



BRB No. 18-0142 BLA

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| DOUGLAS W. NELSON |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| KENAMERICAN RESOURCES, |) | |
| INCORPORATED |) | |
| |) | DATE ISSUED: 12/31/2018 |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Proposed Order Supplemental Award - Fee for Legal Services and Decision on Reconsideration of Phillip Little, Senior Claims Examiner, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

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

PER CURIAM:

Claimant's counsel (counsel), Austin P. Vowels, appeals the Proposed Order Supplemental Award - Fee for Legal Services and Decision on Reconsideration of Senior Claims Examiner Phillip Little (the district director) on an attorney fee petition filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The procedural history of these fee proceedings is as follows.

Counsel filed a complete, itemized fee petition requesting \$1,270.00 for legal services performed before the district director between October 27, 2016 and August 28, 2017.¹ The total fee requested represents 2.5 hours of services performed by counsel at an hourly rate of \$250.00 and 4.3 hours of services performed by a paralegal, Trisha Wright, at an hourly rate of \$150.00.

After considering the regulatory criteria at 20 C.F.R. §725.366(b), the district director issued a Proposed Order Supplemental Award - Fee for Legal Services (Supplemental Award) on November 8, 2017 finding the requested hourly rate for attorney services and the total number of hours claimed to be reasonable, but reducing the requested hourly rate for paralegal services to \$75.00.² Specifically, the district director awarded a total fee of \$947.50, representing 2.5 hours of attorney services at an hourly of \$250.00 and 4.3 hours of paralegal services at an hourly rate of \$75.00.

On November 30, 2017, counsel requested reconsideration of the district director's Supplemental Award, challenging the reduction of the hourly rate for paralegal services. In support of his reconsideration request, counsel reiterated the qualifications of the paralegal, and provided copies of prior fee awards issued to counsel in 2017 for work performed before the United States Court of Appeals for the Sixth Circuit and the Office of Administrative Law Judges, in which the paralegal's hourly rate of \$150.00 was approved. Counsel asserted that the decision of the Sixth Circuit awarding Ms. Wright the hourly rate of \$150.00 for paralegal services should be considered "controlling and persuasive evidence." Counsel's Brief on Reconsideration at 1. On January 4, 2018 the district director denied counsel's request for reconsideration of his fee petition. On

¹ The fee petition submitted by claimant's counsel (counsel) sets forth his qualifications and level of experience in federal black lung claims as well as the qualifications and experience of the paralegal. The fee petition also included, in pertinent part: an itemized statement of the time spent on the claim; citations to prior fee awards issued to counsel in 2016 and 2017 for work performed before the Benefits Review Board and the Office of Administrative Law Judges in which his hourly rate of \$250.00 was approved; and citations to prior fee awards issued to counsel in 2017 for work performed before the Office of Administrative Law Judges, in which the paralegal's hourly rate of \$150.00 was approved. Counsel asserted that he was seeking hourly rates at the "high end" of the customary range requested for both himself and the paralegal, based on the complex nature of black lung cases and the high level of education of the paralegal.

² The Proposed Order Supplemental Award - Fee for Legal Services (Supplemental Award) does not indicate whether employer filed objections to counsel's attorney fee petition.

December 13, 2017, the district director denied counsel's request for reconsideration of his fee petition.

On appeal, counsel contends that the district director erred in reducing the hourly rate for the paralegal. Employer did not file a response brief in this appeal.³

The amount of an 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); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989); see *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008). 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).

Hourly Rate

In determining the amount of a fee to be awarded under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. See *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Supreme Court has held that a 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 burden falls on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by persons of comparable skill, experience, and reputation. *Id.* at 896 n.11.

Counsel contends that he requested hourly rates at the "the high end" of the range of hourly rates usually charged for both himself and Ms. Wright due to the "complex nature and specialized legal and medical knowledge required to pursue federal black lung claims" and to Ms. Wright's superior qualifications.⁴ Counsel's Brief at 3, citing Attorney Fee

³ We affirm, as unchallenged on appeal, the district director's determination of \$250.00 as a reasonable hourly rate for counsel's services. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ Counsel asserts that Ms. Wright has earned a Bachelor of Science in Political Science and Legal Studies and a Master of Science in Public Service Administration from the University of Evansville. Counsel's Brief at 3. Further, counsel maintains that Ms. Wright has "approximately six years" of experience working in law firms. *Id.*

Petition at 2. Counsel therefore asserts that the district director acted arbitrarily in granting counsel's requested hourly rate for attorney services but reducing the requested hourly rate for paralegal services. Counsel's Brief at 3. We disagree.

The regulations provide for the payment of attorney fees that are reasonably commensurate with the necessary work done, taking 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 relevant information. 20 C.F.R. §725.366(b); *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 13 BLR 2-364 (1990); see *Blankenship v. Schweiker*, 676 F.2d 116, 117-118 (4th Cir. 1982); *Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984). The district director properly evaluated counsel's fee application in light of these factors and found that, here, "the complexity of the issues, the qualifications of the representative, and the level at which the claim was decided" warranted the reduction of the paralegal's hourly rate from \$150.00 to \$75.00. Supplemental Order at 1. The district director noted that the hourly rate of \$75.00 for paralegal services "is comparable to that being charged by other highly qualified attorneys within the same geographical location." *Id.* On reconsideration, the district director further explained that \$75.00 is the "normal [hourly] rate for services performed by a paralegal before the [d]istrict [d]irector" and that the "paralegal's work before the [d]istrict [d]irector" in this case did not require specialized skills or experience because it was "a routine case." Decision on Reconsideration at 1.

Because the award of a particular hourly rate in one case is based on the facts and circumstances of that case, the hourly rate awarded in other cases is not binding in subsequent unrelated cases. See generally *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217 (1986). Moreover, while counsel submitted attorney fee awards granting Ms. Wright the hourly rate of \$150.00, all of these cases involved paralegal services at a higher level of proceedings than the district director level. Thus, counsel has not shown the district director's reasons for reducing the paralegal's hourly rate to be arbitrary, capricious, or an abuse of discretion. Further, aside from asserting that all black lung cases are unique, counsel has not explained why the district director erred in characterizing this particular claim as "routine." Counsel's Brief at 5.

As we can discern no abuse of discretion in the district director's determination that an hourly rate of \$75.00 for paralegal services was reasonable in light of the criteria contained in 20 C.F.R. §725.366(b), we affirm the award of attorney's fees in the amount of \$947.50, representing 2.5 hours of attorney services at an hourly rate of \$250.00 and 4.3 hours of paralegal services at an hourly rate of \$75.00. *Abbott*, 13 BLR 1-15; *Pritt*, 9 BLR at 1-160; *Gillman v. Director, OWCP*, 9 BLR 1-7, 1-9 (1986).

Accordingly, the district director's Proposed Order Supplemental Award - Fee for Legal Services and Decision on Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge