

BRB No. 11-0237 BLA

CLARK J. JONES)
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 Claimant-Respondent)
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 v.)
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 KING COAL COMPANY)
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 and)
)
 BITUMINOUS CASUALTY) DATE ISSUED: 12/16/2011
 CORPORATION)
)
 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 Alice M. Craft, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Attorney Fee Order (08-BLA-5093) of Administrative Law Judge Alice M. Craft relating to an award of benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006),

amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Claimant's counsel submitted a fee petition to the administrative law judge, requesting a fee of \$8,663.75 for work performed between September 8, 2007 and May 12, 2010, representing 17.40 hours of legal services by Joseph E. Wolfe at an hourly rate of \$300.00; 0.25 hour of legal services by Bobby S. Belcher, Jr., at an hourly rate of \$250.00; 11.75 hours of legal services by Ryan C. Gilligan at an hourly rate of \$175.00; and 13.25 hours of services by a legal assistant at an hourly rate of \$100.00 (collectively, claimant's counsel). After considering counsel's fee petition and employer's objections thereto, the administrative law judge approved the requested hourly rates for the three attorneys as reasonable, but reduced the hourly rate for the legal assistant to \$75.00 per hour, finding that the requested hourly rate was excessive. The administrative law judge further approved the number of hours requested for legal services performed by Bobby S. Belcher and Ryan C. Gilligan, but reduced the number of hours requested for legal services performed by Joseph E. Wolfe to 16.90 hours, and reduced the number of hours for services performed by the legal assistant to 8.50 hours. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$7,826.25 for legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge erred in finding that the hourly rates requested by the three attorneys were reasonable, arguing that claimant's counsel failed to produce specific evidence of the prevailing market rates for services in the relevant geographic area for similarly qualified attorneys doing similar work, and that the administrative law judge did not rely on market proof when approving the requested hourly rates. Counsel responds, urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs, has not filed a response to employer's appeal. Employer has submitted a reply brief, reiterating its arguments on appeal.¹

The amount of an attorney's fee 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger v. Coal Co.*, 21 BLR 1-102, 1-108 (1998) (*en banc*).

¹ We affirm, as unchallenged on appeal, the administrative law judge's finding that Attorney Wolfe is entitled to fees for 16.90 hours of services; Attorney Belcher is entitled to fees for 0.25 hour of services; Attorney Gilligan is entitled to fees for 11.75 hours of services; and the legal assistant is entitled to fees for 8.50 hours of services at the rate of \$75.00 per hour. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)), provides that when a claimant wins a contested case, the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a “reasonable attorney’s fee” to claimant’s counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a).

Employer asserts that the administrative law judge did not employ the proper analysis in determining the appropriate hourly rates for the attorneys. Employer argues that the administrative law judge’s failure to explain how the factors she considered supported her finding that the hourly rates of \$300.00, \$250.00, and \$175.00 were reasonable contravenes the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), and fails to comply with applicable legal authority on fee-shifting. We disagree.

In determining the appropriate fee award, the administrative law judge is required to apply the regulatory criteria found at 20 C.F.R. §725.366(b), which provides that the fee award must 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); *see Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *see also Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988). Failure to discuss and apply the regulatory criteria requires remand. *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984).

In this case, the administrative law judge performed the requisite analysis set forth in Section 725.366(b), considered employer’s objections and the evidence provided by both parties as to the prevailing market rate for black lung attorneys, and adequately explained her determination that hourly rates of \$300.00, \$250.00, and \$175.00 for work performed by Attorneys Wolfe, Belcher, and Gilligan were reasonable under the facts of this case. Within a proper exercise of her discretion, the administrative law judge relied on the following considerations: the nature of the issues involved in this case; the qualifications of the attorneys; Attorney Wolfe’s expertise developed in over thirty-two years of specialized practice in this area of law, as well as Attorney Belcher’s over sixteen years of experience, and Attorney Gilligan’s three years of experience representing black lung claimants; Altman & Weil’s *Survey of Law Firm Economics*, reporting a range of hourly rates for attorneys in various regions based on years of practice and experience; the nature of the services rendered; evidence of fees counsel received in the past, based on a list of twenty-one cases in which the requested rates were awarded as reasonable; and the ultimate benefit to claimant. *See B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657, 665-666, 24 BLR 2-106, 2-124 (6th Cir. 2008)

(adjudicator might need to consider one or more specific factors, including experience and complexity of the case, to determine where the particular attorney's representation lies along the spectrum of the market for legal services). While acknowledging that the *Altman & Weil Survey* alone does not provide sufficient information for a determination of the market rate, the administrative law judge permissibly concluded that this evidence, considered in conjunction with the other factors, including evidence of fees counsel received in the past, was appropriately included within the range of sources from which to ascertain a reasonable rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-291 (4th Cir. 2010); *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); *Parks v. Eastern Assoc. Coal Corp.*, 24 BLR 1-177, 1-181 n.5 (2010) (Order). As the administrative law judge, within a proper exercise of her discretion, determined that counsel provided sufficient evidence supporting the requested hourly rates for the three attorneys as reasonable for work performed before the Office of Administrative Law Judges, we affirm her approval of the hourly rates of \$300.00 for Attorney Wolfe, \$250.00 for Attorney Belcher, and \$175.00 for Attorney Gilligan. Because employer has failed to satisfy its burden of proving that the hourly rates awarded were excessive or that the administrative law judge abused her discretion in this regard, we affirm the administrative law judge's award of attorneys' fees in the amount of \$7,826.25. *See generally Broyles v. Director, OWCP*, 824 F.2d 327, 10 BLR 2-194 (4th Cir. 1987), *aff'd sub nom. Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge