

BRB No. 10-0477 BLA

CUBERT SPENCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEST VIRGINIA SOLID ENERGY, INCORPORATED	)	
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (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 Decision and Order (05-BLA-0018) of Administrative Law

Judge Linda S. Chapman granting an attorney's fee in connection with a claim<sup>1</sup> 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). The administrative law judge considered counsel's fee petition, and employer's objections thereto, and awarded claimant's counsel a total fee of \$3,781.25 for 13.75 hours of legal services at an hourly rate of \$275.00.

On appeal, employer contends that the administrative law judge's fee award should be vacated because claimant's counsel failed to establish the prevailing market rate for his legal services. Claimant's counsel responds in support of the attorney's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief regarding the administrative law judge's attorney's fee award.<sup>2</sup> In a reply brief, employer reiterates its previous 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final.<sup>3</sup> *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

An application seeking a fee for services performed on behalf of a claimant must indicate the customary billing rate of each person performing the services. 20 C.F.R. §725.366(a). The regulations provide that an approved fee shall take into account "the quality of the representation, the qualifications of the representative, the complexity of

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<sup>1</sup> In a Decision and Order dated December 3, 2009, the administrative law judge awarded benefits. Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the evidence established the existence of complicated coal workers' pneumoconiosis. *Spence v. W. Va. Solid Energy, Inc.*, BRB No. 10-0230 BLA (Dec. 23, 2010) (unpub.). The Board, however, vacated the administrative law judge's finding regarding the date of entitlement to benefits, and remanded the case for further consideration. *Id.*

<sup>2</sup> As the Director, Office of Workers' Compensation Programs, accurately notes, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect employer's appeal of the administrative law judge's attorney's fee award.

<sup>3</sup> The record indicates that claimant's last coal mine employment was in Kentucky. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

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. *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).

Employer contends that claimant’s counsel failed to provide sufficient information relevant to the applicable market rate. We disagree. In his fee petition, claimant’s counsel provided an extensive list of black lung cases from 2004 to 2008, in which he was awarded an hourly rate of between \$200.00 and \$225.00. Claimant’s counsel indicated that, in 2008, he raised his hourly rate to \$275.00. In support of the increased hourly rate, claimant’s counsel provided a list of black lung cases in which the Office of Administrative Law Judges and the Board have awarded him an hourly rate of \$275.00. Based on the documentation provided by claimant’s counsel, the administrative law judge found that the referenced black lung awards support claimant’s counsel’s requested hourly rate of \$275.00. Decision and Order at 3. As a general proposition, rates awarded in other cases do not set the prevailing market rate. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23. However, where, as in this case, there is only a small number of comparable attorneys, a tribunal may look to prior awards for guidance in determining a prevailing market rate. *Id.*; *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010) (recognizing that evidence of fees received in the past is an appropriate method of establishing a market rate). Thus, the administrative law judge permissibly relied upon counsel’s prior fee awards in establishing the appropriate market rate.

In support of his requested hourly rate, claimant's counsel also provided evidence of his expertise and experience in the field of black lung litigation,<sup>4</sup> a relevant factor that an administrative law judge may consider in determining a reasonable hourly rate. *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 2-124; Decision and Order at 3. Based on counsel's "quality of representation and his qualifications, in addition to the complexity of the legal issues involved," the administrative law judge found that an hourly rate of \$275.00 in this case was "more than reasonable." Decision and Order at 3.

In awarding claimant's counsel an hourly rate of \$275.00, employer accurately notes that 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 3. However, in awarding the hourly rate of \$275.00, 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 evidence of counsel's prior fee awards, to find that his requested hourly rate was reasonable. *See* 20 C.F.R. §725.366(b); *Bentley*, 522 F.3d at 664, 24 BLR at 2-122; *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 895, 22 BLR 2-514, 2-535 (7th Cir. 2002); Decision and Order at 3. Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse her discretion in determining that claimant's counsel's requested hourly rate of \$275.00 was reasonable, and reflected the applicable market rate.<sup>5</sup> Decision and Order at 3-4; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge's approval of the requested hourly rate of \$275.00.

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<sup>4</sup> Claimant's counsel has represented miners in black lung cases for over twenty years at all stages of the adjudicatory process. Claimant's counsel has also given presentations to other attorneys on topics relating to black lung litigation. Claimant's Counsel's Affidavit in Support of Fee Petition.

<sup>5</sup> Employer accurately notes that the administrative law judge erred in stating, at one point in her decision, that claimant's counsel did not have the burden of submitting market evidence establishing the prevailing market rate. Employer's Brief at 5. However, because the administrative law judge relied upon relevant evidence provided by counsel in determining the applicable market rate in this case, the administrative law judge's incorrect statement is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In light of the foregoing, we affirm the administrative law judge's attorney's fee award in the amount of \$3,781.25. *Abbott*, 13 BLR at 1-16. As noted, this fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman*, 18 BLR at 1-17.

Accordingly, the administrative law judge's Decision and Order awarding an attorney's fee is affirmed.

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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BETTY JEAN HALL  
Administrative Appeals Judge