

BRB No. 12-0019 BLA

MARTHA M. WEST)
(a/k/a MARTHA CHILDRESS))
(Widow of JAMES G. WEST))
)
Claimant-Respondent)
)
v.)
)
N.O.W. COAL COMPANY)
)
and)
) DATE ISSUED: 10/24/2012
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Supplemental Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order (07-BLA-5136) of Administrative Law Judge Daniel F. Solomon 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 (Supp. 2011) (the Act). Counsel requested a total fee of \$13,857.50 for 30.65 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 2.25 hours of legal services at an hourly rate of \$200.00 (W. Andrew Delph), 16.50 hours of legal services at an hourly rate of \$175.00 (Ryan C. Gilligan), and 13.25 hours of legal services at an hourly rate of \$100.00 (legal assistants).²

In his Supplemental Decision and Order, the administrative law judge disallowed compensation for 6.75 hours of the 30.65 hours of legal services provided by Mr. Wolfe (\$2,025.00). After reducing the hourly rate requested by the legal assistants from \$100.00 to \$75.00, the administrative law judge disallowed an additional \$1,430.00 “in paralegal time.” The administrative law judge, therefore, awarded claimant’s counsel a total fee of \$10,407.00.

On appeal, employer contends that the administrative law judge’s attorney’s fee award is excessive. Claimant’s counsel responds in support of the administrative law judge’s attorney’s fee award. The Director, Office of Workers’ Compensation Programs, has not filed a response brief.³

The amount of an award of an attorney’s fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

¹ Claimant filed a survivor’s claim on February 5, 2005. In a Decision and Order on Second Remand dated January 24, 2011, the administrative law judge awarded benefits. In a Decision and Order dated February 15, 2012, the Board affirmed the administrative law judge’s award of benefits. *West v. N.O.W. Coal Co.*, BRB No. 11-0379 BLA (Feb. 15, 2012) (unpub.). The Board subsequently denied employer’s motion for reconsideration. *West v. N.O.W. Coal Co.*, BRB No. 11-0379 BLA (Sept. 21, 2012) (Order) (unpub.).

² Claimant’s counsel filed two attorney fee petitions for his work before the administrative law judge. The first petition was for legal services performed from September 2006 to August 2007 and from August 2008 to February 2009. The second petition was for legal services performed from March 2009 to January 2011.

³ The miner’s coal mine employment was in Virginia. 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).

Hourly Rate

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).

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). 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).

Employer contends that the administrative law judge's fee award should be vacated because claimant's counsel failed to establish the prevailing market rates for the legal services provided in this case. We disagree. The administrative law judge listed numerous fee awards from 2007 to 2011, wherein he, and other administrative law judges, had granted Mr. Wolfe, Mr. Delph, and Mr. Gilligan similar hourly rates to those requested in this case. Supplemental Decision and Order at 3-4. In *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010), the United States Court of Appeals for the Fourth Circuit recognized that evidence of fees received in the past is an appropriate factor to take into account when establishing a market rate.

In awarding the respective hourly rates of \$300.00, \$200.00, and \$175.00, the administrative law judge also relied upon the attorneys' extensive experience in litigating federal black lung cases, noting that Mr. Wolfe was the most experienced attorney in his geographic area.⁴ Supplemental Decision and Order at 4. This is a relevant factor that an administrative law judge may consider in determining a reasonable hourly rate for

⁴ In his fee petitions, claimant's counsel noted that attorneys in his law firm "are very experienced" in the area of black lung law. Counsel further noted that he knows of "no other firms in Virginia and very few across the nation taking new [black lung] cases." Claimant's Counsel's 2009 and 2011 Attorney Fee Petitions.

claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124.

Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse his discretion in determining that claimant's counsel's requested hourly rates were reasonable, and reflected the applicable market rates. Supplemental Decision and Order at 6; see *Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; see also *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge's approval of the requested hourly rates.⁵

Allowable Hours

Employer also objects to the administrative law judge's calculation of allowable hours. Once a service has been found to be compensable, the adjudicating officer must decide whether the amount of time expended by the attorney in performance of the service is excessive or unreasonable. See *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

The administrative law judge disallowed a total of 6.75 hours of legal services performed by Mr. Wolfe. Supplemental Decision and Order at 7. The administrative law judge also disallowed an additional \$1,430.00 "in paralegal time." *Id.* As a result, the administrative law judge awarded claimant's counsel a total fee of \$10,407.00. *Id.*

Employer contends that the administrative law judge did not address its "objection to all the time for the legal assistants as clerical and/or duplicate of Mr. Wolfe's work." Employer's Brief at 12. We disagree. The administrative law judge disallowed \$1,430.00 "in paralegal time," encompassing all of the hours requested by claimant's counsel for work performed by his legal assistants.

⁵ While the case was before the administrative law judge, employer filed a motion to compel discovery, seeking information from claimant's counsel regarding his attorney fee requests in other cases. In his Decision and Order, the administrative law judge denied employer's discovery request, finding, *inter alia*, that the process would be "an exercise in futility." Supplemental Decision and Order at 2. Employer contends that the administrative law judge erred in denying its discovery request. However, because employer has not demonstrated prejudicial error or an abuse of discretion on the part of the administrative law judge in denying its request, the administrative law judge's decision to deny employer's motion to compel discovery is affirmed. See *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Moreover, our review of the fee award reveals that the administrative law judge, after disallowing 6.75 hours of the 30.65 hours of legal services provided by Mr. Wolfe (\$2,025.00), and \$1,430.00 in paralegal time, applied the proper standard to the remaining requested hours, and did not abuse his discretion in allowing these entries. *Abbott*, 13 BLR at 1-16. Consequently, we affirm the administrative law judge's attorney's fee award.

Accordingly, the administrative law judge's Supplemental Decision and Order awarding attorney fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge