

BRB No. 10-0481 BLA

CHARLES E. REED)
)
 Claimant-Respondent)
)
 v.)
)
 TRIPLE S ENERGY, INCORPORATED) DATE ISSUED: 05/03/2011
)
 and)
)
 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 Order Awarding Attorney Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Order Awarding Attorney Fees (2007-BLA-05456) of Administrative Law Judge Pamela Lakes Wood rendered in connection with a miner's claim 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).¹ On August 12, 2009, the administrative law judge issued a Decision and Order Granting Benefits pursuant to 20 C.F.R. Part 718.² Counsel for claimant thereafter submitted a fee petition to the administrative law judge requesting a total fee of \$7,893.75, representing 16.75 hours of services performed by Attorney Joseph E. Wolfe at an hourly rate of \$300; 2.0 hours of services performed by Attorney W. Andrew Delph at an hourly rate of \$200; 8.25 hours of services performed by Attorney Ryan C. Gilligan at an hourly rate of \$175; and 10.25 hours of services performed by legal assistants at an hourly rate of \$100. The administrative law judge considered the fee petition, and employer's objections thereto, and awarded a total fee of \$7,643.75 for legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge's attorney fee award should be vacated because counsel failed to "provide market evidence supporting the rates requested[,]" for the legal services provided. Employer's Brief at 1. Employer also contends that the administrative law judge improperly rejected its proffered market evidence and erred in concluding that billing in quarter-hour increments is permitted by law. Claimant's counsel has responded in support of the fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer replies, reiterating its position and attaching additional evidence in support of its argument regarding the appropriate hourly rates.³

¹ 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 fee award.

² On September 3, 2009, employer appealed the administrative law judge's August 12, 2009 Decision and Order Granting Benefits to the Board. In a Decision and Order issued on September 29, 2010, the Board affirmed the administrative law judge's award of benefits. *Reed v. Triple S Energy, Inc.*, BRB No. 09-0819 BLA (Sept. 29, 2010) (unpub.). Employer's November 1, 2010 Motion for Reconsideration of the Board's decision is currently pending. On May 14, 2010, the Board received employer's notice of appeal with regard to the administrative law judge's award of attorney fees, which appeal was docketed as BRB No. 10-0481 BLA, and is disposed of herein.

³ We note that the Board cannot consider evidence that was not part of the record before the administrative law judge. *See Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). We, therefore, return this new evidence to employer.

The 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*); *Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894, 1-896 (1980). An attorney fee may be approved pending a final award of benefits, but that fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

An application seeking a fee for legal 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 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 fee 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 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); *see generally B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008) (defining “reasonable hourly rate” as “the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.”) 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.

Employer contends that the administrative law judge erred in determining the hourly rate for the legal services provided, arguing that the administrative law judge failed to require counsel to provide market evidence establishing hourly rates for the legal services provided. Employer contends that counsel’s statement regarding customary billing rates, standing alone, is not sufficient proof. Employer’s Brief at 4-5. Employer also contends that the administrative law judge’s reliance on rates awarded in prior claims is not sufficient to set a prevailing market rate. *Id.* at 6. Employer further contends that the administrative law judge erred in discrediting the affidavits proffered by employer, as evidence of the prevailing market rate. *Id.* at 7-9. Lastly, employer contends that the administrative law judge erred in rejecting employer’s challenges to the

counsel's use of a quarter-hour billing method. *Id.* at 9-10. There is merit, in part, to employer's contentions.

In determining that the hourly rates requested by Mr. Wolfe, Mr. Delph, Mr. Gilligan, and the legal assistants were reasonable, the administrative law judge found them supported by information in counsel's fee petition,⁴ and the history of hourly rates previously granted to counsel and upheld by the Board. In particular, the administrative law judge cited numerous cases dating back to 2007 in which she, as well as other administrative law judges, awarded Attorney Wolfe an hourly rate of \$300. Supplemental Order at 2-4. As employer asserts, however, the administrative law judge did not require counsel to provide specific evidence of the prevailing market rate to support the hourly rates requested, but rather, relied on counsel's statement that the requested hourly rates for the legal services provided were their "customary" billing rates.

Under a similar set of facts, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held, in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010), that an administrative law judge erred by determining a reasonable hourly rate in the absence of satisfactory, specific evidence of the prevailing market rates. In so holding, the court detailed the fee applicant's burden, and the sources of evidence that were appropriate in establishing reasonable hourly rates in the fee-shifting context. *Cox*, 602 F.3d at 289, 24 BLR at 2-290.

In this case, while counsel submitted a page from the "Altman & Weil" survey of attorney fees for the "Middle Atlantic" and "South Atlantic" regions, in addition to a detailed description of the educational background and work experience of each of the attorneys in this case, he failed to provide specific evidence of the prevailing market rates in the relevant community in which he seeks an award and, therefore, he failed to meet his burden of proof. *See Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990). Consequently, we vacate the administrative law judge's award of attorney fees and remand the case for the administrative law judge to determine reasonable hourly rates for legal services provided in accordance with the court's guidance in *Cox*. *See Cox*, 602 F.3d at 290 n.12, 24 BLR at 2-290-91 n.12. On remand, contrary to employer's contention, counsel may submit

⁴ Claimant's counsel, in support of the requested hourly rates, provided an itemized fee petition containing evidence of the expertise and experience in the field of black lung litigation, the professional status, and the normal billing rate, for each person who performed services and for whose work a fee is claimed. Additionally, in response to the administrative law judge's December 15, 2009 Order, counsel verified that the requested hourly rates were the "customary billing rates" for the attorneys and legal assistants associated with this case.

evidence of fees received in the past,⁵ as well as affidavits of other lawyers, whether or not they practice black lung law, if they are familiar with both the skills of the fee applicants and, more generally, with the type of work in the relevant community. Further, in determining a reasonable, prevailing market rate, the administrative law judge is not limited to consideration of fees granted in black lung cases; rather, consideration of fees granted in other administrative proceedings of similar complexity would also yield instructive information. *See generally Cox*, 602 F.3d at 290, 24 BLR at 2-291 (recognizing that evidence of fees received in the past is an appropriate method of establishing market rate); *Robinson v. Equifax Info. Servs.*, 560 F.3d 235, 245 (4th Cir. 2009); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County*, 24 BLR 1-172 (2010).

We reject, however, employer's assertion that the administrative law judge erred in discounting its evidence of the prevailing market rates.⁶ The administrative law judge correctly noted that employer submitted fee petitions from other attorneys representing claimants in black lung claims, and affidavits in support of its assertion that the "Altman

⁵ As a general proposition, rates awarded in other cases do not set the prevailing market rate. 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. *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23 (6th Cir. 2008); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010).

⁶ 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 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, 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.

& Weil” survey fees are inaccurate, and that experienced lawyers earn no more than \$150.00 per hour for litigating black lung claims in counsel’s geographic area. Supplemental Order at 4-5. Contrary to employer’s argument, the administrative law judge permissibly determined that employer’s counsel’s affidavit was entitled to no weight, as it neither provided sufficiently specific underlying information to make it reliable, nor recognized the factors that are necessarily incorporated into rates charged by counsel. *See City of Burlington v. Dague*, 505 U.S. 557 (1992); *Cox*, 602 F.3d at 290 n.12, 24 BLR at 2-290-91 n.12; *Robinson*, 560 F.3d at 245; *Jones*, 21 BLR at 1-108; Supplemental Order at 4-5. Similarly, the administrative law judge permissibly accorded little weight to the additional evidence submitted by employer, *i.e.*, fee petitions from other attorneys and the affidavit regarding fees paid by an insurance company to its counsel, finding it insufficient to establish a prevailing market rate.⁷ *Id.* Therefore, contrary to employer’s contention, the administrative law judge acted within her discretion in finding that employer’s proof was not more probative than the hourly rates for legal services awarded to counsel in prior cases. *See Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 (2010); *Abbott*, 13 BLR at 1-16; *see also Jones*, 21 BLR at 1-108; Supplemental Order at 5. Thus, the administrative law judge permissibly concluded that employer’s evidence did not establish that the prevailing market rate for an experienced attorney in counsel’s region was, at most, \$150 per hour.

Furthermore, we reject employer’s contention that the administrative law judge erred in approving counsel’s use of quarter-hour billing. Contrary to employer’s contention, quarter-hour billing is permissible, as long as the total amount of time is reasonable. *Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127. Herein, the administrative law judge addressed employer’s objections to counsel’s billing in quarter-hour increments, as well as the number of hours billed, and reduced the 37.25 hours of requested time by 1.5 hours, for a total of 35.75 hours of compensable time. Supplemental Order at 6-7. Specifically, the administrative law judge rejected employer’s challenge to legal services provided by the legal assistants as being clerical in nature and thus, not compensable, stating that “[m]ost of the challenged activities, such as review and analysis of the file, calendaring, and client contact, are not clerical in nature[,]” and such functions are integral to the proper conduct of litigation. Supplemental Order at 6.⁸ As the administrative law judge acted within her discretion in

⁷ As the United States Court of Appeals for the Sixth Circuit stated in *Bentley*, the rates received by attorneys who represent employers “are undoubtedly affected by several factors, including volume of work and prompt payment. Attorneys who represent claimants, on the other hand, likely do not benefit from the same high volume of work.” *Bentley*, 522 F.3d at 665, 24 BLR at 2-125.

⁸ The administrative law judge agreed with employer that services provided by legal assistants on February 20, 2007 (binding exhibits), June 4, 2007 (analyzing file and

finding the total number of hours claimed to be reasonable in light of the legal services performed, we affirm her determination to approve counsel's use of the quarter-hour billing method. *See Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127; *Abbott*, 13 BLR at 1-17; Supplemental Order at 6.

Accordingly, we affirm in part and vacate in part the administrative law judge's Supplemental Order Awarding Attorney Fees, and remand this case for reconsideration. On remand, the administrative law judge must initially require counsel to provide evidence of a prevailing market rate to support the hourly rates requested. The administrative law judge must then reconsider counsel's fee petition in accordance with the criteria set forth at 20 C.F.R. §725.366.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

issuing check), August 8, 2007 (scheduling appointment and mailing), and December 17, 2008 (logging in deposition) were clerical in nature and, therefore, disallowed these entries totaling one hour of legal services. Supplemental Order at 6. In addition, the administrative law judge disallowed one-half hour of legal services dated August 13, 2009 requested by Mr. Wolfe, as duplicative of services performed by a legal assistant. Supplemental Order at 5-6.