



BRB No. 16-0166 BLA

BOBBY R. BRANTLEY)
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 Claimant-Petitioner)
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 v.)
)
 BIG RIDGE, INCORPORATED)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED: 09/23/2016

DECISION and ORDER

Appeal of the Revised Proposed Order Supplemental Award Fee for Legal Services of Alffie Chilton, Claims Examiner, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Richard H. Risse (White & Risse, LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant's counsel (counsel) appeals the Revised Proposed Order Supplemental Award Fee for Legal Services of Claims Examiner Alffie Chilton (the district director) on an attorney fee petition filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2012) (the Act). The procedural history of these fee

proceedings is as follows. Counsel submitted an itemized fee petition, requesting a fee for legal services performed before the district director between August 11, 2013 and February 9, 2015.¹ Counsel requested a fee in the amount of \$7,532.82, representing 27.5 hours of attorney services at an hourly rate of \$225.00, three hours of paralegal services at an hourly rate of \$100.00, and \$1,045.32 in expenses. On March 24, 2015, prior to expiration of the period allowed for employer's objections, the district director issued a Proposed Order Supplemental Award Fee for Legal Services (Supplemental Award) awarding the entire sum requested. Employer requested reconsideration and submitted objections to counsel's fee petition, to which counsel responded.

After considering the regulatory criteria at 20 C.F.R. §725.366(b) and employer's objections to the fee petition, on April 15, 2015 the district director issued a Revised Proposed Order Supplemental Award Fee for Legal Services (Revised Supplemental Award), which reduced counsel's hourly rate, the number of hours requested, and the claimed expenses. Specifically, the district director awarded a total fee of \$6,191.71, for 24.55² hours of attorney services at an hourly rate of \$207.00, one hour of paralegal services at an hourly rate of \$100.00, and \$1,009.86 in expenses. The district director explained that all time spent in preparation of the fee petition had been disallowed, pursuant to 20 C.F.R. §725.366(b).

On April 28, 2015, counsel requested reconsideration of the district director's Revised Supplemental Award, challenging the district director's reduction of his hourly

¹ The fee petition submitted by claimant's counsel (counsel) set forth his qualifications and level of experience in federal black lung claims. The fee petition also included, in pertinent part: an itemized statement of the time spent on the claim; copies of seven prior fee awards issued to counsel in 2014 and 2015 for work performed before the United States Court of Appeals for the Sixth Circuit, the Benefits Review Board, and the district director, in which his hourly rate of \$225.00 was approved; and an affidavit from counsel attesting that the hourly rate of \$225.00 is his customary rate, and that he has never sought, nor been awarded, a lesser rate, even when opposing counsel has objected. Subsequently, in response to employer's objections and the district director's request for additional information, counsel provided the appropriate table from the National Law Journal's 2014 Survey of Law Firm Economics (2014 Survey), documenting standard hourly billing rates for attorneys practicing in the Middle Atlantic region who possess similar years of experience. Counsel also provided the method by which the Survey calculates "years of legal experience," and confirmation of the date he was admitted to the bar to practice law.

² Counsel concedes that hours awarded should total 24.5, not 24.55, and that this is a typographical error. Counsel's Brief at 6 n.1.

rate and the disallowance of all time spent defending the fee application. In support of his reconsideration request, counsel asserted that \$225.00 is his customary rate and is within the range for attorneys with “[two] or [three] Years” of experience, as set forth in the National Law Journal’s 2014 Survey of Law Firm Economics (2014 Survey). Counsel asserted that, although he had less than two years of experience at the time his services were rendered, because he had more than two years of experience at the time he filed his fee petition, he was requesting an hourly rate of \$225.00 for all work performed, to compensate for the delay in payment of the fees. Counsel’s June 30, 2015 letter at 1.

On December 9, 2015, the district director denied counsel’s request for reconsideration of his fee petition. Referencing 20 C.F.R. §725.366(b), the district director stated that the Department of Labor (DOL) pays fees based on the applicable hourly rate at the time services were performed, not when the fee application was submitted. The district director also stated that no fees are allowed for the defense of a fee.

On appeal, counsel contends that the district director erred in reducing his hourly rate to \$207.00 and in disallowing the hours requested for defending his fee petition. Employer filed a response, urging affirmance of the attorney fee award,³ to which counsel replied. The Director, Office of Workers’ Compensation Programs, did not file a brief in this appeal.⁴

The amount of an award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *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). An attorney’s fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

³ In response to counsel’s appeal, employer filed a Motion to Dismiss Interlocutory Appeal, arguing that counsel’s appeal was untimely and premature. Counsel filed a Response to Motion to Dismiss Interlocutory Appeal. By Order dated May 26, 2016, the Board denied employer’s motion to dismiss. The Board held that counsel’s appeal, filed on December 15, 2015, of the district director’s December 9, 2015 reconsideration determination was timely and that 20 C.F.R. §725.366(e) permits direct appeals to the Benefits Review Board of fee awards rendered by district directors.

⁴ Claimant’s counsel does not contest the district director’s reduction of the requested 27.5 hours of legal services by three hours, or the reduction of his claimed expenses. Counsel’s Brief at 10. We therefore affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Hourly Rate

In determining the amount of an attorney's fee to be awarded 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. See *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Supreme Court has held that 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 burden falls on the fee applicant 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." *Id.* at 896 n.11.

In challenging the district director's Revised Supplemental Award, counsel argues that the district director's reduction of his hourly rate is neither supported by substantial evidence nor consistent with current legal precedent. Specifically, counsel asserts that the district director erred in reducing his hourly rate from \$225.00, the standard rate for attorneys with two to three years of experience, as set forth in the 2014 Survey, to \$207.00, the standard rate for attorneys with less than two years of experience, on the grounds that the DOL pays fees based on the applicable hourly rate at the time services were performed, not when the fee application was submitted. Counsel's Brief at 11. Counsel's contention has merit.

The district director appropriately began her assessment of the reasonableness of the requested hourly rate by considering regulatory criteria set forth at 20 C.F.R. §725.366(b), including the quality of representation, qualifications of the representatives, complexity of the legal issues involved, level of proceedings to which the claim was raised, and the level of the claim at which counsel entered the proceedings. 20 C.F.R. §725.366(b); *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 13 BLR 2-364 (1990); see *Blankenship v. Schweiker*, 676 F.2d 116, 117-118 (4th Cir. 1982); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984); Revised Supplemental Award at 1. The district director found that because counsel "had less than [two] years experience as the staff attorney" at the time the services were rendered in this case,⁵ and "the work was performed in a routine case which did not call for special ability

⁵ Counsel's bar certificate from the Kentucky Supreme Court indicates that he was admitted to practice law on February 12, 2013. Counsel performed all legal services before the district director between August 11, 2014 and February 9, 2015, and filed his fee petition on March 13, 2015. Thus, while counsel had less than two years of experience when all work was performed, he had more than two years of experience when his fee petition was filed.

and effort,” an hourly rate of \$207.00, which is the standard hourly billing rate listed in the 2014 Survey for attorneys with “under two years” of experience in the Middle Atlantic region, was a reasonable market rate. *Id.*

On reconsideration, counsel asserted that, pursuant to *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989), he was requesting a billing rate of \$225.00 an hour for the entire time period in which he represented claimant to compensate for the delay between the performance of his services and the payment for those services. *See* Counsel’s June 30, 2015 letter at 1-2. In response, the district director reiterated that the DOL pays fees based on the applicable rate at the time the services were performed, not when the fee petition was filed. *See* District Director’s June 23, 2015 and December 9, 2015 letters. However, as counsel correctly asserts, in denying the requested augmentation, as inconsistent with the DOL’s regulations governing the payment of fees, the district director failed to recognize that an attorney may be awarded fees based on his rate at the time he files a fee petition, as enhancement for the delay in payment of the fees.

The United States Supreme Court has held that enhancement for the delay in payment of an attorney’s fee may be an “appropriate factor in what constitutes a reasonable attorney’s fee” under a fee shifting statute. *Jenkins*, 491 U.S. at 284. The Fourth Circuit has also authorized the enhancement of a fee to compensate for delay in payment, *i.e.*, the passage of time between when the services were rendered and when the fee award becomes enforceable. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 805, 21 BLR 2-631, 2-638 (4th Cir. 1999) (approving a supplemental petition to increase attorney’s hourly rate to account for the six year delay).

Moreover, the Board has held that it is within the discretion of the factfinder to adjust the fee by employing any reasonable means to compensate counsel for delay, including the use of the current hourly rate. *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97 (1995), *citing Jenkins*, 491 U.S. at 282, 284. Thus, the district director erred in declining to consider claimant’s request for an hourly rate of \$225.00 for all work performed as enhancement for the delay in payment of the fees. Moreover, the district director did not discuss any of the evidence submitted by counsel to support his fee request, including his prior fee awards in black lung cases in which he was awarded an hourly rate of \$225.00. Counsel’s Brief at 15, *citing* Revised Supplemental Award at 2; *see B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-123 (6th Cir. 2008); *accord Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-290 (4th Cir. 2010); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 (2010) (Order).

Because the district director did not consider, in accordance with *Kerns*, whether counsel is entitled to an hourly rate of \$225.00 for all work performed as enhancement for delay in payment of the fees, we vacate her hourly rate determination. On remand,

the district director should consider whether counsel's request for payment at his current rate is reasonable, in light of all relevant evidence⁶ and the circumstances of this case.⁷ *See Parks v. E. Associated Coal Corp.*, 24 BLR 1-177, 1-181 (2010).

Allowable Hours

Counsel also contends that the district director erred in declining to award fees for 4.75 hours counsel spent defending his fee petition. We agree. In her December 9, 2015 reconsideration letter, the district director stated that, pursuant to 20 C.F.R. §725.366(b), the district director could not approve fees for services defending a fee petition. While the regulations do not specifically address this point,⁸ it has been held consistently that a claimant's attorney is entitled to a fee award where he successfully defends his fee petition or where he succeeds on appeal in obtaining an increased fee. *See Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 903 (7th Cir. 2003); *Kerns*, 247 F.3d at 134, 22 BLR at 2-286; *Workman v. Director, OWCP*, 6 BLR 1-1281, 1-1283 (1984). Moreover, contrary to the district director's finding, and as counsel correctly asserts, the DOL has recognized that the regulations do not prohibit an attorney from receiving a fee for time spent litigating the amount of his attorney's fees:

The prohibition in [20 C.F.R.] § 725.366(b) on fees for time spent filling out a fee application presents an entirely different question from whether it is reasonable to require an employer who unsuccessfully challenges that application to pay a fee for the necessary additional time that the attorney was required to spend defending his fee request. . . . The Department

⁶ Specifically, the district director need not rely exclusively on the standard rate for attorneys in the Middle Atlantic region as set forth in the 2014 Survey. Like rates awarded in prior cases, the standard rates listed in state bar surveys provide inferential evidence of a market rate, but themselves do not set the rate. *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23 (6th Cir. 2008); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 2-289-90, 24 BLR 2-269, 2-290-91 (4th Cir. 2010); *Parks v. E. Associated Coal Corp.*, 24 BLR 1-177, 1-181 (2010).

⁷ Counsel concedes that, at the time of his appeal to the Board, only about eighteen months had passed since he started providing services to claimant, far shorter than the six year delay in *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 805, 21 BLR 2-631, 2-638 (4th Cir. 1999). Counsel's Brief at 13-14.

⁸ The regulation provides only that "[n]o fee approved shall include payment for time spent in *preparation* of a fee application." 20 C.F.R. §725.366(b) (emphasis added).

believes that the current regulations permit an award of attorneys' fees in the latter case. . . .

65 Fed. Reg. 79,920, 79,980 (Dec. 20, 2000); Counsel's Brief at 19. Finally, the Board recently held that the Supreme Court's decision in *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ___, 135 S. Ct. 2158 (2015) does not apply to cases involving a fee awarded pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), as incorporated by the Black Lung Benefits Act, 30 U.S.C. §932(a), to preclude counsel's entitlement to an attorney's fee for defending his fee petition. *See Clisso v. Elro Coal Co.*, 50 BRBS 13 (2016). We, therefore, vacate the district director's disallowance of time counsel spent defending his fee petition.

On remand, the district director must reconsider all evidence relevant to determining a reasonable market rate for an attorney of counsel's experience and expertise, and consider whether enhancement for delay is appropriate. The district director must also determine whether the time requested for defending the fee petition was reasonable.

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge