

BRB No. 10-0325 BLA

VIRGIL CLEVINGER)
)
Claimant-Respondent)
)
v.)
)
HARMAN MINING CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 02/15/2011
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Attorney Fee Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney Fee Order (2005-BLA-5166) of Administrative Law Judge Larry S. Merck with respect to a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Following the administrative law judge's award of benefits on remand, claimant's counsel, Joseph E. Wolfe, submitted a fee petition to the administrative law judge requesting a fee of \$2,737.50, representing 4.5 hours of legal services by Mr. Wolfe at an hourly rate of \$300.00;¹ 5.0 hours of legal services by W. Andrew Delph at an hourly rate of \$200.00; 0.5 hours of legal services by Ryan C. Gilligan at an hourly rate of \$175.00; and 3.0 hours of services by legal assistants at an hourly rate of \$100.00. In support of the requested hourly rates, Mr. Wolfe submitted a page from the 2006 Survey of Law Firm Economics published by Altman & Weil (Altman & Weil survey), and a letter detailing his education and experience, and that of his colleagues. Employer objected that claimant's counsel failed to support his fee petition with market evidence, and challenged the reasonableness of the hours claimed. After consideration of employer's objections to the fee petition, the administrative law judge determined that the requested hourly rates were reasonable, but reduced the number of hours for Mr. Wolfe to 3.75 hours. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$2,512.50 for legal services performed while the case was on remand before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge erred in awarding hourly rates that are not supported by evidence of a market rate. Employer further contends that the recent amendments to the Act, which became effective on March 23, 2010, are not implicated in this case. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal, but agrees with employer's position that, because the appeal in this case addresses only the award of an attorney's fee, the amendments to the Act do not affect this appeal.

The amount of an attorney's fee award by an administrative law judge 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.²

¹ As the administrative law judge correctly noted, although Mr. Wolfe's cover letter stated that he was requesting \$400.00 per hour, the accompanying fee petition requested only \$300.00 per hour. In addition, the total fee request of \$2,737.50 reflected an hourly rate of \$300.00 for Mr. Wolfe. Attorney Fee Order at 2 n.3.

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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);

Employer argues that the administrative law judge erred in determining the hourly rate for claimant's counsel in the absence of specific evidence from claimant's counsel of the prevailing market rate. Specifically, employer asserts that the administrative law judge abused his discretion by relying on the Altman & Weil survey of attorney fees. Employer contends that the survey does not address hourly rates for black lung work in rural Virginia, and asserts that the administrative law judge failed to explain how the survey established a market rate in counsel's geographic area. Employer also asserts that the administrative law judge erred in discrediting the affidavits proffered by employer as evidence of the prevailing market rate. Employer's Brief at 5-8. Further, employer challenges the administrative law judge's reliance on subjective factors such as counsel's "experience and expertise" and "his own observations of their performance at the hearing." Employer's Brief at 4. Lastly, employer contends that the administrative law judge erred in rejecting employer's challenges to the number of hours claimed.

We hold that employer's arguments regarding the attorneys' fees have merit, in part. When a claimant wins a contested case, the Act provides that the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The regulation governing fees provides, in part, that:

Any fee approved . . . 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 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. Delaware 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). 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 lawyers of comparable skill, experience, and reputation.” *Id.* at 896 n.11.

In finding that the hourly rates requested by Mr. Wolfe, Mr. Delph, Mr. Gilligan, and the legal assistants, were reasonable, the administrative law judge stated that he relied on his “own observation of their performance at the hearing and on brief, Mr. Wolfe’s high Martindale-Hubble rating, the surveys of hourly rates for the geographic area, and other relevant factors, including the rates awarded to these attorneys in the prior fee award.” Attorney Fee Order at 5. As employer asserts, however, the administrative law judge did not explain how this evidence supported his determination that \$300.00 per hour is the applicable market rate for claimant’s counsel, in light of employer’s assertions that (1) the Altman & Weil survey of attorney fees lists average rates; (2) the survey does not identify the type of work performed; (3) it does not address hourly rates for black lung work in rural Virginia; and (4) claimant’s counsel provided no other market evidence to support the hourly rates requested. Consequently, this aspect of the administrative law judge’s fee order does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Moreover, subsequent to the issuance of the administrative law judge’s fee order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held, in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010), that an administrative law judge erred by determining a reasonable hourly rate in the absence of satisfactory specific evidence of the prevailing market rates. The court detailed the fee applicant’s burden, and appropriate sources of evidence, in establishing a reasonable hourly rate in the fee-shifting context. In this case, while counsel submitted a page from the Altman & Weil survey of attorney fees for the “Middle Atlantic” and “South Atlantic” regions, he failed to provide specific evidence of the prevailing market rates in the relevant community in which he seeks an award and, therefore, he failed to meet his burden of proof. See *Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990). Consequently, we vacate the administrative law judge’s award of attorneys’ fees and remand the case for the administrative law judge to determine a reasonable hourly rate in accordance with the Court’s guidance in *Cox*.³ See *Cox*, 602 F.3d at 290, n.12, 24 BLR at 2-290-91, n.12.

³ Counsel may submit evidence of the fees he has received in the past, as well as affidavits of other lawyers who might not practice black lung law, but who are familiar both with the skills of the fee applicant and, more generally, with the type of work in the relevant community. Further, in determining a reasonable prevailing rate, the administrative law judge is not limited to consideration of fees granted in black lung cases; rather, consideration of the fees granted in other administrative proceedings of

We reject, however, employer’s assertion that the administrative law judge erred in discounting employer’s evidence of the prevailing market rate. The administrative law judge correctly noted that employer submitted fee petitions from other attorneys representing claimants in black lung claims, and affidavits, in support of its assertion that the Altman & Weil survey fees are inaccurate, and that experienced lawyers earn no more than \$150.00 per hour for litigating black lung claims in counsel’s geographic area. Attorney Fee Order at 5. Contrary to employer’s assertion, the administrative law judge acted within his discretion in finding that employer’s proof was not more probative than the hourly rates awarded to counsel in prior cases and to other similarly experienced attorneys in Kentucky.⁴ See *Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 (2010); *Abbott*, 13 BLR at 1-16; see also *Jones*, 21 BLR at 1-108; Attorney Fee Order at 5. Thus, the administrative law judge permissibly concluded that employer’s evidence did not establish that the prevailing market rate for counsel’s region is, at most, \$150.00 per hour.

We further reject employer’s assertion that the administrative law judge erred in approving claimant’s counsel’s use of quarter-hour billing. The administrative law judge addressed employer’s objections to counsel’s billing in quarter-hour increments, and correctly found that quarter-hour billing is permissible “as long as the total amount of time is reasonable.” Attorney Fee Order at 6, citing *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008). Employer maintains that the United States Court of Appeals for the Sixth Circuit in *Bentley* approved the use of a quarter-hour billing method only because “the lower tribunals [had already] carefully reviewed the time submitted and reduced the hours.” Employer’s Brief at 9. Contrary to

similar complexity would also yield instructive information. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 245 (4th Cir. 2009); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994); see also *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int’l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010).

⁴ The administrative law judge noted that, in addition to a prior fee award to claimant’s counsel, hourly rates of greater than \$150.00 had been approved in recent black lung cases brought by attorneys for claimants practicing in nearby Prestonsburg, Pikeville, and Whitesburg, Kentucky. Attorney Fee Order at 5. Employer does not challenge the administrative law judge’s review of these prior fee awards for the purpose of assessing whether \$150.00 an hour is the maximum hourly rate charged for black lung work in counsel’s geographic area. We note, however, that the prior fee order granting Mr. Wolfe \$300.00 an hour, which the administrative law judge also listed, on page five of his order, was the fee order that was vacated by the Fourth Circuit in *Cox*. Therefore, that order does not constitute evidence that Mr. Wolfe’s market rate is \$300.00 an hour.

employer's argument, in *Bentley*, the Sixth Circuit clarified that the use of quarter-hour billing was no more suspect than billing by tenth-hour increments, and that, “[a]s long as the total number of billable hours is reasonable in relation to the work performed, the work should be affirmed.” *Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127. As the administrative law judge acted within his discretion in finding the total number of hours claimed to be reasonable in light of the services performed, we affirm his determination to approve counsel's use of the quarter-hour billing method. *Abbott*, 13 BLR at 1-17; Attorney Fee Order at 6.

Accordingly, we vacate the administrative law judge's award of attorneys' fees, and remand this case for reconsideration. On remand, the administrative law judge must initially require claimant's counsel to provide evidence of a prevailing market rate. The administrative law judge must then reconsider counsel's fee petition in accordance with the criteria set forth at 20 C.F.R. §725.366.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge