

BRB No. 13-0318 BLA

RANDALL D. BELCHER)
)
 Claimant-Respondent)
)
 v.)
)
 CARTER BRANCH MINING COMPANY,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 02/27/2014
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Order (11-BLA-5476) of Administrative Law Judge Pamela J. Lakes awarding attorney's fees with respect to a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant's counsel requested a total fee of \$8,150.00, for 12.75 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), .50 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), 2.0 hours of legal services at an

hourly rate of \$200.00 (W. Andrew Delph), 8.75 hours of legal services at an hourly rate of \$150.00 (Micah S. Blankenship), and 25.0 hours of legal services at an hourly rate of \$100.00 (legal assistants). Counsel's fee petition also requested expenses in the amount of \$1,087.60.

In her Order, the administrative law judge disallowed compensation for 2.0 hours of legal services provided by the legal assistants (\$200.00) because the work was clerical in nature. The administrative law judge also disallowed expenses totaling \$170.00 for two x-ray readings, as it was unclear from the record whether these readings were reasonable and necessary. The administrative law judge, therefore, awarded claimant's counsel a total fee of \$7,950.00, and granted claimant's counsel expenses in the amount of \$917.60.

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Neither claimant's counsel, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.¹

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. *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 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 attorney's fees to award 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. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008).

¹ Claimant was last employed in coal mining in Kentucky. *Belcher v. Carter Branch Mining Co.*, BRB No. 13-0202 BLA (Dec. 19, 2013) (unpub.). Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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). 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 challenges the hourly rates awarded by the administrative law judge, contending that the rates are not supported by prevailing market evidence, and that the administrative law judge failed to explain her findings, as required by 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). Employer's Brief at 3-4. We disagree. The administrative law judge explained that she found that the requested hourly rates were reasonable in light of the nature of the case, each person's knowledge and experience, and the evidence of the prevailing market rate. Order at 4-5. We note that in support of his fee petition, counsel provided citations to thirty-five cases in which Mr. Wolfe was awarded fees at an hourly rate of at least \$300.00. Letter from Mr. Wolfe dated February 15, 2013. In eleven of these cases Mr. Gilligan was awarded \$225.00 an hour, and in fifteen of these cases Mr. Delph was awarded \$200.00 an hour.² *Id.* The cases listed by counsel also include at least fourteen awards of an hourly rate of \$100.00 for work performed by counsel's legal assistants. *Id.* Evidence of fees received in the past is an appropriate factor to take into account when determining a market rate. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; *see also E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572, BLR (4th Cir. 2013); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010), *petition for review denied*, *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013) (unpub.); *Westmoreland Coal Co. v. Cox*, 602 F.3d

² Counsel also submitted an affidavit from Timothy C. MacDonnell, the supervising attorney of the Black Lung Legal Clinic at Washington and Lee University in Virginia. Fee Petition, Exhibit 8. Affidavits from attorneys who are familiar with both the skills of a fee applicant and the type of work involved in federal black lung cases are appropriate to consider in establishing a market rate. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 291 (4th Cir. 2010). Mr. MacDonnell stated that he has handled over fifty federal black lung claims, that his hourly billing rate is \$220.00, that he has known Mr. Gilligan for three years and believes him to be "exceptionally knowledgeable and competent in federal black lung matters," and that he believes an hourly rate of \$225.00 for Mr. Gilligan's legal services is "entirely reasonable." Fee Petition, Exhibit 8.

276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010). In awarding the respective hourly rates of \$300.00, \$225.00, and \$200.00 to Mr. Wolfe, Mr. Gilligan, and Mr. Delph, the administrative law judge also relied upon the nature of the case, as well as the attorneys' knowledge, experience, and quality of work.³ These factors are relevant to an administrative law judge's determination of the reasonableness of a requested hourly rate for claimant's counsel. 20 C.F.R. §725.366(b); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124; *see also Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71 (4th Cir. 2009).

Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse her discretion in determining that claimant's counsel's requested hourly rates for Mr. Wolfe, Mr. Gilligan, Mr. Delph, and the legal assistants were reasonable and reflected the applicable market rates.⁴ *See Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Maggard v. Int'l Coal Grp., Knott Cnty., LLC*, 24 BLR 1-203, 1-205 (2010). We, therefore, affirm the administrative law judge's approval of these requested hourly rates.⁵

³ In his fee petition, claimant's counsel noted that attorneys in his law firm "are very experienced" in the area of black lung law. Letter from Mr. Wolfe dated February 15, 2013. Counsel further noted that he knows of "no other firms in Virginia and very few across the nation taking new [black lung] cases." *Id.*

⁴ In its "Opposition to Fees," filed with the administrative law judge, employer attached claimant's counsel's discovery responses in other cases, purporting to show that the requested hourly rates in the current case are not market based. Employer contends that the administrative law judge erred in "reject[ing] . . . "employer's evidence." Employer's Brief at 7. The administrative law judge, however, considered the submissions by claimant, together with the challenges raised by employer, and found that the hourly rates claimed reflected the prevailing rates for representing black lung claimants in the relevant market area. Order at 5. Because employer has not demonstrated that the administrative abused her discretion in determining that counsel's discovery responses failed to undermine the significance of the hourly rates awarded to counsel in previous black lung cases, this finding is affirmed. *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).

⁵ While the case was before the administrative law judge, employer sought to engage in discovery, seeking information from claimant's counsel regarding prior fee awards. In her Order, the administrative law judge denied employer's discovery request. Order at 5. Employer contends that the administrative law judge erred in denying its discovery request. However, because employer has not demonstrated prejudicial error or

Regarding the requested hourly rates for Mr. Blankenship, however, employer correctly argues that counsel provided no evidence of Mr. Blankenship's qualifications, expertise, or experience in the field of black lung litigation, and also did not provide citations to any cases in which Mr. Blankenship was awarded an hourly rate of \$150.00.⁶ Employer's Brief at 8. The administrative law judge acknowledged counsel's omission, but noted that, in other recent cases, she had awarded fees to Mr. Blankenship at an hourly rate of \$150.00, and had found his briefing skills to be excellent. Order at 4-5. Thus the administrative law judge concluded that Mr. Blankenship warranted at least the \$150.00 hourly rate requested.

While the amount of an attorney's fee award by an administrative law judge is discretionary, the fee applicant bears the burden of producing specific evidence of the prevailing market rate. *See Gosnell*, 724 F.3d at 570; *Cox*, 602 F.3d at 289, 24 BLR at 2-290. In the absence of satisfactory specific evidence of the prevailing market rate, an adjudicatory tribunal cannot itself determine the reasonable hourly rate. *Cox*, 602 F.3d at 290, 24 BLR at 2-291. Moreover, while the regulation governing fees for work performed before an administrative law judge requires only that counsel "indicate the professional status (e.g. attorney, paralegal, law clerk, lay representative or clerical)" of the persons performing the work for which fees are requested, 20 C.F.R. §725.366(a), the regulation further provides that the approved fee "shall take into account . . . the qualifications of the representative." 20 C.F.R. §725.366(b). Given the absence of market rate evidence in the record to support the hourly rate requested for Mr. Blankenship's legal services, we vacate the administrative law judge's award of fees for legal services provided by Mr. Blankenship. On remand, the administrative law judge must provide claimant's counsel with an opportunity to submit an amended fee petition. *See Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1055 (9th Cir. 2009). The amended fee petition must include market rate evidence to support the rate requested for Mr. Blankenship's services, as well as evidence of his qualifications. 20 C.F.R. §725.366(b).

an abuse of discretion in the administrative law judge's denial of its request, the administrative law judge's decision to deny employer's motion to compel discovery is affirmed. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

⁶ Mr. Blankenship was not identified as having performed legal services in any of the thirty-five black lung cases listed by Mr. Wolfe. Thus, claimant's counsel did not provide evidence of prior fee awards to Mr. Blankenship, in any amount.

Allowable Hours

Employer next argues that the administrative law judge erred by “summarily reject[ing] employer’s objections to fourteen hours of legal services, which employer contended were either clerical, and thus non-compensable, unnecessary, excessive, or duplicative. Employer’s Brief at 9. Contrary to employer’s contention, the administrative law judge reviewed each entry objected to by employer, and acted with her discretion in finding that while six entries, totaling two hours of legal services, represented non-compensable clerical work, the remaining services were neither purely clerical in nature, unnecessary, excessive, nor duplicative. *See Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16; Order at 5-6. Consequently, we hold that the total number of hours awarded by the administrative law judge was reasonable and supported by the record. *See Gosnell*, 724 F.3d at 578.

Finally, because employer has not raised a specific objection to any of the costs incurred by claimant, *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983), we affirm the administrative law judge’s determination that claimant is entitled to reimbursement for costs in the amount of \$917.60.

Accordingly, the administrative law judge’s Order awarding attorney fees is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge