



BRB No. 19-0321 BLA

THEODORE M. LATUSEK, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 12/02/2019
)	
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 of Anna L. Bailey, Claims Examiner, United States Department of Labor.

Sue Anne Howard, Wheeling, West Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Edward Waldman (Kate S. O'Scanlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant's counsel (counsel) appeals the Proposed Order Supplemental Award - Fee for Legal Services (Supplemental Award) of Claims Examiner Anna L. Bailey (the district director) on an attorney fee petition filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2012) (the Act). Counsel filed a complete itemized fee petition requesting \$13,509.06 for legal services performed and costs incurred before the district director between December 7, 1994 and April 7, 2010. The total fee requested represented 49.25 hours of legal services at an hourly rate of \$265.00, and \$457.81 in expenses.

After considering the regulatory criteria and the parties' arguments, the district director issued the Supplemental Award on August 13, 2018, reducing the requested hourly rate from \$265.00 to an hourly rate of \$100.00 for the period from 1994 through 1995, \$125.00 per hour for the period from 2004 through 2005, and \$175.00 per hour for the period from 2008 through 2010. She also reduced the number of hours requested and the claimed expenses.¹ The district director therefore awarded a total fee of \$5,250.00² for 35.25 hours of legal services at an hourly rate \$100.00, 11.25 hours of legal services at \$125.00 per hour and 1.25 hours of legal services at \$175.00 per hour, plus \$104.84 in expenses.

On appeal,³ counsel contends the district director erred in reducing her hourly rate from the requested \$265.00. Employer responds, urging affirmance of the attorney fee

¹ The district director disallowed 1.50 hours of services rendered in an overpayment proceeding because employer was not a party and \$352.97 in claimed expenses because they represented administrative costs, which are not reimbursable. Proposed Order Supplemental Award - Fee for Legal Services (Supplemental Award) at 1.

² The figure \$5,250.00 appears to be a typographical error as the respective hours and hourly rates amount to a total of \$5,150.00.

³ Prior to the filing of counsel's Petition for Review and brief, employer filed a Motion to Dismiss Appeal, arguing that counsel's appeal was untimely because it was not filed with the Board within thirty days of the August 13, 2018 district director's Supplemental Award. By Order dated April 30, 2019, the Board denied employer's motion to dismiss. The Board held that counsel's appeal, which she filed on September 4, 2018 with the district director, was filed with a subdivision of the Department of Labor within thirty days of the date of filing of the district director's order, and was therefore timely

award. The Director, Office of Workers' Compensation Programs, agrees that remand is appropriate because the district director did not consider whether enhancement for delay was warranted.⁴

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, an abuse of discretion, or not in accordance with applicable law.⁵ *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). The award must be reasonably commensurate with the necessary work done. 20 C.F.R. §725.366(b).

Hourly Rate

In determining the amount of an attorney's 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 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). It is the fee applicant's 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." *Id.* at 896 n.11.

Counsel argues the district director erred in reducing her requested hourly rate of \$265.00 based solely on the time period in which the legal services were rendered without

filed. 20 C.F.R. §802.207(a); *Latusek v. Consolidation Coal Co.*, BRB No. 19-0321 BLA (Apr. 30, 2019) (Order) (unpub.).

⁴ Claimant's counsel does not contest the district director's reductions in the requested hours or claimed expenses. *See* n.1 *supra*. We therefore affirm those reductions, as well as the district director's award of 47.75 hours of legal services and \$104.84 in expenses, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

considering the significant delay in the payment of the requested fees. Counsel's Brief at 1. We agree.

The district director appropriately began her assessment of the reasonableness of the requested hourly rate by considering regulatory criteria set forth at 20 C.F.R. §725.366(b), including the quality of representation, qualifications of the representatives, complexity of the legal issues involved, level of proceedings to which the claim was raised, and the level at which counsel entered the proceedings. 20 C.F.R. §725.366(b); *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715 (1990); see *Blankenship v. Schweiker*, 676 F.2d 116, 117-18 (4th Cir. 1982); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984); Supplemental Award at 1. In reducing the hourly rate, the district director stated the "work was performed in a routine case which did not call for special ability and effort" and "the approved rate is comparable to that being charged by other highly qualified attorneys within the same geographical location." Supplemental Award at 2. The district director, however, did not discuss counsel's contention that she is entitled to an hourly rate of \$265.00 for all work performed in this case, as an enhancement for the delay in payment of the fees.⁶ See Counsel's July 3, 2018 Letter Replying to Employer's Objections.

The United States Supreme Court has held that enhancement for the delay in payment of an attorney's fee is an "appropriate factor in what constitutes a reasonable attorney's fee" under a fee shifting statute. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989). In addition, the Fourth Circuit has authorized the enhancement of a fee to compensate for delay in payment, *i.e.*, the passage of time between when the services were rendered and when the fee award becomes enforceable. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 805 (4th Cir. 1999) (requiring administrative law judge to consider whether to increase attorney's hourly rate to account for the six-year delay).

Counsel began representing claimant in December 1994, continuing through the full adjudication of the initial claim. Following multiple appeals, the Fourth Circuit reversed an award of benefits by decision dated January 23, 2004. *Consolidation Coal Co. v. Latusek*, 89 F. App'x 373 (4th Cir. 2004) (unpub.). Counsel continued representing

⁶ An attorney fee awarded in connection with a miner's claim or survivor's claim is not effective or enforceable until there has been a successful prosecution of a claim and the award of benefits is payable. See 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

claimant and filed a modification request with the district director in January 2005. An administrative law judge later granted modification and awarded benefits in a decision dated February 10, 2015. The Fourth Circuit ultimately affirmed this award in a decision dated January 9, 2018. *Consolidation Coal Co. v. Latusek*, 717 F. App'x 207 (4th Cir. 2018) (unpub.).

In considering the appropriateness of the requested fee, the Board has held that the factfinder may adjust the fee by employing any reasonable means to compensate counsel for delay, including the use of the current hourly rate.⁷ *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97 (1995), citing *Jenkins*, 491 U.S. at 282, 284; see *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-101-02 (1995) (overruling prior Board decisions that delay enhancement constitutes an abuse of discretion, as inconsistent with *Jenkins*); *Bennett v. Director, OWCP*, 17 BLR 1-72, 1-74 (1992) (delay enhancement appropriate under some circumstances). Thus, the district director erred in failing to consider claimant's request for an hourly rate of \$265.00 for all work performed as an enhancement for the delay in payment of the fees. Because the district director did not consider, in accordance with *Kerns*, whether an enhancement for delay was warranted, we vacate her hourly rate determination. On remand, the district director must consider claimant's request in light of all relevant evidence and the parties' arguments.⁸ See *Parks v. Eastern Associated Coal Corp.*, 24 BLR 1-177, 1-181 (2010).

⁷ We reject employer's contention that reliance on cases arising under the Longshore and Harbor Workers' Compensation Act (Longshore Act) is inappropriate in federal black lung cases. See Employer Brief at 9. Attorney fees are awardable under the Black Lung Benefits Act based on the language of Section 28(a) of the Longshore Act. 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a).

⁸ Employer requested before the district director that the hourly rate for claimant's counsel be \$180.00 for work performed between 1994 and 2004, and \$265.00 for work performed between 2004 and 2010. See Employer's Objections dated June 15, 2018 at 1-3.

Accordingly, the district director's Proposed Order Supplemental Award - Fee for Legal Services is affirmed in part and vacated in part, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge