explained and inconsistent with his subsequent statement that, in the San Francisco consumer law market, “an attorney with sixteen to twenty years of experience could reasonably bill paying clients \$556.00 an hour.” *Id.* at 6–7. On remand, the Board instructed the ALJ to reconsider the relevant rate evidence and explain his awarded hourly rate.⁵ *Id.* at 7.

In a May 19, 2023 Attorney Fee Order (Order on Remand), the subject of the current appeal, the ALJ considered the relevant rate evidence pursuant to the Board’s remand instructions.⁶ He awarded Counsel an hourly rate of \$646 prior to an inflation adjustment

⁴ Based on the parties’ agreement, the ALJ found San Francisco, California, is the relevant community.

⁵ The Board further instructed that the ALJ was not compelled to award Counsel 95th percentile rates on remand. It also noted he may adjust Counsel’s rate for inflation “to reflect [his] hourly rate at the time of his 2020 services.” *Hendricks*, slip op. at 7.

⁶ The ALJ considered the following: the declarations of attorneys John Hillsman, Charles Naylor, Joshua Gillelan II, and Deborah Waters; the declaration of Ronald Burdge;

but still determined Counsel was entitled to rates in the 75th, not the 95th, percentile. Order on Remand at 8-17. To account for inflation and delay, the ALJ adjusted the hourly rate to \$672 using the Department of Labor’s (DOL’s) Consumer Price Index (CPI) Inflation Calculator from January 2018, the midpoint of the 2017-2018 survey data, to June 2020 when Counsel filed his fee petition. *Id.* at 17-20. Thus, he awarded Counsel \$96,633.60 for his services, representing 143.8 hours of work at an hourly rate of \$672, resulting in an overall award of \$140,746.10 for fees and costs associated with the successful prosecution of the claim. *Id.* at 20. Counsel again appeals the ALJ’s fee award, and Employer responds, urging affirmance.

Counsel challenges the hourly rate awarded on remand. He asserts the ALJ erred in finding him entitled to 75th percentile hourly rates, instead of the 95th, contending the ALJ’s finding is irrational. Counsel also contends the ALJ erred in adjusting the proxy rate for delay by stopping the adjustment as of the date he filed his fee petition in 2020, instead of in 2023 when the fee was awarded. He further asserts the Board should reconsider its prior affirmance of the ALJ’s rejection of his rebuttal evidence, which affected the ALJ’s reasons for placing him in the 75th percentile, or, alternatively, issue a summary affirmance on that issue.

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 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 as long as he fully considers all relevant evidence, adequately explains 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

the United States Consumer Law Attorney Fee Survey Report, 2017-2018; several prior fee awards from the district director, Board, and circuit court; and two prior ALJ fee awards. Order on Remand at 8-13. The ALJ again gave little weight to the attorneys’ declarations, as the Board had affirmed his prior decision doing so. *Id.* at 13-14; *Hendricks*, slip op. at 6. He also gave little weight to the prior fee awards, as they were rendered in “other geographic markets, relate to attorneys other than Mr. Dupree, or represent appellate rather than trial work.” Order on Remand at 14. Finally, the ALJ relied on Mr. Burdge’s Consumer Law Survey to arrive at a proxy rate. Although he gave little weight to Mr. Burdge’s conclusion that Counsel’s work warrants an hourly rate of \$865, the ALJ applied some of Mr. Burdge’s methodology “to do rough justice” in arriving at a proxy rate. *Id.* at 14-15.

reasonably have resolved either way”); *Carter*, 757 F.3d at 869 (discussing the appropriateness of different rates for attorneys with different levels of experience).

We decline to reconsider issues resolved in the Board’s prior decision, which Counsel asserts affected the ALJ’s determination on remand that he be placed in the 75th percentile for hourly rates. Those holdings are the law of the case. *Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011), *aff’d sub nom. Schwirse v. Dir., OWCP*, 736 F.3d 1165 (9th Cir. 2013) (fully addressed issue is law of the case); *Irby v. Blackwater Sec. Consulting*, 44 BRBS 17 (2010); *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). Specifically, we decline to revisit the Board’s prior holding that the ALJ did not abuse his discretion in excluding four documents Counsel submitted in reply to Employer’s objections to his fee petition.⁷ We also decline to readdress the Board’s prior affirmance of the ALJ’s denial of travel fees and expenses, or time related to the third-party lawsuit. The Board fully addressed these arguments during the prior appeal of this case. *Hendricks*, slip op. at 3-5, 7-9. These decisions constitute the law of the case, *see Schwirse*, 45 BRBS at 55; *Irby*, 44 BRBS at 20, and none of the exceptions to the law of the case doctrine apply.⁸

We also reject Counsel’s assertion that the ALJ’s reasons for placing him in the 75th percentile are irrational. 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.

The ALJ acknowledged Counsel’s reputation, skills, and his record before the ALJ. However, the ALJ concluded rates in the 75th percentile are “appropriate” because Counsel did not demonstrate he could “command a rate in the 95th percentile of attorneys.” Order on Remand at 16. He found Counsel ignored certain procedural orders, rules of practice and procedure, and “basic principles of attorney fee litigation” that “[a] 95th percentile attorney would not ignore.” *Id.* Specifically, the ALJ determined Counsel ignored a procedural rule that all evidence must be submitted with the original fee petition rather than as additional evidence with his reply brief. He also found Counsel disregarded a “basic element of the Rules of Practice and Procedure” when objecting to a witness’s qualifications. *Id.*; D&O at 4; *see also Hendricks*, BRB No. 21-0348, slip op. at 3–5.

⁷ The documents were the declarations of Maurice Hendricks, Derrick Muhammad, Edward Bull III, and Ronald Burdge.

⁸ No exception to the law of the case doctrine applies, as there has not been a change in the underlying factual situation, there has been no intervening controlling authority, and Counsel has not demonstrated the Board’s first decision was clearly erroneous. *See Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69, 70 n.4 (2005).

Moreover, he found Counsel's position that Claimant reached maximum medical improvement (MMI) on April 11, 2017, was contrary to controlling law. Finally, he found the fee petition requested payment for non-compensable work that was clerical, excessive, and duplicative, despite Counsel being the senior attorney who would have reviewed the fee petition before its submission. Order on Remand at 16.

As previously discussed, the Board's prior decision affirmed the ALJ's rejection of Counsel's submission of additional evidence in reply to Employer's objections because this evidence should have been submitted with his fee petition. Consequently, the ALJ did not abuse his discretion in finding Counsel "ignored" an important procedural rule which is something, the ALJ permissibly found, an attorney in the 95th percentile would not have done. *Seachris*, 994 F.3d at 1080.

The ALJ also acted within his discretion in finding Counsel demonstrated skills below the 95th percentile in part because he objected to a vocational expert's qualifications based on an irrelevant regulation.⁹ *Seachris*, 994 F.3d at 1080; *Carter*, 757 F.3d at 869; Order on Remand at 16 (citing D&O at 4); *see* 29 C.F.R. §18.62(a)(1). Nor is there any abuse of discretion in his finding Counsel's MMI arguments in the underlying litigation demonstrated skill below the 95th percentile.¹⁰ Further, we reject Counsel's argument that the ALJ erroneously refused to award a 95th percentile hourly rate because his fee petition billed for non-compensable work that was "clerical, excessive and duplicative."¹¹ Order on

⁹ When the underlying claim was litigated before the ALJ, Counsel objected to testimony from Employer's vocational expert, Howard Stauber. He argued that because the witness did not actively carry certain vocational certifications, and 29 C.F.R. §18.62(a) requires any expert to be "a suitably licensed or certified examiner," Mr. Stauber could not testify as an expert in the claim. D&O at 4; Hearing Tr. at 274-275. The ALJ noted that 29 C.F.R. §18.62(a) by its terms applies only to physical and mental examinations, i.e. independent medical examinations of the Claimant, not vocational experts like Mr. Stauber who "review[ed] records for prospective alternate employment." *Id.* The ALJ found Counsel's misapplication of the regulation supported placing him in the 75th percentile, but not the 95th.

¹⁰ Counsel argued Claimant reached MMI on April 11, 2017, the date of his surgery. The ALJ found this argument was "contrary to controlling authority" because a healing period must occur post-surgery before a claimant's condition can reach MMI. D&O at 35-36; *see Carrion v. SSA Terminals*, 821 F.3d 1168, 1172-1174 (9th Cir. 2016) (while a Claimant's knee injury was at MMI, his disability later became temporary as a subsequent knee surgery creates a new healing period, after which Claimant again reached MMI).

¹¹ Counsel did not challenge the ALJ's reduction of the total requested number of hours for "clerical" work in either his first appeal or this one. Those reductions are as

Remand at 16 (citing Fee Order at 11-12). The ALJ explained that requesting fees for non-compensable work in this case demonstrated skill below the 95th percentile because Counsel, as “the partner overseeing the case,” was responsible for assuring the fee petition complied with proper criteria for reimbursement. Order on Remand at 16 n.8.

The ALJ has discretion to determine whether to award an hourly rate in the 95th percentile. *Seachris*, 994 F.3d at 1080; *see generally 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); *Obadiaru*, 45 BRBS at 25. The ALJ permissibly found these factors directly relate to Counsel’s competence and skill, as an attorney in the 95th percentile attorney “would not ignore these rules...and the basic principles of attorney fee litigation.” Order on Remand at 16. 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. *Seachris*, 994 F.3d at 1080; *Carter*, 757 F.3d at 869.

Counsel also argues he is entitled to an inflationary adjustment from 2016 through May 2023 to account for the delay between the services and the fee award. Cl. Brief at 12-14, 20-26. While Counsel originally requested an hourly rate of \$725, he now asserts he is entitled to a 2023 rate of \$792 per hour. *Id.* at 25. We reject Counsel’s assertion.

In light of the Supreme Court’s decisions in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), consideration of enhancement for delay is appropriate for fee awards under fee-shifting schemes. The Board has agreed they are appropriate under Section 28 of the Act, 33 U.S.C. §928. *Nelson v. Stevedoring Services of Am.*, 29 BRBS 90 (1995). Accordingly, when the question of delay is timely raised, the tribunal awarding the fee must consider this issue. *Johnson v. Dir., OWCP*, 183 F.3d 1169 (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring*, 32 BRBS 245 (1988). The ALJ may adjust the fee based on a historical rate to reflect its present value, apply current market rates, or employ any other reasonable means to compensate the claimant’s attorney for the delay. *Modar v. Mar. Services Corp.*, 632 F. App. 909, 910 (9th Cir. 2015), *vacating* BRB No. 13-0319 (Jan. 17, 2014) (quoting *In re Wash. Pub. Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994)); *Anderson*, 91 F.3d at 1325; *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95, 96-97 (1997).

Here, the ALJ relied primarily on the 2017-2018 United States Consumer Law Attorney Fee Survey Report, based on an attorney’s location in the relevant community and number of years of consumer law experience, Order on Remand at 10-12, 14-16, which

follows: 1) Paul Lazarr by .10; (2) Erin Antrim by 5.9 hours; (3) Mayra King by 1.9 hours; (4) Paul Myers by .5 hours; and (5) Eric Dupree by 1.7 hours. Fee Order at 11.

the Board previously affirmed as being valid categories for comparison, *Hendricks*, slip op. at 5 n.5.¹² See *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1086 (9th Cir. 2015); *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 1053-55 (9th Cir. 2009). He used this report to calculate the 75th percentile hourly rate for a consumer law attorney with forty-one years of experience in San Francisco at \$646 per hour, which he determined is the appropriate prevailing market rate for counsel “given the totality of the evidence and [counsel’s] years of experience, skills, and reputation.” Order on Remand at 16-17. He accounted for inflation by taking judicial notice of the DOL’s CPI inflation calculator. Order on Remand at 20 (citing *CPI Inflation Calculator*, U.S. Bureau of Labor STATISTICS).¹³ Further, he accurately indicated the litigation for this case occurred from September 20, 2018, when the case was docketed with the OALJ, to February 14, 2020, when the Decision and Order granting benefits was issued. Order on Remand at 19. Claimant’s counsel filed his fee petition on June 1, 2020.¹⁴ In its remand instructions, the Board advised the ALJ “may adjust the 2017 survey data on remand to account for inflation in order to reflect Counsel’s hourly rate at the time of his 2020 services.”¹⁵ *Hendricks*, BRB No. 21-0348, slip op. at 6–7.

As the ALJ found, the delay after his February 19, 2021 fee order was due to Counsel’s appeal of the fee award. Order on Remand at 19. An attorney is not entitled to

¹² The ALJ found, contrary to Mr. Burdge’s declaration, that the Consumer Law Survey Report states consumer law attorneys in San Francisco with Counsel’s forty-one years of experience bill an average of \$475 per hour, not \$531 per hour. Order on Remand at 10-11, 15 (citing Consumer Law Survey Report at 237). He further determined that among San Francisco consumer law attorneys, regardless of the number of years of experience, the 75th and 95th percentile hourly rates are \$613 and \$618, respectively. Order on Remand at 11-12 (citing Consumer Law Survey Report at 236).

¹³ https://www.bls.gov/data/inflation_calculator.html

¹⁴ Counsel based his fee request for services rendered between September 2018 and June 2020 on 2020 rates (\$575 per hour), asserting he should be awarded a rate based on the market rate at the time the fee is awarded. Fee Pet. at 7, 16. Before the Board previously, Counsel asserted the ALJ should have adjusted the rates to those at the time of the 2020 services. *Hendricks*, slip op. at 6. In his current petition for review to the Board, Counsel asserts entitlement to “current market rates,” Cl. Brief at 7-9, but also argues for a May 2023 hourly rate of \$792, *id.* at 44.

¹⁵ Accounting for inflation to June 2020, the ALJ awarded Counsel an hourly rate of \$672. Order on Remand at 17-20.

an enhancement for delay caused by an appeal of the fee award. *Anderson v. Dir., OWCP*, 91 F.3d 1322, 1325 n.3 (9th Cir. 1996); Order on Remand at 18. Also, the ALJ permissibly found any delay at the OALJ in processing his fee request was not “so egregious as to require further adjustment.”¹⁶ Order on Remand at 19; *see Christensen*, 557 F.3d at 1056 (it is not an abuse of discretion to deny an enhancement after a two year delay); *Hobbs v. Dir., OWCP*, 820 F.2d 1528, 1530 (9th Cir. 1987) (enhancement permitted when the delay in payment is so extreme or unexpected as to “render an otherwise reasonable fee unreasonable”). Based on relevant precedent, the ALJ permissibly found that “given the delay in this case and the historic rates represented in Consumer Law Survey Report,” adjusting the hourly rate for inflation from January 2018, the midpoint of the survey data, to June 2020, when Counsel filed his fee petition, is “appropriate.” Order on Remand at 19. Because the ALJ has discretion to adjust the fee for inflation and fully explained his decision, we affirm his awarded hourly rate of \$672. *Allen*, 31 BRBS at 96.

¹⁶ In support, Counsel cites *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95, 96-97 (1997). There, the Board held an ALJ erred in denying an augmentation of the attorney’s hourly rate to account for an eleven-year delay between the performance of his services and the issuance of the fee award and payment of his fee. In the present claim, however, the ALJ accurately found Counsel is not entitled to rates as of May 2023 because the delay after the ALJ’s February 19, 2021 fee order was due to counsel’s appeal of the fee award. Order on Remand at 19; *see Anderson*, 91 F.3d at 1325 n.3.

Accordingly, we affirm the ALJ's May 19, 2023 Attorney Fee Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I continue to disagree with the majority's conclusion in the first appeal that Counsel is not entitled to any fees for protecting Claimant's Longshore Act interests when Claimant settled his third-party civil lawsuit. *Hendricks v. Trapac LLC*, BRB No. 21-0348, slip op. at 11 (Jul. 29, 2022) (unpub.) (Buzzard, J., concurring and dissenting); 33 U.S.C. §933(g) (procedures for and effects of civil settlements on Longshore Act claims); see *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (courts have "discretion to depart from the law of the case where . . . the first decision was clearly erroneous"). Otherwise, I concur.

GREG J. BUZZARD
Administrative Appeals Judge