

DANNY BENTLEY) BRB No. 06-0304 BLA
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Claimant-Petitioner)
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v.)
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B & G MINING, INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 12/22/2006
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)

DANNY BENTLEY) BRB No. 06-0281 BLA
)
Claimant-Respondent)
)
v.)
)
B & G MINING, INCORPORATED)
)
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

Appeals of the Proposed Order - Supplemental Award - Fee for Legal Services of Mary B. Tackett, District Director, United States Department of Labor, and the Decision and Order Granting Attorney Fees of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant's counsel (counsel) appeals the Proposed Order - Supplemental Award - Fee for Legal Services of District Director Mary B. Tackett (the district director) on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act), assigned Case Number BRB No. 06-0304 BLA. On appeal, counsel challenges the district director's reduction in counsel's hourly rate and the number of hours awarded, and employer responds, urging affirmance. Employer appeals the Decision and Order Granting Attorney Fees (2003-BLA-6478) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), assigned Case Number BRB No. 06-0281 BLA. On appeal, employer contends that the hourly rate and number of hours awarded were excessive, to which counsel responds, urging affirmance. By Order issued on February 15, 2006, the Board consolidated both appeals for decision. In addition, the record before the Board contains a fee petition from counsel seeking compensation for services performed during employer's appeal on the merits of the claim in Case Number BRB No. 05-0676 BLA, which employer opposes.¹

¹ Counsel has also filed a "Motion for Attorney's Fee for Time Spent Litigating Attorney Fee Order," urging the Board to issue an order allowing counsel to file attorney fee petitions before the district director, the administrative law judge and the Board for time spent litigating his fees for representation of claimant. Employer has filed an objection to counsel's motion, correctly maintaining that such an order is unnecessary. Counsel may seek additional fees by filing attorney fee petitions with the appropriate tribunal before which work was performed, in response to which employer may file an objection, and the appropriate adjudicator(s) will rule on counsel's fee request. 20 C.F.R. §§725.366, 802.203.

The award 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Appeal of the District Director's Attorney Fee Award, BRB No. 06-0304 BLA:

Counsel submitted two fee petitions to the district director, requesting a total fee of \$5,812.50 for 23.25 hours of services at \$250.00 per hour, after adjustments were made for errors in arithmetic.² The district director found that the hourly rate requested was excessive, and reduced the rate to \$200.00 per hour. The district director also disallowed 4.25 hours of services rendered before the administrative law judge from September 22, 2003 through June 18, 2005, as well as 1.75 hours of services rendered before the Board from June 20, 2005 through August 15, 2005, and 7.5 hours for services rendered between August 8, 2000 and November 14, 2000 in connection with an earlier claim which had been withdrawn pursuant to 20 C.F.R. §725.306. Accordingly, the district director awarded counsel a fee of \$1950.00 for 9.75 hours of services at the rate of \$200.00 per hour.

On appeal, counsel does not challenge the disallowance of time spent for services in the withdrawn claim, but generally asserts that he "feels he should be granted an attorney fee from August 2001 through April 25, 2004," based on the administrative law judge's award of benefits payable to claimant from August 2001, the month in which this claim was filed. Claimant's Brief at 3. The district director, however, allowed all of the itemized entries requested by counsel in connection with this claim except the entries for services provided while the case was not under her jurisdiction. Proposed Order at 2. As fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed, the district director properly disallowed the hours requested for services rendered during periods when this claim was not pending before the district director. 33 U.S.C. §928(c); 20 C.F.R. §725.366; *see generally Matthews v. Director, OWCP*, 9 BLR 1-184 (1986).

Counsel also maintains that he is entitled to his customary hourly rate of \$250.00 in view of his expertise in representing federal black lung claimants for approximately

² Counsel's original attorney fee petition, filed on May 27, 2005, requested \$5,562.50 for 22.25 hours of services performed between August 8, 2000 and April 25, 2004 at \$250.00 per hour; however, the itemized services listed by counsel totaled only 20 hours. Counsel's supplemental fee petition, filed on August 29, 2005, requested \$813.00 for 3.25 hours of services performed between March 16, 2004 and August 15, 2005 at \$250.00 per hour.

twenty-five years, and counsel has submitted copies of multiple attorney fee awards wherein counsel was granted fees at rates between \$225.00 and \$250.00 per hour for his representation of other claimants at various levels of the proceedings. Counsel thus argues that the attorney fee awarded at an hourly rate of \$200.00 was unreasonable and should be increased. We disagree.

The regulations provide for the payment of attorney fees which are reasonably commensurate with the necessary work done, taking 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 relevant information. 20 C.F.R. §725.366(b). The district director properly evaluated counsel's fee application in light of these factors, and concluded that the work "was performed in a routine case which did not call for special ability and effort" and that "the approved rate is comparable to that being charged by other highly qualified attorneys within the same geographical location who also have considerable expertise in the handling of Federal Black Lung claims." Proposed Order at 1. Because the award of a particular hourly rate in one case is based on the unique facts and circumstances of that case, the hourly rate previously awarded is not binding in subsequent unrelated cases. *See generally Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). As we can discern no abuse of discretion in the district director's determination that an hourly rate of \$200.00 was reasonable in terms of the criteria contained in 20 C.F.R. §725.366(b), we affirm the award of attorney fees in the amount of \$1950.00 for 9.75 hours of services rendered. *Abbott*, 13 BLR 1-15; *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986).

Appeal of the Administrative Law Judge's Award of Attorney Fees, BRB No. 06-0281 BLA:

Counsel submitted two fee petitions to the administrative law judge, requesting a total fee of \$14,562.50 for 58.25 hours of services performed between February 15, 2001 and July 7, 2005, at the rate of \$250.00 per hour. After considering employer's objections and counsel's response thereto, the administrative law judge disallowed 3.5 hours of services performed on August 13, 2002, and for the period of August 20, 2001 through January 16, 2002, while the case was not under his jurisdiction. The administrative law judge also disallowed 3.5 hours as excessive, but approved the hourly rate requested, and awarded counsel a fee of \$12,812.50, representing 51.25 hours of services at \$250.00 per hour.

On appeal, employer initially contends that the administrative law judge's award of an hourly rate of \$250.00 is excessive, unsupported and inconsistent with law. Employer maintains that the administrative law judge incorrectly based his hourly rate determination on the basis that the rate sought by counsel was consistent with the hourly

rates commonly awarded for such services performed by experienced counsel before the Office of Administrative Law Judges and other tribunals, and did not take into consideration employer's uncontradicted evidence that the market rate charged by other experienced attorneys in the same geographic location was \$125.00 per hour. Employer's Brief at 2-5. Contrary to employer's arguments, however, the administrative law judge addressed employer's objections to the fee petition, and permissibly awarded counsel his customary hourly rate of \$250.00 for black lung cases based on counsel's expertise developed in twenty-five years of specialized practice in that field. Employer's assertion that an hourly rate of \$125.00 would be appropriate and more consistent with the rate obtained by experienced attorneys in Eastern Kentucky in this area of law is insufficient to meet employer's burden of proving that the rate awarded was excessive or that the administrative law judge abused his discretion in this regard. *See generally Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); *Pritt*, 9 BLR 1-159; *Gillman*, 9 BLR 1-7. Consequently, we affirm the award of \$200.00 per hour as a reasonable hourly rate.

Employer further challenges the administrative law judge's approval of 51.25 hours of services, arguing that while counsel justified spending 10.75 hours for developing and reviewing the evidence, attending depositions and the hearing, and drafting briefs, the remaining time spent by counsel was either unnecessary, excessive, or clerical in nature. Employer's Brief at 6-7. In considering counsel's fee petition, the administrative law judge specifically considered employer's objections to itemized entries, and employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in finding that the hours he approved were reasonable and necessary. *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Consequently, we affirm the administrative law judge's award of \$12,812.50 in attorney fees as supported by substantial evidence. *Abbott*, 13 BLR 1-15.

Counsel's Attorney Fee Petition to the Board, BRB No. 05-0676 BLA:

Lastly, counsel has filed an attorney fee petition for compensation in the amount of \$3,565.00, representing 14.25 hours of services for work performed before the Board between May 13, 2005 and September 9, 2005 at the rate of \$250.00 per hour. Employer opposes the petition, arguing that the requested hourly rate is excessive since the market rate for counsel's services is \$125.00 per hour. Employer also maintains that the number of hours requested is excessive for the performance of routine tasks and essentially secretarial work, some of which involved duplication of services, and urges the Board to reduce the inflated number of hours requested to one hour. Employer's Brief at 2-5.

After review of the fee petition, the Board considers the requested hourly rate of \$250.00 to be excessive in view of the nature and complexity of the case, and therefore reduces the hourly rate to \$225.00. Further review of counsel's fee petition reveals

several requests for the performance of the same services on either the same or different dates, as follows: .25 hour on both May 24, 2005 and June 8, 2005 for a letter to client enclosing the Board's briefing time set for May 19, 2005; .25 hour on both June 24, 2005 and June 27, 2005 for receipt, review and filing of a motion for extension of time; and .25 hour on August 1, 2005 as well as two entries of .25 hour on August 2, 2005, for receipt, review and filing of employer's motion to dismiss and remand to the district director for modification. Consequently, we disallow one hour of the duplicated services claimed. Counsel has additionally included in his fee petition services that are unrelated to the appeal before the Board. Therefore, we disallow five hours of the itemized time claimed as follows: .25 hour on May 13, 2005; .25 hour on May 14, 2005; .25 hour on May 27, 2005; .25 hour on June 5, 2005; .25 hour on June 9, 2005; .25 hour on June 13, 2005; .25 hour on June 14, 2005; .25 hour on June 18, 2005; two entries of .25 hour on June 20, 2005; .25 hour on June 23, 2005; .25 hour on June 24, 2005; two .25 entries on June 29, 2005; .25 hour on August 5, 2005; .25 hour on August 15, 2005;.25 hour on August 29, 2005; .25 hour on September 1, 2005; .25 hour on September 2, 2005; and .25 hour on September 7, 2005.

In all other aspects, we find the remaining fee to be reasonable in light of the necessary services performed. Accordingly, the Board awards a total fee of \$1856.25, representing 8.25 hours of services at \$225.00 per hour, 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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge