

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB Nos. 18-0177 BLA
and 18-0328 BLA

BERNARD E. THOMAS, JR.)

Claimant-Petitioner)

v.)

DATE ISSUED: 06/26/2019

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Supplemental Order Granting Attorney Fees and Order Granting Claimant's Motion for Attorney Fees for Work Performed to Defend Fee Petition of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Morton Law PLC), Henderson, Kentucky, for claimant.

Sarah A. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (or counsel), Austin P. Vowels, appeals the Supplemental Order Granting Attorney Fees and Order Granting Claimant's Motion for Attorney Fees for Work

Performed to Defend Fee Petition (2015-BLA-05443) of Administrative Law Judge Timothy J. McGrath, in connection with a claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act).²

Claimant's counsel submitted two itemized fee petitions in this case: one for legal services performed in establishing entitlement on the merits of the claim and one for legal services rendered in defense of his fee petition. In the initial fee petition, counsel requested \$17,810.55 for legal services rendered before the Office of Administrative Law Judges from April 8, 2015 to June 1, 2017, and associated expenses. The total fee requested includes 46.3 hours of services performed by attorney Austin P. Vowels at an hourly rate of \$250.00, 13 hours of legal services performed by attorney John C. Morton at an hourly rate of \$300.00, 3.50 hours of services performed by paralegal Trisha Wright at an hourly rate of \$150.00, and litigation expenses in the amount of \$1,810.55.

After considering the fee petition and employer's objections pursuant to the regulatory criteria at 20 C.F.R. §725.366(b), the administrative law judge issued a Supplemental Order Granting Attorney Fees finding the requested hourly rates excessive. The administrative law judge determined both attorneys are entitled to an hourly rate of \$225.00, and the paralegal an hourly rate of \$100.00. The administrative law judge also disallowed 2.8 hours of work performed by Mr. Morton and 0.50 hours of work performed

¹ On May 16, 2017, the administrative law judge issued a Decision and Order Awarding Benefits, which employer appealed to the Board. On March 5, 2018, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Remand stating that the Black Lung Disability Trust Fund accepts liability for this case and does not contest claimant's entitlement to benefits. By Order dated March 28, 2018, the Board granted the Director's motion, dismissed employer as a party, and remanded the case to the district director for payment of benefits by the Black Lung Disability Trust Fund. *Bernard E. Thomas, Jr. v. Director, OWCP*, BRB No. 17-0486 BLA (Mar. 28, 2018) (Order) (unpub.).

² Claimant's counsel's appeal of the administrative law judge's Supplemental Order Granting Attorney Fees was assigned BRB No. 18-0177 BLA and his appeal of the administrative law judge's Order Granting Claimant's Motion for Attorney Fees for Work Performed to Defend Fee Petition was assigned BRB No. 18-0328 BLA. The Board consolidates these appeals for purposes of decision only.

by Mr. Vowels as excessive or duplicative. The administrative law judge awarded a total fee of \$14,760.55.³

On appeal, claimant's counsel alleges the administrative law judge erred in reducing the requested hourly rates and in reducing the amount of time billed. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's reduction of the requested hourly rates. The Director agrees the administrative law judge erred in disallowing 1.2 hours for legal services rendered by Mr. Morton on August 18, 2016 and 0.50 hours for legal services rendered by Mr. Vowels on June 1, 2017. Claimant's counsel filed a reply brief, reiterating his contentions on appeal.

The amount of an attorney's fee award 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.⁴ 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). The regulations provide that an approved fee must 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 the fee requested." 20 C.F.R. §725.366(b).

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. *Pennsylvania 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).

³ The administrative law judge approved 45.8 hours of legal services performed by Mr. Vowels at an hourly rate of \$225.00 (\$10,305.00), 10.2 hours of legal services performed by Mr. Morton at an hourly rate of \$225.00 (\$2,295), and 3.5 hours of legal services performed by the paralegal at an hourly rate of \$100.00 (\$350.00). The administrative law judge also approved expenses in the amount of \$1,810.55. Supplemental Order Granting Attorney Fees at 11.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Hourly 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); *see also Bentley*, 522 F.3d at 663, 24 BLR at 2-121. 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).

Claimant's counsel argues that the administrative law judge erred in not relying on the prior fee awards he submitted in support of his requested hourly rate of \$250.00, as "the fact that such awards were unopposed, in and of itself, speaks to the reasonableness of the awards." Claimant's Brief at 16. We disagree. "Reasonableness" is not the only standard the administrative law judge is to apply in assessing a rate request. The rate must also be consistent with the prevailing market rate and counsel has not explained how the unopposed fee petitions establish this required fact. *See Geier*, 372 F.3d at 791. Thus, claimant's counsel has not established the administrative law judge abused his discretion in finding that the unopposed attorney fee petitions "are not indicative of the appropriate prevailing [rate]." Supplemental Order Granting Attorney Fees [Supplemental Order] at 7; *Maddox v. Lodestar Energy, Inc., Inc.*, No 18-3514, 2019 WL 386958 at **2 (6th Cir. Jan. 30, 2019) (unpub.); *see Jones*, 21 BLR at 1-108.

We also reject counsel's assertion that the administrative law judge erred in finding his reliance on two unpublished Board decisions was misplaced.⁵ The administrative law judge reasonably found that because a description of the attorneys' experience is not included in the decisions cited by counsel, they are of limited value in drawing comparisons to counsel's requested hourly rate. *See Maddox*, 2019 WL 386958 at **2; *Abbott*, 13 BLR at 1-16; Supplemental Order at 7.

Moreover, the administrative law judge permissibly determined that the Laffey Matrix, showing differing hourly rates for attorneys based on the number of years that they

⁵ Claimant's counsel set forth two Board cases awarding an hourly rate of at least \$250.00, *Swan v. Midwest Coal Co.*, BRB Nos. 12-0105 BLA and 12-0106 BLA (Nov. 29, 2012) (unpub.), and *Swiney v. Donald Swiney Mining*, BRB No. 12-0643 BLA (July 19, 2013) (unpub.), arguing that these are indicative of the prevailing market rate. Claimant's Brief at 16-17.

have been out of law school, and the National Law Journal (NLJ) data for partners of law firms across the country are not useful in determining the prevailing market rate, as the information presented in the Laffey Matrix and NLJ is “not categorized by the type or complexity of cases litigated, geographic area, or the particular amount of experience of the litigation attorneys/partners[.]” Supplemental Order at 7-8; *see Maddox*, 2019 WL 386958 at **2; *Maggard v. Int’l Coal Group, Knott County, LLC*, 24 BLR 1-172, 1-174 (2010).

In reviewing counsel’s requested hourly rate, the administrative law judge performed the requisite analysis set forth in 20 C.F.R. §725.366(b), and permissibly relied on the qualifications and expertise of counsel; past hourly rates awarded to counsel;⁶ the quality of the representation and the nature and complexity of the legal issues involved; and the necessity of increasing the hourly rate to account for prevailing market rate and increased costs. 20 C.F.R. §725.366(b); *see Bentley*, 522 F.3d at 663, 24 BLR at 2-121; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010); Supplemental Order at 8-9. We therefore affirm the administrative law judge’s designation of \$225.00 as the appropriate hourly rate for claimant’s counsel, Mr. Vowels. *See Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330, 1-332 (1984).

Similarly, we affirm the administrative law judge’s designation of \$225.00 as the appropriate hourly rate for co-counsel, Mr. Morton. The administrative law judge permissibly determined that based on the description of the legal services provided by Mr. Morton, mainly the review of various documents pertaining to the claim and the case file,

⁶ The administrative law judge cited to Orders by administrative law judges wherein employer objected to counsel’s hourly rate, and where Mr. Vowels was awarded \$225.00. Supplemental Order at 9, *citing Abell v. Island Creek Ky. Mining Co.*, 2016-BLA-05461 (May 22, 2017), *Adams v. Island Creek Ky. Mining Co.*, 2015-BLA-05729 (June 22, 2017), and *Maddox v. Lodestar Energy, Inc.*, 2015-BLA-05461 (May 12, 2017). Claimant’s counsel asserts these orders are not reliable evidence of an appropriate rate because *Abell* and *Maddox* were appealed on the fee issue, and all three orders were issued prior to *Advent Mining LLC v. Davis*, No. 16-4049, 697 Fed. App’x 862 (6th Cir. Dec. 21, 2017) in which the United States Court of Appeals for the Sixth Circuit awarded him an hourly rate of \$250.00 and awarded his paralegal an hourly rate of \$150.00. Claimant’s Brief at 15. Claimant’s argument is misplaced, as *Abell* and *Maddox* were subsequently affirmed by the Board, *see Abell v. Island Creek Coal Co.*, BRB No. 17-0459 BLA (May 21, 2018) (unpub.); *Maddox v. Lodestar Energy, Inc.*, BRB No. 17-0460 BLA (May 16, 2018) (unpub.), and *Maddox* was further affirmed by the Sixth Circuit, subsequent to the issuance of *Davis*. *See Maddox v. Lodestar Energy, Inc., Inc.*, No 18-3514, 2019 WL 386958 (6th Cir. Jan. 30, 2019) (unpub.).

the nature and complexity of the legal issues presented, and Mr. Morton's expertise in black lung law, an hourly rate of \$225.00 was appropriate in this case. 20 C.F.R. §725.366(b); *see Bentley*, 522 F.3d at 663, 24 BLR at 2-121; *Cox*, 602 F.3d at 290; Supplemental Order at 9.

We also reject counsel's contentions concerning the administrative law judge's reduction of the paralegal's hourly rate from the \$150.00 requested to \$100.00. The administrative law judge permissibly declined to give controlling weight to the prior unopposed fee awards on the grounds that they are not evidence of the appropriate market rate. *See Maddox*, 2019 WL 386958 at **3; Supplemental Order at 10. Additionally, the administrative law judge permissibly determined that the unpublished Board case cited by counsel, *Honeycutt v. Tammy Anne, Inc.*, BRB No. 10-0546 BLA (June 29, 2011) (unpub.), does not support the requested rate because the qualifications of the legal assistants in that case are not included in the decision and they were only awarded \$100.00 an hour. *See Maggard*, 24 BLR at 1-175. As claimant's counsel has failed to establish that the administrative law judge abused his discretion in finding that he did not support the requested hourly rate, we affirm his determination that counsel's paralegal was entitled to an hourly rate of \$100.00.⁷ *Maddox*, 2019 WL 386958 at **3.

Allowable Hours

Claimant's counsel next argues the administrative law judge erred in disallowing the time entries for legal services provided by Mr. Morton on April 8, 2015, April 28, 2016 and August 18, 2016, as well as his own 0.50 hours of legal services provided on June 1, 2017. Initially, counsel challenges the administrative law judge's disallowance of 1.0 hour spent by Mr. Morton on April 8, 2015 attending the initial conference with claimant. The appropriate inquiry when addressing work rendered by two counsel in a case is whether the services rendered by each counsel were necessary to establish entitlement. *See Charles v. Director, OWCP*, 3 BLR 1-81, 1-83 (1981). Here, the administrative law judge noted that Mr. Vowels also requested 1.7 hours on April 8, 2015, for "conference with [claimant], review file, preparation of medical records release." Supplemental Order at 6. As these time entries overlap and apparently concern the same conference, the administrative law judge permissibly denied the 1.0 hour claimed by Mr. Morton as duplicative. *See Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Ball*, 7 BLR at 1-619; Supplemental Order at 6.

Similarly, we affirm the administrative law judge's disallowance of the 0.60 hours legal services provided by Mr. Morton on April 28, 2016 because the requested time was

⁷ Counsel's request to hold this case in abeyance pending the issuance of a decision in *Maddox* is moot. Counsel's Reply Brief at 7.

excessive and duplicative of several entries for similar legal services provided by Mr. Vowels. Supplemental Order at 5. Claimant's counsel maintains that because they share responsibility, they both need to keep up-to-date on the case, including frequent review of the file. Claimant's Brief at 12. As the administrative law judge permissibly found, claimant's counsel did not adequately explain why the additional review by Mr. Morton of a letter to the administrative law judge concerning the submission of Joint Pre-Hearing statements was necessary.⁸ See *Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Ball v. Director, OWCP*, 7 BLR 1-617, 1-619 (1984); Supplemental Order at 5. We therefore affirm the administrative law judge's disallowance of 0.60 hours of Mr. Morton's legal services rendered on April 28, 2016.

With regard to the administrative law judge's disallowance of 1.2 hours of legal services rendered by Mr. Morton on August 18, 2016 for review of the record and review of the Director's post-hearing brief, the Director contends that these services were not duplicative of services provided by Mr. Vowels. Director's Letter Brief at 3. The Director states the tasks rendered by Mr. Vowels and Mr. Morton did not overlap and, therefore, the services rendered by both counsel are reasonable and, thus, compensable.

Likewise, the Director states the 0.50 hours of legal services rendered by Mr. Vowels on June 1, 2017 to review the administrative law judge's Decision and Order and call claimant were not duplicative of Mr. Morton's review of the administrative law judge's Decision and Order rendered the week prior because Mr. Vowels provided the further action of calling claimant. Director's Letter Brief at 3. The Director therefore states that Mr. Vowels should be compensated for the 0.50 hours of legal services rendered on June 1, 2017.

We accept the Director's concession, as representative of the party responsible for payment of the attorney fee, to the reasonableness of the 1.2 hours of legal services rendered by Mr. Morton on August 18, 2016 and the 0.50 hours of legal services rendered by Mr. Vowels on June 1, 2017. We therefore modify the administrative law judge's award to increase the allowable legal services by Mr. Vowels from 45.8 hours to 46.3 hours, and increase the allowable legal services by Mr. Morton from 10.2 hours to 11.4 hours. Because we rejected the remainder of claimant's counsel's allegations of error, however, no further modifications to the award are warranted. Consequently, we modify the fee award by adding \$112.50 ($\225.00×0.50) for services performed by Mr. Vowels and \$270.00 ($\225.00×1.2) for services performed by Mr. Morton to the fee awarded by the

⁸ The Director notes that Mr. Morton's review of the record and Joint Pre-Hearing Statement occurred after the filing of the Joint Pre-Hearing statement with the administrative law judge. Director's Letter Brief at 2 n.1.

administrative law judge. Additionally, as we rejected claimant's counsel challenge to the administrative law judge's reduction of the paralegal's hourly rate, we affirm his award of \$350.00 for 3.5 hours of services performed by the paralegal at an hourly rate of \$100.00. We also affirm the administrative law judge's initial award of expenses in the amount of \$1,810.55. Thus, with respect to claimant's counsel's initial fee petition, we modify the total fee award from \$14,760.55 to \$15,143.05.

Subsequent to the administrative law judge's issuance of the Supplemental Order Granting Attorney Fees, claimant's counsel filed a second attorney fee application, seeking to recover fees for the time spent defending the original fee application. This fee petition requested a total fee of \$2,600.00, representing 10.4 hours of legal services performed by Austin P. Vowels, claimant's counsel, at an hourly rate of \$250.00.

In considering the second fee petition for defense of the initial fee petition, the administrative law judge properly found claimant's counsel is entitled to request reasonable fees incurred in litigating an award of attorney's fees. *See Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001); Order Granting Claimant's Motion for Attorney Fees for Work Performed to Defend Fee Petition at 3. Consequently, finding the requested hours of legal services rendered in defense of the initial fee petition to be reasonable, the administrative law judge awarded counsel 10.4 hours of legal services at an hourly rate of \$225.00, the same rate he awarded counsel in the Supplemental Order Granting Attorney Fees. *Id.* at 2 n.1, 3.

On appeal, counsel argues that the administrative law judge erred in reducing the requested hourly rate to \$225.00. Claimant's Brief [BRB No. 18-0328 BLA] at 3. We disagree. For the reasons we provided in affirming the hourly rate set forth in the administrative law judge's Supplemental Order Granting Attorney Fees, *see* discussion, *supra*, we likewise affirm his determination to award Mr. Vowels an hourly rate of \$225.00 in defense of his fee. Consequently, we affirm the administrative law judge's total fee of \$2,340.00, representing 10.4 hours of legal services rendered by Mr. Vowels at an hourly rate of \$225.00.

Accordingly, the administrative law judge's Supplemental Order Granting Attorney Fees is affirmed, as modified, to reflect a total fee of \$15,143.05. The administrative law judge's Order Granting Claimant's Motion for Attorney Fees for Work Performed to Defend Fee Petition is also affirmed in the amount of \$2,340.00. Thus, claimant's counsel is entitled to a total fee of \$17,483.05, payable by the Black Lung Disability Trust Fund.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge