

BRB No. 11-0606 BLA

DONALD JUSTUS)
)
 Claimant-Respondent)
)
 v.)
)
 SOW BRANCH COAL COMPANY) DATE ISSUED: 04/30/2012
)
 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 Awarding Attorney's Fees and the Order Denying Request for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order Awarding Attorneys' Fees and the Order Denying Request for Reconsideration (2007-BLA-5790) of Administrative Law Judge Linda S. Chapman, rendered pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by*

Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ Claimant was awarded benefits and his counsel, Joseph E. Wolfe, submitted a fee petition to the administrative law judge, requesting a total fee of \$20,901.25 for 105 hours of work performed by his law firm from May 16, 2005 through October 25, 2010. The total fee request represented 44.5 hours of legal services rendered by Attorney Wolfe, at an hourly rate of \$300.00; 0.75 hour of legal services rendered by Attorney Bobby S. Belcher, Jr., at an hourly rate of \$250.00; 4.25 hours of legal services rendered by Attorney W. Andrew Delph, at an hourly rate of \$200.00; 13.25 hours of legal services rendered by Attorney Ryan C. Gilligan, at an hourly rate of \$175.00; 41.50 hours of services by full-time legal assistants, at an hourly rate of \$100.00; and 0.75 hours of services by part-time legal assistants, at the hourly rate of \$60.00.² After considering the fee petition and employer's objections thereto, the administrative law judge approved the requested hourly rates as reasonable, but disallowed several time entries.³ Supplemental Decision and Order at 4. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$16,348.75 for legal services performed while the case was before the Office of Administrative Law Judges. *Id.* at 8. Employer subsequently filed a Motion for Reconsideration, urging the administrative law judge to reconsider the hourly rates she awarded and contending that several additional time entries should be disallowed. The administrative law judge, however, denied the motion, finding no reason to amend the fee award. Order Denying Request for Reconsideration at 1-2.

On appeal, employer contends that the administrative law judge erred in finding

¹ The administrative law judge issued a Decision and Order Awarding Benefits to claimant on October 20, 2010. Pursuant to employer's appeal, the Board affirmed the administrative law judge's award of benefits. *Justus v. Sow Branch Coal Co.*, BRB No. 11-0160 BLA (Nov. 30, 2011) (unpub.).

² Employer correctly notes that charges in the fee petition were miscalculated, as claimant's counsel's time entries total 45 hours and the legal assistants' time entries total 41.75 hours. With these corrections, the total fee should have been listed as \$21,076.25.

³ The administrative law judge disallowed the time entries for services performed when the claim was before the district director from May 16, 2005 through August 12, 2005, and from June 16, 2006 through May 14, 2007, representing: 7.0 hours of services by Attorney Wolfe; 0.25 hour of work by Attorney Belcher; 0.5 hour of work by Attorney Delph; and, 8.0 hours of work by various legal assistants. Supplemental Decision and Order at 5. In addition, the administrative law judge disallowed 14.75 hours of work by full-time legal assistants and 0.25 hours of work by a part-time legal assistant, because the services rendered in these time entries were clerical in nature. *Id.* at 5-8.

that the hourly rates requested by the four attorneys were reasonable, as there was no evidence provided by counsel regarding the prevailing market rate and because the administrative law judge did not rely on market proof when approving the requested hourly rates. Employer contends that the administrative law judge erred in finding that its motion for reconsideration was untimely and that it has been denied an opportunity to raise specific objections to the itemized time entries. Employer further asserts that the administrative law judge exhibited bias and that, if the case is remanded, it should be assigned to a different administrative law judge. Claimant's counsel responds, urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs, has not filed a response to employer's appeal. Employer has submitted a reply brief, reiterating its arguments on appeal.

The Act provides that when a claimant wins a contested case, the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), as incorporated by 33 U.S.C. §928(a). The amount of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.⁴ *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger v. Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Employer asserts that the administrative law judge did not employ the proper analysis in determining the appropriate hourly rates for the attorneys. Employer argues that the administrative law judge's failure to explain how the factors she considered supported her finding that the hourly rates of \$300.00, \$250.00, \$200.00 and \$175.00 were reasonable, contravenes the Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), and fails to comply with applicable legal authority on fee-shifting. We disagree.

In determining the appropriate fee award, the administrative law judge is required to apply the regulatory criteria found at 20 C.F.R. §725.366(b), which provides that the fee award must take into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." 20 C.F.R. §725.366(b); see *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *Velasquez v.*

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Director, OWCP, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988).

In this case, the administrative law judge performed the requisite analysis set forth in 20 C.F.R. §725.366(b), considered employer's objections and the evidence provided by both parties, as to the prevailing market rate for black lung attorneys, and adequately explained her determination that hourly rates of \$300.00, \$250.00, \$200.00 and \$175.00 for work performed by Attorneys Wolfe, Belcher, Delph and Gilligan were reasonable under the facts of this case. The administrative law judge correctly considered the nature of the issues involved in this case; the qualifications of the attorneys; Attorney Wolfe's expertise developed in over thirty-two years of specialized practice in this area of law, as well as Attorney Belcher's over sixteen years of experience, Attorney Delph's several years of experience and Attorney Gilligan's four years of experience representing black lung claimants; Altman & Weil's *Survey of Law Firm Economics*, reporting a range of hourly rates for attorneys in various regions based on years of practice and experience; the nature of the services rendered; evidence of fees counsel received in the past, based on a list of twenty-one cases in which the requested rates were awarded as reasonable; and the ultimate benefit to claimant. See *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657, 665-666, 24 BLR 2-106, 2-124 (6th Cir. 2008). While acknowledging that the Altman & Weil survey alone does not provide sufficient information for a determination of the market rate, the administrative law judge permissibly concluded that this evidence, considered in conjunction with the other factors, including evidence of fees counsel received in the past, was appropriately included within the range of sources from which to ascertain a reasonable rate. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-291 (4th Cir. 2010); *Maggard v. Int'l Coal Group*, 24 BLR 1-172, 1-174-175 (2010) (Order); *Maggard v. Int'l Coal Group*, 24 BLR 1-203, 1-205 (2010) (Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010) (Order); *Parks v. Eastern Assoc. Coal Corp.*, 24 BLR 1-177, 1-181 n.5 (2010).

Employer also contends that the administrative law judge erred in denying employer's request for reconsideration on the grounds that, by failing to raise specific objections when the fee petition was filed, they were late. Employer asserts that it is permitted to raise specific objections for the first time on reconsideration. We disagree. Employer has not established that the administrative law judge's denial of employer's motion for reconsideration was an arbitrary or capricious act or an abuse of her discretion.

In denying employer's motion for reconsideration, the administrative law judge noted that employer filed a motion to summarily deny the fee request on November 23, 2010, and again on January 25, 2011. The administrative law judge found, contrary to employer's contentions, that her order awarding fees was issued four weeks after claimant's counsel responded to employer's request for admissions concerning fees and employer had two opportunities to address the fee petition. The record supports the

administrative law judge's deduction that employer had an opportunity to object to the fee petition before she ruled on the petition. Moreover, the administrative law judge's fee award reflected proper consideration of the factors set forth at 20 C.F.R. §725.366(b). Finally, the administrative law judge addressed employer's arguments on reconsideration regarding the hourly rates, and explained why she found them without merit. Consequently, we conclude that the administrative law judge acted soundly within her discretion in finding there was "no good cause to reopen this matter to consider the Employer's additional objections." Order Denying Request For Reconsideration at 2; *see Abbott*, 13 BLR at 1-16.

Because the administrative law judge rationally found that claimant's counsel provided sufficient evidence to support the requested hourly rates, we affirm her approval of the hourly rates of \$300.00 for Attorney Wolfe, \$250.00 for Attorney Belcher, \$200.00 for Attorney Delph, \$175.00 for Attorney Gilligan and \$100.00 for full-time legal assistants. Because the administrative law judge permissibly determined that the work performed by counsel for claimant before the Office of Administrative Law Judges was reasonable, we affirm the administrative law judge's award of attorneys' fees in the amount of \$16,348.75. *See generally Broyles v. Director, OWCP*, 824 F.2d 327, 10 BLR 2-194 (4th Cir. 1987), *aff'd sub nom. Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988).

Attorney Fees For Work Performed Before the Board

Claimant's counsel has filed a complete, itemized statement, requesting a fee for services performed before the Board in *Justus*, BRB No. 11-0160 BLA (Nov. 30, 2011)(unpub.), pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a total fee of \$4,193.75, representing 5.25 hours of legal services rendered at an hourly rate of \$300.00 by Attorney Wolfe, 10.75 hours of legal services rendered at an hourly rate of \$225.00 by Attorney Gilligan, and 2.0 hours of legal services rendered at an hourly rate of \$100.00 by legal assistants. Employer objects to the fee petition, arguing that the fee petition is incomplete because it does not include evidence of the prevailing market rate for the persons providing the legal services in this case. Employer's Opposition to Shifted Fees at 2. Employer explains that the prior attorney fee awards cited by claimant's counsel are insufficient to establish the market rate because they are not in the record; several of them pre-date the rejection of counsel's fee petitions by the United States Court of Appeals for the Fourth Circuit and the Board; and they do not relieve claimant's counsel from his burden of establishing the market rate for the purposes of this case, as fee awards in other cases do not preclude litigation of the issue of the appropriate market rate. Employer also indicates that if past fee awards are relevant, the Board should consider awards of hourly rates to claimant's counsel that are lower than the amounts requested in this case. Employer suggests that prior awards establish that Attorney Wolfe's hourly rate should be \$200.00; Attorney Gilligan's hourly rate should be \$100.00; and the legal assistants' hourly rate should be \$50.00.

Employer further objects to the total number of hours claimed. Employer alleges that 2.0 hours spent by the legal assistants, taking telephone messages and reviewing the file, was clerical work and not compensable; that time spent putting deadlines on the case docket was also either clerical or duplicative of the attorneys' charges, and that time spent obtaining consent and filing a motion for an extension of time was unnecessary. Employer further argues that 1.0 hour of time billed by Attorney Gilligan also duplicates time billed by Attorney Wolfe, and that the 0.25 hour spent by Attorney Gilligan, in requesting an extension of time from the Board, was unnecessary and clerical. Additionally, employer alleges that the 0.5 hour spent by Attorney Wolfe, drafting a motion for an extension of time to file a brief with the Board, was unnecessary, and that the 2.0 hours spent for reviewing letters or orders during the course of the appeal was not reasonable and should be limited to 0.8 hour. Employer also asserts that the 0.25 hour charged for checking the status of the appeal was duplicative of an earlier entry. Therefore, employer concludes that the Board should limit the award to a total fee of \$1,610.00, representing 3.3 hours for Attorney Wolfe at \$200.00 an hour and 9.5 hours for Attorney Gilligan at \$100.00 an hour.

We reject employer's contention that claimant's counsel has not provided sufficient information relevant to the applicable market rate for his legal services. In support of his requested hourly rate, claimant's counsel submitted the 2006 Altman & Weil survey and an extensive list of black lung cases from 2006 to 2011 before the Office of Administrative Law Judges in which he was awarded an hourly rate of at least \$300.00. Evidence of fees counsel received in the past is an appropriate consideration in establishing the market rate. *See Cox*, 602 F.3d at 290, 24 BLR at 2-291; *Maggard*, 24 BLR at 1-205. In addition, claimant's counsel provided evidence of his expertise and experience in the field of black lung litigation. *See 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. Upon consideration of the market rate evidence submitted with claimant's counsel's fee petition, the Board finds that claimant's counsel has established that the rate he is requesting in his fee petition is his customary rate and is also comparable to the rate he regularly earns in black lung cases. Furthermore, notwithstanding employer's challenge on this issue, employer has not submitted any contrary evidence to show that the hourly rate requested is unreasonable within claimant's counsel's geographic area. Consequently, we find that claimant's counsel's requested rate is reasonable and we approve his requested hourly rate of \$300.00. *See Bowman*, 24 BLR at 1-169 n.4 (2010).

In his fee petition, claimant's counsel also seeks an hourly rate of \$225.00 for the legal services of his associate, Attorney Gilligan. In support of the requested hourly rate, claimant's counsel has provided evidence of Attorney Gilligan's expertise and experience in the field of black lung litigation. *See Holiday*, 591 F.3d at 228, 43 BRBS at 71; *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124. Further, claimant's counsel lists five fee awards from 2011 in which Attorney Gilligan was awarded an hourly rate of \$225.00 in

black lung cases. Employer argues that the evidence of five 2011 fee awards to Attorney Gilligan at an hourly rate of \$225.00 does not establish that this is his customary rate, since Attorney Gilligan was also awarded a lower rate in an equal number of decisions. Contrary to employer's assertion, although Attorney Gilligan was awarded a lower rate in some of the cases listed by claimant's counsel between 2008 and 2011, we are not persuaded that Attorney Gilligan's rate increase is unreasonable. We also note that the fee petition describes Attorney Gilligan's participation in black lung conferences and states that he teaches black lung legal seminars. Thus, we conclude that, in this case, claimant's counsel has provided sufficient evidence of a market rate of \$225.00 in his geographic area for an attorney of Attorney Gilligan's expertise and experience, for appellate work before the Board. Consequently, we approve an hourly rate of \$225.00 for Attorney Gilligan.

Claimant's counsel has identified the training, education, and experience of his legal assistants. Claimant's counsel has also listed several awards at an hourly rate of \$100.00 for the services of claimant's counsel's legal assistants. In light of this information, we approve the requested hourly rate of \$100.00 for work performed by his legal assistants. 20 C.F.R. §802.203(d)(2).

We next address employer's objections to the number of hours requested by claimant's counsel. Employer specifically challenges the following eight itemized entries performed by legal assistants, totaling 2.0 hours of services: 0.25 hour on February 7, 2011, describing a telephone call from claimant's daughter, who left a message; 0.25 hour on March 23, 2011, documenting a telephone call to employer's counsel regarding an extension of time to file a response brief and leaving a message; 0.25 hour on March 28, 2011, to review the file for deadlines and to calendar the date for filing a response brief; 0.25 hour on April 21, 2011, to review the file for deadlines and noting the need to file for an extension of time to file a response brief; 0.25 hour on April 21, 2011, documenting a telephone call to employer's counsel regarding an extension of time to file a response brief and leaving a message; 0.25 hour on April 25, 2011, to review the file for deadlines, review the Board's Order and calendar the due date of the brief; 0.25 hour on May 3, 2011, to review the file regarding the due date of the response brief and advise counsel; and 0.25 hour on May 5, 2011, to review the file to determine the status of the brief and note that it was written and submitted. Employer also alleges that the .25 hour spent on April 21, 2011 by Attorney Gilligan, sending a letter and motion to the Board requesting an extension of time to file a brief, was both unnecessary and clerical.

Employer argues that these entries represent clerical services that are not compensable and, further, that the tasks may be duplicative or unnecessary. Employer's contentions have merit, in part. Traditional clerical duties, whether performed by clerical employees or counsel, are not properly compensable services for which separate billing is permissible, but rather must be included as part of overhead in setting the hourly rate. *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986); *McKee v. Director, OWCP*, 6 BLR 1-

233 (1983); *Childers v. Director, OWCP*, 2 BLR 1-1198 (1980); *Marcum*, 2 BLR at 1-896. Consequently, we disallow the 0.5 hour spent by the legal assistants on February 7, 2011 and April 21, 2011, for answering the telephone, recording a message, placing a telephone call and leaving a message. We also agree with employer that the 0.25 hour of work by Attorney Gilligan on April 21, 2011, mailing a letter and motion to the Board by certified mail, with copies to the parties, is purely clerical in nature and is disallowed.

However, we will allow the remaining six one-quarter hour entries for March 23, 2011, March 28, 2011, April 21, 2011, April 25, 2011, May 3, 2011 and May 5, 2011, for work performed by a legal assistant analyzing the file and placing relevant dates on the calendar. These services are not purely clerical and billing the time expended in performing the compensable services in quarter-hour increments is permissible. *Whitaker*, 9 BLR at 1-127-128; *Bentley*, 522 F.3d at 663, 24 BLR at 2-121. In addition, we reject employer's argument that the four quarter-hour entries on November 20, 2010, December 30, 2010, February 13, 2011 and March, 28, 2011, totaling 1.0 hour for work performed by Attorney Gilligan reviewing the file, reviewing employer's motions, noting the briefing schedule, reviewing the Board's Order addressing the motion, as well as filing a motion, duplicates the services rendered by Attorney Wolfe on November 20, 2010, December 20, 2010, January 29, 2011, February 14, 2011 and March 23, 2011. Employer has not established that these actions were performed in the same manner and for the same reason.

Employer next challenges the necessity of the 0.50 hour entries on March 20, 2011 and March 23, 2011 for time spent by claimant's counsel reviewing correspondence and preparing a motion for an extension of time to file a response brief. Employer also challenges the reasonableness of the following eight itemized entries performed by claimant's counsel, which involved the review of letters and orders: 0.25 hour on October 28, 2010, analyzing employer's letter to the Board and its notice of appeal; 0.25 hour on November 17, 2010, analyzing the Board's acknowledgement letter to employer regarding this appeal; 0.25 hour on November 29, 2010, regarding submission of a letter to the Board; 0.25 hour on December 20, 2010, to analyze a letter to the Board and employer's motion for an extension of time to file a brief; 0.25 hour on December 27, 2010, to analyze Solicitor's letter to the Board; 0.25 hour on January 29, 2011, to analyze an Order from the Board regarding the filing deadline for employer's brief; 0.25 hour of time on April 23, 2011, to analyze the Board's Order setting filing deadlines; and 0.25 hour on June 16, 2011, to analyze the Board's Order acknowledging the receipt of briefs. Employer finally argues that the 0.25 hour entry of December 5, 2010, to analyze and review the file to check the status of the appeal, duplicates the time entry of November 29, 2010, indicating claimant's counsel filed a letter with the Board.

Upon review of claimant's counsel's descriptions of the services rendered in the itemized entries to which employer objects, we conclude that the foregoing itemized

entries comprise necessary and appropriate legal services and are not excessive. *See Bentley*, 522 F.3d at 663, 24 BLR at 2-121. Moreover, periodic review of the file for deadlines and briefing schedules is a legitimate recurring activity in prolonged cases and is, therefore, compensable. *McNulty v. Director, OWCP*, 4 BLR 1-128 (1981). Consequently, the Board rejects employer's objections with respect to the services rendered in these itemized time entries. We, therefore, award the requested fee for these services.

We find the remaining hours of legal services to be reasonably commensurate with the necessary work performed in the appeal before the Board, and we award a fee for these services. 20 C.F.R. §802.203(e). In summary, we award claimant's counsel a fee of \$4,087.50 for 17.25 hours of legal services performed before the Board, representing 5.25 hours rendered at an hourly rate of \$300.00 by Joseph E. Wolfe, 10.5 hours rendered at an hourly rate of \$225.00 by Ryan C. Gilligan, and 1.5 hours rendered at an hourly rate of \$100.00 by legal assistants.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorneys' Fees and the Order Denying Request for Reconsideration are affirmed. We also award claimant's counsel an attorney's fee of \$4,087.50 for 17.25 hours of work performed before the Board in *Justus*, BRB No. 11-0160 BLA, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge