

BRB No. 08-0527 BLA

C.S. )  
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 Claimant-Respondent )  
 )  
 v. )  
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 WEST VIRGINIA SOLID ENERGY, )  
 INCORPORATED )  
 ) DATE ISSUED: 01/16/2009  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Granting Attorney Fees and Decision and Order Denying Employer's Request for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Attorney Fees and Decision and Order Denying Employer's Request for Reconsideration (05-BLA-0018) of Administrative Law Judge Linda S. Chapman (the administrative law judge), 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). In a Decision and Order on Remand issued on October 16, 2007, the administrative law judge awarded benefits to claimant. Pursuant to employer's appeal, the Board vacated the administrative

law judge's award of benefits and remanded the case to the administrative law judge for further consideration. [*C.S.*] v. *West Virginia Solid Energy, Inc.*, BRB No. 08-0159 BLA (Nov. 25, 2008)(McGranery, J., concurring and dissenting)(unpub.).

Three weeks after the administrative law judge's 2007 Decision and Order on Remand Awarding Benefits, claimant's counsel filed a fee petition with the administrative law judge requesting a fee of \$8,567.20, representing thirty-five and one-quarter hours of services at \$225 per hour and expenses in the amount of \$635.95. Employer objected to the requested hourly rate and the number of hours. After considering employer's objections, the administrative law judge determined that \$225 per hour was an appropriate hourly rate in light of claimant's counsel's quality of representation and his qualifications. Decision and Order Granting Attorney Fees at 3-4. Disallowing one-half hour of time, the administrative law judge awarded claimant's counsel \$7,818.75 for thirty-four and three-quarter hours of professional services in connection with this claim. *Id.* at 4. The administrative law judge additionally determined that claimant's counsel was entitled to \$635.95 for costs that he incurred in obtaining CT scan readings, x-ray readings, lung tissue slides, and Dr. Khan's review of the medical records and examination of the tissue slides. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$8,454.70, representing payment for services and expenses rendered to claimant while the claim was before the Office of Administrative Law Judges. Decision and Order Granting Attorney Fees at 5-6. Thereafter, upon review of employer's motion for reconsideration, and claimant's response thereto, the administrative law judge found no reason to amend her order awarding an attorney's fee. Decision and Order Denying Employer's Request for Reconsideration at 1-2.

On appeal, employer contends that the administrative law judge erred in determining that \$225 was a reasonable hourly rate, in granting compensation for thirty-four and three-quarter hours, and in awarding \$635.95 for expenses incurred in establishing claimant's case. Claimant responds, urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs, has not filed a response to employer's appeal. Employer has filed a reply brief reiterating its contentions.

The award of an attorney's 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*). Since we have vacated the award of benefits in this case, we note that no fee award is enforceable until the claim has been successfully prosecuted and all appeals are exhausted. See 20 C.F.R. §725.367(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Employer first argues that the administrative law judge erred in awarding an hourly rate of \$225. In awarding claimant's counsel an hourly rate of \$225, the

administrative law judge inappropriately referenced the risk of loss. Risk of loss cannot be factored into the determination of the hourly rate. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 510, 17 BLR 2-1, 2-3 (4th Cir. 1992); Decision and Order at 4. However, in awarding the hourly rate of \$225, the administrative law judge also applied the regulatory criteria appropriately, and took into account the complexity of the legal issues involved, as well as claimant's counsel's qualifications, experience, quality of representation, and the fact that he had previously been awarded hourly rates between \$200 and \$225, to find that his requested hourly rate was reasonable.<sup>1</sup> *See* 20 C.F.R. §725.366(b); *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122 (6th Cir. 2008); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 895, 22 BLR 2-514, 2-535 (7th Cir. 2002); Decision and Order Granting Attorney Fees at 3-4. Based on the administrative law judge's proper analysis of the regulatory criteria, we affirm her finding that an hourly rate of \$225 was reasonable.

Employer next argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Specifically, employer contends that the number of hours claimed in this case is excessive based on counsel's use of the quarter-hour billing method. Employer's Brief in Support of Petition for Review at 8-9. Contrary to employer's contention, the administrative law judge did not err in finding that counsel's practice of billing in quarter-hour increments was reasonable. We note that the administrative law judge considered the work performed and reduced the quarter-hour billing for work she found did not require the allocated time. *See Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); 20 C.F.R. §802.203(d)(3).

We additionally reject employer's contention that the administrative law judge erred in compensating claimant's counsel for thirty-four and three-quarter hours because, employer argues, four hours to prepare, take, and review a doctor's deposition; five hours to review the case file and chart evidence prior to the hearing; eight hours for work on the post-hearing brief; and six hours for work on the brief on remand are "objectively excessive given the experience that the ALJ credited counsel with having." Employer's Brief in Support of Petition for Review at 8. The administrative law judge addressed

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<sup>1</sup> The administrative law judge did not abuse her discretion in finding that the declaration of Ms. Christine Terrill, submitted by employer, attesting to the hourly rate that Old Republic Insurance Company pays attorneys working in eastern Kentucky of between \$90 and \$140 per hour to defend black lung claims, was not persuasive evidence of claimant's counsel's market rate, in light of the factors listed at 20 C.F.R. §725.366(b). Decision and Order Granting Attorney Fees at 3-4; Declaration of Christine Terrill (attached to employer's objections to the fee request).

employer's contention, and specifically found the amount of time that claimant's counsel expended on these services was "appropriate," and explained that "in the absence of a showing of fraud or overreaching, [she would] not presume that the time billed for these entries was excessive." Decision and Order Granting Attorney Fees at 4, 5. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, in finding that the requested charges were reasonable. See 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984); Decision and Order Granting Attorney Fees at 4, 5.

We also reject employer's assertion that the administrative law judge abused her discretion in reimbursing claimant's counsel \$635.95 for the costs of CT scan and x-ray readings, preparation of lung tissue slides, and Dr. Khan's medical report, because none of these fees or costs was incurred at the hearing. Section 28(d) of the Longshore Act, 33 U.S.C. §928(d), as incorporated by 30 U.S.C. §932(a), permits the recovery of fees for medical experts who do not attend the hearing. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899-902, --- BLR --- (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001). Further, although employer is correct in noting that case law from the United States Court of Appeals for the Seventh Circuit does not constitute binding precedent in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the standard of review endorsed by the court in *Hawker* is consistent with that applied by the Board and the Sixth Circuit to the review of an administrative law judge's findings regarding attorney fee petitions, namely, whether the administrative law judge's findings are arbitrary, capricious, or an abuse of discretion. See *Bentley*, 522 F.3d at 661, 24 BLR at 2-117; *Hawker*, 326 F.3d at 902, --- BLR at ---. In this case, the administrative law judge reviewed the cost entries for the CT scan and x-ray readings, preparation of tissue slides, and Dr. Khan's medical report, and specifically determined that claimant's counsel adequately documented the \$635.95 in costs that he incurred,<sup>2</sup> and that the costs were reasonably necessary to establish entitlement to benefits. See 20 C.F.R. §725.366(c); Decision and Order Granting

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<sup>2</sup> In so finding, the administrative law judge relied on claimant's counsel's itemization of his expenses and certification that the expenses were reasonably incurred in his representation of claimant. Decision and Order Denying Employer's Request for Reconsideration at 2. We note that the dates listed for the services are consistent with the timing of the hearing before the administrative law judge.

Attorney Fees at 5-6; Decision and Order Denying Employer's Request for Reconsideration at 1-2. We therefore decline to hold that the administrative law judge abused her discretion in allowing reimbursement to claimant's counsel for these costs. *Picinich v. Lockheed Shipbuilding*, 22 BRBS 128 (1989).

In light of the foregoing, we affirm the administrative law judge's award of attorney fees in the amount of \$8,454.70. *Abbott*, 13 BLR 1-15, 1-16 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). The fee award is not enforceable until there has been a successful prosecution of claimant's case. *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993).

Accordingly, the Decision and Order Granting Attorney Fees and Decision and Order Denying Employer's Request for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge