

BRB No. 12-0210 BLA

AVERY MURPHY (deceased) )  
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 Claimant-Respondent )  
 )  
 v. ) DATE ISSUED: 01/10/2013  
 )  
 IDA CARBON CORPORATION )  
 )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

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

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Order Awarding Fees (09-BLA-5306) of Administrative Law Judge Pamela J. Lakes in connection with a claim<sup>1</sup> filed pursuant to the provisions

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<sup>1</sup> Claimant filed a miner's claim on April 4, 2008. In a Decision and Order dated February 22, 2011, the administrative law judge awarded benefits. Upon review of employer's appeal, the Board affirmed the administrative law judge's award of benefits. *Murphy v. Ida Carbon Corp.*, BRB No. 11-0429 BLA (Mar. 12, 2012) (unpub.). The Board subsequently denied employer's motion for reconsideration, and approved a fee in

of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant's counsel submitted an itemized fee petition, requesting a total fee of \$11,076.25, purportedly representing 25.20 hours<sup>2</sup> of legal services performed by Joseph E. Wolfe at an hourly rate of \$300.00, 2.75 hours of legal services performed by W. Andrew Delph at an hourly rate of \$200.00, 4.75 hours of legal services performed by Ryan C. Gilligan at an hourly rate of \$175.00, 20.00 hours of services performed by counsel's full-time legal assistants at an hourly rate of \$100.00, and 0.75 hour of services performed by counsel's part-time legal assistants at an hourly rate of \$60.00. Claimant's counsel indicated that the services were provided while the case was pending before the administrative law judge. The administrative law judge considered counsel's fee petition and employer's objections thereto, and awarded claimant's counsel a total fee of \$9,976.25, for 49.75 hours of legal services provided by claimant's counsel and his staff.<sup>3</sup>

On appeal, employer contends that the administrative law judge granted counsel's attorney fee prematurely, and further erred in awarding fees for work that was duplicative, clerical, and not related to the miner's claim. Claimant responds, urging the Board to affirm the administrative law judge's Order Awarding Fees. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Additionally, claimant's counsel filed a fee petition with the Board for services performed in this appeal, and a supplemental fee petition for services performed before the Board in BRB No. 11-0429 BLA. Employer has filed objections to both fee petitions. We first address the appeal of the administrative law judge's fee award.

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, or an abuse of discretion. *See 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 contends that the administrative law judge erred by granting counsel's attorney fee petition, as the award of benefits was "not final," in view of employer's

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the amount of \$3,318.75 for work performed before the Board. *Murphy v. Ida Carbon Corp.*, BRB No. 11-0429 BLA (Sept. 24, 2012) (Order) (unpub.).

<sup>2</sup> The amount of 25.20 hours listed on the fee petition appears to be a typographical error, as the total fee requested for Mr. Wolfe is for 25.50 hours of work.

<sup>3</sup> Employer did not object to the requested hourly rates, but objected to several time entries. The administrative law judge disallowed 4.00 hours of work performed by Mr. Wolfe and a full-time paralegal, finding that this time was spent in furtherance of a future survivor's claim, not the miner's claim. Order Awarding Fees at 4.

appeal of the administrative law judge's Decision and Order awarding benefits. Employer's Brief at 2. Employer's contention lacks merit. An attorney fee award does not become effective or enforceable until there has been a successful prosecution of the claim and an award of benefits is payable. *See Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995). However, in the interest of judicial efficiency, it was reasonable for the administrative law judge to render her decision on claimant's counsel's fee petition, subject to final adjudication of the claim. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991). Therefore, the administrative law judge did not err in ruling on claimant's counsel's fee petition.

Employer further objects to the 3.50 hours that the administrative law judge awarded claimant's counsel for services provided on January 15, 2010; February 20, 2010; June 18, 2010; July 2, 2010; July 9, 2010; August 20, 2010; August 24, 2010; September 10, 2010; and January 7, 2011. Specifically, employer contends that the work associated with the above entries may have been undertaken in furtherance of a future survivor's claim, not the miner's claim. Employer's Brief at 3-6.

A review of the administrative law judge's Order Awarding Fees reveals that the administrative law judge fully considered whether the contested entries were reasonable and related to the present claim, pursuant to 20 C.F.R. §725.366. Order Awarding Fees at 4. The administrative law judge disallowed 4.00 hours of entries that referenced either the filing of a survivor's claim or the miner's autopsy or death certificate, concluding that these entries did not relate to the miner's claim. Order Awarding Fees at 4. As to the remaining entries, the administrative law judge rationally found that claimant's counsel sufficiently documented that the services were necessary in the pursuit of benefits in the miner's claim. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); Order Awarding Fees at 4-5. Furthermore, the administrative law judge did not abuse her discretion in finding that the time spent performing those services was reasonable. *Id.* As the administrative law judge addressed employer's objections, and sufficiently explained why she rejected them, we hold that the administrative law judge did not abuse her discretion in finding the above entries to be compensable. *See Jones*, 21 BLR at 1-108.

Employer next contends that the administrative law judge did not explain, in accordance 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), the bases for her decision to award the time for entries that employer alleged were duplicative and clerical. Specifically, employer maintains that the administrative law judge incorrectly characterized 1.00 hour of legal assistant time calendaring events as compensable legal work, rather than clerical work, and further erred in finding no duplication of effort in 12.00 hours of work performed by the attorneys and legal assistants in reviewing the case file, communicating with claimant,

and drafting a brief for closing argument before the administrative law judge. Employer's Brief at 6-8. Employer's arguments lack merit.

With respect to the specific time entries challenged by employer, the administrative law judge disagreed that the calendaring entries were clerical in nature, and further rejected employer's contention that there were entries covering duplicated work. Periodic review of the file for deadlines and briefing schedules is a legitimate recurring activity in prolonged cases, and is therefore compensable.<sup>4</sup> See *McNulty v. Director, OWCP*, 4 BLR 1-128 (1981). Similarly, work performed by a legal assistant in analyzing the file and calendaring relevant dates may, as here, be found necessary and not excessive or clerical. *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657, 666, 24 BLR 2-106, 2-127 (6th Cir. 2008); *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-218 (1986). The administrative law judge's findings are sufficient under the APA, given their context, and she acted within her discretion in finding that the services provided constituted compensable legal work that was neither excessive nor clerical. See *Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Abbot*, 13 BLR at 1-16; *Lanning*, 7 BLR at 1-316; Order Awarding Fees at 4-5. As employer has not shown that the administrative law judge acted arbitrarily or capriciously, or abused her discretion, we affirm her approval of 22.00 hours of legal services by Attorney Wolfe; 2.75 hours of legal services by Attorney Delph; 4.75 hours of legal services by Attorney Gilligan; 19.50 hours of services by the full-time legal assistants; and 0.75 hour of services by the part-time legal assistants. Therefore, we affirm her award of a total fee of \$9,976.25 for legal services performed while the case was before the Office of Administrative Law Judges.

We now address claimant's counsel's fee petitions filed in connection with services performed before the Board, pursuant to 20 C.F.R. §802.203. Claimant's counsel has filed, in connection with the current appeal in BRB No. 12-0210 BLA, an itemized statement requesting a fee of \$2,518.75, representing 2.50 hours of legal

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<sup>4</sup> Employer mischaracterizes several of the entries it challenges as duplicative. Employer contends that, on February 2 and 3, 2009, "two separate attorneys billed for calling and writing claimant to schedule an appointment." Employer's Brief at 6. However, Mr. Gilligan received a phone call from claimant on February 2, 2009, and Mr. Wolfe drafted a letter to claimant on February 3, 2009. Attorney Fee Petition at 3. Employer additionally argues that "two individuals billed for authoring claimant's written closing argument" on January 19, 2010. Employer's Brief at 7. However, the fee petition reflects that, on January 19, 2010, a legal assistant drafted a closing argument brief, which was then reviewed and edited by Mr. Gilligan the same day. Attorney Fee Petition at 8. The administrative law judge did not abuse her discretion in finding this time to be compensable. See 20 C.F.R. §725.366; *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

services at an hourly rate of \$300.00 (Joseph E. Wolfe), 0.75 hour of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), 10.00 hours of legal services at an hourly rate of \$150.00 (Micah Blankenship), and 1.00 hour of services at an hourly rate of \$100.00 (legal assistants), from January 20, 2012 to October 8, 2012. Claimant's counsel has also filed a supplemental fee petition for services performed before the Board in BRB No. 11-0429 BLA, from April 13, 2012 to October 26, 2012. In the supplemental fee petition, counsel requests a fee of \$1,556.25, representing 2.25 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 1.25 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), and 4.00 hours of legal services at an hourly rate of \$150.00 (Micah Blankenship).

Employer argues that the fee petitions are premature, because its appeal of the Board's decision affirming the award of benefits is pending before the United States Court of Appeals for the Sixth Circuit. We reject employer's argument for the reasons stated above. *See Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982); *Coleman*, 18 BLR at 1-17.

Employer next contends that the fee requested for work performed before the Board in BRB No. 12-0210 BLA, in defense of the administrative law judge's Order Awarding Fees, cannot be granted, as the services performed were not necessary to establishing claimant's entitlement to benefits under 20 C.F.R. §725.366. Employer's Objections at 2-3. Because work performed before the Board in defense of an award of attorney fees at the administrative law judge level is compensable, we reject employer's argument. *Hawker v. Zeigler Coal Co.*, 22 BLR 1-177, 1-181 (2001).

Employer further argues that the five one-quarter hour entries for February 1, 2012, February 16, 2012, March 17, 2012, April 15, 2012, and October 8, 2012 represent clerical services that are not compensable. Employer's Objections at 2. Because work performed by an attorney and a legal assistant reviewing the case file and placing relevant dates on the calendar is not clerical, and as counsel has sufficiently documented that these services were reasonably necessary in the pursuit of benefits, we reject employer's argument. *Bentley*, 522 F.3d at 663, 24 BLR at 2-121; *Whitaker*, 9 BLR at 1-127-28.

Employer finally objects to the \$150.00 hourly rate requested on behalf of Micah Blankenship in both fee petitions, contending that counsel has failed to provide any evidence supporting such a rate. 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).

In his petitions requesting a fee for Ms. Blankenship’s work before the Board, counsel has provided no evidence of Ms. Blankenship’s expertise or experience in the field of black lung litigation. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71 (CRT) (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-122-23. Counsel also has not provided any black lung cases in which Ms. Blankenship was awarded an hourly rate of \$150.00. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010); *Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010) (Order); *Maggard v. Int’l Coal Group, Knott Cnty., LLC*, 24 BLR 1-172 (2010) (Order). Therefore, claimant’s counsel has not provided sufficient evidence of a market rate for Ms. Blankenship in her geographic region for appellate work before the Board.<sup>5</sup> Consequently, we disallow the requested fee for the 10.00 hours of legal services performed by Ms. Blankenship in BRB No. 12-0210 BLA, and the 4.00 hours of legal services performed by her in BRB No. 11-0429 BLA. *See* 20 C.F.R. §802.203(d)(2).

Because claimant’s counsel has not provided a complete fee application, we grant claimant’s counsel thirty (30) days in which to submit an amended fee petition for the work performed by Ms. Blankenship in BRB Nos. 12-0210 BLA and 11-0429 BLA. *Maggard*, 24 BLR at 1-176. The amended fee petition must include Ms. Blankenship’s normal billing rate, 20 C.F.R. §802.203(d)(4), and evidence of the applicable market rate. Any party may file a response to claimant’s counsel’s amended fee petition within ten (10) days from receipt of the petition. 20 C.F.R. §802.203(g).

In all other respects, we find the requested fees to be reasonable in light of the necessary services performed. Therefore, we award a fee of \$1,018.75 for 2.50 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 0.75 hour of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), and 1.00 hour of services at an hourly rate of \$100.00 (legal assistants) in BRB No. 12-0210 BLA, to be paid directly to claimant’s counsel by employer. We further award a supplemental fee of \$956.25 for 2.25 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), and 1.25 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan) in BRB No. 11-0429 BLA, to be paid directly to claimant’s counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

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<sup>5</sup> We also note that counsel has not provided a statement that Micah Blankenship was a member in good standing of a state bar at the time she performed the services at issue, pursuant to 20 C.F.R. §802.203(d)(2).

Accordingly, the administrative law judge's Order Awarding Fees is affirmed. Claimant's counsel is awarded a fee of \$1,018.75 for services performed before the Board in this appeal, and a supplemental fee of \$956.25 for services performed before the Board in BRB No. 11-0429 BLA.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge