

BRB No. 09-0271 BLA  
Case No. 07-BLA-5224

LARRY MAGGARD )  
)  
Claimant-Respondent )  
)  
v. )  
)  
INTERNATIONAL COAL GROUP, )  
KNOTT COUNTY, LLC )  
)  
and )  
) DATE ISSUED: 04/14/2010  
)  
AMERICAN INTERNATIONAL SOUTH )  
INSURANCE GROUP )  
)  
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.<sup>1</sup> Claimant’s counsel requests a total fee of \$1,100.00 for 3.25 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), and 1.25 hours of legal services at an hourly rate of \$100.00 (legal assistant). Employer challenges the requested hourly rates, arguing that they are “excessive.” Employer’s Response to Attorney Fee Petition at 1.

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

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<sup>1</sup> The record reflects that claimant’s last coal mine employment was in Kentucky. Director’s Exhibits 3, 6, 9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

932(l)), 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), 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.<sup>2</sup> *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.”<sup>3</sup> *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The burden falls on the fee applicant to produce satisfactory

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<sup>2</sup> The Sixth Circuit has held that the lodestar method is the appropriate starting point for calculating fee awards under 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). *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008).

<sup>3</sup> The Sixth Circuit has defined the prevailing market rate as “the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.” *See Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004).

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>4</sup> *Blum*, 465 U.S. at 896 n.11; *Westmoreland Coal Co. v. Cox*, F.3d , 2010 WL 1409418 (4th Cir. 2010); *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

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 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 had relied upon a ten-year old hourly rate of \$200.00, had assumed it was reasonable for an hourly rate today, and had 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.<sup>5</sup> *Id.*

In this case, employer contends that claimant’s counsel “offers no evidence that supports a rate of \$300.00 per hour for legal work in federal black lung claims.” Employer’s Response to Attorney Fee Petition at 3. Employer’s contention has merit.

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<sup>4</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>5</sup> Although the Sixth Circuit has held that deference is to be given to a tribunal’s determination of a reasonable attorney’s fee, the court has also emphasized the importance of the tribunal providing a clear and concise explanation of its reasons for the fee award. *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 616 (6th Cir. 2007); *Geier*, 372 F.3d at 791.

Claimant's counsel's fee petition does not provide the Board with the necessary information to determine reasonable hourly rates in this case.

The fee petition submitted by claimant's counsel 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 his normal billing rate or that of his legal assistant. Claimant's counsel has failed to make any declaration regarding the normal hourly rates that he seeks for cases similar to this one. At a minimum, this defect must be cured before the Board addresses counsel's fee petition.<sup>6</sup>

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. *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23 (6th Cir. 2008) (noting that surveys of rates provide evidence of a market rate, but do not set the rate); *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 services similar to those provided by claimant's counsel's firm,<sup>7</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).

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<sup>6</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 the work of each person identified in the fee petition. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124.

<sup>7</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.

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. It appears that claimant's counsel has not considered hourly rates charged by similarly situated attorneys in Kentucky, which may assist him in establishing a market rate.<sup>8</sup> We are mindful that this is not the only evidence relevant to this issue,<sup>9</sup> as the goal is to establish a market rate paid by paying clients in the requesting attorneys' geographic area.<sup>10</sup> See *Depaoli v. Vacation Sales Assocs., L.L.C.*, 489 F.3d 615, 622 (4th Cir. 2007). 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.

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<sup>8</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>9</sup> 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.*

<sup>10</sup> Employer contends that the United States Court of Appeals for the Fourth Circuit "has established the appropriate hourly rate for federal black lung claims falling within their jurisdiction as \$200.00." Employer's Response to Attorney Fee Petition at 2. In support of its contention, employer has attached a copy of a 2006 decision, wherein the Fourth Circuit compensated an attorney at an hourly rate of \$200.00 for his legal services in a federal black lung claim. Employer also cites to a case in which Joseph E. Wolfe was ultimately awarded an hourly rate of \$175.00 for his legal services. However, in that case, Mr. Wolfe was not seeking compensation under the Act. See *Doe v. Chao*, 435 F.3d 492 (4th Cir. 2006).

As a general proposition, rates awarded in other cases do not set the prevailing market rate. See *Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23. However, where there is only a small number of comparable attorneys, a tribunal may look to prior awards for guidance in determining a prevailing market rate. *Id.*

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 whose work a fee is claimed,<sup>11</sup> 20 C.F.R. §802.203(d)(2), and the normal billing rate of 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

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<sup>11</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.

counsel's amended fee petition within ten (10) days from receipt of the petition. 20  
C.F.R. §802.203(g).<sup>12</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>12</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.