

BRB No. 13-0131 BLA

VIRGIL B. CLEVINGER)
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 Claimant-Respondent)
)
 v.)
)
 HARMAN MINING CORPORATION)
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 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 11/21/2013
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Revised Proposed Order Supplemental Award Fee for Legal Services of Phillip K. Little, Senior Claims Examiner, Office of the District Director, United States Department of Labor.

Joseph E. Wolfe (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Revised Proposed Order Supplemental Award Fee for Legal Services of Senior Claims Examiner Phillip K. Little (the district director) on a petition for fees for legal services performed in securing an award of

benefits on a miner's claim, filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹

Claimant's counsel, Joseph E. Wolfe, submitted a fee petition to the district director, requesting \$8,800.00 for work performed from October 10, 2001, to September 14, 2004, representing 26.5 hours of legal services performed by Mr. Wolfe at an hourly rate of \$300.00 (\$7,950.00), 1.5 hours of legal services performed by attorney Bobby S. Belcher at an hourly rate of \$250.00 (\$375.00), and 4.75 hours of services performed by legal assistants at an hourly rate of \$100.00 (\$475.00). The district director awarded claimant's counsel the requested fee of \$8,800.00 in a Proposed Order issued October 9, 2012. After employer moved for reconsideration and raised objections to the fee petition,² the district director, on November 27, 2012, issued a Revised Proposed Order in which he reduced the hourly rate for Mr. Belcher to \$200.00, reduced the hourly rate for the legal assistants to \$75.00, and awarded claimant's counsel a fee of \$8,606.25.

On appeal, employer argues that the administrative law judge erred in determining both the hourly rates and the number of hours approved in calculating the fee. Claimant's counsel responds, urging affirmance of the district director's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer reiterates its arguments in a reply brief.

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. §725.366(a); *see Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). 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.³ *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).

¹ Administrative Law Judge Larry S. Merck awarded benefits to claimant, and the Board affirmed the award. *Clevinger v. Harman Mining Corp.*, BRB No. 11-0710 BLA (July 25, 2012) (unpub.).

² In its motion for reconsideration, employer noted that it had not been served with claimant's counsel's fee petition.

³ Claimant's coal mine employment was in Virginia. *Clevinger*, BRB No. 11-0710 BLA, slip op. at 2 n.3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Employer first challenges the hourly rates awarded by the district director, contending that the rates are not supported by prevailing market evidence. Employer's Brief at 3-5. We disagree. In support of the requested hourly rates, claimant's counsel submitted a list of thirty-five federal black lung cases, from 2006 to 2012, in which Mr. Wolfe was awarded fees at an hourly rate of at least \$300.00. Moreover, in nine of those cases, Mr. Belcher was awarded fees at an hourly rate of at least \$200.00, including seven cases for which he received fees at an hourly rate of \$250.00. Additionally, in fourteen of the thirty-five cases, fees were awarded for the work of legal assistants at an hourly rate of \$100.00. Contrary to employer's contention, prior fee awards may be considered as evidence of a prevailing market rate. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572-74 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010).

Employer also argues that the prior fee awards cited by claimant's counsel do not justify the rates awarded by the district director in this case, because employer cited cases in which Mr. Wolfe, Mr. Belcher, and their legal assistants were awarded fees at lower hourly rates. Employer's Brief at 5. Employer contends that the district director failed to explain why the cases cited by claimant's counsel are entitled to more weight than the cases cited by employer. *Id.* This argument lacks merit. Before the district director, employer cited eight cases in which Mr. Wolfe was awarded fees at hourly rates of \$200.00 or \$250.00, one case in which Mr. Belcher was awarded fees at an hourly rate of \$150.00, and six cases in which their legal assistants were awarded fees at hourly rates of \$50.00 or \$60.00. Motion for Reconsideration and Denial or Reduction of Fee Petition at 6-7, n.6. Employer, however, has not explained how the district director abused his discretion in concluding that the numerous cases cited by claimant's counsel are more probative evidence of prevailing market rates. *See Gosnell*, 724 F.3d at 573 (holding that "a party that argues that the best available evidence of a market rate was not offered must clearly demonstrate that the adjudicator abused its discretion in assessing the strength of the evidence presented"). Furthermore, the district director was not required to address or distinguish the reduced hourly rates awarded in the cases cited by employer. *See Gosnell*, 724 F.3d at 575 n.13. Therefore, we conclude that claimant's counsel provided sufficient evidence of a market rate for the work of Mr. Wolfe, Mr. Belcher, and their legal assistants, and that the hourly rates awarded by district director are reasonable.

Next, employer argues that the administrative law judge erred in determining the number of hours for which claimant's counsel is entitled to fees. Employer's Brief at 6-7. Employer contends that, over several time entries, legal assistants billed a total of 3.50 hours and Mr. Wolfe billed a total 1.75 hours for work that was clerical, not legal. *Id.* at 6 n.3. Employer also argues that Mr. Belcher billed 1.25 hours for work that duplicated work performed by Mr. Wolfe, and that 0.75 hours billed by Mr. Wolfe was unnecessary. *Id.* at 6. Finally, employer contends that forty-six quarter-hour billing entries are

excessive, and that counsel should be limited to a total of 4.6 hours, because the time is for routine tasks that should take no more than a few minutes each. *Id.*

Employer raised these arguments before the district director in its motion for reconsideration, but the district director did not address them in his Revised Proposed Order. Thus, we are unable to discern the basis for his ruling. The district director's failure to provide sufficient reasoning to support an award of fees for the hours challenged by employer renders his decision arbitrary. *See Marcum v. Director, OWCP*, 2 BLR 1-894, 1-897 (1980). Therefore, we must vacate the district director's award of fees for the disputed hours. *Id.* On remand, the district director must address employer's specific objections to the hours billed by claimant's counsel and set forth the reasoning underlying his findings.

Accordingly, the district director's Revised Proposed Order Supplemental Award Fee for Legal Services is affirmed in part and vacated in part, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge