

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0114 BLA

DONALD C. WRIGHT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOL OF KENTUCKY,)	DATE ISSUED: 02/13/2019
INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting, In Part, Claimant's Petition for Attorneys' Fees of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Jeffrey Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting, In Part, Claimant's Petition for Attorneys' Fees (2013-BLA-06023) of Administrative Law Judge Morris D. Davis, rendered in connection with the successful prosecution of 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 submitted a fee petition for legal services performed before the Office of Administrative Law Judges (OALJ) from August 16, 2013 to October 7, 2017. Counsel's petition requested attorney fees in the amount of \$12,087.50,¹ representing 17.5 hours of legal services performed by attorney Joseph E. Wolfe at an hourly rate of \$425.00 (\$7,437.50), 5.0 hours by attorney W. Andrew Delph at an hourly rate of \$300.00 (\$1,500.00), 7.0 hours by attorney Brad Austin at an hourly rate of \$200.00, (\$1,400.00), .5 of an hour by attorney Ryan Gilligan at an hourly rate of \$225.00 (\$112.50), .25 of an hour by attorney Rachel Wolfe at an hourly rate of \$150.00 (\$37.50), and 16 hours of work performed by legal assistants at an hourly rate of \$100.00 (\$1,600.00). Counsel's fee petition also requested expenses in the amount of \$3,150.16.

After considering the fee petition and objections filed by employer and the Director, Office of Worker's Compensation Programs (the Director), the administrative law judge reduced the requested hourly rates for Mr. Wolfe from \$425.00 to \$375.00, and for Mr. Delph from \$300.00 to \$250.00. The administrative law judge awarded \$10,962.50 in attorney fees and \$3,150.16 in expenses, for a total fee of \$14,112.66.

On appeal, employer contends that the administrative law judge's selection of an hourly rate of \$375.00 for Mr. Wolfe is arbitrary and capricious and fails to satisfy the Administrative Procedure Act.² Employer also contends that the administrative law judge erred in finding that .5 of an hour of work performed by Mr. Wolf was not clerical in nature, and that expenses associated with a second examination of claimant were compensable. Claimant's counsel responds, urging affirmance of the administrative law judge's award of

¹ The fee petition requested approval of \$12,037.50 in attorney fees but there was a mathematical error. Supplemental Decision and Order at 2 n.1.

² The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

attorney's fees and costs. The Director has not filed a brief. Employer has filed a reply brief, reiterating its arguments.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 See *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). An application seeking a fee for legal services performed on behalf of a claimant must indicate the customary billing rate for each person performing the services. 20 C.F.R. §725.366(a). The regulations further provide that a 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 the fee requested." 20 C.F.R. §725.366(b).

Hourly Rate

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); *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, (6th Cir. 2008). 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). Evidence of fees received in the past may be an appropriate consideration in establishing a market rate. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010); *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 572-73 (4th Cir. 2013).

³ We affirm, as unchallenged on appeal, the administrative law judge's determinations regarding the hourly rates and the number of hours approved for work by Mr. Delph, Mr. Austin, Mr. Gilligan, Ms. Wolfe, and the legal assistants. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Supplemental Decision and Order at 3-4.

⁴ 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).

In support of his fee petition, Mr. Wolfe provided a list of his qualifications, rates from the National Law Journal's 2014 Survey of Law Firm Economics for the South Atlantic Region, and a list of sixty-seven black lung cases in which the OALJ, Benefits Review Board, the United States Court of Appeals for the Fourth Circuit, and the United States Court of Appeals for the Sixth Circuit have awarded attorney fees to his firm. Fee Petition at 5-11.

In determining Mr. Wolfe's hourly rate, the administrative law judge stated:

Though [Mr.] Wolfe has many years of experience in black lung litigation, he has failed to justify a rate of \$425.00 per hour. The majority of the cases cited by [c]laimant approved a rate of only \$300.00 per hour for [Mr.] Wolfe over the past decade; however, in light of his experience, I find \$300.00 to be a relatively low hourly rate. In *DiCecca v. Battelle Memorial Institute*, BRB No. 13-0378 (Mar. 11, 2015) (order), the Board used the Department of Labor's [(DOL's)] Division of Longshore and Harbor Workers' Compensation National Average Weekly Wages table to adjust an hourly rate to account for inflation. Using this approach, a \$300.00 hourly rate deemed reasonable for work performed in 2007 would equal \$411.20 today. Another reasonable way to adjust the rate is to use the [(DOL's)] Bureau of Labor Statistics Consumer Price Index (CPI) Calculator, which would increase the \$300.00 hourly rate to \$365.81 today. In light of these calculations, I find that \$375.00 per hour is a reasonable hourly rate for the work performed by [Mr.] Wolfe in this case.

Supplemental Decision and Order at 4.

Employer maintains that the record does not support an hourly rate in excess of \$300.00. Employer contends that the administrative law judge failed to follow proper procedures for taking official notice⁵ of the CPI Calculator, and further erred in failing to explain why he increased Mr. Wolfe's hourly rate above \$365.81. Employer's Brief at 5. Employer also challenges the administrative law judge's selection of 2007 as the starting

⁵ The regulation at 29 C.F.R. §18.84, titled "Official Notice," states that "[o]n motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary." 29 C.F.R. §18.84; see *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-138 (1990).

year for his adjustment, when the record shows that Mr. Wolfe was awarded an hourly rate of \$300.00 in 2010. *Id.* at 7, *citing* Fee Petition at 9.

Employer's arguments have merit, in part.⁶ The administrative law judge identified two potential hourly rates adjusted for inflation (\$411.20 and \$365.81) but selected \$375.00 as the appropriate hourly rate for Mr. Wolfe. Because we are unable to discern the basis for the administrative law judge's calculations, and since he offered no explanation as to why he chose \$375.00 as Mr. Wolfe's hourly rate adjusted for inflation, the administrative law judge's finding does not satisfy the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must therefore vacate the administrative law judge's determination and remand the case for further consideration of an appropriate hourly rate for Mr. Wolfe. *See Director, OWCP, v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (The Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion). We instruct the administrative law judge on remand to set forth his findings in sufficient detail to permit review of his rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Allowable Hours

Employer also contends that the administrative law judge erred in not disallowing two time entries by Mr. Wolfe because the work performed was clerical in nature. We agree.

Traditional clerical duties, whether performed by clerical employees or counsel, are not properly compensable services for which separate billing is permissible, but rather must be included as part of overhead in setting the hourly rate. *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217-18 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233, 1-238 (1983).

On August 28, 2013, Mr. Wolfe billed .25 of an hour for "Review letter from [Jackson Kelly] enclosing reimbursement check for client's RO medical exam with Dr. Rosenberg that was on [August 16, 2013]; also Letter forwarding letter and check to client." Fee Petition at 15. On August 21, 2014, Mr. Wolfe billed .25 of an hour for "Letter forwarding \$100 fee for the reread of CXR, dated [July 15, 2014], to Dr. Alexander." *Id.*

⁶ Employer contends that it was not given the opportunity to submit contrary evidence to challenge the administrative law judge's use of the Consumer Price Index (CPI). Although employer fails to explain in this appeal why the CPI is not a reliable source for calculating inflation to support adjustment of Mr. Wolfe's hourly rate, employer will have the opportunity to challenge the CPI on remand.

The administrative law judge determined that the entries were compensable, stating only that “reviewing correspondence often involves legal work.” Supplemental Decision and Order at 5. Contrary to the administrative law judge’s finding, however, the description given by Mr. Wolfe does not involve legal work. Rather, Mr. Wolfe read and prepared correspondence related to routine billing matters, which are clerical services and are not compensable. *See Bentley*, 522 F.3d at 666-67; *Whitaker*, 9 BLR at 1-217-18; *Brown v. Director, OWCP*, 3 BLR 1-95, 1-98 (1979). We therefore vacate the administrative law judge’s finding and disallow the two time entries (.50 of an hour) billed by Mr. Wolfe on August 28, 2013 and August 21, 2014. As employer raises no further objection to the total number of hours billed by Mr. Wolfe they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Allowable Expenses

Employer’s final argument is that the administrative law judge erred in allowing reimbursement for the costs associated with obtaining a second medical evaluation of claimant. Employer asserts that the examination expense was unnecessary and should not be compensable because the results of this second exam were identical to the first exam, the examination was performed by the same physician two months earlier, and there was no change in claimant’s condition between the first and second examination. Employer’s Brief at 9-11. Employer’s arguments are without merit.

The administrative law judge rationally found that the charges were necessary because “[c]laimant is entitled to make strategic decisions about how to present his case, and that includes undertaking a second [examination] from his choice of physician.” Supplemental Decision and Order at 5. Because the administrative law judge provided sufficient reasoning to support reimbursement of the costs of the second examination and employer has not demonstrated an abuse of discretion, we affirm his finding that \$1,380.08 incurred by claimant in obtaining a second medical examination is compensable. *See Jones* 21 BLR at 1-108; *Abbott*, 13 BLR at 1-16. Further, as employer raises no other challenge to the costs requested in the fee petition, we affirm the administrative law judge’s total award of \$3,150.16 in costs. *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting, in Part, Claimant's Petition for Attorneys' Fees, is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge