

BRB No. 13-0094 BLA

CLIFFORD MULLINS )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 HONEY CAMP COAL COMPANY ) DATE ISSUED: 11/27/2013  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Supplemental Decision and Order of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, DC, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order (08-BLA-5585) of Administrative Law Judge William S. Colwell granting an attorney's fee in connection with a claim filed pursuant to the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant's counsel requested a total fee of \$21,087.50, for 39.50 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 1.25 hours of legal services at an hourly rate of \$250.00 (Bobby S. Belcher, Jr.), 9.0 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), 17.0 hours of legal services at an hourly rate of \$200.00 (W. Andrew Delph, Jr.), 35.0 hours of legal services at an hourly rate of \$100.00 (legal assistants). Counsel's fee petition also requested expenses in the amount of \$109.00.

In his Supplemental Decision and Order, the administrative law judge reduced the hourly rate for Mr. Wolfe to \$275.00, reduced the hourly rate for Mr. Belcher to \$225.00 and reduced the hourly rate for Mr. Gilligan to \$200.00. The administrative law judge also disallowed compensation for 0.25 hours of the legal services provided by Mr. Wolfe, and for the 35.00 hours of the legal services provided by the legal assistants. The administrative law judge, therefore, awarded claimant's counsel a total fee of \$16,274.25. The administrative law judge also granted claimant's counsel expenses in the amount of \$109.00.

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimant's counsel responds in support of the administrative law judge's attorney's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its contentions.<sup>1</sup>

The amount of an award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

In determining the amount of attorney's fees to award under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is

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<sup>1</sup> Claimant's coal mine employment was in Virginia. See *Mullins v. Honey Camp Coal Co.*, BRB No. 11-0729 BLA, slip op. at 2 n.3 (July 11, 2012) (unpub.). Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008).

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). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Employer challenges the hourly rates awarded by the administrative law judge, contending that the rates are not supported by prevailing market evidence. We disagree. In determining the prevailing market rate, the administrative law judge considered evidence of fees received in the past by Mr. Wolfe, Mr. Belcher, Mr. Gilligan, and Mr. Delph. Supplemental Decision and Order at 3-4. We note that counsel's fee petition includes citations to twenty-nine cases where Mr. Wolfe was awarded an hourly fee ranging from \$250.00 to \$400.00. See Claimant's Counsel's Fee Petition. Counsel's fee petition also includes citations to cases where Mr. Belcher was awarded an hourly rate ranging from \$200 to \$250.00, where Mr. Gilligan was awarded an hourly rate ranging from \$175.00 to \$225.00, and where Mr. Delph was awarded an hourly rate ranging from \$150.00 to \$200.00. *Id.* In *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010), the United States Court of Appeals for the Fourth Circuit recognized that evidence of fees received in the past is an appropriate factor to take into account when establishing a market rate. In awarding the respective hourly rates of \$275.00, \$225.00, \$200.00, and \$200.00 to Mr. Wolfe, Mr. Belcher, Mr. Gilligan, and Mr. Delph, the administrative law judge also relied upon the attorneys' knowledge and experience.<sup>2</sup> Supplemental Decision and Order at 4. This is a relevant factor that an administrative law judge may consider in determining a reasonable hourly rate for claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71 (CRT) (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124.

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<sup>2</sup> In his fee petition, claimant's counsel stated that attorneys in his law firm "are very experienced" in the area of black lung law. Counsel asserted that he knows of "no other firms in Virginia and very few across the nation taking new [black lung] cases." Claimant's Counsel's Fee Petition.

Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse his discretion in determining reasonable hourly rates for Mr. Wolfe, Mr. Belcher, Mr. Gilligan, and Mr. Delph that reflected the applicable market rates. Supplemental Decision and Order at 4; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, BLR (4th Cir. 2013); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010), *petition for review denied*, *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013) (unpub.)<sup>3</sup>; *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge's award of the hourly rates in this case.<sup>4</sup>

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<sup>3</sup> Employer's request to hold this case in abeyance, pending the Fourth Circuit's disposition of appeals in *Gosnell* and *Bowman* is moot. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, BLR (4th Cir. 2013); *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013).

<sup>4</sup> While the case was before the administrative law judge, employer sought to engage in discovery, seeking information from claimant's counsel regarding prior fee awards. In his Decision and Order, the administrative law judge denied employer's discovery request. Decision and Order at 6. Employer contends that the administrative law judge erred in denying its discovery request. However, because employer has not demonstrated prejudicial error or an abuse of discretion in the administrative law judge's denial of its request, the administrative law judge's decision to deny employer's motion to compel discovery is affirmed. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Accordingly, the administrative law judge's Supplemental Decision and Order awarding attorney's fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge