

BRB No. 09-0627 BLA

MELISSA PARKS)	
(o/b/o JERRY SCOTT))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	
CORPORATION)	DATE ISSUED: 05/25/2010
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Order Awarding Attorney's Fee of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Order Awarding Attorney's Fee (2007-BLA-5276) of Administrative Law Judge Jeffrey Tureck rendered on a miner's claim filed pursuant to the provisions of 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). Claimant's counsel,¹ Joseph E. Wolfe, submitted a fee petition to the administrative law judge requesting a fee of \$4,975.00, representing 10.5 hours of legal services by Mr. Wolfe at an hourly rate of \$300.00; 3.25 hours of legal services by Andrew Delph at an hourly rate of \$200.00; and 11.75 hours of services by legal assistants at an hourly rate of \$100.00. In support of the requested hourly rates, Mr. Wolfe submitted the 2006 Survey of Law Firm Economics published by Altman & Weil (Altman & Weil survey). Following consideration of employer's objections to the fee petition, the administrative law judge determined that the requested hourly rates of \$300.00 for Mr. Wolfe and \$200.00 for Mr. Delph were appropriate, but reduced the rate for the legal assistants to \$75.00 per hour. The administrative law judge also reduced the number of billable hours for Mr. Wolfe and the legal assistants, for an allowable total of 9.05 hours for Mr. Wolfe, 3.25 hours for Mr. Delph, and 7.4 hours for the legal assistants. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$3,920.00 for legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge erred in awarding hourly rates that are neither supported by the record nor consistent with law. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief in this appeal, but contends that the recent amendments to the Act, which became effective on March 23, 2010, are not implicated in this case. Employer replies, agreeing with the Director's position that, because the appeal in this case addresses only the award of an attorney's fee, the amendments to the Act have no impact on the issues raised on appeal.

The amount of an attorney's 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. *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*).

When a claimant wins a contested case, 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 regulation governing fees provides, in part, that:

¹ Claimant is the deceased miner's daughter, who pursued the miner's claim on his behalf.

Any fee approved . . . 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.

In determining the amount of an attorney's fee to be awarded under a fee-shifting statute, the 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 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." *Id.* at 866 n.11.

On appeal, employer argues that the administrative law judge relied on impermissible subjective factors in his determination of the applicable market rate for claimant's counsel. In this regard, employer argues that the administrative law judge abused his discretion by relying on the Altman & Weil survey of attorney fees, contending that the survey lists average rates; does not identify the type of work performed; and "says nothing about the rates for black lung litigation in Norton, Virginia or anywhere else that counsel practices." Further, employer challenges the administrative law judge's reliance on his "own experience" and his general "unsupported observations." Lastly, employer contends that the administrative law judge erred in discrediting the affidavits proffered by employer of the prevailing market rate.² Employer's Brief at 8-13. Some of employer's arguments have merit.

In reviewing the appropriateness of counsel's requested hourly rate, the administrative law judge noted that "there [was] little evidence in this record to go by in

² We affirm, as unchallenged on appeal, the administrative law judge's finding that Mr. Wolfe is entitled to fees for 9.05 hours of services; Mr. Delph is entitled to fees for 3.25 hours of services; and the legal assistants are entitled to fees for 7.4 hours of services. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

setting claimant's counsel's fee."³ Supplemental Order at 3. The administrative law judge acknowledged that the Altman & Weil survey was of limited value because Mr. Wolfe did not provide any assistance in identifying which states fall within each region of the survey; however, the administrative law judge relied on the survey as evidence of a reasonable hourly rate, "since it covers a broad range of attorneys and is broken down by years of practice." *Id.* Noting that the requested rates were considerably less than the averages for attorneys with similar experience in the Middle Atlantic and South Atlantic regions, the administrative law judge determined, based on his experience hearing black lung cases for many years, that counsel's requested rates were reasonable as lodestar billing rates, whereas the affidavits provided by employer were of no probative value in determining a market rate.⁴ *Id.* The administrative law judge further determined that the billing rate of \$100 per hour for the legal assistants "seemed excessive," and should be reduced to \$75 per hour, while noting that "claimant's counsel ha[d] not made a case for billing his legal assistants' time at \$100 an hour." *Id.* at 2-3.

We agree with employer that, on the facts of this case, the administrative law judge's award of attorney's fees cannot be affirmed. The administrative law judge relied on the Altman & Weil survey, which he initially found to be of "limited value," and later found to be "the most probative evidence" because there "was little evidence in this record to go by." Supplemental Order at 2-3. However, as claimant's counsel failed to provide specific evidence of the prevailing market rates in the relevant community for which he seeks an award, he failed to meet his burden of proof. *See Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990). We note that, subsequent to the issuance of the administrative law judge's award of attorney's fees, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, --- BLR --- (4th Cir. 2010), that an administrative law judge erred by determining a reasonable hourly rate in the absence of satisfactory specific evidence of the prevailing market rates, and the court detailed the fee applicant's burden, and appropriate sources of evidence, in establishing a reasonable hourly rate in the fee-

³ The record also contains claimant's answers to employer's interrogatories concerning attorney's fees, in which Mr. Wolfe stated that 99% of his work was done on a contingent basis. He stated that the firm has no fee paying clients, but "[i]f we ever do, we will charge \$300.00 per hour."

⁴ Employer provided an affidavit of one of its associate attorneys attesting to the hourly rates charged by seven unnamed attorneys he interviewed who primarily litigate federal black lung claims. Employer also provided an affidavit of the Supervisor of Occupational Disease Claims at Old Republic Insurance Company, who attested to the hourly rate that the insurance company pays its attorneys who litigate federal black lung claims.

shifting context. In the present case, remand is appropriate for the administrative law judge to redetermine a reasonable hourly rate in light of *Cox*.

We find no merit, however, in employer's contention that the administrative law judge erred in discrediting the affidavits it proffered regarding the prevailing market rate. The administrative law judge permissibly determined that the affidavits were entitled to no weight, as they either did not provide sufficiently specific underlying information to make them reliable, or they failed to recognize the factors that are necessarily incorporated into a rate charged by a claimant's counsel. Decision and Order at 2-3; see *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Cox*, 602 F.3d at 290, n.12; *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 245 (4th Cir. 2009); *Jones*, 21 BLR at 1-108.

In light of the foregoing, we vacate the administrative law judge's award of attorney's fees, and remand this case for further findings. On remand, the administrative law judge must, as a starting point to his fee analysis, require Mr. Wolfe to provide evidence of an applicable prevailing rate.⁵ See *Cox*, 602 F.3d at 290, n.12. The administrative law judge must also reconsider counsel's fee petition in accordance with the criteria set forth at Section 725.366.

⁵ Counsel may submit evidence of the fees he has received in the past as well as affidavits of other lawyers, who might not practice black lung law, but who are familiar both with the skills of the fee applicant and more generally with the type of work in the relevant community. Further, in determining a reasonable prevailing rate, the administrative law judge is not limited to consideration of fees granted in black lung cases; rather, consideration of the fees granted in other administrative proceedings of similar complexity would also yield instructive information. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, --- BLR --- (4th Cir. 2010); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 245 (4th Cir. 2009); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994); see also *Bowman v. Bowman Coal Co.*, --- BLR ---, BRB No. 07-0320 BLA (Apr. 15, 2010)(Order); *Maggard v. International Coal Group*, --- BLR ---, BRB No. 09-0271 BLA (Apr. 15, 2010)(Order).

Accordingly, we vacate the administrative law judge's Supplemental Order Awarding Attorney's Fee, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge