

BRB No. 13-0383 BLA

DEBRA L. YATES )  
(Widow of BOBBY YATES) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CALICO COAL COMPANY ) DATE ISSUED: 04/22/2014  
 )  
 and )  
 )  
 OLD REPUBLIC GENERAL INSURANCE )  
 CORPORATION )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of Decision and Order Awarding Attorney Fees of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Attorney Fees (2011-BLA-05229) of Administrative Law Judge Christine L. Kirby, relating to an award of benefits on a survivor's claim, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012)(the Act).<sup>1</sup> Claimant's counsel submitted a fee petition to the administrative law judge requesting \$11,781.25 for 57 hours of legal services performed between November 21, 2006 and January 26, 2012, representing 28.25 hours by Joseph E. Wolfe , Esq., at an hourly rate of \$300.00, 3.25 hours by Ryan C. Gilligan, Esq., at an hourly rate of \$225.00, 0.25 hour by W. Andrew Delph, Jr., Esq., at an hourly rate of \$200.00, and 25.25 hours by legal assistants, at an hourly rate of \$100.00, as well as expenses in the amount of \$3,095.00. In support of the fee petition, claimant's counsel referenced his qualifications and those of his associates, their years of experience, their commitment to assisting coal miners, and the rates approved in prior fee awards. Claimant's counsel also submitted a copy of a page from the 2006 Survey of Law Firm Economics published by Altman & Weil and an affidavit from another attorney to support his assertion that the hourly rates requested were reasonable.

After considering claimant's counsel's fee petition and employer's objections thereto, the administrative law judge denied employer's request for discovery as unnecessary and approved the requested hourly rates of \$300.00 for Mr. Wolfe, \$225.00

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<sup>1</sup> Claimant is the widow of the miner, who died on December 11, 2005. Director's Exhibit 15. The miner was awarded benefits pursuant to a Decision and Order on Remand Awarding Benefits, issued by Administrative Law Judge Alice M. Craft on April 27, 2007, which was affirmed by the Board on July 30, 2008. *See* Miner's Claim Director's Exhibits 115, 126; *B.Y. [Yates] v. Calico Coal Co.*, BRB No. 07-0726 BLA (July 30, 2008) (unpub.), *recon. denied* (Sept. 30, 2009) (unpub. Order). On July 12, 2010, however, employer filed a Motion for Reconsideration and Petition for Modification of Miner's Award, alleging that the Board's decision was based on a mistake in a determination of fact. Miner's Claim Director's Exhibit 131. The claim was referred to the Office of Administrative Law Judges, but on October 18, 2011, employer filed a Withdrawal of Petition for Modification and Motion to Remand, which Administrative Law Judge Christine L. Kirby granted. The miner's claim was then remanded to the district director for the payment of benefits.

Claimant filed her survivor's claim on January 17, 2006, which was denied by Administrative Law Judge Edward Terhune Miller on December 31, 2009. Survivor's Claim Director's Exhibits 2, 106. On April 14, 2010, claimant filed a request for modification of the denial of her survivor's claim. Survivor's Claim Director's Exhibit 108. In a Proposed Decision and Order dated June 9, 2010, the district director determined that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death, and therefore, is entitled to an automatic award of benefits under amended 30 U.S.C. §932(l). Survivor's Claim Director's Exhibit 109. In her January 25, 2012 Decision and Order, the administrative law judge awarded survivor's benefits commencing December 2005, the month in which the miner died.

for Mr. Gilligan, \$200.00 for Mr. Delph and \$100.00 for the legal assistants upon finding that they were “representative of the prevailing market rates” in black lung claims. Decision and Order at 3. The administrative law judge next rejected employer’s contention that the services rendered prior to, and after, claimant’s modification were unnecessary. *Id.* at 4. Furthermore, after addressing employer’s objections to several itemized time entries, the administrative law judge disallowed a total of 5 hours of work performed by Mr. Wolfe between December 7, 2006 and November 29, 2010, as duplicative or relating to clerical tasks. *Id.* at 5-7. The administrative law judge also determined that only 6.25 hours of the 25.25 hours requested for work performed by the legal assistants was compensable, noting that the remainder, totaling 19 hours, represented services that were clerical in nature. *Id.* at 5. The administrative law judge approved all \$3,095.00 of itemized expenses requested, noting that claimant’s counsel provided documentation to support all of the expenses claimed. *Id.* at 7. Accordingly, the administrative law judge awarded claimant’s counsel a total fee of \$11,476.25 for legal services performed and expenses incurred while the case was before the Office of Administrative Law Judges from November 21, 2006 to January 26, 2012.

On appeal, employer contends that the administrative law judge’s attorney fee award is excessive. Neither claimant’s counsel, nor the Director, Office of Workers’ Compensation Programs, has filed a response.

The Act provides that when a claimant wins a contested case, the employer, its 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), incorporating 33 U.S.C. §928(a). Claimant’s counsel is entitled to attorney fees, payable by employer, for the successful prosecution of a claim. *See* 33 U.S.C. §928; 20 C.F.R. §725.367; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991). “Successful prosecution” of a claim requires success in establishing, or preserving, claimant’s entitlement to benefits. *See Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248, 38 BRBS 37, 39 (CRT) (4th Cir. 2004); *Bethenergy Mines Inc. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), *aff’g Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987). The amount of an attorney’s fee awarded by an administrative law judge 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.<sup>2</sup> *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc). In determining the amount of an attorney’s fee to award under a fee-shifting statute, the United States

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<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner’s coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner’s Claim Director’s Exhibit 37; Survivor’s Claim Director’s Exhibits 5, 10.

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 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 contends that the administrative law judge’s fee award should be vacated, arguing that the administrative law judge improperly relied on prior fee awards to determine the market rate. Employer also challenges the administrative law judge’s award of attorney’s fees for work performed by claimant’s counsel in connection with the widow’s denied claim and her subsequent request for modification. Finally, employer contends that the denial of its request for discovery was improper.

Initially, we reject employer’s contention that the administrative law judge erred in denying its discovery request. While the case was before the administrative law judge, employer filed a motion to compel discovery, seeking information from claimant’s counsel regarding his market rates. In her Decision and Order, the administrative law judge found that, “beyond the Altman & Weil survey, [claimant’s counsel] has provided ample evidence that the requested hourly rates have been awarded in prior cases.” Decision and Order at 3. The administrative law judge then denied employer’s discovery request, finding that “discovery to provide further evidence of hourly rates is unnecessary.” *Id.* An administrative law judge has broad discretion in procedural matters, *see* 20 C.F.R. §725.455, and employer has identified no compelling authority in support of its argument that the administrative law judge should have allowed discovery. *See* Employer’s Brief at 9-10. Discerning no abuse of discretion by the administrative law judge, we affirm her decision to deny employer’s motion to compel discovery. *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).

The administrative law judge found that claimant’s counsel’s fee petition includes citations to numerous cases in which Attorney Wolfe was awarded fees with hourly rates

of at least \$300.00. *See* Claimant’s Counsel’s Fee Petition. In many of these cases, Messrs. Gilligan and Delph were awarded their requested hourly rates of \$225.00 and \$200.00. These cases also include awards of an hourly rate of \$100.00 for work performed by claimant’s counsel’s legal assistants. In awarding the respective hourly rates of \$300.00, \$225.00, and \$200.00 to Attorneys Wolfe, Gilligan and Delph, the administrative law judge also relied upon the attorneys’ knowledge and experience,<sup>3</sup> Decision and Order at 2-3, 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. 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. Moreover, the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 25 BLR 2- (4th Cir. 2013), upheld reliance on prior awards for guidance in determining a prevailing market rate. For the reasons set forth in *Gosnell*, we reject employer’s arguments to the contrary in this case.

Based on the administrative law judge’s proper analysis of the regulatory criteria and case law, we hold that the administrative law judge did not abuse her discretion in determining that claimant’s counsel’s requested hourly rates for Attorneys Wolfe, Gilligan and Delph, and claimant’s counsel’s legal assistants, were reasonable and reflected the applicable market rates. *Gosnell*, 724 F.3d at 572-74, 25 BLR at 2- ; *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);<sup>4</sup> *see also Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Maggard v. Int’l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge’s approval of these requested hourly rates.

Employer also maintains that claimant’s counsel should not have been awarded fees for services performed before the administrative law judge in connection with the

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<sup>3</sup> In his fee petition, claimant’s counsel noted that attorneys in his law firm “are very experienced” in the area of black lung law. Claimant’s counsel further noted 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.

<sup>4</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, 25 BLR 2- (4th Cir. 2013); *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013).

survivor's claim prior to modification, from November 21, 2006 to January 14, 2010, because benefits were denied, and after January 14, 2010, in connection with claimant's request for modification. Employer's Brief at 8. Employer contends that the legal services provided by claimant's counsel were not reasonable and necessary because the ultimate award in this case was not due to claimant's counsel's efforts, but was due to the enactment of amendments to the Act contained in Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010). *Id.* Employer argues that the services were unnecessary in light of claimant's automatic entitlement to benefits pursuant to amended Section 932(l). *Id.* at 9. We reject employer's argument.

The Board has held that the "standard test for the administrative law judge to consider in determining whether the services performed by [an] attorney were necessary is whether the attorney, *at the time the work was performed*, could reasonably regard the work as necessary to the establishment of entitlement." *Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999) (emphasis added). In this case, the administrative law judge specifically found that the work performed, both prior to and after the request for modification, was "necessary and relevant" to an award of benefits. Decision and Order at 4. Contrary to employer's contention, the fact that a change in the law subsequently changed claimant's burden of proof in the survivor's claim has no bearing on whether the services were necessary at the time they were rendered. *See Duke v. Cowin & Co.*, 25 BLR 1-55 (2012). We, therefore, affirm the administrative law judge's finding that the legal services provided by claimant's counsel were relevant and necessary, and thus, reasonable.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney Fees, requiring employer to pay claimant's counsel \$11,476.25, representing \$8381.25 for 33 hours of legal services rendered to claimant while the case was before the Office of Administrative Law Judges, and \$3,095.00 for costs incurred by claimant in this case, is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge