

BRB No. 05-0949 BLA

REXFORD STAPLETON)
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 08/14/2006
)
 HADDIX MINING AND)
 DEVELOPMENT CORPORATION)
)
 and)
)
 AMERICAN BUSINESS AND)
 MERCANTILE INSURANCE)
 MUTUAL, INCORPORATED)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand Award of Attorney's Fees of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky.

Laura Metcoff Klaus (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 Decision and Order on Remand Award of Attorney's Fees (00-BLA-0103) of Administrative Law Judge Daniel J. Roketenetz rendered in connection with 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). The fee award in this case is before the Board for the second time.¹

After the administrative law judge awarded claimant benefits, claimant's counsel filed a fee petition with him, requesting a total fee of \$11,900, representing 59.5 hours of attorney services at \$200 per hour, and an additional \$1,729.83 in expenses.² Employer objected to the fee petition, and claimant replied, requesting an additional one hour for attorney services at \$200 per hour to defend his fee petition. The administrative law judge awarded claimant's counsel a total fee of \$13,829.83, representing 60.5 hours of attorney services at \$200 per hour, and \$1,729.83 in expenses.

Upon employer's appeal of the administrative law judge's fee award, the Board vacated the fee award with respect to the hourly rate, as the administrative law judge improperly considered, in part, risk of loss, in making his determination. *Stapleton, supra*. In all other respects, the Board affirmed the administrative law judge's fee award, including the administrative law judge's approval of the total time and expenses requested. The Board summarily denied employer's motion for reconsideration of the Board's affirmance of the award of expenses. *Stapleton v. Haddix Mining & Development Corp.*, BRB No. 03-0564 BLA (February 18, 2005)(Order on Reconsideration)(unpub.). On remand, the administrative law judge accepted briefs from both employer and claimant before he issued his fee award. Claimant's counsel's brief on remand included the affidavits of two "similarly situated" counsel. Employer filed a motion to strike these affidavits. The administrative law judge again awarded claimant's counsel the entire fee requested at \$200 per hour, after denying employer's motion to strike the affidavits submitted with claimant's brief on remand. In the instant appeal, employer contends that the administrative law judge again erred on remand by improperly considering risk of loss in his award of the hourly rate of \$200. Claimant's counsel responds in support of the administrative law judge's fee award.

¹ The history of this case is set out in the Board's decision in *Stapleton v. Haddix Mining & Development Corp.*, BRB No. 03-0564 BLA (May 28, 2004)(unpub.), and will not be repeated here except for the relevant facts.

² Claimant's counsel is Stephen A. Sanders with the Appalachian Citizens Law Center, Inc., located in Prestonsburg, Kentucky. Mr. Sanders stated, in his affidavit attached to his fee petition, that he is an attorney with over twenty-four years of experience, having been admitted to practice law in Kentucky in 1978. Mr. Sanders also asserted that he is experienced in handling black lung claims at all levels of the claims process, and has spoken at conferences on black lung. Mr. Sanders stated that he has been awarded attorney's fees at \$175 per hour by the district director and administrative law judge, and at \$200 per hour by the Board.

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, or an abuse of discretion. *Esselstein v. Director, OWCP*, 676 F.2d 228, 4 BLR 2-71 (6th Cir. 1982); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer contends that the administrative law judge again erred on remand by taking into account risk of loss in awarding claimant's counsel an hourly rate of \$200. The United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have held that risk of loss cannot be factored into the determination of the hourly rate. *See City of Burlington v. Dague*, 505 U.S. 557 (1992); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

In awarding claimant's counsel an hourly rate of \$200, the administrative law judge stated:

Accordingly, in light of the hourly rate in Eastern Kentucky as shown through similarly situated practitioners' affidavits, the complexity of the case demonstrated by two appeals to the Board, and the extensive experience of [claimant's counsel] including over twenty-four years of practice, I find that it is appropriate to grant him an hourly fee that is on the high end of the reasonable range. In addition, I noted that the Board awarded [claimant's counsel] \$225.00 an hour in this case for practice at the appellate level.³ Therefore, *without an enhancement for risk of loss*, I continue to award [claimant's counsel] an hourly rate of \$200.00 for his services.

Decision and Order on Remand Award of Attorney's Fees at 4 (emphasis added). Thus, notwithstanding the administrative law judge's discussion of risk of loss, the administrative law judge additionally stated that he awarded the \$200 hourly rate without including an enhancement for risk of loss. *Id.* The administrative law judge took into account affidavits from two counsel with comparable experience, and who practice law in the same geographical area, attesting to the fees they received in prior cases. Mr. Stayton, an attorney handling federal black lung claims since 1982, stated that he believed that a reasonable hourly rate for claimant's counsel is at least \$200 per hour, based on the fee awards Mr. Stayton has received in federal black lung claims, and based on claimant's counsel's expertise in the federal black lung field. Exhibit B to Claimant's Remand Brief in Support of his Attorney Fee Petition. Mr. Holliday, a Kentucky attorney since 1977, who regularly

³ The Board modified claimant's counsel's request for an hourly rate from \$380 to \$225 in its order awarding fees for services performed before the Board in the first appeal of the administrative law judge's fee award in BRB No. 03-0564 BLA. *See Stapleton v. Haddix Mining & Development Corp.*, BRB No. 03-0564 BLA (July 6, 2004)(unpub.).

represents federal black lung claimants, stated that his customary billing rate for federal black lung claims is \$200 per hour, and that he has been awarded fees at this rate by the administrative law judges, the Board, and the United States Courts of Appeals for the past ten years. Exhibit C to Claimant's Remand Brief in Support of His Attorney Fee Petition.

Initially, we reject employer's argument that the administrative law judge erred in considering the affidavits of Messrs. Stayton and Holliday because they were untimely filed. The regulations permit the administrative law judge to set the time limits for the filing of a fee petition, including its supporting documentation. 20 C.F.R. §725.366(a). Employer has shown no abuse of discretion on the part of the administrative law judge in admitting, on remand, the affidavits of Messrs. Stayton and Holliday. Thus, we hold that the administrative law judge acted within his discretion in admitting the affidavits of Messrs. Stayton and Holliday, and in denying employer's motion to strike these affidavits. 20 C.F.R. §725.366(a); Decision and Order on Remand Award of Attorney's Fees at 2; *see generally Bankes v. Director, OWCP*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1985); *Bradley v. Director, OWCP*, 8 BLR 1-418 (1985).

We also reject employer's argument that the administrative law judge erred in relying on the affidavits of Messrs. Stayton and Holliday because they based their opinions as to the hourly rate the administrative law judge should award claimant's counsel, on fee awards they have received in the past. The United States Court of Appeals for the Seventh Circuit has affirmed the hourly rates for fees awarded to claimant's counsel by the Board and an administrative law judge, based on previously awarded fees received by counsel, and similarly situated counsel, in the absence of any contrary information regarding counsel's market rate from employer. *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 22 BLR 2-483 (7th Cir. 2002). We rely on the holdings of the Seventh Circuit in the absence of contrary Sixth Circuit and Board caselaw on this issue. In the instant case, the record contains no contrary information regarding claimant's counsel's market rate.⁴ Thus, we hold that the administrative law judge permissibly relied, in part, on the affidavits of Messrs.

⁴ In its objections to claimant's counsel's fee petition, employer submitted two declarations by Ms. Sellers and Ms. Baker, managers of the workers' compensation units at Old Republic Insurance Company and Horizon Natural Resources, respectively. Ms. Sellers and Ms. Baker both stated that their respective companies pay experienced attorneys, with at least ten years of experience, who defend federal black lung claims in Eastern Kentucky, \$90 to \$125 per hour. We are not persuaded that their declarations are relevant to claimant's counsel's market rate in that they do not indicate claimant's counsel's market rate and do not specify the hourly rate they pay attorneys with over twenty-four years of experience, as claimant's counsel has.

Stayton and Holliday, attesting to the hourly rate they have received in prior fee awards, in determining a reasonable hourly rate for claimant's counsel.⁵ *Id.*

Lastly, we affirm the administrative law judge's fee award of \$200 per hour. 20 C.F.R. §725.366(b) provides that the fee awarded should be reasonably commensurate with the necessary work done and 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(b). The administrative law judge evaluated the rate pursuant to the factors at 20 C.F.R. §725.366(b) and rationally awarded \$200 per hour based on the affidavits of Messrs. Stayton and Holliday, the qualifications of claimant's counsel, and the level of proceedings to which this claim was raised. *See Amax Coal Co., supra; Peabody Coal Co., supra; Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003); *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); 20 C.F.R. §725.366(b); Decision and Order on Remand Award of Attorney's Fees at 4. Consequently, we reject employer's contention that the administrative law judge erred on remand by improperly considering risk of loss in his determination of claimant's counsel's hourly rate: Any error in the administrative law judge's discussion of risk of loss is harmless, since he additionally evaluated the requested hourly rate pursuant to the criteria at Section 725.366(b), without regard to risk of loss.⁶ *See* 20 C.F.R. §725.366(b); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order on Remand Award of Attorney's Fees at 4.

Accordingly, the administrative law judge's Decision and Order on Remand Award of Attorney's Fees is affirmed.

SO ORDERED.

⁵ Moreover, employer has shown no abuse of discretion in the administrative law judge's consideration of prior fees he has awarded to other counsel practicing in Kentucky, and in his acknowledgment that Mr. Holliday has appeared before him on several occasions.

⁶ The Board previously affirmed the administrative law judge's fee approval of the total time requested in *Stapleton v. Haddix Mining & Development Corp.*, BRB No. 03-0564 BLA (May 28, 2004)(unpub.), slip op. at 11-12. Thus, we decline to address employer's challenge, in the instant appeal, to the administrative law judge's approval of the total time requested, based on the law of the case doctrine, where employer does not assert that an exception to the law of the case doctrine applies here, and none is apparent. *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999)(*en banc*); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting); Employer's Brief at 5-6 n. 1.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge