

BRB No. 11-0810 BLA

RUEL B. MCGUIRE )  
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 Claimant-Respondent )  
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 v. )  
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 TERESA COAL COMPANY )  
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 and )  
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 OLD REPUBLIC INSURANCE COMPANY ) DATE ISSUED: 08/22/2012  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Attorney Fee Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Attorney Fee Order (03-BLA-6038) of Administrative Law Judge Alice M. Craft rendered in connection with an award of benefits on a 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 submitted a fee petition to

the administrative law judge, requesting a fee of \$14,925.00 for work performed from November 10, 2008 through January 18, 2011, representing 49.75 hours of legal services at an hourly rate of \$300. Employer objected to the hourly rate and the number of hours requested, and moved, in the alternative, to hold the fee petition in abeyance to permit employer to obtain discovery regarding the rate requested by claimant's counsel. After considering counsel's fee petition and employer's objections thereto, the administrative law judge found the requested hourly rate to be reasonable and sufficiently documented, but disallowed one hour of services as excessive or duplicative. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$14,625.00 for legal services performed while the case was before the Office of Administrative Law Judges, and denied employer's motion to hold the fee petition in abeyance.

On appeal, employer contends that the administrative law judge failed to consider appropriate market rate evidence and apply the correct standard in approving counsel's requested hourly rate. Employer also challenges the number of hour approved, and maintains that the administrative law judge improperly denied employer the opportunity to obtain discovery from counsel. Claimant's counsel responds in support of the administrative law judge's attorney fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

The amount of an attorney 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.<sup>1</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 (1988)(en banc).

Initially, we reject employer's argument that the administrative law judge's denial of its motion to hold the fee petition in abeyance to permit discovery violated employer's "basic due process right." Employer's Brief at 7. Noting that employer provided no authority to support its assertion that discovery should be granted in order to obtain evidence of prevailing market rates, the administrative law judge acted within her discretion in finding that discovery was not necessary in this case, as employer had provided its objections to counsel's fee petition, and counsel had provided sufficient evidence to support his requested hourly rate. Attorney Fee Order at 2; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

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<sup>1</sup> The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Employer next challenges the hourly rate approved herein, arguing that the administrative law judge failed to require claimant's counsel to produce market evidence to support his requested rate, and erred by relying on past fee awards in unrelated cases. Employer further contends that the administrative law judge's consideration and valuation of various factors did not comply with law, and that her treatment of the evidence proffered by claimant's counsel and employer was inconsistent. Employer's arguments are without merit.

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:

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(b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that the "lodestar method" is the appropriate starting point for calculating fee awards under the Act, *i.e.*, the fee amount equals the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008). The factors identified at Section 725.366(b) do not supplant or enhance the lodestar method but, rather, are already reflected therein. *Id.*, 522 F.3d at 663, 24 BLR at 2-121.

In the present case, the administrative law judge properly considered all of the relevant evidence provided by both parties as to the prevailing market rate for black lung attorneys in the relevant geographic area, in conjunction with the factors set forth in Section 725.366(b), and adequately explained her determination that an hourly rate of \$300 was reasonable under the facts of this case. Taking all factors into account, and noting that the rates awarded in other cases provide some guidance as to what the market rate is, and are appropriately included within the range of sources from which to ascertain a reasonable rate, the administrative law judge permissibly relied on the following considerations: comparable hourly rates received by black lung attorneys in the area; prior fee awards to claimant's counsel at the requested hourly rate of \$300; the services rendered; the expertise involved; the type of case handled; and the ultimate benefit to

claimant.<sup>2</sup> Attorney Fee Order at 4; *see Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010). Finding no abuse of the administrative law judge's discretion, we affirm her approval of an hourly rate of \$300 as reasonable.

Employer next challenges the number of hours approved by the administrative law judge. Specifically, employer maintains that the 7.50 hours charged by counsel for writing letters to claimant was excessive and constituted clerical work; that the administrative law judge erred in allowing 1.75 hours for counsel to file motions for extensions of time to submit evidence and closing arguments; and that counsel's charge of 14 hours to take two depositions at the same location on two consecutive days was not reasonable, noting that counsel traveled from Pikeville to Lexington, Kentucky and back each day, and his round-trip travel time was five hours. Employer's Brief at 8. Employer's arguments lack merit. While acknowledging that the scheduling of appointments constitutes noncompensable clerical work, *see Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986), the administrative law judge reviewed the time entries challenged by employer and acted within her discretion in finding that counsel's communications to claimant constituted compensable legal work. Attorney Fee Order at 5; *Abbott*, 13 BLR at 1-16. Similarly, the administrative law judge permissibly concluded that the time spent by counsel requesting extensions of time and for the travel to, preparation for, and taking of two depositions were compensable as reasonably necessary to the preparation or presentation of claimant's case. Attorney Fee Order at 5-7; *see Bentley*, 522 F.3d at 665-666, 24 BLR at 2-124. As employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, we affirm her finding that a total of 48.75 hours of legal services was reasonable under the circumstances of this case. *See* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

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<sup>2</sup> While the administrative law judge also referenced the risk of loss, it does not appear that she relied on this factor to enhance counsel's customary hourly rate; rather, compensation for the risk of loss is already incorporated into any reasonable hourly rate. *See City of Burlington v. Dague*, 505 U.S. 557 (1992); *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

Accordingly, the administrative law judge's Attorney Fee Order 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