

U.S. Department of Labor

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



BRB Nos. 19-0257 BLA
and 19-0258 BLA

SHIRLEY C. LAWSON)
(o/b/o and Widow of RALPH E. LAWSON)
)
Claimant-Respondent)
)
v.)
)
TRIPLE R COAL COMPANY,)
INCORPORATED)
)
and) DATE ISSUED: 03/23/2020
)
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 Award of Attorney's Fees
of Carrie Bland, Administrative Law Judge, United States Department of
Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds),
Norton, Virginia, for claimant.

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

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order Awarding Attorney's Fees (2015-BLA-05140, 2018-BLA-05311) of Administrative Law Judge Carrie Bland issued in connection with the successful prosecution by claimant's counsel (counsel) of a miner's claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).

For work performed before the administrative law judge in both claims, counsel requested \$17,268.75 for 93.25 hours of legal services and \$6,427.80 in expenses, for a total of \$23,696.55. Counsel requested \$300.00 per hour for services Joseph E. Wolfe provided, \$225.00 per hour for Ryan Gilligan, \$200.00 per hour for Andrew Delph, Jr., \$150.00 per hour for Brad A. Austin, \$150.00 per hour for Rachel Wolfe, and \$100.00 per hour for legal assistants. The administrative law judge rejected employer's objections and awarded the requested attorney's fee and costs in full.

Employer appeals the fee award.¹ Counsel responds, urging affirmance of the fee award. The Director, Office of Worker's Compensation Programs, has not filed a response.

When an attorney prevails on behalf of a client, the Act provides that the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to the claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The amount of an attorney fee award 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.² *See Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (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).

¹ We affirm, as unchallenged on appeal, the administrative law judge's allowance of \$6,427.80 for costs incurred. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Supplemental Decision and Order at 6.

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 59.

Hourly Rate

Employer first challenges the amount of the fee award, asserting the administrative law judge did not apply the correct standard in considering the hourly rates requested. We disagree.

In determining the amount of an attorney's fee 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 the appropriate starting point for calculating fee awards under the Act. *See E. Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010). 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). In order to identify the prevailing market rate, the fee applicant must 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; *see Gosnell*, 724 F.3d at 571. Further, the regulation states: "[a]ny fee approved under . . . this section shall be reasonably commensurate with the necessary work done and shall 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).

Employer contends counsel failed to support the hourly rates requested with market evidence, i.e., what fee-paying clients pay counsel or similarly-qualified attorneys charge by the hour in comparable cases, and that a "description of past fee awards does not satisfy a claimant's [counsel's] burden." Employer's Brief at 3-5. Employer asserts that, because counsel did not establish the prevailing market rate, the administrative law judge abused her discretion in not denying the application. *Id.* at 3. Employer also contends the administrative law judge erred in relying on prior fee awards and fee awards to other attorneys in the geographic area in which counsel practices, without explaining why she did not credit employer's contrary evidence of hourly rates. *Id.* at 3. We reject employer's arguments.

The administrative law judge appropriately recognized that counsel bears the burden of producing sufficient evidence to show his requested fee is reasonable and market-based.

Supplemental Decision and Order at 2. Moreover, evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See Gosnell*, 724 F.3d at 572; *Cox*, 602 F.3d at 290. After discussing counsel's supporting documentation and acknowledging employer's objections, the administrative law judge found counsel established that the requested rates "are in line with prevailing rates charged for similar services by similarly experienced attorneys in the southwestern Virginia community." Supplemental Decision and Order at 4. She found counsel's prior fee awards "extremely valuable in determining the reasonableness of the requested rates" based upon the significant number of Black Lung cases that counsel handles and the numerous fee awards awarded counsel by the Office of Administrative Law Judges (OALJ), the Benefits Review Board, and the courts. *Id.* She determined counsel demonstrated that each of the requested rates was reasonable. *Id.*

The administrative law judge granted an hourly fee of \$300.00 for Mr. Wolfe's work based upon his numerous fee awards and considerable expertise. Supplemental Decision and Order at 4. She granted a \$225.00 fee for Mr. Gilligan and a \$200.00 fee for Mr. Delph based upon several fee awards approving the same rates for them. *Id.* She also granted a fee of \$150.00 for Mr. Austen and Ms. Wolfe based upon numerous fee awards for them, noting that the requested rate is lower than the average hourly rate listed in the 2014 Survey for attorneys in the South Atlantic region with similar experience. *Id.* at 5. Finally, the administrative law judge granted counsel a \$100.00 rate for work performed by legal assistants based upon the "vast majority" of prior fee awards for them and each assistant's level of knowledge and expertise. *Id.* at 5. She noted that, while some of the fee awards approved a lower hourly rate, many of them were awarded at the district director level and "therefore do not reflect the rates appropriate for work before the OALJ." *Id.* Because the administrative law judge acted within her discretion in analyzing the relevant criteria and explaining the factors she considered, we affirm her approval of the requested hourly rates.³ 20 C.F.R. §725.366(b); *see Gosnell*, 724 F.3d at 572; *Abbott*, 13 BLR at 1-16.

³ Employer argues that because the district director awarded a lower hourly rate for the work Mr. Wolfe and the legal assistants performed in this case and counsel did not appeal that decision, counsel is barred from asking for a higher fee for the work performed before the administrative law judge. Employer's Brief at 5-6 n. 5. Employer's argument is without merit. Each fee petition must be filed at the level at which the services were provided and, in considering these petitions, the adjudicator must take into consideration various factors such as the complexity of the issues and "the level of proceedings to which the claim was raised." 20 C.F.R. §725.366(a), (b); *see also* 20 C.F.R. §725.455(a) ("any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge."). Consequently, a fee award for work done

Allowable Hours

Employer next contends the administrative law judge did not adequately address its objections to counsel's fee petition related to the number of hours charged. We agree.

Employer first challenged counsel's use of the quarter-hour billing system, identifying 11.75 hours Mr. Wolfe billed for reviewing letters, orders and correspondence as excessive and 9.50 hours he billed for forwarding documents as clerical. Employer's Opposition to Fee Petition at 9. Employer objected to .25 hours Mr. Wolfe charged on June 26, 2013, as duplicative of work he performed on June 11, 2013. *Id.* at 9-10. Employer also asserted that .50 hours Mr. Wolfe charged for conducting a phone conference with claimant on August 13, 2014, was duplicative of Mr. Austin's phone conference with claimant on August 12, 2014. *Id.* at 10. Employer objected to four entries on March 31, 2016, related to the preparation of a closing argument brief as duplicative and excessive: a legal assistant charged 7.50 hours for reviewing and analyzing the evidence in the file and preparing the brief; Ms. Wolfe charged .50 hours to review and edit the brief; Mr. Austin charged 1.50 hours to review and edit the brief; Mr. Wolfe charged .50 hours to review and submit the brief for filing. *Id.* at 10. Finally, employer asserted .25 hours Mr. Wolfe charged on August 4, 2016, and .25 hours Mr. Austin charged on the same day for reviewing an Order was duplicative and unnecessary. *Id.*

While the administrative law judge generally stated that employer objected to several billing entries as excessive, she summarily determined the services rendered were reasonable in relation to the work performed and were necessary to establish entitlement. Supplemental Decision and Order at 5. Absent any analysis, we cannot discern the basis for her determination that the billing was reasonable and necessary, and thus we cannot determine if she abused her discretion in awarding the fees requested. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016) (the court could not "guess at what the [administrative law judge] meant to say, but didn't"). Because the administrative law judge's findings do not satisfy the Administrative Procedure Act (APA),⁴ we vacate her attorney's fee award as it relates to the number of hours of legal services Mr. Wolfe, Mr.

before the district director does not preclude counsel from asking for a higher fee for work done before the OALJ. *Id.*

⁴ The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Austin, Ms. Wolfe, and the legal assistants performed.⁵ On remand, the administrative law judge must address employer's specific objections to the hours counsel billed and set forth the reasoning underlying her findings in compliance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the administrative law judge's Supplemental Decision and Order Award of Attorney's Fees is affirmed in part and vacated in part, and the cases are remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

⁵ We affirm, as unchallenged on appeal, the administrative law judge's approval of .25 hours of work Mr. Gilligan performed and 2.0 hours of work Mr. Delph performed. *Skrack*, 6 BLR at 1-711.