

BRB No. 09-0693 BLA

EMALGEA LEEDY)	
(o/b/o JOHNNIE LEEDY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SUPERIOR MINING & MINERALS)	DATE ISSUED: 06/30/2010
)	
Employer-Petitioner)	
)	
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 Attorney Fees 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.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (2004-BLA-5846) of Administrative Law Judge Linda S. Chapman rendered on a miner's

claim¹ 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). Claimant's counsel, Stephen A. Sanders, submitted a fee petition to the administrative law judge requesting a fee of \$3,575, representing 13 hours of legal services performed between February 18, 2009 and March 20, 2009 by Mr. Sanders at an hourly rate of \$275. Employer objected to the requested hourly rate and to the number of hours billed. After considering employer's objections, the administrative law judge found the requested hourly rate and number of hours of service to be reasonable. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$3,575 for legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge failed to consider relevant market evidence and apply the correct standard in approving Mr. Sanders's hourly rate and the number of hours requested. Claimant's counsel has responded in support of the fee award. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response brief in this appeal, but contends that the recent amendments to the Act, which became effective on March 23, 2010, are not implicated in this case. Employer replies in support of its position, and agrees with the Director that, because the appeal in this case addresses only the award of an attorney's fee, the amendments to the Act have no impact on the issues raised on appeal. Employer has also filed a supplemental brief, citing additional case law in support of its position.

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 *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661, 24 BLR 2-106, 2-117 (6th Cir. 2008); *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*).

When a claimant wins a contested case, the Act provides that the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee"

¹ Claimant is the executrix of the estate of the deceased miner, who pursued the miner's claim on his behalf. Decision and Order on Remand Awarding Benefits dated August 2, 2007.

² The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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.

In challenging the hourly rate approved herein, employer contends that the administrative law judge failed to require claimant's counsel to produce market evidence to support his requested hourly rate, and erred by relying on past fee awards in unrelated cases. Employer further contends that the administrative law judge's treatment of the evidence proffered by claimant's counsel³ and employer⁴ was inconsistent. Employer's arguments are without merit.

³ In support of his fee petition, claimant's counsel submitted an affidavit referencing his education, years of experience, and specific awards he received in multiple black lung cases at all stages of the adjudication process from 2004 to 2008 at an hourly rate of \$200 to \$225. Claimant's counsel also swore that he increased his hourly rate to \$275 in 2008, and referenced black lung attorney's fee awards he received for work performed before the Office of Administrative Law Judges, the Board, and the United States Court of Appeals for the Fourth Circuit, approving hourly rates of \$250 and \$275.

⁴ In support of its objection to the hourly rate, employer submitted a fee petition from Mark L. Ford of the Ford Law Offices, Harlan, Kentucky, requesting a fee for work performed before the district director in the years 2002 and 2005 at an hourly rate of \$150 in an unrelated case; a fee petition from James L. Hamilton of the law firm of Hamilton & Stevens, PLLC, Pikeville, Kentucky, requesting a fee for work performed before an administrative law judge in the years 2005 and 2006 at an hourly rate of \$150 in an unrelated case; and two fee petitions from Brent Yonts of the law firm of Brent Yonts, PSC, Greenville, Kentucky, requesting fees for services performed before an administrative law judge from September 2005 through July 2008 based on an hourly rate of \$150 in two unrelated cases. Employer also submitted a Supplemental Award from the district director approving the hourly rate of \$150 requested by John Anderson of Barbourville, Kentucky; the declaration of W. William Prochot of the law firm of Greenberg Traurig, Washington, D.C., stating that, generally, \$150 per hour is the maximum hourly rate charged by attorneys in Eastern Kentucky and Southwest Virginia,

In reviewing counsel's requested hourly rate, the administrative law judge appropriately considered claimant's counsel's educational background and experience, and found him to be a "very competent attorney" who is "highly experienced in the area of federal black lung benefits cases [with] extensive professional credentials." Supplemental Decision and Order at 4; *see* 20 C.F.R. §725.366(b). The administrative law judge also considered employer's objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys. Taking all factors into account, and noting that the rates awarded in other cases do not set the prevailing market rate, but provide some guidance as to what the market rate is, the administrative law judge acted within her discretion in determining that employer's arguments were unpersuasive in light of employer's proffered evidence that she found to be "not especially helpful" or "not probative." Supplemental Decision and Order at 3-5. Accordingly, we find no abuse of discretion and affirm the administrative law judge's approval of an hourly rate of \$275. *See City of Burlington v. Dague*, 505 U.S. 557 (1992); *Bentley*, 522 F.3d at 661, 24 BLR at 2-117; *Helton v. Director, OWCP*, 6 BLR 1-176, 1-179 (1983).

Employer also contends that the administrative law judge applied the wrong standard for determining the reasonableness of the number of hours requested. Employer asserts that claimant's counsel appears to have charged a standard amount of time for briefing rather than the actual time worked, arguing that counsel billed nearly the same amount of time for briefing this matter on the second remand as he did for prior briefing. Employer's Brief at 9. Employer's contentions lack merit. The administrative law judge noted that counsel charged twelve hours for writing his second remand brief, as compared to 14 hours in 2006 and 13 hours in 2007 for researching, drafting and editing his briefs before the Board. Supplemental Decision and Order at 5 n.4. Notwithstanding employer's argument that counsel should have gained greater efficiency from prior briefing, the administrative law judge permissibly determined that the number of hours billed was "modest," noting that the prosecution of this claim had spanned a considerable period of time, involving two appeals to the Board and subsequent briefing on remand, and that employer had vigorously contested every issue of entitlement. Supplemental Decision and Order at 5. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion in finding that the hours she approved were reasonable and necessary. *See* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984), *citing McNulty v. Director, OWCP*, 4 BLR 1-128, 1-132 (1981); Supplemental Decision and Order at 5. Consequently, we

based on his interview of seven unnamed black lung attorneys practicing in these areas; and the declaration of Christine M. Terrill of Old Republic Insurance Company, stating that the company pays Eastern Kentucky attorneys no more than \$150 per hour for defending black lung claims.

affirm the administrative law judge's finding that a total of 13 hours of legal services was reasonable under the circumstances of this case.

Accordingly, we affirm the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees of \$3,575 for legal services performed on behalf of claimant.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge