



BRB No. 17-0459 BLA

RALPH ABELL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 05/21/2018
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	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.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant's counsel, Austin Vowels, appeals the Supplemental Order Granting In Part Attorney Fees (2016-BLA-05328) 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 (the Act). On March 31, 2017, 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 submitted a fee petition to the administrative law judge, requesting \$19,269.10 for legal services rendered before the Office of Administrative Law Judges from January 4, 2016 to April 10, 2017, and associated expenses. The total fee requested represents 51.00 hours of services performed by claimant's counsel at an hourly rate of \$250.00, 37.50 hours of services performed by a paralegal at an hourly rate of \$150.00, and expenses in the amount of \$894.10. Employer objected to the hourly rates claimed for counsel and the paralegal.

After considering claimant's counsel's fee petition and employer's objections to it, the administrative law judge found both requested hourly rates excessive. She determined that claimant's counsel is entitled to an hourly rate of \$225.00 and that the paralegal is entitled to an hourly rate of \$100.00. The administrative law judge also disallowed 0.40 hours requested for work performed by the paralegal because the service was clerical. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$16,079.10.¹

On appeal, claimant's counsel argues that the administrative law judge erred in reducing the requested hourly rates and in disallowing time billed by the paralegal. Employer's counsel responds in support of the awarded fee. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Claimant's counsel filed a reply brief, reiterating his contentions on appeal.

I. The Board's Standard of Review

The amount of an attorney's fee award 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 *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). An application for a fee for legal services performed on behalf of a claimant must indicate the

¹ The administrative law judge approved 51.00 hours of legal services performed by claimant's counsel at an hourly rate of \$225.00 (\$11,475.00) and 37.10 hours of legal services performed by the paralegal at an hourly rate of \$100.00 (\$3,710.00). The administrative law judge also approved expenses in the amount of \$894.10.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

customary billing rate of each person performing the services. 20 C.F.R. §725.366(a). 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).

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).

II. Hourly Rate

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); *see also Bentley*, 522 F.3d at 663, 24 BLR at 2-121. 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).

Claimant’s counsel argues that the administrative law judge erred in not relying on the unopposed prior fee awards he submitted in support of his requested hourly rate of \$250.00, as “[t]he fact that such awards were unopposed, in and of itself, speaks to the reasonableness of the awards.” Claimant’s Brief at 10. We disagree. “Reasonableness” is not the only standard the administrative law judge is to apply in assessing a rate request. The rate must also be consistent with the prevailing market rate and counsel has not explained how the unopposed fee petitions establish this required fact. *See Geier*, 372 F.3d at 791. Thus, claimant’s counsel has not established that the administrative law judge abused her discretion in finding that the unopposed attorney fee petitions “are not indicative of the appropriate prevailing rate.”³ Supplemental Order at 2; *see Jones*, 21 BLR at 1-108.

³ In the Supplement to Petitioner’s Brief, claimant’s counsel submitted a fee order from the Sixth Circuit in which he was awarded an hourly rate of \$250.00 and his paralegal was awarded an hourly rate of \$150.00. However, where different adjudicators are

We also reject counsel's assertion that the administrative law judge erred in finding that counsel's reliance on two unpublished Board decisions was misplaced. In *Swan v. Midwest Coal Co.*, BRB Nos. 12-0105 BLA and 12-0106 BLA (Nov. 29, 2012 (unpub.)), the Board affirmed the approval of a \$300.00 hourly rate for Joseph Wolfe. In *Swiney v. Donald Swiney Mining*, BRB No. 12-0643 BLA (July 19, 2013) (unpub.), the Board affirmed a fee award for Thomas Johnson based on an hourly rate of \$250.00. The administrative law judge reasonably found that because a description of the attorneys' experience is not included in these decisions, they are of limited value in drawing comparisons to counsel's requested hourly rate. See *Abbott*, 13 BLR at 1-16; Supplemental Order at 2.

In addition, the administrative law judge permissibly determined that the National Law Journal data for partners of law firms across the county is not useful in determining the prevailing market rate, as "this information is not broken down by the types of cases litigated, geographic area, or the amount of experience of the partners polled. . . ." Supplemental Order at 3; see *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172, 1-174 (2010). Similarly, the administrative law judge reasonably found that the United States Consumer Law Attorney Fee Survey Report was not helpful because it "only considered the rates of attorneys practicing consumer law in Kentucky, and Attorney Vowels has provided no basis for how this is relevant in the area of black lung claims." Supplemental Order at 3; see *Bentley*, 522 F.3d at 663, 24 BLR at 2-121. Further, we reject counsel's assertion that the Laffey Matrix should be considered as evidence by the Board because it corroborates the requested fee. Claimant's counsel did not submit this evidence before the administrative law judge and, therefore, we are precluded from considering it for the first time on appeal. See *Berka v. North American Coal Co.*, 8 BLR 1-183, 1-184 (1985). We therefore affirm the administrative law judge's designation of \$225.00 as the appropriate hourly rate for claimant's counsel. See *Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330, 1-332 (1984).

We also reject counsel's contentions concerning the administrative law judge's reduction of the paralegal's hourly rate from the \$150.00 requested to \$100.00. The administrative law judge did not abuse her discretion in declining to give controlling weight to the prior fee awards he submitted in support of the paralegal hourly rate on the grounds that they were unopposed and involved different adjudicators, who could have reasonably

awarding fees for work performed before them, reasonable differences in opinion about what constitutes the appropriate rate can be expected. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 665, 24 BLR 2-106, 2-125 (6th Cir. 2008). The administrative law judge therefore was not bound by the fee award made to him by the Sixth Circuit.

differed about what constitutes the appropriate rate. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; Supplemental Order at 3. Additionally, the administrative law judge permissibly determined that the unpublished Board case cited by counsel, *Honeycutt v. Tammy Anne, Inc.*, BRB No. 10-0546 BLA (June 29, 2011) (unpub.), does not support the requested rate because the qualifications of the paralegals in that case are not included in the decision and they were, in fact, only awarded \$100.00 an hour. *See Maggard*, 24 BLR at 1-175. Claimant's counsel has thus failed to establish that the administrative law judge abused her discretion in finding that he did not support the requested hourly rate. *See Bentley*, 522 F.3d at 661, 24 BLR at 2-117-18. Consequently, we affirm the administrative law judge's determination that counsel's paralegal was entitled to an hourly rate of \$100.00.

III. Allowable Hours

Claimant's counsel next argues that the administrative law judge erred in disallowing the paralegal time billed for the entry "Reviewed letter from Dr. Alexander and prepared the response letter to Dr. Alexander with supplemental payment," as clerical in nature. Supplemental Order at 4. Counsel states that because this entry reflects communication with an expert witness, the administrative law judge erred in disallowing the 0.40 hours requested. We disagree. As the administrative law judge permissibly found, this entry involved the paralegal reviewing and responding to a letter from Dr. Alexander regarding payment, which can reasonably be considered clerical. *See Bentley*, 522 F.3d at 666-67, 24 BLR at 2-127; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986) (clerical services are considered part of office overhead and are figured into the hourly rate). Therefore, we affirm the administrative law judge's disallowance of the paralegal's time by 0.40 hours.

Consequently, we affirm the administrative law judge's award of \$11,475.00 for 51.00 hours of services performed by claimant's counsel at an hourly rate of \$225.00. We also affirm her award of \$3,710.00 for 37.10 hours of services performed by the paralegal at an hourly rate of \$100.00. Further, we affirm the administrative law judge's award of expenses in the amount of \$894.10, for a total award of \$16,079.10.

Accordingly, the administrative law judge's Supplemental Order Granting In Part Attorney Fees is affirmed.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge