

U.S. Department of Labor

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



BRB Nos. 18-0289 BLA
and 18-0289 BLA-A

WILLIAM H. GROVES)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 ARCH ON THE GREEN, INCORPORATED)
)
 and)
)
 LIBERTY MUTUAL INSURANCE GROUP) DATE ISSUED: 05/06/2019
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Jonathan C. Calianos, Administrative Law Judge,
United States Department of Labor.

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

William A. Lyons (Lewis and Lewis Law Office), Hazard, Kentucky, for
employer/carrier.

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

PER CURIAM:

Claimant's counsel appeals, and employer/carrier (employer) cross-appeals, the Order (2016-BLA-05538) of Administrative Law Judge Jonathan C. Calianos granting an attorney's fee in connection with a claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant's counsel requested a total fee of \$9,934.03, for 18.5 hours of legal services at an hourly rate of \$250.00, 28.1 hours of paralegal work at an hourly rate of \$150.00, and \$1,094.03 in expenses.

After holding a telephone conference on March 16, 2018 and considering the regulatory criteria at 20 C.F.R. §725.366(b), the administrative law judge issued an Order on March 19, 2018, finding claimant's counsel's requested hourly rate and number of hours reasonable.² He reduced the paralegal's requested hourly rate, however, to \$100.00. Thus, the administrative law judge awarded a total fee of \$8,529.03, representing 18.5 hours of legal services at an hourly rate of \$250.00, 28.1 hours of paralegal services at an hourly rate of \$100.00, and expenses in the amount of \$1,094.03.

On appeal, claimant's counsel contends that the administrative law judge erred in reducing the paralegal's hourly rate. Employer has filed a cross-appeal, urging affirmance of the administrative law judge's reduction of the paralegal's hourly rate, but arguing that the total number of hours awarded is excessive. Claimant's counsel responds to employer's brief on cross-appeal, arguing that the amount of hours awarded is reasonable. The Director, Office of Workers' Compensation Programs, has not filed a response to either appeal.³

The amount of an award of an attorney fee is discretionary and will be upheld unless shown to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21

¹ In a Decision and Order dated December 13, 2017, the administrative law judge awarded benefits.

² The administrative law judge explained the reasons for his findings were "stated on the record during the hearing" and he incorporated them into his Order. Order at 2.

³ We affirm, as unchallenged on appeal, the administrative law judge's approval of claimant's counsel's hourly rate of \$250.00. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We similarly affirm his unchallenged award of 1,094.93 in expenses. *Id.*

BLR 1-102, 1-108 (1998) (en banc); see *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657 (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. Dep’t. of Labor v. Triplett*, 494 U.S. 715 (1990).

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).

Paralegal’s Hourly Rate

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 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).

Claimant’s counsel argues the administrative law judge erred in not relying on four prior fee awards that he submitted or cited, in which his paralegal was awarded \$150.00 per hour for her paralegal services,⁴ asserting these fee awards constitute “direct, inferential proof of the prevailing market rate.” Claimant’s Counsel’s Brief at 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. Although

⁴ Claimant’s counsel attached a fee order issued by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, awarding the paralegal an hourly rate of \$150.00. Claimant’s Counsel’s Brief at 4-5; Motion for Attorney’s Fees at 5. Additionally, claimant’s counsel cited three fee orders issued by administrative law judges awarding the paralegal an hourly rate of \$150.00. *Id.* Claimant’s counsel also cited a 2012 fee order issued by an administrative law judge awarding a paralegal an hourly rate of \$100.00. *Id.* Claimant’s counsel asserts that his paralegal “is more educated than the traditional paralegal,” having earned a Bachelor of Science in Political Science and Legal Studies and a Master of Science in Public Service Administration. Claimant’s Counsel’s Brief at 5.

claimant's counsel referenced three cases in which an administrative law judge awarded his paralegal an hourly rate of \$150.00, he conceded that another administrative law judge awarded her an hourly rate of \$100.00. Hearing Transcript at 14. While acknowledging the complexity of black lung cases and the paralegal's excellent education, the administrative law judge permissibly found that her six years of experience was insufficient to warrant an "enhanced rate" of \$150.00 per hour. *See Bentley*, 522 F.3d at 665 (recognizing that an administrative law judge can award a lower hourly rate to an attorney with less experience). Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that he did not abuse his discretion in awarding the paralegal an hourly rate of \$100.00.⁵ 20 C.F.R. §725.366(b); Order at 2.

Allowable Hours

Employer argues that several of the time entries for claimant's counsel and his paralegal should be disallowed as duplicative, contending the administrative law judge compensated claimant's counsel and his paralegal for review and preparation of the same documents and preparation of the same brief.⁶ *Id.* The administrative law judge rejected employer's objection, explaining it was reasonable for claimant's counsel to review the work performed by the paralegal. Hearing Transcript at 15-17. The administrative law judge noted that if claimant's counsel had not delegated the initial preparation of the brief, the entire preparation of the brief would have been billed at his higher rate.⁷ *Id.* The

⁵ The administrative law judge also referenced his personal knowledge that paralegals in Connecticut who perform work pursuant to the Longshore and Harbor Workers' Compensation Act are awarded an hourly rate of \$91.00. Hearing Transcript at 15. Because this work was outside the geographical area where the paralegal worked, we agree with claimant's counsel that this information was not relevant to establishing her hourly rate. 20 C.F.R. §725.366(b). Because the administrative law judge reduced the paralegal's requested hourly rate for a valid reason -- her relative lack of experience -- the administrative law judge's error was harmless, however. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁶ Employer objected to the paralegal spending "nearly nine hours" preparing a brief with claimant's counsel spending an additional five hours performing the same task. Hearing Transcript at 16. Employer also objected to the paralegal and claimant's counsel both spending time preparing the evidence. *Id.* at 16-17.

⁷ Employer argues that paralegals entitled to a "higher rate" of \$150.00 per hour should not need for their work to be reviewed by an attorney. Employer's Brief at 4. As previously addressed, however, the administrative law judge reduced the paralegal's hourly rate to \$100.00, citing her relative lack of experience. Given the paralegal's lack of

administrative law judge further found that the fee application was commensurate with the necessary work performed. Order at 2. The administrative law judge therefore permissibly rejected employer's objections. *Id.* Consequently, we hold that the total number of hours awarded by the administrative law judge was reasonable and supported by the record. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 578 (4th Cir. 2013).

Accordingly, we affirm the administrative law judge's Order awarding an attorney's fee.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

experience, the administrative law judge found review of her work reasonable. Hearing Transcript at 15-17.