

BRB No. 07-0292 BLA

J.V.)
)
 Claimant-Respondent)
)
 v.)
)
 EDD POTTER COMPANY,)
 INCORPORATED)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-) DATE ISSUED: 12/19/2007
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney's Fees of William S. Colwell, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier appeals the Supplemental Decision and Order Granting Attorney's Fees (Supplemental Decision) (2004-BLA-6260) of Administrative Law

Judge William S. Colwell rendered on 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). On July 25, 2006, the administrative law judge issued a Decision and Order awarding benefits pursuant to 20 C.F.R. Part 718. The administrative law judge also issued a Supplemental Decision on November 17, 2006 granting claimant's counsel the amount of \$11,937.50 in attorney fees, reflecting 47.75 hours of legal work performed at the hourly rate of \$250.00, while this case was pending before the Office of Administrative Law Judges.

On appeal, employer challenges the administrative law judge's approval of an hourly rate of \$250.00. Employer also contends that the administrative law judge erred in failing to disallow time spent by counsel performing services that were either excessive or clerical in nature.¹ Claimant responds, urging affirmance of the administrative law judge's attorney fee award. Employer has also filed a reply brief. The Director, Office of Workers' Compensation Programs, has declined to respond to this appeal unless specifically requested to do so by the Board.²

The award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (*en banc*); *Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894, 1-896 (1980).

We first address employer's assertion that the administrative law judge erred in determining that claimant's counsel was entitled to an hourly rate of \$250.00. Employer argues that the administrative law judge erred in rejecting its "uncontradicted evidence" establishing the market rate for black lung attorneys in the geographic region of claimant's practice areas is no more than \$140.00 per hour.³ Employer Brief at 3.

¹ On August 21, 2006, employer appealed to the Board the administrative law judge's July 25, 2006 Decision and Order. At employer's request, that appeal subsequently was dismissed by the Board in order for employer to pursue modification. [*J.V.*] *v. Edd Potter Co.*, BRB No. 06-0870 BLA (Nov. 28, 2006) (unpub. Order). On December 15, 2006, the Board received employer's notice of appeal with regard to the administrative law judge's award of attorney fees, which appeal was docketed as BRB No. 07-0292 BLA.

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

³ In the instant case, claimant's counsel submitted a fee petition to the administrative law judge seeking attorney fees for 47.75 hours of legal work at an hourly

Employer also contends that the administrative law judge's reliance on the factors set forth at 20 C.F.R. §725.366(b) was in error because he did not specifically apply a market rate analysis as required by law. We disagree.

In determining the appropriate hourly rate to be applied in this case, the administrative law judge properly determined that Section 725.366(b) is controlling. Supplemental Decision at 3-4. Section 725.366(b) states that “[a]ny fee approved under...this section shall be reasonably commensurate with the necessary work done and 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).

In considering the reasonableness of the requested hourly rate of \$250.00 in conjunction with Section 725.366(b), the administrative law judge stated:

Turning to the application of the factors listed in [Section] 725.366(b), I find that the appropriate hourly rate in this case is \$250.00 per hour. First, I had the opportunity to observe the [c]laimant's attorney in his handling of this case, and I find that the quality of representation was very good. Second, I find that he has been practicing in this practice area for twenty-five years, so the qualifications of the representative are also very good. In addition, I take note of the collection of recent attorney's fee awards provided by the [c]laimant's attorney. In nine of the awards from Administrative Law Judges and the Benefits Review Board, he has been awarded \$255 to \$250 per hour for his work representing black lung claimants. In one award from and [sic] Administrative Law Judge, he was

rate of \$250.00. Employer objected to the hourly rate, arguing that it was excessive. *See* Objection to Attorney Fee Petition. Employer asked the administrative law judge to award an hourly rate of no more than \$140.00. In support of its request, employer submitted an affidavit from a claims adjuster with Old Republic Insurance Company, who averred that defense attorneys in eastern Kentucky receive only an average of \$90.00 to \$140.00 per hour to defend black lung claims. *Id.* Employer also cited to several decisions issued by the United States Court of Appeals for the Sixth Circuit to support its assertion that a market-based analysis is required when determining the reasonableness of an hourly rate requested by an attorney. *Id.* The administrative law judge, however, properly noted that “none of the cited cases deal [sic] with determining the appropriate hourly rate in a Black Lung Benefits Act case.” Supplemental Decision and Order Granting Attorney's Fees (Supplemental Decision) at 3.

awarded \$187.50 per hour. I take these decisions as further evidence of the reasonableness of the requested hourly rate.

Supplemental Decision at 4.

Contrary to employer's assertion, the administrative law judge did not abuse his discretion by failing to credit its evidence as to the proper market rate to be awarded claimant's counsel. The administrative law judge specifically addressed employer's objections to the fee petition, but determined, in accordance with Section 725.366(b), that the expertise of claimant's counsel supported an award of \$250.00 per hour, based on counsel's twenty-five years of specialized practice in the field of federal black lung law, and the quality of the representation he provided in this case. *Id.* Because the administrative law judge acted within his discretion, *see Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998) (*en banc*); *Pritt*, 9 BLR at 1-159, we affirm the award of \$250.00 per hour as a reasonable hourly rate.⁴

Employer next argues that the administrative law judge erred in approving counsel's use of a quarterly billing system, and his request for 47.75 hours of legal work. Employer proposes that claimant's counsel is only entitled to 15.3 hours, as his fee petition reflected excessive hours billed for client contacts, conferences, and clerical services. We disagree.

In considering counsel's fee petition, the administrative law judge specifically considered employer's objections to itemized entries. Supplemental Decision at 4-5. The administrative law judge permissibly declined to reduce counsel's fee based on his use of quarter-hour billing increments. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); Supplemental Decision at 5. He also permissibly determined that the time counsel spent conferring with his client and explaining decisions issued in this case was reasonable and compensable. *Marcum*, 2 BLR at 1-896.

Furthermore, the administrative law judge specifically rejected employer's challenge to the following entries as being only clerical in nature: November 2, 2004, December 2 and 9, 2004, February 3 and 9, 2005, April 2, 5 and 15, 2005, May 25, 2005, June 18 and 23, 2005, July 12, 2005, and August 5, 2005. The administrative law judge

⁴ Contrary to employer's contention, the administrative law judge permissibly gave consideration to evidence of fee awards issued in comparable cases where counsel was involved in determining the reasonableness of counsel's hourly rate. *See Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37 (CRT) (4th Cir. 2004); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); Supplemental Decision at 4.

noted that on December 9, 2004, claimant's counsel requested one-quarter hour for a facsimile letter sent to Bluefield Regional Medical Center, requesting a biopsy report and medical reports of claimant. Supplemental Decision at 6. Although the administrative law judge acknowledged that the transmission of a facsimile was considered an administrative task that would normally be disallowed, he also determined that "the intent of the entry" was also to record counsel's preparation of the letter, which was compensable attorney work. *Id.* In addition, the administrative law judge determined that "[f]or the other entries which record receiving, reviewing, and filing correspondence related to this case, the critical acts of reading and reviewing to understand each of those documents are important and essential attorney actions." *Id.*

Employer's assertions of error in this appeal are insufficient to meet its burden of proving that the administrative law judge acted in a manner that was arbitrary, capricious, or an abuse of discretion. *Jones*, 21 BLR at 1-108. We, therefore, affirm the administrative law judge's determination approving an hourly rate of \$250 as reasonable, and his determination approving 47.25 hours of legal services billed by claimant's counsel as essential attorney services. *See* 20 C.F.R. §725.366; *Abbott*, 13 BLR at 1-16; *see generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Thus, we affirm the administrative law judge's attorney fee award in the amount of \$11,937.50.⁵

⁵ An attorney's fee award is not enforceable 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).

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge