

BRB No. 07-0219 BLA

D.G.B.)
(Widow of W.C.B.))
)
Claimant-Respondent)
)
v.)
)
ISLAND FORK CONSTRUCTION)
COMPANY)
)
and)
) DATE ISSUED: 11/09/2007
WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND/BRICK)
STREET)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
) DECISION and ORDER
Party-in-Interest

Appeal of the Supplemental Decision and Order – Partial Award of Attorney Fees of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order – Partial Award of Attorney Fees of Administrative Law Judge Richard T. Stansell-Gamm rendered on a survivor’s claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed her survivor’s claim on April 4, 2005. Director’s Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on January 5, 2006. Director’s Exhibit 32. At employer’s request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was scheduled for September 13, 2006. While the case was pending with the OALJ, employer accepted liability for benefits on July 26, 2006. Claimant’s counsel filed a petition for attorney fees on August 31, 2006. The administrative law judge subsequently issued his award of attorney fees on November 3, 2006, directing employer to pay the amount of \$3,225.00 for legal services rendered to claimant.

Employer appeals, asserting that the administrative law judge erred in approving an hourly rate of \$300.00. Claimant’s counsel responds, urging affirmance of the attorney fee award. The Director, Office of Workers’ Compensation Programs, has declined to file a brief.

The standard of review for the Board in analyzing petitioner’s arguments on appeal of an attorney fee determination is whether the determination is arbitrary, capricious, or an abuse of discretion. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). All fee petitions must be filed with, and approved by, the adjudicating officer or tribunal before whom the services were performed. 20 C.F.R. §§725.365, 725.366(a); *Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). The adjudicating officer must discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the fee award due, if any. *See Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

Claimant’s counsel submitted a fee petition to the administrative law judge, seeking approval of \$4,275 in attorney fees, representing 10.5 hours of legal work performed by Mr. Wolfe at the rate of \$400 per hour, and .75 hours of work performed by a legal assistant at the rate of \$100 per hour. Employer objected to the fee petition, alleging that the hourly rates were unreasonable and excessive. After considering employer’s objections, the administrative law judge reduced Mr. Wolfe’s hourly rate to \$300, but approved the \$100 per hour rate charged for the legal assistant. Because employer did not raise an objection to the amount of hours requested, the administrative law judge approved 10.50 hours of legal work by Mr. Wolfe, at the rate of \$300 per hour (\$3150), and .75 hours of work performed by the legal assistant, at the rate of \$100.00 per hour (\$75). Consequently, the administrative law judge awarded attorney fees in the amount of \$3,225.

Employer contends that an award of \$300 per hour for Mr. Wolfe's services in this case is excessive. Employer's Brief in Support of Petition for Review at 3. Contrary to employer's contention, the administrative law judge specifically addressed employer's objection to the requested hourly rate of \$400 by Mr. Wolfe and reduced that amount in keeping with what he determined to be reasonable for the geographic practice area, and Mr. Wolfe's level of experience in federal black lung litigation. The administrative law judge specifically noted that, in support of his request for an hourly rate of \$400, Mr. Wolfe attached an attorney fee survey as of January 1, 2002 for the South Atlantic Region. Based on this survey, the administrative law judge determined that Mr. Wolfe's "requested hourly fee of \$400 well exceeds the average rate of \$289 and is also above the upper quartile of \$325." Supplemental Decision and Order – Partial Award of Attorney Fees (Supplemental Decision) at 2. Taking into consideration that Mr. Wolfe was "highly experienced" in the area of federal black lung, and that his office was one of the few in the area that accepted these types of cases, the administrative law judge determined an hourly rate of \$300 was appropriate for his level of expertise and years of experience. Supplemental Decision at 2; *see* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Because employer has failed to demonstrate why the administrative law judge's ruling should be considered arbitrary, capricious or an abuse of discretion, *see Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986); *Abbott*, 13 BLR at 1-16, and since his determination to reduce Mr. Wolfe's hourly rate to \$300 in this case appears reasonable, it is affirmed.¹

¹ Although employer provided copies of cases wherein Mr. Wolfe and his legal assistant were awarded a lower hourly rate than that approved by this administrative law judge, the awards were based on the facts and circumstances of those particular cases, and they are not binding for purposes of this case. *See Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986).

Accordingly, the Supplemental Decision and Order – Partial Award of Attorney Fees of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge