

BRB No. 12-0207 BLA

RALPH D. DYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FARWEST COAL COMPANY	)	DATE ISSUED: 01/30/2013
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney Fees of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (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 Decision and Order Awarding Attorney Fees (2005-BLA-06152) of Administrative Law Judge Christine L. Kirby relating to an award of benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant's counsel, Joseph E. Wolfe and Ryan C. Gilligan of the law firm of Wolfe Williams Rutherford & Reynolds, submitted a fee petition to the administrative law judge, requesting a fee of \$5,031.25 for 21.5 hours of legal services performed between June 16, 2010 and March 9, 2011, representing 3.0 hours of legal services by Joseph E. Wolfe at an hourly rate of \$300.00; 18.25 hours of legal services by Ryan C. Gilligan at an hourly rate of \$225.00; and 0.25 hours of services by a legal assistant at an hourly rate of \$100.00. 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 rates for both attorneys and the

legal assistant. The administrative law judge further approved payment requested for the number of hours of legal services performed by Attorneys Wolfe and Gilligan, but denied the one-quarter of an hour of services performed by the legal assistant, finding that the services were clerical in nature. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$5,006.25 for legal services performed while the case was before the Office of Administrative Law Judges on remand from the Board from June 16, 2010 to March 9, 2011.

On appeal, employer contends that the administrative law judge abused her discretion in failing to allow discovery and erred in finding that the hourly rates requested were reasonable. Employer argues that claimant's counsel failed to produce specific evidence of the prevailing market rates. Employer alleges that the administrative law judge did not rely on market proof when approving the requested 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. Employer also contends that the administrative law judge improperly rejected its proffered market evidence. Claimant's counsel has not responded to this appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief in this appeal.

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.<sup>1</sup> *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).

Employer specifically argues that the administrative law judge erred in awarding hourly rates of \$300.00 to Mr. Wolfe and \$225.00 to Mr. Gilligan. Employer asserts that the administrative law judge erred by not requiring claimant's counsel to meet their

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<sup>1</sup> 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); Director's Exhibit 1.

burden of producing specific market evidence to support the rates requested and the fees that she awarded. Employer also contends that the administrative law judge erred in relying on the Altman & Weil 2006 Survey of Law Firm Economics and prior awards involving claimant's counsel to ascertain the hourly rates she awarded. We disagree.

Contrary to employer's assertion, the administrative law judge found that "beyond the Altman and Weil Survey, Mr. Wolfe has provided ample evidence that the requested hourly rates have been awarded in prior cases." Decision and Order at 3. After referencing the numerous fee awards from 2006 to 2008 listed in claimant's counsel's fee petition, wherein administrative law judges granted Mr. Wolfe and Mr. Gilligan similar hourly rates to those requested in this case, the administrative law judge stated:

While I am aware that his requested rates have not been awarded on every occasion, I find that, based on the amount of cases Mr. Wolfe has cited, the hourly rates are nonetheless representative of the prevailing market rates for successful representation of black lung disability claimants.

Decision and Order at 4.

In *Cox*, 602 F.3d at 290, 24 BLR at 2-291, the United States Court of Appeals for 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.<sup>2</sup> In awarding the respective hourly rates of \$300.00 and \$225.00, the administrative law judge also relied upon the attorneys' experience in litigating federal black lung cases.<sup>3</sup> Decision and Order at 4. This is another 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.

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<sup>2</sup> "The prevailing market rate may be established through affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market." *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987).

<sup>3</sup> In his fee petition, claimant's counsel noted that the requested hourly rates were his customary billing rates for black lung representation and that the attorneys in his law firm "are very experienced" in the area of black lung law. April 7, 2011 Attorney Fee Petition. 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.*

Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse her discretion in determining that claimant's counsel's requested hourly rates were reasonable, and reflected the applicable market rates. Decision and Order at 5; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *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 Mr. Wolfe and \$225.00 for Mr. Gilligan as being reasonable in this case.

In addition, 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, employer filed a motion to compel discovery, seeking information from claimant's counsel regarding his attorney fee requests in other cases. In her Decision and Order, the administrative law judge denied employer's discovery request, finding, *inter alia*, that "a petition for attorney's fees should not result in a 'second major litigation.'" Decision and Order at 2. An administrative law judge exercises broad discretion in procedural matters, *see* 20 C.F.R. §725.455, and employer has identified no authority in support of its argument that the administrative law judge should have allowed discovery. Employer's Brief at 11. Moreover, because employer has not demonstrated prejudicial error or an abuse of discretion on the part of the administrative law judge in denying its request, the administrative law judge's decision to deny employer's motion to compel discovery is affirmed. *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). Because employer has not demonstrated an abuse of discretion in the administrative law judge's award of the attorney's fee in this case, we affirm the administrative law judge's fee award of \$5,006.25 for legal services performed on behalf of claimant. *See Jones*, 21 BLR at 1-108.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney Fees is affirmed. We order employer to pay claimant's counsel \$5,006.25 for legal services performed while the case was pending before the Office of Administrative Law Judges.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge