

BRB No. 12-0644 BLA

GORDON F. CHARLES)
)
 Claimant-Respondent)
)
 v.)
)
 BROKEN HILL MINING COMPANY,)
 INCORPORATED)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 08/16/2013
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Order (09-BLA-5619) of Administrative Law Judge Lystra A. Harris granting an attorney's fee in connection with a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)

(the Act). Claimant's counsel requested a total fee of \$19,443.75, for 34.0 hours of legal services at an hourly rate of \$300.00 (Joseph E. Wolfe), 6.75 hours of legal services at an hourly rate of \$225.00 (Ryan C. Gilligan), 6.0 hours of legal services at an hourly rate of \$200.00 (Andrew Delph), 17.0 hours of legal services at an hourly rate of \$150.00 (Micah S. Blankenship), and 39.75 hours of legal services at an hourly rate of \$100.00 (legal assistants). Counsel's fee petition also requested expenses in the amount of \$2,318.09.

In her Order, the administrative law judge disallowed compensation for 27.75 hours of the legal services provided by the legal assistants (\$2,775.00) because the work was clerical in nature. The administrative law judge, therefore, awarded claimant's counsel a total fee of \$16,688.75. The administrative law judge also granted claimant's counsel expenses in the amount of \$2,318.09.

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimant's counsel responds in support of the administrative law judge's attorney'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.¹

The amount of an 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (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).

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 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. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008).

¹ Claimant's coal mine employment was in Kentucky and Ohio. *Charles v. Broken Hill Mining Co.*, BRB No. 12-0247 BLA (Jan. 24, 2013) (unpub.). Accordingly, 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).

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; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Employer contends that the administrative law judge's fee award should be vacated because it is impossible to determine what factors the administrative law judge relied upon to find "the prevailing market rates." Employer's Brief at 3. We disagree. The administrative law judge found that the requested hourly rates were "well-supported" by the nature of the case, the level of each person's knowledge and experience, and the prevailing market rates. Order at 2. We note that counsel's fee petition includes citations to twenty-nine cases where Mr. Wolfe was awarded hourly fees of at least \$300.00. See Claimant's Counsel's Fee Petition. In many of these cases, Mr. Gilligan and Mr. Delph were awarded their requested hourly rates of \$225.00 and \$200.00. These cases also include awards of an hourly rate of \$100.00 for work performed by counsel's legal assistants. In *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010), the United States Court of Appeals for the Fourth Circuit recognized that evidence of fees received in the past is an appropriate factor to take into account when establishing a market rate. In awarding the respective hourly rates of \$300.00, \$225.00, and \$200.00 to Mr. Wolfe, Mr. Gilligan, and Mr. Delph, the administrative law judge also relied upon the attorneys' knowledge and experience.² Order at 2. This is a relevant factor that an administrative law judge may consider in determining a reasonable hourly rate for claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124.

Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse her discretion in determining that claimant's counsel's requested hourly rates for Mr. Wolfe, Mr. Gilligan, Mr. Delph, and his legal assistants were reasonable, and reflected the applicable market rates. Order at

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

2; see *Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; see also *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge's approval of these requested hourly rates.³

We note, however, that claimant's counsel did not submit any evidence to support a prevailing market rate for Mr. Blankenship's legal services. The fee applicant bears the burden of producing specific evidence of the prevailing market rate. See *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, F.3d , 2013 WL 3929100 (4th Cir. July 31, 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-290 (4th Cir. 2010). In the absence of satisfactory specific evidence of the prevailing market rate, an adjudicatory tribunal cannot itself determine the reasonable hourly rate. *Cox*, 602 F.3d at 290, 24 BLR at 2-291.

Given the absence of evidence in the record to support the prevailing market rate for Mr. Blankenship's legal services, and the absence of evidence in the record regarding his qualifications, we vacate the administrative law judge's award of fees for legal services provided by Mr. Blankenship. On remand, the administrative law judge must provide claimant's counsel with an opportunity to submit an amended fee petition. See *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1055 (9th Cir. 2009). The amended fee petition must include evidence of the prevailing market rate for Mr. Blankenship's services, as well as evidence of his qualifications (i.e., training, education, and experience). 20 C.F.R. §725.366(a).

Allowable Hours

Employer also argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Specifically, employer contends that counsel's billing in quarter-hour increments was unreasonable. We reject employer's argument and hold that, under the facts of this case, counsel's practice of billing in quarter-hour increments was reasonable. See 20 C.F.R.

³ While the case was before the administrative law judge, employer filed a motion to compel discovery, seeking information from claimant's counsel regarding the basis for his requested hourly rates. In her Order, the administrative law judge denied employer's discovery request. Order at 2. Employer contends that the administrative law judge erred in denying its discovery request. However, because employer has not demonstrated prejudicial error or an abuse of discretion on the part of the administrative law judge in denying its request, the administrative law judge's decision to deny employer's motion to compel discovery is affirmed. See *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

§802.203(d); *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 666-67, 24 BLR 2-106, 2-117, 2-127 (6th Cir. 2008). In conducting her review, the administrative law judge acted within her discretion in finding that 27.75 hours of the charges by counsel's legal assistants were not compensable because the work performed was clerical in nature. Order at 2-6. The administrative law judge also addressed, and reasonably rejected, employer's objections to certain work performed by Mr. Wolfe and Mr. Gilligan. Order at 7-9. Consequently, we hold that the total number of hours awarded by the administrative law judge was reasonable and supported by the record. *See Gosnell*, 2013 WL 3929100, at *11.

Expenses

Employer also argues that the administrative law judge erred in approving claimant's counsel's request for expenses. Counsel requested reimbursement for a total of \$2,318.09 in expenses. Employer objected to \$2,243.09 of the requested expenses, representing that portion spent by counsel in developing the evidence, including the costs of obtaining a medical examination, and the interpretations of x-rays and CT scans.⁴ *See* Claimant's Fee Petition. Employer argued that counsel could only recover fees of the medical experts who attended the hearing. In her Order, the administrative law judge permissibly overruled employer's objection, finding that claimant's counsel could recover the fees of his medical experts "regardless of whether they attended the hearing, were deposed, or merely submitted reports for consideration." Order at 9; *see Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003); *Branham v. E. Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994). Because employer does not raise any other objection to claimant's request for expenses, we affirm the administrative law judge's award of a total of \$2,318.09 in expenses.

⁴ Employer did not object to the \$75.00 that claimant's counsel spent obtaining medical records. Employer's Opposition to Fee Petition at 12.

Accordingly, the administrative law judge's Order awarding attorney fees is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge