

BRB No. 09-0182 BLA

B.M.)
(Widow of and o/b/o Estate of L.M.))
)
Claimant-Respondent)
)
v.)
)
JONES BRANCH COAL COMPANY,) DATE ISSUED: 08/20/2009
INCORPORATED)
)
and)
)
AMERICAN BUSINESS & MERCANTILE)
INSURANCE MUTUAL)
)
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Attorney Fee Order (06-BLA-5873 and 06-BLA-5874) of Administrative Law Judge Larry S. Merck with respect to a miner's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ In a decision dated January 11, 2008, the administrative law judge awarded benefits in the miner's claim but denied benefits in an associated survivor's claim. Subsequently, the administrative law judge denied the Director's motion for reconsideration on March 6, 2008. Employer appealed, and the Board affirmed the administrative law judge's award of benefits in the miner's claim. *Estate of L.M. v. Jones Branch Coal Co.*, BRB No. 08-0354 BLA (Feb. 27, 2009)(unpub.). The administrative law judge's denial of benefits in the survivor's claim was not appealed. *Id.*, slip op. at 2 n.1.

Claimant's counsel, Thomas W. Moak of Moak & Nunnery, P.S.C., Prestonsburg, Kentucky, initially submitted a fee petition before the administrative law judge on February 8, 2008, which included a request for fees in the unsuccessful survivor's claim. In response to employer's objection to counsel's request for fees for services rendered in the unsuccessful prosecution of the survivor's claim, the administrative law judge ordered claimant's counsel to file an amended fee petition for services rendered only in the successful miner's claim.

On March 28, 2008, claimant's counsel filed his amended fee petition, requesting a fee of \$2,100, representing six hours of attorney services at \$350 per hour.² Employer objected to the requested hourly rate, but raised no objection to the number of hours claimed.³ In support of its objection to the hourly rate, employer submitted a fee petition from Mr. Yonts of the law firm of Brent Yonts, P.S.C., Greenville, Kentucky, requesting a fee of \$150 per hour in an unrelated case. Employer also submitted the declaration of Mr. Prochot of the law firm of Greenberg Traurig, Washington, D.C., stating that, generally, \$150 per hour is the maximum hourly rate charged by attorneys in Eastern

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); *Estate of L.M. v. Jones Branch Coal Co.*, BRB No. 08-0354 BLA (Feb. 27, 2009)(unpub.), slip op. at 3 n.4.

² Employer subsequently filed a Motion to Deny Shifted Fees or to Compel Discovery. Claimant responded, and employer filed a reply brief. On August 25, 2008, the administrative law judge denied employer's motion.

³ Employer stated that an hourly rate of \$150 was appropriate for claimant's counsel. Employer's Objection to Shifted Fees, dated September 11, 2008, at 1, 2, 7, 9, 10.

Kentucky and Southwest Virginia, based on his interview of seven black lung attorneys practicing in these areas. Also submitted was the declaration of Ms. Terrill of Old Republic Insurance Company, stating that the company pays Eastern Kentucky attorneys \$90 to \$140 per hour for defending black lung claims. Claimant responded to employer's objections, and in support of his response submitted the affidavits of Messrs. McGuire and Carter, attorneys who practice law in Kentucky, who stated that a reasonable hourly rate in black lung litigation is \$200 to \$350 and \$200 to over \$300, respectively. After considering employer's objections, the administrative law judge approved an hourly rate of \$300. Attorney Fee Order at 2-4. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$1,800, representing six hours of attorney services at the rate of \$300 per hour.

On appeal, employer contends that the administrative law judge erred by awarding claimant's counsel the hourly rate of \$300. Additionally, employer requests that the case be remanded to the administrative law judge to determine "the reasonableness of the hours claimed." Claimant responds in support of the fee award. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661, 24 BLR 2-106, 2-117 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer argues that the administrative law judge erred in awarding an hourly rate of \$300 to claimant's counsel. Employer asserts that the administrative law judge erred by providing no reason for his award of a \$300 hourly rate, erred in taking judicial notice of the Altman & Weil Survey of Law Firm Economics, and erred by relying on prior Board decisions affirming awards of \$300 per hour in other cases involving both claimant's counsel and another black lung attorney.

In awarding claimant's counsel an hourly rate of \$300, the administrative law judge inappropriately took judicial notice of the Altman Weil survey,⁴ without addressing employer's objections to the use of the survey. See *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990); Attorney Fee Order at 3. However, contrary to employer's contention, the administrative law judge also applied appropriate regulatory criteria, and properly considered claimant's counsel's twenty-two

⁴ Specifically, the administrative law judge noted that the 2005 Altman & Weil Survey, for the East South Central Region, "provides a considerable range of fees," from \$250 to \$335 per hour for attorneys with twenty-one or more years of experience, such as claimant's counsel. Attorney Fee Order at 3.

years of legal experience, the evidence provided by both parties as to the prevailing market rate for black lung attorneys, and the objections of employer.⁵ See 20 C.F.R. §725.366(b); [*Bentley*], 522 F.3d at 661, 24 BLR at 2-117; Attorney Fee Order at 3-4. In addition, the administrative law judge correctly stated that risk of loss cannot be factored into the determination of the hourly rate. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *Bentley*, 522 F.3d at 666, 24 BLR at 2-125. Based on the administrative law judge's proper analysis of the regulatory criteria and the relevant evidence of record, we affirm his finding that an hourly rate of \$300 was reasonable.⁶ See 20 C.F.R. §725.366(b); *Bentley*, 522 F.3d at 664, 24 BLR at 2-126; *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 894-895, 22 BLR 2-514, 2-535-36 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-493 (7th Cir. 2002). In addition, we decline to remand this case to the administrative law judge to address the "reasonableness of the hours claimed" as employer did not object to the number of hours claimed when this case was before the administrative law judge, and employer raised no specific objection to the hours claimed on appeal. See *Braenovich v. Cannelton Indus.*, 22 BLR 1-236, 1-251 (2003); *Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-

⁵ Contrary to employer's assertion, the administrative law judge did not consider claimant's counsel's prior fee award of \$300 per hour in *Parsons v. Wolf Creek Collieries*, Case No. 2001-BLA-0248 (Dec. 13, 2007). Thus, employer's argument that the administrative law judge erred by considering the *Parsons* case lacks merit. Employer's Brief at 7. In addition, employer's submission that \$100 per hour is reasonable because that rate was approved for counsel by the United States District Court in the Eastern District of Kentucky in a Social Security case has no relevance here, because this case involves whether claimant was entitled to black lung benefits, not whether he is entitled to Social Security benefits. See *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 665-66, 24 BLR 2-106, 2-125 (6th Cir. 2008); Employer's Brief at 10-11. Moreover, we note that employer asserted before the administrative law judge that \$150 was a reasonable hourly rate. See n.3, *supra*.

⁶ As set forth above, employer argues that the administrative law judge erred in taking judicial notice of the 2005 Altman & Weil Survey. However, because the administrative law judge did not rely on the survey, but relied on other data to support his award, any error in the administrative law judge's taking judicial notice of the survey is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Similarly, as the administrative law judge merely referenced, but did not rely on, the Board's prior decision in *O.R.H. v. Blue Star Coal Corp.*, BRB No. 07-0124 BLA (Oct. 30, 2007) (unpub.), in which the Board affirmed an hourly rate of \$300 to another attorney in another case, employer's argument that the administrative law judge erred by considering this case lacks merit. *Larioni*, 6 BLR at 1-1278.

121 (1987); Employer's Brief at 11; Employer's Objection to Shifted Fees, dated September 11, 2008, at 9-10.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge