

BRB No. 13-0099 BLA

THOMAS O. WHITE)
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 08/16/2013
)
 ALFRED WHITED COAL COMPANY /)
 SUN COAL COMPANY, INCORPORATED)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (10-BLA-5415) of Administrative Law Judge Linda S. Chapman granting an attorney's fee in connection with a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Counsel requested a total fee of \$10,056.25 for 23.0 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 0.25 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), 3.0 hours of legal services at an hourly rate of \$200.00 (Andrew Delph), 3.0 hours of legal services at an hourly rate of \$150.00 (Micah S. Blankenship), and 20.5 hours of legal services at an hourly rate of \$100.00 (legal assistants).

In her Decision and Order, the administrative law judge disallowed compensation for 0.70 hours of the 23.0 hours of legal services provided by Mr. Wolfe (\$210.00), and for 7.75 hours of the legal services provided by the legal assistants (\$775.00). The administrative law judge, therefore, awarded claimant's counsel a total fee of \$9,071.25.

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimant's counsel responds in support of the administrative law judge's attorney's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.¹

The amount of an 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

Employer argues that, because claimant's counsel failed to provide evidence regarding the qualifications of Mr. Blankenship and the legal assistants, the administrative law judge erred in granting a fee for their services. We agree. The regulations provide that a fee application "shall indicate the professional status (e.g., attorney, paralegal, law clerk, law representative or clerical) of the person performing [the] work." 20 C.F.R. §725.366(a)(1). In addition, the approved fee "shall take into account . . . the qualifications of the representative." 20 C.F.R. §725.366(b). In this case, claimant's counsel failed to provide any evidence regarding Mr. Blankenship's qualifications. Moreover, although claimant's counsel identified twenty persons who provided services as "legal assistants," he did not provide any specific information regarding their respective qualifications (i.e., training, education, and experience) to justify that classification.

Furthermore, claimant's counsel did not submit any evidence to support the prevailing market rate for Mr. Blankenship's legal services."² The United States Court of

¹ Claimant's coal mine employment was in Virginia. *White v. Alfred Whited Coal Co.*, BRB No. 12-0292 BLA (Mar. 15, 2013) (unpub.). 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).

² The administrative law judge accurately noted that claimant's counsel "attached numerous decisions approving the fees for his firm's legal assistants at the rate of \$100 an hour." Decision and Order at 2. Although employer challenges whether each person identified as a "legal assistant" actually has the requisite qualifications to merit such a

Appeals for the Fourth Circuit has held that the fee applicant bears the burden of producing specific evidence of the prevailing market rate. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, F.3d , 2013 WL 3929100 (4th Cir. July 31, 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-290 (4th Cir. 2010). In the absence of satisfactory specific evidence of the prevailing market rate, an adjudicatory tribunal cannot itself determine the reasonable hourly rate. *Cox*, 602 F.3d at 290, 24 BLR at 2-291.

Given the absence of evidence in the record to support the prevailing market rate for Mr. Blankenship's legal services, and the absence of evidence in the record regarding the qualifications of Mr. Blankenship and the legal assistants,³ we vacate the administrative law judge's award of fees for legal services provided by Mr. Blankenship and the legal assistants. On remand, the administrative law judge must provide claimant's counsel with an opportunity to submit an amended fee petition. *See Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1055 (9th Cir. 2009). The amended fee petition must include evidence of the applicable market rate for Mr. Blankenship, and the professional status and qualifications (i.e., training, education, and experience) of Mr. Blankenship and each "legal assistant" providing legal services. 20 C.F.R. §725.366(a).

Employer also argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Specifically, employer contends that the number of hours claimed in this case is excessive, based on counsel's use of "24 billing professionals." Employer's Brief at 5. By using "multiple people," employer asserts that billing in quarter-hour increments was unreasonable. *Id.* Contrary to employer's contention, the administrative law judge did not err in finding that counsel's practice of billing in quarter-hour increments was reasonable. It is noted that the administrative law judge considered the work performed, and reduced the quarter-hour billing for work she found did not require the allocated time. *See Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); Decision and Order at 4. In conducting her review, the administrative law judge eliminated over thirty charges by Mr. Wolfe and certain legal assistants that were not

classification, employer does not challenge the administrative law judge's finding that an hourly rate of \$100.00 is the prevailing market rate for one of counsel's qualified legal assistants. This determination is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Because employer does not challenge the administrative law judge's determination regarding the hourly rates awarded to Joseph E. Wolfe, Ryan C. Gilligan, and Andrew Delph, these findings are affirmed. *Skrack*, 6 BLR at 1-711.

compensable because the work performed was clerical in nature. Decision and Order at 3-5. Consequently, we hold that the total number of hours awarded by the administrative law judge was reasonable and supported by the record. *See Gosnell*, 2013 WL 3929100, at *11.

Accordingly, the administrative law judge's Decision and Order awarding attorney fees is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge