

BRB No. 05-0706 BLA-A

BILLY D. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 04/17/2006
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and Costs of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

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

PER CURIAM:

Claimant's counsel appeals the Supplemental Decision and Order Awarding Attorney's Fees and Costs<sup>1</sup> of Administrative Law Judge Larry W. Price for legal services performed in securing for claimant an award of benefits 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). Claimant's counsel filed a complete, itemized fee petition with Judge Campbell, requesting a total fee of \$22,576.84 for 93.25

---

<sup>1</sup>Employer filed an appeal to the Board in the decision awarding claimant benefits, BRB No. 05-0706 BLA, but later moved to have its appeal dismissed. By order dated July 29, 2005, the Board granted employer's motion and dismissed its appeal.

hours of legal services at an hourly rate of \$225.00, as well as \$1,595.59 for expenses. Employer filed objections to the fee petition of claimant's counsel, and claimant's counsel filed a reply to employer's objections. Before the schedule for filing was completed, Judge Campbell retired and the case was reassigned to the administrative law judge. Upon consideration of the fee petition, the administrative law judge reduced the requested hourly rate to \$185.00 and reduced the requested amount for expenses to \$1,311.86, based on employer's objections. Supplemental Decision and Order Awarding Attorney's Fees and Costs at 1-3. Additionally, the administrative law judge found the number of hours requested by claimant's counsel to be reasonable and appropriate. *Id.* at 2. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$18,563.11 for 93.25 hours of legal services at an hourly rate of \$185.00, with an additional \$1,311.86 for expenses. *Id.* at 3.

On appeal, claimant's counsel asserts that the administrative law judge erred in reducing the hourly rate from the requested \$225.00 to \$185.00. Claimant's Counsel's Brief at 6-12. Employer has not filed a response to claimant's counsel's appeal of the administrative law judge's fee award. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.<sup>2</sup>

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 law. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant's counsel asserts that the administrative law judge's reduction in his hourly rate is "arbitrary, unsupported by substantial evidence and an abuse of discretion for at least five separate reasons." Claimant's Counsel's Brief at 7. Specifically, claimant's counsel contends that (1) the administrative law judge merely recited the factors listed in 20 C.F.R. §725.366(b) and did not identify specific evidence to support his finding that an hourly rate of \$185.00 is reasonable; (2) the administrative law judge did not consider counsel's experience and expertise in the area of black lung law; (3) the administrative law judge's finding that the requested hourly rate of \$225.00 is excessive given the specific geographic community is unsupported by substantial evidence; (4) the administrative law judge provided no explanation for his conclusion that \$225.00 is excessive given the issues involved in this case; (5) the administrative law judge "failed to give meaningful consideration to the fact that \$225.00 has routinely been the hourly

---

<sup>2</sup>We affirm the administrative law judge's findings that claimant's counsel is entitled to compensation for 93.25 hours of legal services performed, and to reimbursement in the amount of \$1,311.86 for expenses incurred, as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

rate awarded to claimant's counsel in black lung cases for the past several years." *Id.* at 8-11.

In considering the reasonableness of claimant's counsel's requested hourly rate of \$225.00, the administrative law judge reviewed employer's objections to this rate. Supplemental Decision and Order Awarding Attorneys Fees and Costs at 1. The administrative law judge noted employer's arguments that the requested hourly rate "is excessive from a market perspective and from the standpoint of the complexity of the case" and that "the rate should be reduced because it is beyond the prevailing community rate and provides a windfall to claimant's counsel." *Id.* The administrative law judge further noted that employer offered the *2003 State Occupational Employment and Wage Estimates for West Virginia* to demonstrate that an hourly rate of \$150.00 is more appropriate. *Id.* The administrative law judge noted claimant's counsel's response to employer's objections. In this regard, the administrative law judge stated that claimant's counsel cited to the *Altman Weil Survey of Law Firm Economics* to demonstrate the national average hourly rate is closer to \$225.00 and refers to cases where counsel has been awarded his requested hourly rate of \$225.00. Ultimately, the administrative law judge found that employer had demonstrated that the requested hourly rate is excessive "given the specific geographic community and the type of issues involved in this matter" and that an hourly rate of \$185.00 is more reasonable "after consideration of the issues involved, the degree of skill [with] which Claimant was represented, the amount of time involved, and other relevant factors." *Id.*

As claimant's counsel asserts, although the administrative law judge referred to his consideration of the issues involved in this case and the skill of counsel, he did not provide any meaningful analysis or identify any specific evidence to support his finding that \$185.00 was a more reasonable hourly rate than the requested hourly rate of \$225.00. To substantiate his claim of experience and expertise in the area of black lung law, claimant's counsel submitted an affidavit in which he described his thirty years of experience in black lung litigation. Additionally, claimant's counsel submitted affidavits of two colleagues who support his assertion that \$225.00 is a reasonable hourly rate for counsel's geographic area. The administrative law judge made no mention of his consideration of these affidavits in his decision. Moreover, in claimant's counsel's affidavit he asserts that other administrative law judges have awarded him an hourly rate of \$225.00, as has the Benefits Review Board. Although the administrative law judge stated that counsel had been awarded \$225.00 per hour in the past, he did not set forth any reason for failing to find this evidence persuasive to award counsel his requested hourly rate in the present case. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). In this regard, claimant's counsel cites *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004) and *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002), in which both the Fourth and Seventh

Circuit courts acknowledged that it is reasonable for an administrative law judge to give consideration to evidence of fee awards in comparable cases when determining the reasonableness of an attorney's rate.

Furthermore, claimant's counsel correctly notes that the administrative law judge referred to the document entitled, *2003 State Occupational Employment and Wage Estimates for West Virginia*, submitted by employer, but did not discuss that claimant's counsel pointed out, in his reply to employer's objections to the fee petition, that this document is irrelevant because it refers to lawyers' wages and not lawyers' hourly billing rates charged to clients. Moreover, in considering the Altman Weil *Survey of Law Firm Economics*, attached to counsel's fee petition, the administrative law judge misstated that this survey demonstrates that the national average hourly rate is closer to \$225.00. As claimant's counsel points out, the administrative law judge mischaracterized the information provided in this survey as the *national* average when, in fact, the \$266.00 average hourly rate cited is the average rate for the *region* of the country which includes West Virginia, where claimant's counsel practices law.

Based on the foregoing, we hold that the administrative law judge's reduction of claimant's requested hourly rate of \$225.00 to \$185.00 is arbitrary and unsupported by the record. We, therefore, vacate the administrative law judge's finding that an hourly rate of \$185.00 is reasonable and modify his decision to reflect an hourly rate of \$225.00. Claimant's counsel is entitled to a total fee of \$22,293.11 for 93.25 hours of legal services at an hourly rate of \$225.00, and an additional \$1,311.86 for expenses.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and Costs is affirmed in part and modified in part consistent with this opinion.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge