



BRB No. 17-0648 BLA

DAVID F. PERSIANNI, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TOP GUN COAL COMPANY,	)	DATE ISSUED: 08/14/2018
INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Supplemental Decision and Order Awarding Attorney Fees and Costs of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

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

Andrea Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees and Costs (2016-BLA-05214) of Administrative Law Judge Paul C. Johnson, Jr., in connection with the successful prosecution<sup>1</sup> of a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act).

Claimant's counsel submitted a fee petition for legal services performed before the Office of Administrative Law Judges (OALJ) from January 10, 2016 to June 10, 2017, requesting a fee in the amount of \$8,368.75. Counsel's petition requested fees for 14.75 hours of legal services performed by attorney Joseph E. Wolfe at an hourly rate of \$425.00 (\$6,268.75), 4.5 hours of legal services by attorney W. Andrew Delph at an hourly rate of \$300.00 (\$1,350.00), .5 hour of legal services by attorney Brad Austin at an hourly rate of \$200.00, (\$100.00), 1.0 hour of legal services by attorney Victoria Herman at an hourly rate of \$150.00 (\$150.00), and 5.0 hours for work performed by a legal assistant at an hourly rate of \$100.00 (\$500.00). Counsel also requested reimbursement of expenses and costs in the amount of \$1,756.26.

After considering the fee petition and employer's objections, the administrative law judge reduced the requested hourly rate for Mr. Wolfe from \$425.00 to \$350.00, and for Mr. Delph from \$300.00 to \$250.00. The administrative law judge further reduced the allowable amount of time for various entries. The administrative law judge determined that Mr. Wolfe was entitled to a fee for 10.3 hours at \$350.00 per hour; Mr. Delph was entitled to a fee for 4.5 hours at \$250.00 per hour; Mr. Austin was entitled to a fee for .5 hour at \$200.00 per hour; Ms. Herman was entitled to a fee for .85 of an hour at \$150.00 per hour; and the legal assistants were entitled to 5 hours at \$100.00. The administrative law judge also allowed the full amount of \$1,756.26 in expenses. Accordingly, the administrative law judge awarded a fee of \$7,213.76.

On appeal, employer alleges that the administrative law judge abused his discretion in awarding Mr. Wolfe's fees at an excessive hourly rate. Counsel responds in support of the awarded fee. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion,

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<sup>1</sup> By letter dated June 1, 2017, employer informed the administrative law judge that it would accept liability for payment of benefits in the underlying claim. On June 7, 2017, the administrative law judge issued an Order of Remand. The dates noted in the Supplemental Decision and Order Awarding Attorney Fees and Costs for the above actions are incorrect.

or not in accordance with applicable law.<sup>2</sup> See *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). An application seeking a fee for legal services performed on behalf of a claimant must indicate the customary billing rate for each person performing the services. 20 C.F.R. §725.366(a). The regulations further provide that a fee award must 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 the fee requested.” 20 C.F.R. §725.366(b).

An attorney’s reasonable hourly rate is “to be calculated according to the prevailing market rates in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is “the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.” *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); see *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, (6th Cir. 2008). The fee applicant has the burden to produce satisfactory evidence “that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation.” *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Employer argues that the administrative law judge’s approved hourly rate of \$350.00 for Mr. Wolfe’s legal services is arbitrary, capricious, and inconsistent with applicable law. We disagree. In support of his fee petition, counsel provided a list of his qualifications, rates from the National Law Journal’s 2014 Survey of Law Firm Economics (Survey), and seventy black lung cases in which the OALJ, Benefits Review Board, and the United States Court of Appeals for the Fourth Circuit have awarded attorney fees to his firm. Fee Petition dated June 19, 2017 at 4-11 (unpaginated). The administrative law judge discussed the Survey hourly rates, acknowledged counsel’s thirty-eight years of experience

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<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge’s findings regarding the hourly rates for Mr. Delph, Mr. Austin, Ms. Herman, and the legal assistants; the number of hours for which the firm was entitled to compensation; and the reimbursement amount for costs and expenses. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

in black lung law, and the “numerous cases in which [counsel] was awarded \$350.00 and approximately six cases in which he was awarded \$425.00 per hour at the OALJ level.” Decision and Order at 3 (unpaginated). The Fourth Circuit has recognized that evidence of fees received in the past may be an appropriate consideration in establishing a market rate. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572-73 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010).

Based on the administrative law judge’s analysis of the relevant criteria and his explanation of the factors he considered, we conclude that the administrative law judge did not abuse his discretion in determining that a \$350.00 hourly rate for Mr. Wolfe in this case was reasonable and reflected the applicable market rate. 20 C.F.R. §725.366(b); *see Bentley*, 522 F.3d at 663-4; *Gosnell*, 724 F.3d at 572; *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int’l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010); Decision and Order at 3.

Accordingly, the administrative law judge’s Supplemental Decision and Order Awarding Attorney Fees and Costs is affirmed.

SO ORDERED.

HALL, Chief

BETTY JEAN

Administrative Appeals Judge

JUDITH S. BOGGS

Administrative Appeals Judge

BUZZARD

GREG J.

Administrative Appeals Judge