

BRB No. 11-0572 BLA

EDGAR A. HAMPTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ANR COAL COMPANY, LLC)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	DATE ISSUED: 05/17/2012
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Award of Attorney's Fee of Daniel F. Solomon, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order - Award of Attorney's Fee (08-BLA-5389) of Administrative Law Judge Daniel F. Solomon relating to an award of benefits on a 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). Claimant’s counsel submitted a fee petition to the administrative law judge, requesting a fee of \$15,568.75 for work performed between December 11, 2007 and May 20, 2010, representing 33.25 hours of legal services by Joseph E. Wolfe at an hourly rate of \$300.00; 0.25 hour of legal services by Bobby S. Belcher, Jr., at an hourly rate of \$250.00; 0.25 hour of legal services by W. Andrew Delph at an hourly rate of \$200.00; 17.75 hours of legal services by Ryan C. Gilligan at an hourly rate of \$175.00; and 23.75 hours of services by legal assistants at an hourly rate of \$100.00 (collectively, claimant’s counsel). After considering counsel’s fee petition and employer’s objections thereto, the administrative law judge approved the requested hourly rates for the four attorneys as reasonable, but reduced the hourly rate for the legal assistants to \$75.00, finding that the requested hourly rate was excessive. The administrative law judge further approved the number of hours requested for legal services performed by the four attorneys, but reduced the number of hours for services performed by the legal assistants to 12.0 hours. The administrative law judge awarded claimant’s counsel a total fee of \$10,987.50 for legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge erred in finding that the hourly rates requested by the four attorneys were reasonable, arguing that claimant’s counsel failed to produce specific evidence of the prevailing market rates for services in the relevant geographic area for similarly qualified attorneys doing similar work, and that the administrative law judge did not rely on market proof when approving the requested hourly rates. In response, claimant’s counsel notes that the Supplemental Decision and Order contains a clerical error, as the administrative law judge failed to include Attorney Gilligan’s 17.75 hours of legal services at an hourly rate of \$175.00 in his final calculation of the fee award. Thus, counsel urges affirmance of the fee award, as modified to include an additional \$3,106.25, the amount the administrative law judge approved for Attorney Gilligan’s legal services, for a total fee of \$14,093.75. The Director, Office of Workers’ Compensation Programs, has not filed a response to employer’s appeal.¹

The amount of an attorney’s fee 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. *Abbott v. Director, OWCP*, 13 BLR 1-15

¹ We affirm, as unchallenged on appeal, the administrative law judge’s approval of the number of hours requested by the four attorneys, and his finding that the legal assistants are entitled to fees for 12.0 hours of services at the rate of \$75.00 per hour. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Supplemental Decision and Order at 6.

(1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger v. 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” 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.

Employer asserts that the administrative law judge did not employ the proper analysis in determining the appropriate hourly rates for the attorneys. Specifically, employer contends that the administrative law judge’s failure to explain how the factors set forth in Section 725.366(b) support his finding that the hourly rates of \$300.00, \$250.00, \$200.00, and \$175.00 are reasonable contravenes the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), and fails to comply with applicable legal authority on fee-shifting. Employer argues that the administrative law judge impermissibly: relied on his personal beliefs and non-record evidence as bases to identify a market rate; relied on unpublished past fee awards, which do not constitute market evidence; relied on rates awarded in cases under the Defense Base Act, 42 U.S.C. §1651, where attorneys typically receive \$400.00 to \$450.00 per hour; declined to apply the rates awarded in Social Security cases, even though such cases are very similar to black lung work; and rejected evidence of the hourly rates charged by other attorneys who represent claimants. Employer’s arguments lack merit.²

² We reject employer’s additional argument, that the administrative law judge erred in granting counsel’s motion for leave to file a late response to employer’s request for admissions, Employer’s Brief at 2-3, and agree with counsel’s response, that the administrative law judge acted within the broad discretion afforded him in resolving procedural issues. Claimant’s Brief at 8, citing *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc).

In this case, the administrative law judge performed the requisite analysis set forth in Section 725.366(b), considered employer's objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys, and adequately explained his determination that hourly rates of \$300.00, \$250.00, \$200.00, and \$175.00 for work performed by Attorneys Wolfe, Belcher, Delph, and Gilligan were reasonable under the facts of this case. Within a proper exercise of his discretion, the administrative law judge relied on the following considerations: the nature of the issues involved in this case; the qualifications of the attorneys; Attorney Wolfe's expertise developed over thirty-five years of specialized practice in this area of law, as well as Attorney Belcher's over sixteen years of experience, Attorney Delph's several years of experience practicing in Virginia, and Attorney Gilligan's three years of experience representing black lung claimants; Altman & Weil's *Survey of Law Firm Economics*, reporting a range of hourly rates for attorneys in various regions based on years of practice and experience; the nature of the services rendered; evidence of fees counsel received in the past, based on a list of twenty-nine cases in which the requested rates were awarded as reasonable; and the ultimate benefit to claimant. *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 665-666, 24 BLR 2-106, 2-124 (6th Cir. 2008) (adjudicator might need to consider one or more specific factors, including experience and complexity of the case, to determine where the particular attorney's representation lies along the spectrum of the market for legal services). Contrary to employer's arguments, while the Altman & Weil survey alone does not provide sufficient information for a determination of the market rate, the administrative law judge may properly consider this evidence, in conjunction with other factors, including evidence of fees counsel received in the past, as appropriately included within the range of sources from which to ascertain a reasonable rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-291 (4th Cir. 2010); *Maggard v. International Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010) (Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010) (Order); *Parks v. Eastern Assoc. Coal Corp.*, 24 BLR 1-177, 1-181 n.5 (2010) (Order). We reject employer's contention that the administrative law judge abused his discretion in discrediting evidence of the rates charged by three other attorneys who represent black lung claimants, and evidence of fees awarded in Social Security cases. The administrative law judge acknowledged that "I know the three lawyers who Employer relies upon well," and permissibly concluded that "they are competent but not as well qualified as [counsel] and therefore the value is not comparable." Supplemental Decision and Order at 5. Similarly, the administrative law judge properly found that the fee awards in Social Security cases are "limited by law," and thus rationally found that they "are not comparable fees." Supplemental Decision and Order at 5; *see Parks*, 24 BLR at 1-181, *citing City of Burlington v. Dague*, 505 U.S. 557 (1992); *Jones*, 21 BLR at 1-108. As the administrative law judge, within a proper exercise of his discretion, determined that counsel provided sufficient evidence supporting the requested hourly rates for the four attorneys, as reasonable for work performed before the Office of Administrative Law Judges, we affirm his approval of the hourly rates of \$300.00 for Attorney Wolfe,

\$250.00 for Attorney Belcher, \$200.00 for Attorney Delph, and \$175.00 for Attorney Gilligan.

After determining that Attorney Gilligan's hourly rate of \$175.00 was reasonable, the administrative law judge acknowledged that employer did not dispute the 17.75 hours requested for Attorney Gilligan. Supplemental Decision and Order at 7. However, when he calculated the various amounts owed to Attorneys Wolfe, Belcher, and Delph, the administrative law judge omitted a computation for Attorney Gilligan. Hence, we modify the administrative law judge's decision to reflect a total fee award of \$14,093.75, which includes the additional \$3,106.25 fee approved for Attorney Gilligan.

Accordingly, the administrative law judge's Supplemental Decision and Order - Award of Attorney's Fee is affirmed, as modified, consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge