

BRB No. 07-0320 BLA  
Case No. 05-BLA-5070

CASBY G. BOWMAN )  
)  
Claimant-Respondent )  
)  
v. )  
)  
BOWMAN COAL COMPANY, )  
INCORPORATED )  
)  
and )  
) DATE ISSUED: 04/15/2010  
)  
AMERICAN BUSINESS & MERCANTILE )  
REASSURANCE COMPANY )  
)  
Employer/Carrier- )  
Petitioners )  
)  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
)  
Party-in-Interest ) ORDER

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in this appeal pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a total fee of \$4,457.50 for 6.40 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 8.50 hours of legal services at an hourly rate of \$250.00 (Bobby B. Belcher, Jr.), 0.50 hour of legal services at an hourly rate of \$175.00 (Ryan C. Gilligan), and 3.25 hours of legal services at an hourly rate of \$100.00 (legal assistant). Employer has submitted an "Opposition to Fee Petition," contending that claimant's counsel's fee petition should be denied because he has failed to support his request with "market evidence." Employer's Opposition to Fee Petition at 2. In the alternative, employer objects to the requested hourly rates, arguing that the hourly rates of Mr. Wolfe and Mr. Belcher should each be reduced to \$125.00, and the hourly rate of the legal assistant should be

reduced to \$55.00. *Id.* at 5. Employer further contends that some of the time spent by claimant’s counsel on legal services was “duplicative, excessive and unnecessary.”<sup>1</sup> *Id.* at 6.

When a claimant wins a contested case, the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act), provides that 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), incorporating 33 U.S.C. §928(a). The regulations governing the operation of the Board provide that a fee application “shall be complete in all respects” and must contain, *inter alia*, the following information:

The normal billing rate for each person who performed services on behalf of the claimant. The rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status.

20 C.F.R. §802.203(d)(4). The regulations further provide that:

Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded, and, when the fee is to be assessed against the claimant, shall take into account the financial circumstances of the claimant. A fee shall not necessarily be computed by multiplying time devoted to work by an hourly rate.

20 C.F.R. §802.203(e).

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. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Supreme Court has held that 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 burden falls on the fee applicant to produce satisfactory

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<sup>1</sup> Employer requests that the Board deny claimant’s fee petition based upon claimant’s counsel’s refusal to respond to employer’s discovery request. Employer did not file a motion with the Board to compel claimant’s counsel to comply with its discovery request, nor did the Board, on its own motion, compel discovery. Consequently, we deny employer’s request.

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.”<sup>2</sup> *Blum*, 465 U.S. at 896 n.11.

In a recent case arising under the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, the United States Court of Appeals for the Fourth Circuit<sup>3</sup> vacated the hourly rate awarded by the Board for work performed before it. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009). In that case, claimant’s counsel had requested an hourly rate of \$420.00. The Board held that the requested hourly rate was excessive, and reduced the hourly rate to \$250.00, noting that this was the prevailing hourly rate for claimants’ attorneys in the geographic area where the case arose. The Fourth Circuit held that the Board abused its discretion, noting that the Board relied upon a ten-year old hourly rate of \$200.00, assumed it was reasonable for an hourly rate today, and adjusted it upwards by the arbitrary amount of \$50.00. *Id.* The Fourth Circuit, therefore, remanded the case to the Board for a determination and explanation of the appropriate hourly rate. *Id.*

The Fourth Circuit provided the following guidance for determining a reasonable hourly rate:

In the usual case, we have said that an attorney identifies the appropriate hourly rate by demonstrating what similarly situated lawyers would have been able to charge for the same service. *See Depaoli v. Vacation Sales*

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<sup>2</sup> The United States Supreme Court has recognized the difficulty of determining a reasonable hourly rate, stating that:

[D]etermining an appropriate “market rate” for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively - even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely.

*Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984).

<sup>3</sup> The record reflects that claimant’s coal mine employment was in Virginia. Director’s Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

*Assocs., L.L.C.*, 489 F.3d 615, 622 (4th Cir. 2007). Typically, this means an attorney will demonstrate the market rate for services in the geographic jurisdiction of the litigation. See *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 244 (4th Cir. 2009).

*Holiday*, 591 F.3d at 227. A market rate should be established with evidence of earnings attorneys received from paying clients for similar services in similar circumstances. *Robinson*, 560 F.3d at 244. The fee applicant bears the burden of producing specific evidence of prevailing market rates.<sup>4</sup> *Westmoreland Coal Co. v. Cox*, F.3d , 2010 WL 1409418 (4th Cir. 2010); *Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990).

In this case, employer contends that claimant’s counsel has failed to “support his fee petition with market evidence, which is either what fee-paying clients pay him for similar work or what fee-paying clients pay other similarly-situated lawyers in the same geographic area for similar work.” Employer’s Opposition to Fee Petition at 2. We agree with employer that claimant’s counsel’s fee petition does not provide the Board with the necessary information with which to determine reasonable hourly rates in this case.

We initially note that the fee petition is incomplete on its face, because it does not contain “the normal billing rate for each person who performed services on behalf of the claimant.” 20 C.F.R. §802.203(d)(4). Although claimant’s counsel identifies the hourly rates that he seeks in this case, claimant’s counsel has not identified the normal billing rates of each attorney. Claimant’s counsel has failed to make any declaration regarding the normal hourly rates that its lawyers seek for cases similar to this one. At a minimum, this defect must be cured before the Board addresses counsel’s fee petition.<sup>5</sup>

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<sup>4</sup> “The prevailing market rate may be established through affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel’s actual billing practice or other evidence of the actual rates which counsel can command in the market.” *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987).

<sup>5</sup> In support of the requested hourly rates, claimant’s counsel has stressed the significance of (1) the difficulty of black lung litigation, (2) the skill required to represent miners properly, and (3) the experience, reputation, and ability of its attorneys in providing this representation. These are relevant factors that may be considered by the Board in determining a reasonable hourly rate for each person for whom a fee is claimed. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009).

Moreover, claimant's counsel has not provided sufficient information relevant to the market rate for services in the geographic jurisdiction of the litigation. Claimant's counsel relies exclusively upon a 2006 Altman Weil "Survey of Law Firm Economics" to justify his requested hourly rates. Although the Board may consider fee schedules, it is not bound by them. *Holiday*, 591 F.3d at 229 (recognizing that fee schedules are "a useful starting point to determine fees, not a required referent."); In this case, because the survey alone does not provide sufficient information for the Board to determine that the listed rates are for similar services as those provided by claimant's counsel's firm,<sup>6</sup> it is of little assistance in determining the prevailing market rate. See *Ceballos v. Sec'y of Health & Human Servs.*, No. 99-97V, 2004 WL 784910, at \*6 (Fed. Cl. Spec. Mstr. Mar. 25, 2004); *Kennedy v. Sec'y of Health & Human Servs.*, 2009 WL 2750961 (Fed. Cl. July 28, 2009); see also *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009) (Board should give fee applicant chance to cure defect if it could not be anticipated).

In addressing the difficulty of determining a reasonable hourly rate, claimant's counsel states that he knows of "no other firms in Virginia and very few across the nation taking new [federal black lung] cases." Claimant's Counsel's Fee Petition at 1. Hourly rates charged by similarly situated attorneys in Kentucky may assist in establishing a market rate.<sup>7</sup> We are mindful that this is not the only evidence relevant to this issue,<sup>8</sup> as the goal is to establish a market rate paid by paying clients in the requesting attorneys'

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<sup>6</sup> The survey lists rates charged by attorneys in three broad regions (New England, Middle Atlantic, and South Atlantic), based upon their years of experience. The survey does not take into account the size of the firms or the nature of the litigation in its list of hourly billing rates.

<sup>7</sup> We note that attorneys from Whitesburg, Pikeville, Harlan, and Hazard, Kentucky perform appellate work for claimants before the Board. Each of these cities is within an approximate sixty mile radius of Norton, Virginia.

<sup>8</sup> The Fourth Circuit has recognized a range of sources which counsel can draw upon in establishing a reasonable prevailing market rate. For example, claimant's counsel could submit evidence of the fees that he has received in the past, or affidavits of other lawyers who might not practice federal black lung law, but who are familiar both with the skills of the fee applicants and more generally with the type of work in the relevant community. *Westmoreland Coal Co. v. Cox*, F.3d , 2010 WL 1409418 (4th Cir. 2010). Evidence regarding the fees that counsel has received for work involving cases of similar complexity could also be useful in establishing a reasonable prevailing market rate. *Id.*

geographic area.<sup>9</sup> *Depaoli*, 489 F.3d at 622. Thus, in order to be entitled to a rate claimed, it is claimant's counsel's 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.

Because claimant's counsel has not provided a complete fee application, we grant claimant's counsel thirty (30) days in which to submit an amended fee petition. *Christensen*, 557 F.3d at 1055. The amended fee petition must include, *inter alia*, the professional status of each person for whom a fee is claimed,<sup>10</sup> 20 C.F.R. §802.203(d)(2), and the normal billing rate for each person who performed services on behalf of the claimant. 20 C.F.R. §802.203(d)(4). Claimant's counsel also should submit evidence of an applicable market rate. Any party may file a response to claimant's counsel's

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<sup>9</sup> In support of its contention that the hourly rates sought by claimant's counsel are excessive, employer has attached numerous documents to its Opposition to Fee Petition. These documents include: (1) attorney declarations regarding market rates in southwest Virginia; (2) copies of fee petitions submitted by attorneys in other federal black lung cases; (3) a response brief filed by Mr. Wolfe in a different case addressing his requested hourly rate; and (4) a copy of a 2009 administrative law judge decision in which Mr. Wolfe's requested hourly rate was reduced from \$300.00 to \$200.00.

<sup>10</sup> The regulations provide that:

[I]f such professional status is other than attorney, a definition of the professional status of such individual must be included in the fee petition, including a statement of the individual's training, education and experience.

20 C.F.R. §802.203(d)(2). Claimant's counsel has not identified the training, education, and experience of his legal assistant(s).

amended fee petition within ten (10) days from receipt of the petition. 20 C.F.R. §802.203(g).<sup>11</sup>

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>11</sup> In light of our decision to grant claimant's counsel an opportunity to submit an amended fee petition, we decline, at this time, to address employer's contention that the time requested by claimant's counsel for certain legal services is excessive.