

BRB No. 11-0390 BLA

EMILY BOLLING )  
(Widow of OWEN BOLLING) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 INDIAN MOUNTAIN COAL COMPANY )  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY ) DATE ISSUED: 02/28/2012  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Order Awarding Attorney Fees on Second Remand of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

W. William Prochot (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 Awarding Attorney Fees on Second Remand (05-BLA-5307) of Administrative Law Judge Pamela J. Lakes relating to an award of benefits on a survivor's 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). This case is before the Board for the second time. In a Supplemental Order Awarding Attorneys' Fees dated June 15, 2009, the administrative law judge determined that the fees requested by claimant's counsel actually totaled \$2,995.00, rather than the amount stated in the fee petition.<sup>1</sup> The administrative law judge approved the total number of hours requested for legal services and the total amount requested for expenses. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$2,995.00 for legal services performed while the case was before the Office of Administrative Law Judges and \$3,747.00 for expenses.

In response to employer's appeal, the Board vacated the administrative law judge's award of attorneys' fees and remanded the case to the administrative law judge to determine a reasonable hourly rate in accordance with the guidance of the United States Court of Appeals for the Fourth Circuit in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). The Board instructed the administrative law judge, on remand, to initially require claimant's counsel to provide evidence of an applicable prevailing hourly rate, to reconsider the fee petition in accordance with the criteria set forth in 20 C.F.R. §725.366, and to specifically determine whether the record contains documentation to support the expenses claimed for the medical reports of Drs. Perper and Robinette, the x-ray reading from Professional Imaging, and bills for x-rays from St. Mary's Hospital. *Bolling v. Indian Mountain Coal Co.*, BRB No. 09-0705 BLA (June 16, 2010) (unpub.).

In an Order Awarding Attorney Fees on Second Remand dated February 7, 2011, the administrative law judge approved the requested hourly rate as reasonable, approved the number of hours requested for legal assistant time, and disallowed the charge for the telephone call between claimant's counsel and an official from the district director's office. Accordingly, the administrative law judge reduced the award of fees to claimant's counsel from \$2,995.00 to \$2,920.00 for legal services performed while the case was before the Office of Administrative Law Judges. In addition, the administrative law judge disallowed \$1,000.00 of costs claimed for Dr. Perper's pathology report, thereby reducing the award for expenses from \$3,747.35 to \$2,747.35. In a subsequent Order dated May 16, 2011, the administrative law judge denied claimant's counsel's request for

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<sup>1</sup> Claimant's counsel submitted a fee petition to the administrative law judge, requesting a fee of \$2,575.00 for legal services performed while the case was before the Office of Administrative Law Judges between March 7, 2008 to November 11, 2008, representing 3.15 hours of legal services by Joseph E. Wolfe at an hourly rate of \$300.00; 11.0 hours of legal services by Ryan C. Gilligan at an hourly rate of \$175.00; 1.25 hours of services by a legal assistant at an hourly rate of \$100.00 (collectively, claimant's counsel); and expenses totaling \$3,747.00.

reconsideration of the administrative law judge's Order Awarding Attorney Fees on Second Remand.

On appeal, employer contends that the administrative law judge erred in failing to comply with the Board's remand instructions. Employer argues that, because claimant's counsel failed to produce specific evidence of the prevailing market rate for legal services, the administrative law judge erred in finding that the hourly rate was reasonable. Employer also asserts that the administrative law judge erred in relying on past fee awards to establish the prevailing market rate. Further, employer argues that the administrative law judge erred in relying solely on canceled checks as documentation supporting the medical expert charges.<sup>2</sup> Neither claimant's counsel, nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to employer's appeal.

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*).

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).

Initially, employer argues that the administrative law judge erred in failing to comply with the Board's instructions on remand; therefore, employer contends, she rendered similar errors, providing compelling grounds for the Board to vacate her decision on remand. Specifically, employer asserts that, in spite of claimant's counsel's failure to provide market rate evidence, the administrative law judge relied solely on claimant's counsel's past fee awards, which are insufficient to establish the prevailing market rate and are not controlling to find that his hourly rate was reasonable. Employer contends that the administrative law judge's citation to past fee awards constituted "independent research [that] was inappropriate" and "suggests a lack of objectivity"

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<sup>2</sup> In the interest of preserving this argument for further appeal, employer challenges the Board's prior holding that claimant's counsel was entitled to recover fees for an expert witness who did not testify at the hearing because, employer asserts, this holding is not supported by law. See *Bolling v. Indian Mountain Coal Co.*, BRB No. 09-0705 BLA, *slip op.* at 6-7 (June 16, 2010) (unpub.).

because the fee applicant bears the burden of proof. Employer's Brief at 4-5. Lastly, employer argues that the administrative law judge's mere mention of the factors set forth in 20 C.F.R. §725.366(b) as supportive of her determination that the hourly rate was 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), because she failed to explain how the factors supported her determination.

In our prior decision, we remanded the case with specific instructions for the administrative law judge to: (1) require claimant's counsel to provide evidence of the prevailing market rate, and then reconsider the fee petition in accordance with the criteria set forth in Section 725.366 and *Cox*; (2) reconsider a sworn affidavit proffered to support employer's argument that the fees claimed were excessive, and clearly explain her findings in accordance with the APA; (3) determine whether a telephone call by an official from the district director's office to claimant's counsel was a necessary part of prosecuting the case on claimant's behalf and, therefore, a compensable charge; and (4) address employer's allegation that the record is devoid of documentation supporting the charges for the reports of Drs. Perper and Robinette, the x-ray reading from Professional Imaging, and the bills for x-rays from St. Mary's Hospital.<sup>3</sup> *Bolling, slip op.* at 4, 5, 7 n.5. Pursuant to the Board's Decision and Order remanding the case, the administrative law judge ordered the parties to respond and submit the appropriate evidence.<sup>4</sup> On

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's disallowance of time for a telephone call by an official from the district director's office to claimant's counsel, as this activity was not a necessary part of prosecuting the case on claimant's behalf. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Order Awarding Attorney Fees on Second Remand at 5. In addition, no party has challenged the fact that the administrative law judge had a conversation with Mr. Steve Breeskin on February 4, 2010 concerning the aforementioned call.

<sup>4</sup> Pursuant to the Board's June 16, 2010 Decision and Order remanding the case, the administrative law judge issued a Notice of Assignment on Remand and Order on September 20, 2010 requiring the parties to submit briefs and/or additional evidence within thirty days. No party responded. On October 7, 2010, employer filed a Motion to Deny Fee Petition or Hold Briefing in Abeyance because claimant's counsel had not supplemented his fee request. By Order dated October 8, 2010, the administrative law judge denied employer's request. On November 16, 2010, employer filed a Motion to Summarily Deny or Reduce Fee Petition because claimant failed to provide supporting documentation. By Order Denying Motion to Summarily Deny Fee Petition, Striking Discovery, and Requiring Response dated December 7, 2010, the administrative law judge denied employer's request. By correspondence dated January 18, 2011, claimant's counsel responded to the administrative law judge's December 7, 2010 Order by

remand, the administrative law judge considered claimant's counsel's evidence consisting of his past fee awards, and relied solely on this evidence to conclude that "[claimant's counsel] has established a market rate." Order Awarding Attorney Fees on Second Remand at 4. However, the administrative law judge failed to reconsider a sworn affidavit, which was proffered to support employer's argument that the rates claimed were excessive, pursuant to the Board's remand instructions. See *B & G Mining, Inc., v. Director, OWCP [Bentley]*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008). Further, although the administrative law judge stated that she found, "after considering the factors set forth in the regulations, that the appropriate billing rates are the rates claimed," she neither discussed the specific factors set forth in Section 725.366(b) nor specifically explained how they supported the rate requested. Order Awarding Attorney Fees on Second Remand at 4; see 20 C.F.R. §725.366(b); *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). Because the administrative law judge's failure to discuss and apply the regulatory criteria set forth in Section 725.366(b) requires remand, we vacate the administrative law judge's hourly rate determination. *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984). On remand, the administrative law judge must consider all of the relevant evidence, including employer's evidence, in conjunction with the factors set forth in Section 725.366(b), in order to ascertain a reasonable hourly rate and clearly explain her findings and conclusions in accordance with the APA. See *Cox*, 602 F.3d at 289, 24 BLR at 2-291; *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).

Next, employer contends that the administrative law judge erred in failing to comply with the Board's remand instruction to address whether the record contains clear documentation to support the charges for the reports of Drs. Perper and Robinette, the x-ray reading from Professional Imaging, and the bills for x-rays from St. Mary's Hospital. Employer argues that claimant's counsel failed to submit bills for Dr. Robinette and

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providing evidence of the prevailing market rate. By letter dated January 5, 2011, the Director, Office of Workers' Compensation Programs (the Director), indicated that the official in the district director's office had no recollection of a telephone call with claimant's counsel; thus, the Director abstained from taking a position on whether the call occurred and whether time for the call was compensable. On January 26, 2011, employer filed an Opposition or Motion for Reconsideration of Denial of Discovery, alleging that claimant's counsel had not complied with the administrative law judge's Order or the Board's Decision and Order. In an Order Awarding Attorney Fees on Second Remand dated February 7, 2011, the administrative law judge summarily denied employer's request. Order Awarding Attorney Fees on Second Remand at 3.

Professional Imaging, and that he failed to proffer an explanation for his failure to do so. Employer asserts that a canceled check is insufficient to demonstrate what an expert's fee was for or that it was reasonable. Employer's Brief at 6-7. In the fee petition dated December 1, 2008, claimant's counsel attached copies of two checks written by claimant that were payable to Dr. Joshua Perper, three receipts from St. Mary's Hospital, a bill from Highland Pathology Consultants, P.C., and two cancelled checks issued by claimant's counsel that were payable to Professional Imaging and Dr. Emory Robinette, respectively. In an Order Denying Motion to Summarily Deny Fee Petition, Striking Discovery, and Requiring Response dated December 7, 2010, the administrative law judge stated, "It is unclear why the Board found canceled checks included with the December 1, 2008 petition inadequate." Order Denying Motion to Summarily Deny Fee Petition, Striking Discovery, and Requiring Response at 2. By correspondence dated January 18, 2011, claimant's counsel responded to the administrative law judge's December 7, 2010 Order. In his response, claimant's counsel attached a letter indicating that an additional \$1,000.00 was due to Dr. Perper, and an invoice from Dr. Perper to document the expenses that were claimed. On remand, the administrative law judge stated, "I disagree that a canceled check is not adequate documentation, absent a reason to question the documentation, and I find the documentation for costs to be adequate... ." Order Awarding Attorney Fees on Second Remand at 5. Contrary to the administrative law judge's finding, the Board instructed the administrative law judge to "specifically address employer's allegations that there is no documentation to support the charges for the reports of Drs. Perper and Robinette, the x-ray reading from Professional Imaging, and the bills for x-rays from St. Mary's [Hospital]. See Employer's Brief at 13." *Bolling, slip op.* at 7 n.5. Because the administrative law judge did not comply with the Board's remand instructions, we vacate the administrative law judge's determination with respect to costs and remand the case for the administrative law judge to address employer's prior objection and the sufficiency of the documentation submitted. See *Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988) ("...a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it.").

Accordingly, the administrative law judge's Order Awarding Attorney Fees on Second Remand is vacated, and the case is remanded for further proceedings consistent with this opinion.<sup>5</sup>

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>5</sup> Because we vacate the administrative law judge's February 7, 2011 Order Awarding Attorney Fees on Second Remand, we also vacate her May 16, 2011 Order Denying Reconsideration.