

BRB No. 11-0595 BLA

ANNA L. BATEMAN	)	
(Widow of THEODORE T. BATEMAN)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/27/2012
	)	
EASTERN ASSOCIATED COAL	)	
CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order (07-BLA-5909) of Administrative Law Judge Richard T. Stansell-Gamm granting an attorney's fee in connection with a claim<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act,

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<sup>1</sup> Claimant filed a survivor's claim on September 14, 2006. In a Decision and Order dated September 21, 2009, the administrative law judge denied benefits because he found that the evidence did not establish that the miner's death was due to

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). The administrative law judge considered counsel's fee petition, and employer's objections thereto, and awarded claimant's counsel a total fee of \$18,595.60 for 55.5 hours of legal services at an hourly rate of \$220.00, and \$6,385.60 in expenses.

On appeal, employer contends that the administrative law judge's fee award should be vacated because claimant's counsel did not provide any compensable services. Employer specifically argues that, because the award of benefits in this case was based upon a change in law, claimant's counsel's work was not necessary. Employer further contends that the administrative law judge's fee award should be vacated because claimant's counsel failed to establish the prevailing market rate for his legal services. Claimant's counsel responds in support of the attorney's fee award. In a reply brief, employer reiterates its previous contentions.

The amount of an attorney's fee awarded 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.<sup>2</sup> *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*).

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pneumoconiosis. The administrative law judge subsequently denied claimant's request for reconsideration. Claimant filed an appeal with the Board.

On March 23, 2010, while claimant's claim was pending before the Board, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l). By Decision and Order dated February 23, 2011, the Board held that claimant was derivatively entitled to survivor's benefits pursuant to amended Section 932(l). *Bateman v. Eastern Assoc. Coal Corp.*, BRB No. 10-0335 BLA (Feb. 23, 2011) (unpub.). The Board subsequently denied employer's motion for reconsideration. *Bateman v. Eastern Assoc. Coal Corp.*, BRB No. 10-0335 BLA (May 20, 2011) (unpub.).

<sup>2</sup> The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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, 1-202 (1989) (en banc).

Employer contends that the legal services provided by claimant's counsel were not reasonable and necessary because the ultimate award in this case was not due to counsel's efforts, but was due to the enactment of amendments to the Act contained in Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010). Employer's Brief at 1-3; Reply Brief at 1-2. We reject employer's argument.

The Board has held that the "standard test for the administrative law judge to consider in determining whether the services performed by [an] attorney were necessary is whether the attorney, *at the time the work was performed*, could reasonably regard the work as necessary to the establishment of entitlement." *Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999) (emphasis added). In this case, the administrative law judge specifically found that, "through a lengthy and persistent prosecution of [claimant's] survivor's claim, . . . [c]laimant's counsel caused her claim to be still pending as of March 23, 2010, which rendered [amended] Section 932(l) applicable to her claim and led to her receipt of benefits." Supplemental Decision and Order at 4. Contrary to employer's contention, the fact that a change in the law subsequently changed claimant's burden of proof in the survivor's claim has no bearing on whether the services were necessary at the time they were rendered. *See Duke v. Cowin & Co.*, BLR , BRB No. 10-0679 BLA (Jan. 27, 2012), slip op. at 3-4. We, therefore, affirm the administrative law judge's finding that the legal services provided by claimant's counsel were reasonable and necessary.<sup>3</sup>

Employer also challenges the administrative law judge's award of an hourly rate of \$220.00. If a party fails to raise objections to a fee petition when filed, the party cannot subsequently contest the award on appeal. *Abbott*, 13 BLR at 1-16. Having failed to raise the issue of counsel's requested hourly rate before the administrative law judge, employer has waived its right to raise this issue on appeal to the Board.

Moreover, employer's contention, that claimant's counsel failed to provide sufficient information relevant to the applicable market rate, has no merit. In support of his requested hourly rate, claimant's counsel provided a list of black lung cases in which the Office of Administrative Law Judges, the Board, and the United States Court of Appeals for the Fourth Circuit have awarded attorneys from his Black Lung Clinic an

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<sup>3</sup> In addition, we reject employer's assertion that claimant is not entitled to a fee because it was the miner, and not claimant, who was the prevailing party in this claim. Contrary to employer's assertion, the administrative law judge properly found that claimant is the prevailing party in this survivor's claim, determined eligible for benefits by application of amended Section 932(l). 30 U.S.C. §932(l); *see W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 389 (4th Cir. 2011); *Duke v. Cowin & Co.*, BLR , BRB No. 10-0679 BLA (Jan. 27, 2012); Supplemental Decision and Order at 4.

hourly rate of \$220.00. Based on the documentation provided by claimant's counsel, the administrative law judge found that the referenced black lung awards support claimant's counsel's requested hourly rate of \$220.00. Supplemental Decision and Order at 4. As a general proposition, rates awarded in other cases do not set the prevailing market rate. *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23 (6th Cir. 2008). However, where, as in this case, there is only a small number of comparable attorneys, a tribunal may look to prior awards for guidance in determining a prevailing market rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010) (recognizing that evidence of fees received in the past is an appropriate method of establishing a market rate). Thus, the administrative law judge permissibly relied upon counsel's prior fee awards in establishing the appropriate market rate. Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse his discretion in determining that claimant's counsel's requested hourly rate of \$220.00 was reasonable, and reflected the applicable market rate. Supplemental Decision and Order at 4; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge's approval of the requested hourly rate of \$220.00.

In light of the foregoing, we affirm the administrative law judge's attorney's award of \$18,389.85 in attorney's fees and expenses. *Abbott*, 13 BLR at 1-16.

Accordingly, the administrative law judge's Supplemental Decision and Order awarding an attorney's fee is affirmed.

SO ORDERED.

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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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BETTY JEAN HALL  
Administrative Appeals Judge