

BRB No. 13-0293 BLA

DELBERT W. HALL)
)
 Claimant-Respondent)
)
 v.)
)
 HYTERS COAL INCORPORATED)
)
 and)
)
 OLD REPUBLIC GENERAL INSURANCE) DATE ISSUED: 04/18/2014
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Approving Attorney Fees of Linda S. Chapman,
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: McGRANERY, HALL and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order Approving Attorney Fees (2010-
BLA-5383) of Administrative Law Judge Linda S. Chapman, rendered in connection

with a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).¹

Claimant's counsel requested a fee totaling \$14,387.50 for 29 hours of legal services performed by Joseph E. Wolfe, Esq., at an hourly rate of \$300; 0.50 hours of legal services performed by Ryan C. Gilligan, Esq., at an hourly rate of \$225; 4.75 hours of legal services performed by W. Andrew Delph, Esq., at an hourly rate of \$200; 13.00 hours of legal services performed by Micah S. Blankenship, Esq., at an hourly rate of \$150; and 26.75 hours of legal services performed by legal assistants at an hourly rate of \$100. Counsel's fee petition also included expenses in the amount of \$2,975.00, which he requested to be reimbursed directly to claimant.

The administrative law judge found the requested hourly rates appropriate, but disallowed \$925 for 9.25 hours requested for services performed by legal assistants, and \$435 for Mr. Wolfe, including one entry for 0.25 hour and eight entries reduced from 0.25 to 0.10 hour. The administrative law judge, therefore, awarded claimant's counsel a total fee of \$13,027.50. The administrative law judge also granted reimbursement of costs in the amount of \$2,975.00.

On appeal, employer argues that the administrative law judge erred in determining both the appropriate hourly rates and number of hours of services. Claimant's counsel responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer reiterates its arguments in a reply brief.

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, an abuse of discretion, or not in accordance with applicable law.² See *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).

¹ Administrative Law Judge Linda S. Chapman awarded benefits to claimant, and the Board affirmed the award. *Hall v. Hyters Coal, Inc.*, BRB No. 13-0021 BLA (Sept. 27, 2013) (unpub.), *recon. denied*, (Jan. 31, 2014) (Order) (unpub.).

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Hall*, BRB No. 13-0021 BLA, slip op. at 2 n.3.

I. 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 "lodestar amount" by multiplying the number of hours reasonably expended in preparing and litigating the case by a reasonable hourly rate. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). 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; *Plyler v. Evatt*, 902 F.2d 237, 277 (4th Cir. 1990). In cases in which no billing rate has been established by law, the prevailing market rate should be determined with reference to the next best evidence, which includes evidence of fee awards received in similar cases. *See E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572-73 (4th Cir. 2013). The regulations also provide guidance on considerations relevant to the determination of an award of attorneys' fees in black lung benefits cases. Pursuant to 20 C.F.R. §725.366(b):

Any fee approved . . . shall be reasonably commensurate with the necessary work done and 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 this case, the administrative law judge initially stated, "[i]n support of his fee petition, Mr. Wolfe noted that he has [thirty-two years] of experience, with ratings of high to very high in legal ability," and that "Mr. Wolfe stated that Mr. Gilligan has obtained significant experience before the Benefits Review Board and the Fourth and Sixth Circuit Courts of Appeals." Order at 1-2. The administrative law judge further noted that claimant's counsel relied on the 2006 Altman & Weil Survey of Law Firm Economics (Altman & Weil Survey), a list of thirty-five attorney fee awards for an hourly rate of at least \$300, and a list identifying the legal assistants, as well as their experience and qualifications. *Id.* at 2, 4 n.4.

The administrative law judge acknowledged employer's contention that claimant's counsel did not establish a prevailing market rate for each attorney and its argument that the citation of prior fee awards did not cure this defect. Order at 2-3. Using the 2012 Altman & Weil Survey, the administrative law judge determined the hourly rates for equity partners and associates by categories consisting of region, state, firm size, population area, and individual litigation specialties. *Id.* at 3. The administrative law judge found that the average hourly rate is \$307 for equity partners and \$219.60 for associates. *Id.* at 3. She next averaged the hourly rates in each of the foregoing categories based on years of experience, and found that an attorney with less than two years of experience received an average hourly rate of \$199.20; an attorney with four to five years of experience received \$225.20 per hour; an attorney with six to seven years of experience received \$234.00 per hour; and an attorney with thirty-one or more years of legal experience received an hourly rate of \$361.60. *Id.* at 4. Recognizing that these rates were accurate as of January 1, 2012, when much of the work reflected in claimant's counsel's petition was performed in 2010 and 2011, the administrative law judge stated that she would rely on these averages as a guide. *Id.* The administrative law judge concluded:

Taking these factors into account, and considering the variety of sources provided by Mr. Wolfe, I find that Mr. Wolfe has met his burden to provide satisfactory evidence of an applicable prevailing rate for representation in similar cases in the southwest Virginia area. Considering these factors, as well as the low rates of success for claimants in black lung litigation, and the contingent nature of the attorneys' fees, I find that the appropriate hourly rate for Mr. Wolfe is \$300, \$200 for Mr. Delph's time, \$225 for Mr. Gilligan's time, \$150 for M[r]. Blankenship's time, and \$100 for full time legal assistants. I note that I have had the opportunity to observe these attorneys practice on a number of occasions; I find them to be highly competent, experienced, and qualified attorneys, who produce superior work product. They represented their client in the case at bar zealously and competently.

Id. (footnote omitted).

Employer argues that the administrative law judge's findings regarding the hourly rates cannot be affirmed, as she relied on the 2012 Altman & Weil Survey, which is not part of the record, without providing the parties with notice or an opportunity to respond. Employer further alleges that neither the 2012, nor the 2006, Altman & Weil Survey cited by claimant's counsel, provides sufficient information for the administrative law judge to determine the prevailing market rate. Employer also contends that the administrative law judge did not adequately explain her application of the factors set forth in 20 C.F.R. §725.366. In addition, employer challenges the administrative law judge's reliance on

the contingent nature of attorney fees in black lung cases, and on the evidence of prior fee awards submitted by claimant's counsel. Employer further maintains that the administrative law judge's determination of an hourly rate of \$150.00 for Mr. Blankenship is unsupported, as this attorney's qualifications and experience are not of record.

Upon review of the administrative law judge's Order and employer's allegations of error, we hold that employer has failed to establish that the administrative law judge's findings regarding the appropriate hourly rates for claimant's attorneys, and their legal assistants, constituted an abuse of discretion. Because employer has not identified how it was prejudiced by the administrative law judge's use of the 2012 Altman & Weil Survey as a guide, nor has it presented any evidence indicating that the figures reported by the administrative law judge were inaccurate, we reject employer's due process argument. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Grigg v. Director, OWCP*, 28 F.3d 416, 420 n.7, 18 BLR 2-299, 2-308 n.7 (4th Cir. 1994). We also hold that the administrative law judge acted rationally in determining that the 2012 Altman & Weil Survey provided some guidance in determining whether the hourly rates requested by claimant's counsel were reasonable. *See Gosnell*, 724 F.3d at 575 n.12; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-291 (4th Cir. 2010).

We further reject employer's related allegation that the administrative law judge erred in relying, in part, on fee awards that claimant's counsel has received in prior cases. In *Gosnell*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recently held that "given the absence of private fee agreements in black lung cases, such prior fee awards undoubtedly qualify as one category of the 'next best evidence' of a prevailing market rate." *Gosnell*, 724 F.3d at 523. Employer's argument regarding the administrative law judge's reference to the risk of loss is also without merit, as it does not appear that she actually relied on this factor to enhance counsel's customary hourly rate; rather, compensation for the risk of loss is already incorporated into any reasonable hourly rate. *See City of Burlington v. Dague*, 505 U.S. 557 (1992); *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

Lastly, we reject employer's contentions that the administrative law judge did not properly apply the factors set forth in 20 C.F.R. §725.366(b) and identified no support for her finding that Mr. Blankenship was entitled to an hourly rate of \$150. The administrative law judge performed the requisite analysis in stating that the information presented in claimant's counsel's fee petition, combined with her personal observation of the work performed, established that the attorneys and legal assistants who performed the services in this case are highly competent, experienced and qualified, and produce superior work. *See 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). Further, because the administrative law judge rationally considered the strength of the evidence presented by both claimant's counsel and employer regarding the appropriate market rate, employer has failed to demonstrate that her findings as to the appropriate hourly rate for the attorneys and legal assistants identified in the fee petition constituted an abuse of discretion. *See Gosnell*, 724 F.3d at 523; *Abbott*, 13 BLR at 1-16. We affirm, therefore, the administrative law judge's findings of \$300 as the appropriate hourly rate for Mr. Wolfe; \$225 per hour for Mr. Gilligan; \$200 per hour for Mr. Delph; \$150 per hour for Mr. Blankenship; and \$100 per hour for the legal assistants.

II. Hours of Service

The administrative law judge initially disallowed 9.25 hours requested for work done by the legal assistants, as the activities they performed "are clerical in nature, and thus not compensable." Order at 5-6. The administrative law judge also reduced the amount of time claimed for Mr. Wolfe's services by reducing the .25 hour claimed for eight entries to .10 hour, stating "[t]hese entries reflect . . . review of standard procedural orders or correspondence, which should not take an experienced attorney . . . more than .10 hour to review." *Id.* at 6. The administrative law judge further stated, "[m]ost of the entries to which the Employer objected as clerical are included in the list above. I do not agree with the Employer that the remainder of the entries reflect purely clerical work." *Id.* The administrative law judge also denied employer's objections to entries by Mr. Wolfe and Mr. Blankenship as unnecessary and further found that the practice of billing in .25 hour increments was "appropriate." *Id.*

Employer alleges that the administrative law judge abused her discretion in "reducing only one hour and twelve minutes from the twenty-eight contested hours" of Mr. Wolfe's time, and "refusing to reduce" any of the time entries for the remaining attorneys and legal assistants. Employer's Brief in Support of Petition for Review at 8. Employer also contends that the administrative law judge erred in allowing billing in quarter-hour increments, as her reduction of a number of Mr. Wolfe's quarter-hour entries established that she recognized that such billing "does not adequately reflect the time devoted to certain tasks." *Id.* at 9. In addition, employer asserts that the administrative law judge did not adequately explain why she determined that only certain tasks should be reduced from .25 hour to .10 hour.

Employer's contentions are without merit. The administrative law judge conducted a thorough review and reached a conclusion that is supported by the record, that the total number of hours claimed, with the exception of the disallowed entries, was reasonable. *See Gosnell*, 724 F.3d 577-78; *Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Abbott*, 13 BLR at 1-16. In particular, the administrative law judge permissibly determined that quarter-hour billing is acceptable, as long as the total amount of time

claimed is reasonable. *See Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993). As employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, we affirm her findings approving 27.55 hours of legal services performed by Mr. Wolfe; 0.50 hours of legal services performed by Mr. Gilligan; 4.75 hours of legal services performed by Mr. Delph; 13.00 hours of legal services performed by Mr. Blankenship; and 17.50 hours of legal services performed by legal assistants. *See Gosnell*, 724 F.3d 577-78; *Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Abbott*, 13 BLR at 1-16.

III. Conclusion

Based on the foregoing, we affirm the administrative law judge's decision to award a fee totaling \$13,027.50 for the services performed by claimant's counsel. We further affirm, as unchallenged on appeal, the administrative law judge's decision to grant claimant's counsel's request for expenses in the amount of \$2,975.00. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Order at 7.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in my colleagues' decision to affirm the administrative law judge's attorney fee award, based on her consideration of prior fee awards in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572-73 (4th Cir. 2013).

JUDITH S. BOGGS
Administrative Appeals Judge