



BRB No. 18-0585 BLA

STEVE B. CONLEY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NATIONAL MINES CORPORATION)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	DATE ISSUED: 10/25/2019
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Attorney Fee Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Attorney Fee Order (2013-BLA-05755) of Administrative Law Judge Joseph E. Kane rendered on an attorney's fee petition filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹

Claimant's counsel filed an itemized statement requesting an attorney's fee for services performed before the Office of Administrative Law Judges. 20 C.F.R. §725.366. Claimant's counsel requested a fee of \$15,699.81, representing seventeen hours of legal services by Joseph E. Wolfe at an hourly rate of \$425; 0.25 hour of legal services by Ryan C. Gilligan at an hourly rate of \$225; 6.75 hours of legal services by W. Andrew Delph at an hourly rate of \$300; 3.75 hours of legal services by Brad A. Austin at an hourly rate of \$200; 26.25 hours of services by legal assistants at an hourly rate of \$100; and expenses of \$3,018.56.

After considering the regulatory criteria at 20 C.F.R. §725.366(b), the administrative law judge reduced the requested hourly rates for Mr. Wolfe to \$350 and Mr. Delph to \$225, but found the hourly rates of \$225 for Mr. Gilligan, \$200 for Mr. Austin, and \$100 for the legal assistants are reasonable.² The administrative law judge disallowed hours requested for services that were clerical in nature and reduced the hours requested for reviewing routine documents. He also found all claimed expenses are reasonable. Thus, the administrative law judge awarded a total fee of \$13,043.56, representing 14.5 hours of attorney services by Mr. Wolfe at an hourly rate of \$350; 6.75 hours of attorney services by Mr. Delph at an hourly rate of \$225; 0.25 hour of attorney services by Mr.

¹ The Board affirmed the award of benefits. *Conley v. Nat'l Mines Corp.*, BRB No. 17-0435 BLA (June 20, 2018), *recon. denied*, (Jan. 7, 2019), *appeal pending*, No. 19-3139 (6th Cir.).

² The regulation provides 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).

Gilligan at an hourly rate of \$225; 3.75 hours of attorney services by Mr. Austin at an hourly rate of \$200; 26.25 hours of legal assistant services at an hourly rate of \$100; and \$3,018.56 in expenses.

On appeal, employer contends the administrative law judge lacked the authority to award the attorney's fee in this case because he was not properly appointed under the Appointments Clause of the Constitution, Art. II §2, cl. 2. Employer also challenges the hourly rate awarded to Mr. Wolfe and the award of a fee for certain itemized entries. Claimant responds, urging affirmance of the attorney's fee award. The Director, Office of Workers' Compensation Programs, responds in opposition to employer's contention that the administrative law judge lacked the authority to award an attorney's fee.³

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, based on an abuse of discretion, or not in accordance with applicable law. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Appointments Clause Challenge

Citing *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), employer contends the administrative law judge was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2, and therefore lacked the authority to award the attorney's fee in this case. Employer previously raised this Appointments Clause issue in its Motion for Reconsideration of the Board's decision on the merits. The Board found it forfeited because employer raised it after the Board issued a decision on the merits. *Conley v. Nat'l Mines Corp.*, BRB No. 17-0435 BLA, slip op. at 1 n.1 (Jan. 7, 2019) (unpub. Order); *see Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Bryan*, ___ F.3d ___, Nos. 18-3680, 18-3909, 18-4022, 2019 WL 4282871 (6th Cir. Sept. 11, 2019) (affirming Board's holding that employer forfeited Appointments Clause issue by first raising it in a motion for reconsideration); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256-57 (6th Cir. 2018) (employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief). Further, a party who fails to properly preserve the challenge to the administrative law judge's authority on the merits of entitlement cannot raise such challenge in an ancillary attorney's fee proceeding. *Aguilar*

³ Employer does not challenge the administrative law judge's finding that the expenses were reasonable. Therefore, this determination is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Attorney Fee Order at 10.

v. Navy Exch. Serv. Command, BRB No. 18-0327, slip op. at 3 (Dec. 20, 2018) (unpub.). We therefore reject employer's Appointments Clause contention.

Hourly Rate

In determining the amount to be awarded under a fee-shifting statute, a court must determine the number of hours reasonably expended and multiply them by a reasonable rate. *See Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). A reasonable hourly rate is calculated according to the prevailing market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886 (1984). 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 persons of comparable skill, experience, and reputation. *Id.* at 896 n.11; *see Maggard v. Int'l Coal Group*, 24 BLR 1-172, 1-173 (2010) (Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-168 (2010) (Order).

Employer contends claimant's counsel failed to support the hourly rates requested with market evidence, i.e., what fee-paying clients pay counsel or similarly-qualified attorneys charge by the hour in comparable cases, and that a "description of past fee awards does not satisfy a claimant's [counsel's] burden." Employer's Brief at 10. Employer asserts the administrative law judge's reliance on counsel's past fee awards contravenes the Administrative Procedure Act (APA), 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a), as he failed to explain his finding that Mr. Wolfe is entitled to an hourly rate of \$350.

Contrary to employer's argument, evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664 (6th Cir. 2008); *see also E. Assoc. Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010). Noting that Mr. Wolfe is a highly qualified attorney who has practiced black lung litigation for more than forty years, the administrative law judge considered the fee awards of administrative law judges, the Board, and the United States Courts of Appeals offered as market rate evidence and found they support an hourly rate of \$350. Attorney Fee Order at 4. The administrative law judge's decision does not violate the APA as he stated the evidentiary basis for his conclusion, and employer has failed to establish he abused his discretion. Therefore, we affirm the \$350 hourly rate for Mr. Wolfe's services.⁴ *Bentley*, 522 F.3d at 666.

⁴ Employer does not challenge the administrative law judge's award of \$225 per hour for Mr. Delph and Mr. Gilligan, \$200 per hour for Mr. Austin, and \$100 per hour for

Number of Hours Requested

Employer also challenges counsel's use of quarter-hour minimum billing increments as an unreasonable method of calculating the amount of time necessary to perform the identified tasks. Contrary to employer's contention, the administrative law judge properly found he has the discretion to award a fee based on quarter-hour minimum increments. *See Bentley*, 522 F.3d at 666; Attorney Fee Order at 6. In addition, the administrative law judge appropriately evaluated each quarter-hour entry to determine whether the amount billed was reasonable. *Bentley*, 522 F.3d at 666-67; Attorney Fee Order at 7.

Employer next challenges the administrative law judge's allowance of several of Mr. Wolfe's time entries, asserting they are for clerical work, excessive, or vague. Specifically, employer contends the administrative law judge's disallowance of a February 24, 2016 entry for forwarding claimant's medical authorization to employer as clerical cannot be reconciled with his allowance of entries dated August 12, 2013, January 23, 2014, January 9, 2016, January 11, 2016, March 2, 2016, and May 20, 2016, as the services rendered on these dates were, likewise, clerical. Employer's Brief at 10. In reviewing employer's objections to thirteen entries as clerical in nature, the administrative law judge agreed that certain entries were "largely clerical," and thus, disallowed them. Attorney Fee Order at 5-6. He similarly found the tasks of sending and receiving medical releases on January 11, 2016 and January 28, 2016 were "mixed clerical" and therefore, disallowed 0.25 hour. Attorney Fee Order at 6. However, in assessing the remaining entries at issue the administrative law judge concluded these tasks were not clerical and were therefore compensable. Attorney Fee Order at 5-6. He fully acknowledged employer's objection to the other entries, *see id.*, and employer has not established he abused his discretion in concluding the time is compensable. *See Bentley*, 522 F.3d at 666-667; *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). Therefore, we affirm the attorney's fee award in all respects.

the legal assistants. Therefore, these findings are affirmed. *See Skrack*, 6 BLR at 1-711; Attorney Fee Order at 4.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge