

BRB No. 13-0041 BLA

CINDY H. HONEYCUTT	)	
(o/b/o HERBERT L. HONEYCUTT)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/18/2013
	)	
TAMMY ANNE, INCORPORATED	)	
	)	
and	)	
	)	
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 Awarding Attorney Fees on Remand and the Order Denying Employer's/Carrier's Motion to Reconsider of Larry S. Merck, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Supplemental Decision and Order Awarding Attorney Fees on Remand and the Order Denying Employer's/Carrier's Motion to Reconsider (2006-BLA-5209) of Administrative Law Judge Larry S. Merck (the administrative law judge) in connection with a claim<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). In his initial Attorney Fee Order, the administrative law judge awarded claimant's counsel a total fee of \$14,393.75 for 34.1 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 2.85 hours of legal services at an hourly rate of \$175.00 (Ryan C. Gilligan), and 36.65 hours of services at an hourly rate of \$100.00 (legal assistants).

Pursuant to employer's appeal, the Board held that the administrative law judge did not sufficiently explain how the evidence provided by claimant's counsel supported his determination that a \$300.00 hourly rate is the applicable market rate for Mr. Wolfe, and held that claimant's counsel failed to submit evidence regarding the customary billing rates for each person performing work contained in the fee petition, pursuant to 20 C.F.R. §725.366(a). *Honeycutt v. Tammy Anne, Inc.*, BRB No. 10-0546 BLA, slip op. at 4 (June 29, 2011) (unpub.). The Board also held that claimant's counsel "failed to provide 'satisfactory specific evidence' of the prevailing market rates in the relevant community for the type of work for which he seeks an award . . . ." *Id.* at 5, *citing Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289-90, 24 BLR 2-269, 290 (4th Cir. 2010). The Board further held that the administrative law judge did not adequately explain the bases for his decision to allow charges that employer challenged as noncompensable. *Id.* at 5-6. The Board, therefore, vacated the administrative law judge's award of attorney fees, and remanded the case for further consideration. *Id.* at 6-7.

In a Supplemental Decision and Order Awarding Attorney Fees on Remand, dated July 10, 2012, the administrative law judge considered counsel's amended fee petition, and employer's objections thereto, and awarded claimant's counsel a total fee of \$13,573.75, for 32.9 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 2.85 hours of legal services at an hourly rate of \$175.00 (Ryan C. Gilligan), and 32.05 hours of legal services at an hourly rate of \$100.00 (legal assistants). The administrative law judge denied employer's motion for reconsideration on September 24, 2012.

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<sup>1</sup> The miner, Herbert L. Honeycutt, filed a claim on December 7, 2004. In a Decision and Order dated November 4, 2009, Administrative Law Judge Thomas F. Phalen, Jr. awarded benefits. Upon review of employer's appeal, the Board affirmed the award of benefits. *Honeycutt v. Tammy Anne, Inc.*, BRB No. 10-0187 BLA (Dec. 21, 2010) (unpub.).

On appeal, employer contends that the administrative law judge erred in awarding hourly rates that are not supported by evidence of a market rate. Claimant's counsel responds in support of the administrative law judge's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions. Additionally, claimant's counsel has filed a fee petition for work performed before the Board in the prior appeals, BRB Nos. 10-0546 BLA and 10-0187 BLA. Employer has filed objections to the fee petition.

The amount of an attorney's fee award by an administrative law judge 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.<sup>2</sup> See *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Employer contends that the administrative law judge's fee award must be vacated because he failed to properly consider the relevant market rate evidence on remand. Employer's Brief at 4-8. We disagree. The administrative law judge found that the requested hourly rates were reasonable in light of the nature of the case, each person's knowledge and experience, and the evidence of the prevailing market rate. Supplemental Decision and Order at 9-10. We note that counsel's fee petition includes citations to twenty-nine cases in which Mr. Wolfe was awarded fees at an hourly rate of at least \$300.00. Amended Fee Petition at 3-5. In four of these cases Mr. Gilligan was awarded \$175.00 an hour, and in five cases Mr. Gilligan was awarded \$225.00.<sup>3</sup> *Id.* The cases listed by counsel also include awards of an hourly rate of \$100.00 for work performed by

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<sup>2</sup> The miner's coal mine employment was in Kentucky. Therefore, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

<sup>3</sup> Counsel also submitted an affidavit from Timothy C. MacDonnell, the supervising attorney of the Black Lung Clinic at Washington and Lee University in Virginia. Amended Fee Petition, Exhibit 3. Affidavits from attorneys who are familiar with both the skills of a fee applicant and the type of work involved in federal black lung cases are appropriate to consider in establishing a market rate. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 291 (4th Cir. 2010). Mr. MacDonnell stated that he has handled over fifty federal black lung claims, that his hourly billing rate is \$220.00, that he has known Mr. Gilligan for three years and believes him to be "exceptionally knowledgeable and competent in federal black lung matters," and that he believes an hourly rate of \$225.00 for Mr. Gilligan's legal services is "entirely reasonable." Amended Fee Petition, Exhibit 3. In this case, claimant's counsel sought a lower rate for Mr. Gilligan, of \$175.00 an hour, for work performed before the administrative law judge.

counsel's legal assistants. Evidence of fees received in the past is an appropriate factor to take into account when determining a market rate.<sup>4</sup> *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23 (6th Cir. 2008); *see also E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, F.3d , 2013 WL 3929100, \*6-8 (4th Cir. 2013); *Cox*, 602 F.3d at 290, 24 BLR at 2-291. In awarding the respective hourly rates of \$300.00 and \$175.00 to Mr. Wolfe and Mr. Gilligan, the administrative law judge also relied upon the nature of the case, as well as the attorneys' knowledge, experience, and quality of work.<sup>5</sup> These factors are relevant to an administrative law judge's determination of the reasonableness of a requested hourly rate for claimant's counsel. 20 C.F.R. §725.366(b); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124; *see also Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71 (4th Cir. 2009).

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 for Mr. Wolfe, Mr. Gilligan, and the legal assistants<sup>6</sup> were reasonable and reflected the applicable market rates. *See Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Maggard v. Int'l Coal Grp., Knott Cnty., LLC*, 24 BLR 1-203, 1-205 (2010). We, therefore, affirm the administrative law judge's approval of these requested hourly rates.

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<sup>4</sup> We reject employer's argument that counsel's inclusion of the fee award that was vacated in *Cox* among his list of multiple prior fee awards establishes that the administrative law judge's determination of the market rate was improper. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, F.3d , 2013 WL 3929100, \*8, \*12 n.10 (4th Cir. 2013) (holding that "our analysis is not altered by the exclusion of that one fee award from the substantial evidence of prevailing market rates established by the twenty remaining prior fee awards").

<sup>5</sup> In his fee petition, claimant's counsel noted that attorneys in his law firm "are very experienced" in the area of black lung law. Amended Fee Petition at 2. Counsel further noted that he knows of "no other firms in Virginia and very few across the nation taking new [black lung] cases." *Id.*

<sup>6</sup> Employer contends that an across-the-board hourly rate of \$100.00 for counsel's legal assistants is improper. Employer's Brief at 9. However, it was reasonable for the administrative law judge to examine prior fee awards to find that \$100.00 is the prevailing market rate for counsel's legal assistants. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Employer further contends that claimant's counsel has "failed to provide any information regarding the background and experience of eight [legal] assistants," and that counsel is therefore not entitled to an award for work performed by those assistants. Employer's Brief at 9, citing *Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-171 n.10 (2010); *Maggard v. Int'l Coal Grp.*, 24 BLR 1-172, 1-176 n.22 (2010). We disagree. Employer's reliance on *Maggard* and *Bowman* for the proposition that claimant's counsel is required to identify the qualifications for his legal assistants is misplaced, as those cases concern awards of fees for work performed before the Board, pursuant to 20 C.F.R. §802.203(d)(2). *Bowman*, 24 BLR at 1-171 n.10; *Maggard*, 24 BLR at 1-176 n.22. Contrary to employer's contention, the regulation governing fees for work performed before an administrative law judge requires only that counsel "indicate the professional status (e.g. attorney, paralegal, law clerk, lay representative or clerical)" of the persons performing the work for which fees are requested, and counsel did so here. Therefore, the administrative law judge permissibly allowed the claimed amounts. 20 C.F.R. §725.366(a).

Because it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's determination of the hourly rates of \$300.00, \$175.00, and \$100.00 for Mr. Wolfe, Mr. Gilligan, and counsel's legal assistants. Therefore, we affirm the administrative law judge's award of a total fee of \$13,573.75, representing 32.9 hours of legal services at an hourly rate of \$300.00 for Mr. Wolfe, 2.85 hours of legal services at an hourly rate of \$175.00 for Mr. Gilligan, and 32.05 hours of legal services at an hourly rate of \$100.00 for the legal assistants.

We now address claimant's counsel's fee petition for services performed before the Board, pursuant to 20 C.F.R. §802.203. Claimant's counsel has filed, in connection with the appeals in BRB Nos. 10-0546 BLA and 10-0187 BLA, an itemized statement requesting a fee of \$2,331.25, representing 2.25 hours of legal services at an hourly rate of \$300.00 (Mr. Wolfe), 7.25 hours of legal services at an hourly rate of \$225.00 (Mr. Gilligan), and 0.25 hour of services at an hourly rate of \$100.00 (legal assistant), from June 15, 2010 to September 7, 2011.<sup>7</sup>

Employer contends that the fee requested for work performed before the Board in BRB No. 10-0546 BLA, in defense of the administrative law judge's initial Attorney Fee Order, cannot be granted, as the services performed were unnecessary and the Board

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<sup>7</sup> Mr. Wolfe spent one hour of work on BRB No. 10-0187 BLA, represented by charges dated February 10, 2011; April 5, 2011; August 8, 2011; and September 7, 2011. All of the remaining charges relate to BRB No. 10-0546 BLA.

vacated the fee award and remanded the case to the administrative law judge.<sup>8</sup> Employer's Objections at 3. Work performed before the Board in defense of an award of attorney fees at the administrative law judge level is compensable, *see Hawker v. Zeigler Coal Co.*, 22 BLR 1-177, 1-181 (2001), and we conclude that counsel has established the necessity of this work in defense of the fee petition in this case. *Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984). We therefore reject employer's argument.

Employer contends that claimant's counsel has not provided sufficient information relevant to the applicable market rates of the persons providing legal services. We disagree. In his fee petition, Mr. Wolfe submitted a list of numerous cases in which he was awarded an hourly rate of at least \$300.00, as well as cases in which Mr. Gilligan was awarded an hourly rate of \$225.00. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; *see also Gosnell*, 2013 WL 3929100, at \*6-9; *Cox*, 602 F.3d at 290, 24 BLR at 2-291. Counsel also provided evidence of the expertise and experience in the field of black lung litigation that he and Mr. Gilligan share. *See Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124; *see also Holiday*, 591 F.3d at 228, 43 BRBS at 71. As claimant's counsel has provided sufficient evidence of a market rate in his geographic area for attorneys of his, and of Mr. Gilligan's, expertise and experience for appellate work before the Board, we approve the requested hourly rates of \$300.00 and \$225.00 for Mr. Wolfe and Mr. Gilligan. Furthermore, we approve the requested hourly rate of \$100.00 for work performed by claimant's counsel's legal assistant, as counsel has identified the legal assistant's training, education, and experience, and has provided numerous cases in which his legal assistants have received \$100.00 an hour for legal services. *See* 20 C.F.R. §802.203(d)(2).

Employer further objects to the number of hours requested by claimant's counsel, arguing that specific instances of work were either excessive, clerical in nature, or duplicative. Employer's Objections at 3-4. Employer initially objects to three entries of one quarter-hour each in which claimant's counsel reviewed documents, contending that the time requested was excessive for those tasks. *Id.* We disagree. Contrary to employer's contention, claimant's counsel's practice of billing in minimum quarter-hour increments is reasonable, as it is the billing increment set forth in the applicable regulation. 20 C.F.R. §802.203(d)(3); *see Bentley*, 522 F.3d at 666, 24 BLR at 2-127. Consequently, we deny employer's request to reduce the time spent on June 15, 2010; July 15, 2010; and September 22, 2010.

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<sup>8</sup> Employer's objection that the fee petition in BRB No. 10-0546 BLA is premature, because the administrative law judge could deny a fee on remand, is moot, given the administrative law judge's fee award and his denial of employer's motion for reconsideration. Employer's Objections at 1.

Employer next contends that the 0.50 hour that Mr. Gilligan spent on August 17, 2010 and the 0.25 hour that a legal assistant spent on the same day are duplicative. We disagree. On August 17, 2010, Mr. Gilligan reviewed employer's letter, petition for review, and supporting brief filed with the Board. On the same day, counsel's legal assistant provided a separate legal service, reviewing the file for relevant deadlines and calendaring the due date for claimant's counsel's response brief. Work performed by a legal assistant reviewing the case file and placing relevant dates on the calendar constitutes services that are not purely clerical in nature, and may be found necessary and not excessive or duplicative. *Bentley*, 522 F.3d at 663, 24 BLR at 2-121; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-218 (1986). Therefore, we reject employer's argument and allow these requested fees.

However, we agree with employer that the time spent by Mr. Gilligan on July 17, 2011 was duplicative of the time spent by Mr. Wolfe on July 1, 2011. On July 1, 2011, Mr. Wolfe reviewed the Board's Decision and Order affirming, in part, and vacating, in part, the administrative law judge's Attorney Fee Order, and remanding the case for further consideration. As Mr. Gilligan spent 0.25 hour reviewing the same Decision and Order on July 17, 2011, we disallow the 0.25 hour spent by Mr. Gilligan as duplicative. *Bentley*, 522 F.3d at 663, 24 BLR at 2-121; *Whitaker*, 9 BLR at 1-218.

In all other respects, we find the requested fee to be reasonable in light of the necessary services performed. Therefore, we award a fee of \$2,275.00 for 2.25 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 7.00 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), and 0.25 hour of services at an hourly rate of \$100.00 (legal assistant), provided in BRB Nos. 10-0187 BLA and 10-0546 BLA.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees on Remand and Order Denying Employer's/Carrier's Motion to Reconsider are affirmed, and claimant's counsel is awarded a fee of \$2,275.00 for work performed before the Board in BRB Nos. 10-0546 BLA and 10-0187 BLA, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge