

BRB No. 12-0289 BLA

COLUMBUS BEVERLY HALE)
)
 Claimant-Respondent)
)
 v.)
)
 THREE H COAL COMPANY,) DATE ISSUED: 02/11/2013
 INCORPORATED)
)
 and)
)
 OLD REPUBLIC INSURANCE 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 Awarding Fees of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/Carrier (employer) appeals the Order Awarding Fees (2009-BLA-05827) of Administrative Law Judge Pamela J. Lakes, rendered in connection with an award of benefits on a miner's claim filed pursuant to the provisions of the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant's counsel submitted a fee petition to the administrative law judge, requesting a fee in the amount of \$8,500.00 for work performed from June 3, 2009 to September 15, 2011, representing 15.75 hours of legal services by Attorney Joseph E. Wolfe at an hourly rate of \$300.00; 3.00 hours of legal services by Attorney Ryan C. Gilligan at an hourly rate of \$225.00; 7.25 hours of legal services by Attorney W. Andrew Delph at an hourly rate of \$200.00; 16.50 hours of legal services by legal assistants at an hourly rate of \$100.00 and \$1,932.00 for reimbursement of expenses associated with medical examinations and obtaining medical records. After considering claimant's counsel's fee petition and employer's objections thereto, the administrative law judge approved the hourly rates requested for Mr. Wolfe and Mr. Delph, but reduced the hourly rate requested for Mr. Gilligan from \$225.00 to \$200.00. The administrative law judge further approved the total number of hours requested for the work performed by each of the attorneys, but disallowed one hour of the total time requested for work by the legal assistants, on the grounds that the services performed were clerical in nature. Finally, the administrative law judge approved the total amount of costs requested, as reasonable and appropriate. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$8,325.00 for legal services performed and \$1,932.00 for costs incurred, 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 requested hourly rates of Mr. Wolfe and Mr. Delph were reasonable, and in failing to explain the basis for her decision to set the hourly rate for Mr. Gilligan at \$200.00. Employer alleges that the administrative law judge did not rely on market proof when determining the appropriate hourly rates and, thus, failed to comply with applicable legal authority on fee-shifting. Employer maintains that the administrative law judge erred in relying on past fee awards to establish the prevailing market rates. Finally, employer asserts that the administrative law judge's findings do not satisfy the Administrative Procedure Act (APA).¹ Claimant's counsel responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

¹ The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), 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), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's approval of 41.50 hours of legal services performed by the attorneys and legal assistants in this case. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Act provides that when a claimant wins a contested case, the employer, its 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). The United States Court of Appeals for the Fourth Circuit has held that a market rate should be established with evidence of earnings attorneys received from paying clients for similar services in similar circumstances.³ *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 244 (4th Cir. 2009). The fee applicant bears the burden of producing specific evidence of prevailing market rates. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-290 (4th Cir. 2010); *Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990). Moreover, 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, 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).

In this case, employer asserts that the administrative law judge “did not determine the prevailing market rate or conduct any market analysis,” for the attorneys who represented claimant. Employer’s Brief at 3. Employer further asserts that the administrative law judge erred in awarding hourly rates of \$300.00 to Mr. Wolfe, and \$200.00 to Mr. Delph, based on rates awarded claimant’s counsel in prior cases. Employer maintains that it was error for the administrative law judge to rely on the prior fee awards without first considering whether the hourly rates granted in those prior cases were based on market rate evidence. Employer also contends that the administrative law judge’s decision to set the hourly rate for Mr. Gilligan at \$200.00 and to award all of the costs requested is not explained in accordance with the APA. Employer’s arguments, however, are rejected as without merit.

Contrary to employer’s assertion, the administrative law judge has explained, in accordance with APA, how the rates requested for Mr. Wolfe, Mr. Delph and the legal assistants were supported by the information provided in the fee petition and “constitute[d] the prevailing rate for attorneys and legal assistants” with similar amounts of “expertise and experience.” Order Awarding Fees at 3; see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We specifically reject employer’s contention that the administrative law judge erred in relying on prior awards to determine the reasonable hourly rate for Mr. Wolfe and Mr. Delph. In *Cox*, 602 F.3d at 290, 24 BLR at 2-291, 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. See *Bowman v. Bowman*

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant’s coal mine employment was in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Hale v. Three H Coal Co.*, BRB No. 12-0005 BLA, slip op. at 2 n.2 (Sept. 25, 2012) (unpub.).

Coal Co., 24 BLR 1-165, 1-170 n.8 (2010) (Order), *appeal docketed*, *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642 BLA (4th Cir. May 16, 2012).⁴

Furthermore, in awarding the respective hourly rates, the administrative law judge also relied upon the attorneys' experience in litigating federal black lung cases.⁵ Order Awarding Fees at 3-4. Experience 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.

With regard to Mr. Gilligan, we reject employer's contention that the administrative law judge's approval of an hourly rate of \$200.00 "rests on no evidence at all." Employer's Brief at 5. The administrative law judge reduced Mr. Gilligan's hourly rate from \$225.00 to \$200.00, commensurate with the hourly rate of Mr. Delph. Although Mr. Gilligan was awarded an hourly rate of \$175.00 in 2008, the fee petition outlines the experience and training in black lung litigation that Mr. Gilligan has gained in subsequent years.⁶ Therefore, we affirm the administrative law judge's determination

⁴ We deny employer's request to hold this case in abeyance, pending the Fourth Circuit's disposition of appeals in *Gosnell v. Eastern Assoc. Coal Co.*, BRB Nos. 11-0131 BLA and 10-0384 BLA (July 29, 2011) (unpub.) *appeal docketed*, *Eastern Assoc. Coal Co. v. Director, OWCP [Gosnell]*, Nos. 11-2380 and 11-2038 (4th Cir. Dec. 19, 2011); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010) (Order) (unpub.), *appeal docketed*, *Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642 (4th Cir. May 16, 2012). See Employer's Brief at 6.

⁵ In the fee petition, claimant's counsel asserted that the requested hourly rates are his customary billing rates for black lung representation and outlined the level of experience of each of the attorneys and legal assistants who billed time in the case. October 20, 2011 Fee Petition (unpaginated) at [1]. Claimant's counsel further noted that he knows of "no other firms in Virginia and very few across the nation taking new [black lung] cases." *Id.*

⁶ The fee petition states: "Attorney Gilligan has attended the West Virginia [B]lack Lung Conference in June 2008 in Pipestem, West Virginia for continued legal and medical education of 20 hours each conference, and the 2008, 2009 and 2010 National Coalition of Black Lung and Respiratory Disease 2010 [sic] Conferences for continued legal education of 20 hours at [sic] conference. Attorney Gilligan has been responsible for the completion of hundreds of formal arguments in cases before the Office of Administrative Law Judges and the Benefits Review Board." October 20, 2011 Fee Petition at [1].

to award Mr. Gilligan an hourly rate of \$200, as it was reasonable and supported by substantial evidence.

Finally, employer argues that the administrative law judge's decision to award costs to claimant in the amount of \$1,932.00 is not explained in accordance with the APA. We disagree. The administrative law judge noted that the costs by claimant "were not itemized but photo copies of checks and receipts."⁷ Order Awarding Fees at 1 n.1. Although the administrative law judge observed that the manner in which the bills and receipts were presented was "confusing," she explained that she had reviewed the bills in the "context of the evidence in this case" and found that "the costs sought are reasonable and appropriate." *Id.* at 5; *see Bentley*, 522 F.3d at 661, 24 BLR at 2-117; *Jones*, 21 BLR at 1-108; *Wojtowicz*, 12 BLR at 1-165. Because employer has not raised a specific objection to any of the costs incurred by claimant, *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983), we affirm the administrative law judge's determination that claimant is entitled to reimbursement for costs in the amount of \$1,932.00.

In summary, based on the administrative law judge's proper analysis of the regulatory criteria, we conclude that the administrative law judge did not abuse her discretion in determining that hourly rates of \$300.00 for Mr. Wolfe, \$200.00 for Mr. Delph, and \$200.00 for Mr. Gilligan, were reasonable and reflected the applicable market rates. Order Awarding Fees at 3-4; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010); *Bowman*, 24 BLR at 1-170-71. We further hold that the administrative law judge did not act arbitrarily, capriciously, or abuse her discretion, in finding that the requested costs were reasonable. *See* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108. We also reject employer's assertion that the administrative law judge did not render her findings in

⁷ Claimant's counsel listed the costs incurred by claimant in the fee petition. Claimant sought reimbursement of \$600.00 for an August 14, 2009 examination by Dr. Baker; \$90.00 for a record review by Dr. Alexander on August 14, 2010; \$1,200.00 for an examination on October 7, 2009 at the "SW Out Patient Center;" \$22.00 for medical records from Family Health Care Associates and \$20.00 for medical records from "Pulmonary Assoc. of King." October 20, 2011 Fee Petition at [4]. Attached to the fee petition was a copy of a check written by claimant to Dr. Baker for \$600.00 and a receipt; a bill for a black lung examination and copy of a check written out by claimant to Southwest Outpatient Center for \$1,200.00; a copy of a check written out by claimant to Dr. Alexander for \$90.00; a "Statement of Account" addressed to claimant indicating that he owed \$42.00 to the law firm of Wolfe Williams Rutherford & Reynolds for copies of medical records obtained on his behalf.

accordance with the APA. *Wojtowicz*, 12 BLR at 1-165. We, therefore, affirm the administrative law judge's award of attorney fees and costs incurred.

Accordingly, the administrative law judge's Order Awarding Fees is affirmed. We order employer to pay claimant's counsel \$8,325.00 for legal services rendered to claimant, while the case was before the Office of Administrative Law Judges, and to pay \$1,932.00 for costs incurred by claimant in this case.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge