

BRB No. 12-0073 BLA

JIMMY MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SILVER EAGLE MINING COMPANY, INCORPORATED	)	DATE ISSUED: 10/11/2012
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order – Partial Award of Attorney Fees of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order – Partial Award of Attorney Fees (2008-BLA-05556) of Administrative Law Judge Christine L. Kirby rendered in connection with an award of benefits on a miner’s claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Claimant’s counsel (counsel) submitted a fee petition to the administrative law judge, requesting a total fee in the amount of \$10,458.75 for work performed from January 30, 2008 to October 30, 2010, representing 27.75 hours of

legal services by Joseph W. Wolfe at an hourly rate of \$300.00; .75 hours of legal services by Bobby S. Belcher, Jr. at an hourly rate of \$250.00; 1.75 hours of legal services by Ryan C. Gilligan at an hourly rate of \$175.00; 15.5 hours of legal services by full-time legal assistants at an hourly rate of \$100.00; and 1.5 hours of legal services by part-time legal assistants at an hourly rate of \$60.00 (collectively, claimant's counsel). Employer raised various objections to the fee petition.

On October 3, 2011, the administrative law judge issued her Supplemental Decision and Order – Partial Award of Attorney Fees, in which she considered counsel's fee petition and supporting evidence, as well as employer's objections thereto, and found the requested hourly rates to be reasonable and sufficiently documented. However, the administrative law judge disallowed 4.25 hours of services by Msrs. Wolfe, Belcher and Gilligan, 11.75 hours of services by the full-time legal assistants and 1.00 hour of services by the part-time legal assistant, as clerical in nature. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$8,005.00 for legal services performed while the case was before the Office of Administrative Law Judges.<sup>1</sup>

On appeal, employer contends that the administrative law judge failed to consider appropriate market rate evidence and apply the correct standard in approving counsel's requested hourly rates. Neither counsel nor the Director, Office of Workers' Compensation Programs, has filed a response brief.<sup>2</sup>

The amount of an attorney fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion,

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<sup>1</sup> The administrative law judge awarded: Mr. Wolfe a total fee of \$7,275.00, representing 24.25 hours of legal services at an hourly rate of \$300.00; Mr. Belcher a total fee of \$62.50, representing .25 hours of legal services at an hourly rate of \$250.00; Mr. Gilligan a total fee of \$262.50, for 1.50 hours of legal services at an hourly rate of \$175.00; the full-time legal assistants a total fee of \$375.00, for 3.75 hours of legal services at \$100.00 per hour; and the part-time legal assistants a total fee of \$30.00, for .5 hours of legal services at \$60.00 per hour. Supplemental Decision and Order – Partial Award of Attorney Fees at 9.

<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's disallowance of various individual time entries and, therefore, the total time awarded for work performed on this case while it was pending before the Office of Administrative Law Judges. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Supplemental Decision and Order – Partial Award of Attorney Fees at 4-9.

or not in accordance with applicable law.<sup>3</sup> *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger v. Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc).

When a claimant wins a contested case, the Act provides that the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a “reasonable attorney’s fee” to claimant’s counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The regulation governing fees provides, in part, that:

Any fee approved . . . shall 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 fee requested.

20 C.F.R. §725.366(b).

In challenging the hourly rates approved by the administrative law judge, employer contends that the administrative law judge failed to require claimant’s counsel to produce evidence of the prevailing market rates for services in the relevant geographic area. Employer argues that the administrative law judge erred in basing her decision on counsel’s experience and expertise; in relying on the Altman Weil “Survey of Law Firm Economics” (Altman Weil Survey); in relying on counsel’s past fee awards; and in summarily rejecting the fee awards proffered by employer in which claimant’s counsel and other attorneys were awarded lower hourly rates. Employer’s Brief at 3-9. Employer’s arguments are without merit.

In reviewing counsel’s requested hourly rate, the administrative law judge performed the requisite analysis set forth in Section 725.366(b); considered employer’s objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys; and adequately explained her determination that the hourly rates awarded for work performed by the attorneys and legal assistants were reasonable under the facts of this case. Within a proper exercise of her discretion, the administrative law judge relied on the following considerations: past hourly rates received by claimant’s counsel; the nature and complexity of the legal issues involved; the quality of the representation; the qualifications and expertise of the attorneys; and the Altman Weil

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner’s coal mine employment was in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Survey. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008); Supplemental Decision and Order – Partial Award of Attorney Fees at 3-4. While acknowledging that the Altman & Weil Survey, alone, does not provide sufficient information for a determination of the market rate, the administrative law judge permissibly concluded that this evidence, considered in conjunction with the other factors, including evidence of fees counsel received in the past, based on a list of twenty-one cases in which the requested rates were awarded as reasonable, was appropriately included within the range of sources from which to ascertain a reasonable rate. *See Cox*, 602 F.3d at 289, 24 BLR at 2-291; *Maggard v. International Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010) (Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010) (Order); *Parks v. Eastern Assoc. Coal Corp.*, 24 BLR 1-177, 1-181 n.5 (2010)(Order); Supplemental Decision and Order – Partial Award of Attorney Fees at 3-4.

Further, because the administrative law judge, within a proper exercise of her discretion, determined that counsel provided sufficient evidence supporting the hourly rates requested as reasonable for work performed before the Office of Administrative Law Judges, we reject employer’s assertion that claimant’s counsel failed to produce any specific evidence of the prevailing market rates for legal services. *See generally Robinson v. Equifax Information Services, LLC*, 560 F.3d 235, 245 (4th Cir. 2009), *citing Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990)(fee applicant must produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award). Employer has failed to demonstrate that the hourly rates awarded were excessive or that the administrative law judge abused her discretion in this regard. Consequently, we affirm the administrative law judge’s award of an attorney fee in the total amount of \$8,005.00.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge