

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB Nos. 16-0633 BLA
and 16-0634 BLA

GATHA SYKES)
(Widow of and o/b/o HAROLD SYKES))
)
Claimant-Respondent)
)
v.)
)
SUN GLO COAL COMPANY,)
INCORPORATED)
)
and) DATE ISSUED: 07/31/2017
)
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 Supplemental Decision and Order Awarding Representatives' Fees and Costs of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

BEFORE: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order Awarding Representatives' Fees and Costs (2007-BLA-05321 and 2007-BLA-05322) of Associate Chief Administrative Law Judge William S. Colwell, rendered in connection with the successful prosecution of a miner's claim and a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Claimant's counsel submitted an amended-resubmitted fee petition¹ for services performed before the Office of Administrative Law Judges, requesting a fee in the amount of \$45,481.25 for work performed from July 8, 2002 through July 31, 2012, representing 96 hours of legal services by attorney Joseph E. Wolfe at an hourly rate of \$300.00, 5.75 hours of legal services by attorney Bobby S. Belcher at an hourly rate of \$200.00,² 22.25 hours of legal services by attorney Ryan C. Gilligan at an hourly rate of \$225.00, 14 hours of legal services by attorney W. Andrew Delph at an hourly rate of \$200.00, 2.5 hours of legal services by attorney Micah S. Blankenship at an hourly rate of \$150.00, and 73.5 hours of work performed by legal assistants at an hourly rate of \$100.00. Claimant's counsel also requested reimbursement of expenses and costs in the amount of \$10,072.05.

After considering claimant's counsel's fee petition and employer's objections thereto, the administrative law judge found that claimant's counsel's delay in filing the fee petition did not warrant the loss of fees. Supplemental Decision and Order at 2. The administrative law judge approved the requested hourly rates and all requested itemized expenses, but disallowed compensation for 6.25 hours of legal services performed by Mr. Wolfe, 0.50 hour of legal services performed by Mr. Gilligan, 0.25 hour of legal services

¹ Claimant's counsel filed three fee petitions for services performed before the Office of Administrative Law Judges from July 8, 2002 through July 31, 2012. On February 15, 2013, claimant's counsel filed his first fee petition. He filed a resubmitted fee petition dated March 4, 2015. By Order dated August 7, 2015, Associate Chief Administrative Law Judge William S. Colwell ordered claimant's counsel to modify his fee petition. Consequently, claimant's counsel filed an amended-resubmitted fee petition dated September 1, 2015.

² See footnote 9, *infra*.

performed by Mr. Delph, and 24.25 hours³ of services performed by the legal assistants. *Id.* at 4, 5-7, 8. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$41,006.25. *Id.* at 9. The administrative law judge also ordered employer to reimburse claimant in the amount of \$10,072.50⁴ for expenses. *Id.*

On appeal, employer contends that the administrative law judge erred in determining both the hourly rates and the number of hours approved in awarding the fee. Claimant's counsel responds, urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal. In a reply brief, employer reiterates its contentions.⁵

The amount of an 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.⁶ *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

³ Although the administrative law judge stated that he was disallowing compensation for 23.25 hours of services performed by the legal assistants on page eight of his decision, his final computation of fees on page nine of the decision indicates that he disallowed a total of 24.25 hours of services performed by the legal assistants. See Supplemental Decision and Order at 8, 9. The latter figure is consistent with the administrative law judge's finding that the fee petition sought a total of 73.5 hours for the legal assistants and his determination to disallow 23.75 hours of legal assistant time because it was clerical and an additional .5 hour because it was added to the amended-resubmitted fee petition without explanation. *Id.* at 5-7, 8.

⁴ The administrative law judge correctly noted that claimant's counsel sought "\$10,072.05 in costs incurred on behalf of [c]laimant." Supplemental Decision and Order at 2. Consequently, the administrative law judge's award of costs to claimant in the amount of \$10,072.70, on page eight of the decision, and \$10,072.50, on page nine of the decision, appear to be typographical errors. *Id.* at 8, 9.

⁵ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to reimbursement for costs in the amount of \$10,072.05. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as the miner's last coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); *Sykes v. Sun Glo Coal Co.*, BRB Nos. 12-0613 BLA and 12-0614 BLA, slip op. at 4 n.5 (Aug. 30, 2013) (unpub.).

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).

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). Further, the regulation at 20 C.F.R. §725.366(b) states that "[a]ny fee approved under . . . this section shall be reasonably commensurate with the necessary work done and 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).

Employer initially argues that the hourly rates awarded by the administrative law judge for legal services are not supported by prevailing market rate evidence, that the administrative judge failed to require claimant to establish a market rate, and that the administrative law judge failed to explain, as required by the Administrative Procedure Act (APA)⁷, what evidence he relied upon in determining appropriate hourly rates. We disagree. In determining the prevailing market rate, the administrative law judge noted that he considered evidence of fees received in the past by Messrs. Wolfe, Belcher,

⁷ The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented" 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Gilligan, Delph, and Blankenship. Supplemental Decision and Order at 3-4. Specifically, claimant's counsel's fee petition includes citations to forty-six cases in which Mr. Wolfe was awarded an hourly rate of at least \$300.00.⁸ See September 1, 2015 Amended-Resubmitted Fee Petition at 4-8. In several of these cases, Messrs. Belcher, Gilligan, Delph, and Blankenship were awarded their requested hourly rates of \$200.00, \$225.00, \$200.00 and \$150.00, respectively. *Id.* These cases also include awards of an hourly rate of \$100.00 for work performed by claimant's counsel's legal assistants. *Id.* Evidence of fees received in the past provides some guidance as to what the market rate is, and is appropriately included within the range of sources from which to ascertain a reasonable 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, 25 BLR 2-359, 2-375-76 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010). In awarding the respective hourly rates of \$300.00, \$250.00,⁹ \$225.00, \$200.00 and \$150.00 to Messrs. Wolfe, Belcher, Gilligan, Delph, and Blankenship, the administrative law judge also explained that he considered the "complexity of the litigation," as well as the attorneys' "years of experience and expertise," and "the quality of the representation."¹⁰ Supplemental Decision and Order at 3-4. 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);

⁸ Claimant's counsel also provided affidavits from other attorneys to support his assertion that the hourly rates requested were reasonable. September 1, 2015 Amended-Resubmitted Fee Petition at 9-15. 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).

⁹ Although claimant's counsel's resubmitted fee petition dated March 1, 2015 listed the hourly rate of Bobby S. Belcher as \$250.00, his amended-resubmitted fee petition dated September 1, 2015 listed the hourly rate of Mr. Belcher as \$200.00. Thus, the administrative law judge incorrectly determined that claimant's counsel sought an hourly rate of \$250.00 for the legal services of Bobby S. Belcher. Supplemental Decision and Order at 2.

¹⁰ In his fee petition, claimant's counsel noted that attorneys in his law firm "are very experienced in this difficult area of [black lung] law" and noted that Mr. Wolfe has over 38 years of legal experience. September 1, 2015 Amended-Resubmitted Fee Petition at 1. Claimant's counsel further noted that he knows of "no other firms in Virginia and very few across the nation taking new [black lung] cases." *Id.*

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 relevant criteria and his explanation of the factors he considered, we hold that the administrative law judge did not abuse his discretion in determining that the requested hourly rates for Messrs. Wolfe, Gilligan, Delph, Blankenship, and the legal assistants were reasonable and reflected the applicable market rates. 20 C.F.R. §725.366(b); *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Gosnell*, 724 F.3d at 572, 25 BLR at 375-76; *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We, therefore, affirm the administrative law judge's award of the hourly rates of \$300.00 for Mr. Wolfe, \$225.00 for Mr. Gilligan, \$200.00 for Mr. Delph, \$150.00 for Mr. Blankenship, and \$100.00 for the legal assistants. Further, we modify the administrative law judge's hourly rate award for Mr. Belcher from \$250.00 to \$200.00, to reflect the hourly rate requested on the amended-resubmitted fee petition for this attorney. *See* footnote 9, *supra*.

Allowable Hours

Employer next argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for services. Employer's Brief at 12. Initially, employer asserts that the administrative law judge failed to make a determination of whether billing in quarter-hour increments is reasonable. We disagree. The administrative law judge specifically found that "[b]illing in quarter-hour increments is not unreasonable," noting that the hours requested must be found "reasonable and necessary." Supplemental Decision and Order at 4, *citing Bentley*, 522 F.3d at 666-67, 24 BLR at 2-127 and *Gosnell*, 724 F.3d at 576, 25 BLR at 2-384.

Employer further contends that the administrative law judge violated the APA by failing to explain what objections to individual billing entries he accepted or rejected. Employer's contention has merit, in part.

Review of the administrative law judge's decision reflects that, in light of employer's objections to claimant's billing entries, the administrative law judge disallowed a total of 31.25 hours as not compensable.¹¹ *Id.* at 5-8. Specifically, the administrative law judge disallowed 6.25 hours for services by Mr. Wolfe as clerical in

¹¹ The administrative law judge also noted that, based on his calculation of the hours in the fee petition, "Mr. Wolfe's listed hours total 95 hours," rather than the 96 hours sought by claimant's counsel. Supplemental Decision and Order at 4.

nature, duplicative, or that had been added to the amended-resubmitted fee petition without explanation,¹² 0.50 hour for services by Mr. Gilligan as clerical in nature, 0.25 hour for services by Mr. Delph as clerical in nature, and 24.25 hours for services by the legal assistants that were either clerical in nature or had been added without explanation. As these findings were rational, adequately explained, and within the administrative law judge's discretion, they are affirmed. *See Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16; *Wojtowicz*, 12 BLR at 1-165; Supplemental Decision and Order at 5-9.

However, we agree with employer that the administrative law judge did not adequately discuss all of the specific itemized legal services to which employer objected. While the administrative law judge generally referenced employer's objections to additional "unnecessary and excessive" time entries, and summarily determined that the services rendered "were necessary in the successful pursuit of benefits for [c]laimant," it is not clear which of employer's objections the administrative law judge was addressing in rendering this finding. Specifically, while the administrative law judge disallowed 24.25 hours for services performed by the legal assistants based on employer's objections, as discussed above, employer contested approximately 30 additional hours of time sought for services by the legal assistants, arguing, *inter alia*, that the hours charged were duplicative, vague, excessive, or unnecessary.¹³ *See* Decision and Order at 9; Employer's Opposition to Amended-Resubmitted Fee Petition at 8-11. In addition, while the administrative law judge addressed some of employer's objections to the hours billed by the attorneys, employer raised objections to approximately 54 additional hours billed by Mr. Wolfe, 4 hours billed by Mr. Belcher, 10.25 hours billed by Mr. Gilligan, 9.75 hours billed by Mr. Delph, and 2.5 hours billed by Mr. Blankenship. *See* Employer's Opposition to Amended-Resubmitted Fee Petition at 6-11. It is not clear whether the administrative law judge overlooked these additional objections or found them to be

¹² Although the administrative law judge also found that Mr. Wolfe's September 29, 2007 time entry inexplicably increased by one-half hours in the amended-resubmitted petition, the half hour increase was not included in the administrative law judge's total disallowed hours for Mr. Wolfe. *See* Supplemental Decision and Order at 8-9.

¹³ For example, in addition to other objections, employer asserted that the April 29, 2008 charge by legal assistant "ASH" duplicates an April 26, 2008 charge by Mr. Wolfe; that the February 19, 2009 charge by legal assistant "BLS" was vague; that the 7.5 hours billed by legal assistant "KDD" for preparing evidence summaries and designations between April 2008 and August 2008 were excessive; that the hours billed by legal assistants "JAL" and "RCT" for preparing hearing notebooks were excessive and duplicative; and that the charges by legal assistant "RCT" for preparing briefs were excessive. *See* Employer's Opposition to Amended-Resubmitted Fee Petition at 8-10.

without merit. Because the administrative law judge did not adequately explain his findings, we are unable to determine whether he abused his discretion in awarding fees for the contested hours, and his analysis fails to comport with the APA. *See Marcum*, 2 BLR at 1-897; *see also Jones*, 21 BLR at 1-108; *Wojtowicz*, 12 BLR at 1-165.

In sum, while we hold that the administrative law judge reasonably disallowed 6.25 hours for services by Mr. Wolfe, 0.50 hour for services by Mr. Gilligan, 0.25 hour for services by Mr. Delph, and 24.25 hours for services by the legal assistants, *see Jones*, 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16; *Wojtowicz*, 12 BLR at 1-165, we must vacate the award of fees, overall, and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must address employer's specific objections to the hours billed by claimant's counsel and set forth the reasoning underlying his findings in compliance with the APA.¹⁴ *See Wojtowicz*, 12 BLR at 1-165.

¹⁴ On remand, the administrative law judge should clarify whether the extra half hour billed by Mr. Wolfe on September 29, 2007 is disallowed, as it was not deducted from the total hours awarded in the final calculation of fees. *See Supplemental Decision and Order* at 8-9.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Representatives' Fees and Costs is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge