

U.S. Department of Labor

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



BRB Nos. 18-0450 BLA  
and 18-0450 BLA-A

PATRICIA A. DENNIS )  
(Widow of EMERY M. DENNIS) )

Claimant-Petitioner )  
Cross-Respondent )

v. )

MOUNTAIN EDGE MINING, )  
INCORPORATED )

and )

NATIONAL UNION FIRE/CHARTIS )

Employer/Carrier- )  
Respondents )  
Cross-Petitioners )

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

Party-in-Interest )

DATE ISSUED: 03/25/2019

DECISION and ORDER

Appeal of the Supplemental Order Granting in Part Attorney Fees of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE,  
Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (counsel), Austin P. Vowels, appeals, and employer/carrier (employer) cross-appeals, the Supplemental Order Granting in Part Attorney Fees (2017-BLA-05383) of Administrative Law Judge Colleen A. Geraghty in connection with a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). On February 15, 2018, the administrative law judge issued a Decision and Order awarding benefits pursuant to the regulations at 20 C.F.R. Parts 718 and 725. Thereafter, claimant's counsel filed a complete, itemized fee petition requesting \$18,903.10 for legal services performed before the administrative law judge between January 26, 2017 and February 27, 2018 and reimbursable expenses. The total fee requested represents 25.80 hours of services performed by attorney Austin P. Vowels at an hourly rate of \$250.00, 25.30 hours of services performed by attorney Daniel Boling at an hourly rate of \$175.00, 37.70 hours of services performed by paralegal Trisha Wright at an hourly rate of \$150.00, and litigation expenses in the amount of \$2,370.60.

After considering the regulatory criteria at 20 C.F.R. §725.366(b), on May 3, 2018 the administrative law judge issued a Supplemental Order Granting in Part Attorney Fees (Supplemental Order) finding the requested hourly rates for attorney services rendered by both attorneys and the total number of hours claimed to be reasonable, but reducing the requested hourly rate for paralegal services to \$100.00. Specifically, the administrative law judge awarded a total fee of \$17,018.10, representing 25.80 hours of legal services at an hourly rate of \$250.00, 25.30 hours of legal services at an hourly rate of \$175.00, 37.70 hours of paralegal services at an hourly rate of \$100.00, and litigation expenses in the amount of \$2,370.60.<sup>1</sup>

On appeal, counsel contends that the administrative law judge erred in reducing the hourly rate for the paralegal. Employer filed a cross-appeal, urging affirmance of administrative law judge's reduction of the hourly rate for the paralegal, but asserting that due to two transcription errors in counsel's fee petition, the total number of hours awarded is in error. Counsel responds to employer's brief on cross-appeal, agreeing with employer

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<sup>1</sup> The Supplemental Order Granting in Part Attorney Fees (Supplemental Order) indicates that employer filed no objections to the Motion for Attorney's Fees. Supplemental Order at 2.

that the fee should be reduced based on his two erroneous entries. The Director, Office of Workers' Compensation Programs, has not filed a response to either appeal.<sup>2</sup>

The amount of an award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *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); see *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008). 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); *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 13 BLR 2-364 (1990); see *Blankenship v. Schweiker*, 676 F.2d 116, 117-118 (4th Cir. 1982); *Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984).

In determining the amount of a fee to be awarded 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. See *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986).

### **Hourly Rate**

The Supreme Court has held that a 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 burden falls on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by persons of comparable skill, experience, and reputation. *Id.* at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Counsel argues the administrative law judge erred in not relying on four prior fee awards in which Ms. Wright was awarded \$150.00 per hour for paralegal services,

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<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's determinations that \$250.00 was a reasonable hourly rate for Attorney Vowels' legal services, \$175.00 was a reasonable hourly rate for Attorney Boling's legal services, and the award of expenses for \$2,370.60. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

asserting these fee awards constitute “direct, inferential proof of the prevailing market rate.”<sup>3</sup> Counsel’s Brief at 4-5. We disagree.

While prior fee awards can provide guidance in determining a prevailing market rate, the hourly rate awarded in other cases is not binding in subsequent unrelated cases because individual circumstances determine rates. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; *see generally Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217 (1986). Here, the administrative law judge considered the four cases awarding Ms. Wright \$150.00 per hour but noted that counsel also cited a case where a legal assistant was awarded \$100.00 per hour. Supplemental Order at 2. Thus, she permissibly found the prior fee awards did not constitute evidence establishing \$150.00 per hour as the prevailing market rate. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; *Maddox v. Lodestar Energy, Inc.*, 2019 WL 386958 at \*3 (Jan. 30, 2019) (unpub.). She also considered the arguments and evidence about Ms. Wright’s credentials but permissibly found that “the complexity of the issues, the qualifications of the representative, and the level at which the claim was decided” warranted an hourly rate of \$100.00. 20 C.F.R. §725.366(b); *see Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; *Maddox*, 2019 WL 386958 at \*3 (evidence of a paralegal’s credentials does not reflect the market rate for paralegal services and therefore cannot establish \$150.00 as the prevailing rate); Supplemental Order at 2.

As we can discern no abuse of discretion in the administrative law judge’s determination that an hourly rate of \$100.00 for paralegal services was reasonable in light of the criteria contained in 20 C.F.R. §725.366(b), we affirm this determination.<sup>4</sup> *Abbott*, 13 BLR at 1-16; *Pritt*, 9 BLR at 1-160; *Gillman v. Director, OWCP*, 9 BLR 1-7, 1-9 (1986).

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<sup>3</sup> Claimant’s counsel (counsel) cited one fee order rendered by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, three fee orders issued by administrative law judges awarding Ms. Wright \$150.00 per hour, and one fee order by an administrative law judge awarding a legal assistant \$100.00 per hour. Counsel’s Brief at 4; Motion for Attorney’s Fees at 4-5. Counsel asserted that because Ms. Wright “is far more educated,” having earned a Bachelor of Science in Political Science and Legal Studies and a Master of Science in Public Service Administration from the University of Evansville, her rates have been adjusted upward from that of a legal assistant. Counsel’s Brief at 4; Motion for Attorney’s Fees at 4-5.

<sup>4</sup> Counsel’s request to hold this case in abeyance pending the issuance of a decision in *Maddox* is moot. Counsel’s Brief at 5.

### **Allowable Hours**

In its cross-appeal, employer argues that the administrative law judge's award of \$17,018.10 is incorrect because counsel's Motion for Attorney's Fees contained two transcription errors that erroneously inflated the number of hours awarded by the administrative law judge. Employer's Cross-Appeal Brief at pp. 4-5 [unpaginated]. Counsel responds, agreeing with employer that the 2.0 hours entered for work by Attorney Vowels on January 2, 2018 should have been 0.2 hours, and the 1.0 hour entered for his work on February 27, 2018 should have been 0.1 hour.<sup>5</sup> Claimant's Response Brief at 3.

In light of this concession, we agree with employer that the allowable hours for legal services rendered by Attorney Vowels, at an hourly rate of \$250.00, should be reduced by 2.7 hours, resulting in a total fee reduction of \$675.00. Hence, we modify the administrative law judge's decision to reflect a total fee award of \$16,343.10, representing 23.10 hours performed by Attorney Vowels at an hourly rate of \$250.00, 25.30 hours of services performed by Attorney Boling at an hourly rate of \$175.00, 37.70 hours of services performed by Ms. Wright at an hourly rate of \$100.00, and litigation expenses in the amount of \$2,370.60.

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<sup>5</sup> Counsel's Motion for Attorney's Fees lists "(.2)" hours and "(.1)" hours, respectively, beside the descriptions of work performed by Attorney Vowels on January 2, 2018 and February 27, 2017. The adjacent column labeled "Time (hours)," however, lists 2 hours and 1 hour for these dates. Motion for Attorney's Fees at 9.

Accordingly, the Supplemental Order Granting in Part Attorney Fees of the administrative law judge is affirmed in part and modified in part, consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge