

BRB No. 11-0603 BLA

ELIZABETH BERRY)	
(o/b/o DAMON L. BERRY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED: 05/17/2012
)	
Employer-Petitioner)	
)	
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.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order - Award of Attorney's Fee (2008-BLA-5260) of Administrative Law Judge Daniel F. Solomon rendered 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).¹ Claimant's counsel, Sandra M. Fogel,

¹ Claimant is the widow of the miner, who died while his claim was pending before the administrative law judge. Claimant pursued the miner's claim on his behalf.

submitted a fee petition to the administrative law judge, requesting a total fee of \$9,717.50, representing 36.90 hours of legal services performed from May 18, 2008 to December 8, 2008 and from November 2, 2009 to January 27, 2011 at an hourly rate of \$240.00, plus \$861.50 in expenses. Employer moved to hold claimant's fee petition in abeyance "until discovery on the rate asserted by counsel has been completed," and objected to the requested hourly rate and to the expenses for non-testifying experts. Employer's Opposition to Shifted Fees and Motion to Hold in Abeyance Pending Discovery at 1. After considering employer's objections, the administrative law judge found the requested hourly rate and expenses to be reasonable and sufficiently documented. The administrative law judge awarded a total fee of \$9,717.00 for legal services performed while the case was before the Office of Administrative Law Judges, and denied employer's motion to hold the fee petition in abeyance.

On appeal, employer contends that the administrative law judge failed to consider appropriate market evidence and apply the correct standard in approving counsel's requested hourly rate. Employer also challenges the administrative law judge's award of expenses for non-testifying experts, and requests that the Board vacate the fee award and remand the case for assignment to a different administrative law judge. Claimant's counsel responds in support of the fee award. The Director, Office of Workers' Compensation Programs, has declined to file a response. Employer replies in support of its position.

The amount of an attorney's fee award by an administrative law judge 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.² *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger 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

² The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 2.

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(b).

In challenging the hourly rate approved herein, employer contends that the administrative law judge failed to require claimant's counsel to produce market evidence to support her requested hourly rate, and erred by relying on "vague factors" and past fee awards in unrelated cases. Employer's Brief at 3-9; Employer's Reply Brief at 2-6. Employer's arguments are without merit.

In reviewing counsel's requested hourly rate, the administrative law judge appropriately considered claimant's counsel's educational background and experience, and found her to be "most exceptional and unique" with an "impressive history of scholarship in black lung." Supplemental Decision and Order at 4; *see B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661, 24 BLR 2-106, 2-123-24 (6th Cir. 2008). The administrative law judge further found that the "quality of the representation was exceptional," noting the complexity of the case and counsel's persuasive brief. Supplemental Decision and Order at 8; *see* 20 C.F.R. §725.366(b). The administrative law judge also considered the arguments of the parties, counsel's customary rate, the evidence of fees awarded to other black lung attorneys, and prior fee awards to claimant's counsel. Taking all factors into consideration, and noting the "limited competition for black lung representation in the appropriate geographic area," the administrative law judge found that the requested hourly rate of \$240.00 was reasonable. Supplemental Decision and Order at 6, 8. As no abuse of discretion has been demonstrated, we affirm the administrative law judge's approval of an hourly rate of \$240.00. *See City of Burlington v. Dague*, 505 U.S. 557 (1992); *Bentley*, 522 F.3d at 661, 24 BLR at 2-117.

Lastly, we reject employer's argument that the administrative law judge erred in awarding expenses for non-testifying experts in the absence of actual bills or receipts, as the administrative law judge correctly found that the expenses were recoverable and that counsel's itemization was sufficiently specific to support her claim. Supplemental Decision and Order at 8-9; *see Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899-902, BLR (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Consequently, we affirm the administrative law judge's award of expenses.

Because the administrative law judge approved claimant's counsel's hourly rate, number of hours, and expenses as requested, it is clear that the administrative law judge's decision contains a clerical error, and that claimant is entitled to a total fee of \$9,717.50, rather than \$9,717.00. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993), *citing*

Johnson v. Director, OWCP, 7 BLR 1-206 (1984); *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103 (1979). Consequently, we modify the administrative law judge's award to reflect the correct calculation of the attorney's fee.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge