

BRB No. 13-0255 BLA

VIRGINIA TACKETT)
(Widow of DANNY TACKETT))
)
Claimant-Respondent)
)
v.)
)
WEST VIRGINIA SOLID ENERGY,) DATE ISSUED: 02/24/2014
INCORPORATED)
)
and)
)
AMERICAN BUSINESS AND)
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

J. Logan Griffith and Clayton D. Scott (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Attorney Fee Order (2009-BLA-5096) of Administrative Law Judge John P. Sellers, III, relating to an award of benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant's counsel, J. Logan Griffith, submitted a fee petition to the administrative law judge requesting a fee of \$13,942.50 for 47.9 hours of legal services performed between April 21, 2010 and January 9, 2012, representing 44.9 hours of legal services by Attorney Griffith, at an hourly rate of \$300.00; 2.3 hours of legal services by claimant's counsel's associate, Clayton D. Scott, at an hourly rate of \$175.00, and 0.7 hour of services by a legal assistant at an hourly rate of \$100.00, as well as expenses in the amount of \$4,169.53. In support of the fee petition, claimant's counsel referenced his qualifications, years of experience, his commitment to assisting coal miners and prior fee awards. Claimant's counsel also submitted a copy of a page from the 2006 Survey of Law Firm Economics published by Altman & Weil to support his assertion that the hourly rates requested were reasonable.

After considering claimant's counsel's fee petition and employer's objections thereto, the administrative law judge denied employer's request for discovery and approved the requested hourly rate of \$300.00 for Attorney Griffith. Attorney Fee Order at 2-3. The administrative law judge agreed with employer that claimant's counsel failed to provide documentation supporting the requested hourly rates of \$175.00 for Attorney Scott and \$100.00 for the legal assistant and, thus, denied all of the requested fees for their work.¹ *Id.* at 3. Furthermore, after addressing employer's objections to several itemized time entries, the administrative law judge disallowed a total of 1.7 hours of work by Attorney Griffith on July 14, 2010, August 9, 10 and 19, 2010, November 8, 2010 and January 3, 2011, as excessive and/or relating to clerical tasks. *Id.* at 4. The administrative law judge thus approved payment of \$12,960.00 for 43.2 hours of legal services performed by Attorney Griffith at an hourly rate of \$300.00. *Id.* at 4-5. The administrative law judge also approved \$658.43 of the itemized expenses requested, disallowed \$11.10 in travel expenses and gave claimant's counsel twenty days to provide documentation to support the additional expenses claimed, totaling \$3,500.00. *Id.* at 4. The administrative law judge further stated that claimant's counsel "may send in a

¹ The administrative law judge gave claimant's counsel twenty days to submit documentation to support the hourly rates charged by Attorney Scott and the legal assistant and employer twenty days from receipt of the materials to state its objection, after which the administrative law judge would rule on the charges requested for their work. Attorney Fee Order at 4-5. Although claimant's counsel subsequently submitted documentation to the administrative law judge, the administrative law judge's ruling on this issue is not before the Board in this appeal.

separate fee petition for these expenses, along with documentation of these expenses,” and that he would consider the petition at that time.² *Id.* Accordingly, the administrative law judge awarded claimant’s counsel a total fee of \$13,618.43 for legal services performed, and expenses incurred, while the case was before the Office of Administrative Law Judges from April 21, 2010 and January 9, 2012.

On appeal, employer contends that the administrative law judge abused his discretion in failing to allow discovery. Employer further asserts that the administrative law judge erred in finding that the hourly rate requested for Attorney Griffith was reasonable and argues that claimant’s counsel failed to produce specific evidence of the prevailing market rate. Employer alleges that the administrative law judge did not rely on market proof when approving the requested hourly rate, 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. Employer also contends that the administrative law judge ignored its proffered market evidence. Claimant’s counsel responds, urging affirmance of the fee award. The Director, Office of Workers’ Compensation Programs, has declined to file a substantive response brief in this appeal. Employer has filed a reply brief, reiterating its contentions.³

The amount of an attorney’s fee award 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.⁴ *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661, 24 BLR 2-106, 2-117 (6th Cir. 2008); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); see also *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

Initially, we reject employer’s contention that the administrative law judge erred in denying its discovery request. While the case was before the administrative law judge,

² The administrative law judge’s subsequent ruling on this issue is not before the Board in this appeal.

³ We affirm, as unchallenged on appeal, the administrative law judge’s approval of \$658.43 of the itemized expenses requested. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Attorney Fee Order at 4.

⁴ The record reflects that the miner’s last coal mine employment was in Kentucky. Director’s Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

employer filed a motion to compel discovery, seeking information from claimant's counsel regarding his attorney fee requests in other cases. In his Attorney Fee Order, the administrative law judge noted claimant's counsel "submitted information to substantiate the hourly rates requested, including statements about his qualifications and experience, and copies of fee awards in similar black lung litigation." Attorney Fee Order at 2. The administrative law judge then denied employer's discovery request, finding that "discovery is not necessary for this fee petition." *Id.* An administrative law judge exercises broad discretion in procedural matters, *see* 20 C.F.R. §725.455, and employer has identified no compelling authority in support of its argument that the administrative law judge should have allowed discovery. *See* Employer's Brief at 6-7. Discerning no abuse of discretion by the administrative law judge, we affirm his decision to deny employer's motion to compel discovery. *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).

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). 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). The United States Court of Appeals for the Sixth Circuit has held that, in some circumstances, such as where there is no clear market rate against which to compare the attorney's requested rate, it is appropriate to look to prior awards for guidance in determining a prevailing market rate. *Bentley*, 522 F.3d at 663, 24 BLR at 2-121. The court in *Bentley* specifically stated that reliance upon prior awards is appropriate in determining a prevailing market rate where, as in the case before it, which arose in Kentucky, "there is only a relatively small number of comparable attorneys" *Bentley*, 522 F.3d at 664, 24 BLR at 2-123. The court's ruling is directly applicable to this case, which involves attorneys practicing in Kentucky.

Employer specifically argues that the administrative law judge erred in awarding an hourly rate of \$300.00 to Attorney Griffith. Employer asserts that the administrative law judge erred by not requiring claimant's counsel to meet his burden of producing specific market evidence to support the rates requested and the fees that he was awarded. Employer also contends that the administrative law judge erred in relying on prior fee awards and fee awards to other attorneys in the geographic area in which claimant's counsel practices while ignoring employer's contrary evidence of hourly rates. We

disagree. After discussing claimant's counsel's supporting documentation, which included "five cases in which Mr. Griffith was allegedly awarded \$300/hour," Attorney Fee Order at 2, and acknowledging employer's objections, the administrative law judge stated:

Based upon Mr. Griffith's years of experience as an attorney in the field of black lung, as outlined in his fee petition, my own observation of his work on this matter, the extent of work required for this claim, and the rates awarded to other attorneys practicing in the area surrounding Eastern Kentucky, I find that \$300/hour for Mr. Griffith is a reasonable hourly rate for his services.

Id. at 3.

Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse his discretion in determining that claimant's counsel's requested hourly rate was reasonable, and reflected the applicable market rate. Attorney Fee Order at 3; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 25 BLR 2- (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 n.8 (2010) (Order), *petition for review denied sub nom. Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642, 2013 WL 5228037 (4th Cir. Sept. 18, 2013) (unpub.); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge's approval of an hourly rate of \$300.00 for Attorney Griffith. Consequently, we affirm the administrative law judge's fee award of \$13,618.43 for legal services performed and expenses incurred on behalf of claimant. *See Jones*, 21 BLR at 1-108.

Accordingly, the administrative law judge's Attorney Fee Order requiring employer to pay claimant's counsel \$13,618.43, representing \$12,960.00 for 43.2 hours of legal services rendered to claimant while the case was before the Office of Administrative Law Judges and \$658.43 for costs incurred by claimant in this case, is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge