BRB No. 11-0131 BLA

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| HAROLD GOSNELL | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| EASTERN ASSOCIATED COAL CORPORATION | ) | DATE ISSUED: 07/29/2011 |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order – Partial Award of Attorney Fees of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order (2007-BLA-5525) of Administrative Law Judge Richard T. Stansell-Gamm awarding attorney's fees with respect to a miner'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).[1] Claimant's counsel, Joseph E. Wolfe, submitted a fee petition to the administrative law judge requesting $35,953.75, representing 174.7 hours of professional services performed between January 2, 2007 and July 29, 2010, and reimbursement of costs of $2,840.07 for medical treatment, and $3,332.47 for medical litigation expenses.[2] After considering employer's objections, counsel's response, and the evidence presented, the administrative law judge approved the hourly rates requested, but reduced the number of approved hours from 174.7 to 143.2. The administrative law judge further disapproved the requested $2,840.07 for medical treatment, and reduced the requested $3,332.47 for medical litigation expenses to $2,344.97. Accordingly, the administrative law judge awarded claimant's counsel $31,628.75 in attorney's fees for 143.2 hours of services, and $2,344.97 for reimbursement of costs, for a total award of $33,973.72.

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimant's counsel responds in support of the attorney's fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer submitted a reply brief, reiterating its contentions.

The amount of an attorney's fee award by an administrative law judge 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.[3] *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 attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-17 (1995).

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[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect employer's appeal of the administrative law judge's attorney's fee award.

[2] Claimant's counsel requested an award of fees for time billed by Joseph E. Wolfe; three other attorneys, Bobby S. Belcher, W. Andrew Delph, and Ryan C. Gilligan; and legal assistants. The requested hourly rate for Joseph E. Wolfe was $300.00 per hour for 74.20 hours. The requested hourly rate for Mr. Belcher was $250.00 per hour for .75 hours; for Mr. Delph, $200.00 per hour for 4.75 hours, and for Mr. Gilligan, $175.00 for 40.75 hours. The requested hourly rate for the legal assistants was $100.00 per hour for 54.25 hours.

[3] As the miner's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

When a claimant wins a contested case, the Act provides that 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 regulations provide that an approved fee shall 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**

In determining the amount of an attorney's fee to be awarded under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Supreme Court has held that 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 burden falls on the fee applicant 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." *Id.* at 896 n.11.

Employer initially argues that the administrative law judge erred in approving the hourly rates requested by Mr. Wolfe and his co-counsel. Employer contends that claimant's counsel failed to provide sufficient information relevant to the applicable market rate. Employer's Brief at 4-8. We disagree. In his fee petition, claimant's counsel indicated that the requested rates for him and for Messrs. Belcher, Delph, and Gilligan, of $300.00, $250.00, $200.00, and $175.00 per hour, respectively, reflected their customary billing rates. In support, counsel provided a list of twenty-one black lung cases from 2006 to 2008, in which he was awarded an hourly rate of $300.00. The case list also reflects seven awards of $250.00 per hour and one award of $200.00 per hour for Mr. Belcher, ten awards of $200.00 per hour and one award of $150.00 per hour for Mr. Delph, and two awards of $175.00 per hour and one award of $125.00 per hour for Mr. Gilligan. Based on the documentation provided by claimant's counsel, the administrative law judge found that the referenced black lung awards supported claimant's counsel's requested hourly rate and those of his co-counsel.[4] Supplemental Decision and Order at

[4] The administrative law judge acknowledged that counsel did not submit copies of the decisions. However, the administrative law judge concluded, as was within his discretion, that, based on his review of the five decisions that he had adjudicated, he had

3. Evidence of fees received in the past is an acceptable method of establishing a market rate. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010).

In awarding claimant's counsel and his associates the requested hourly rates, the administrative also relied upon counsel's extensive experience in litigating federal black lung cases. Supplemental Decision and Order at 4. Experience is a relevant factor 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); *see B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 664-65, 24 BLR 2-106, 2-124 (6th Cir. 2008). Finally, the administrative law judge noted that the requested hourly rates comported with the rates listed in the 2006 Survey of Law Firm Economics published by Altman & Weil, for the South Atlantic Region. Supplemental Decision and Order at 4.

We reject employer's contention that the administrative law judge lacked sufficient factual support for the hourly rates that he found to be established. In this case, the administrative law judge did not abuse his discretion in considering the rates awarded to claimant's counsel, and to his associates, in past black lung cases, which are in line with the requested rates in this case. *See Cox*, 602 F.3d at 290, 24 BLR at 2-291.

Based upon the facts of the case, we hold that the administrative law judge did not abuse his discretion in determining that claimant's counsel established that his usual billing rate and those of Messrs. Belcher, Delph, and Gilligan are $300.00, $250.00, $200.00, and $175.00 per hour, respectively. Supplemental Decision and Order at 4; *see Cox*, 602 F.3d at 290, 24 BLR at 2-291; *Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 n.8 (2010); *Maggard v. Int'l Coal Group*, 24 BLR 1-172, 1-175 n.9 (2010).

We further reject employer's contention that the administrative law judge erred in approving an hourly rate of $100.00 for counsel's legal assistants. Employer's Brief at 8. Employer's reliance on *Bowman*, requiring that counsel "identif[y] the training, education and experience of his legal assistant(s)" is misplaced, as that case concerned an award of fees for work performed before the Board, pursuant to 20 C.F.R. §802.203(d)(2). *Bowman*, 24 BLR at 1-171 n.10; Employer's Brief at 8. Contrary to employer's arguments, the regulation governing fees for work performed before an administrative

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no reason to believe that the claimed hourly rate awards in the decisions issued by the other six administrative law judges were inaccurate. *See Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998)(*en banc*); Supplemental Decision and Order at 3 n.1; Employer's Brief at 7.

law judge requires only that counsel "indicate the professional status (e.g. attorney, paralegal, law clerk, lay representative or clerical)" of the persons performing the work for which fees are requested, and counsel did so here. 20 C.F.R. §725.366(a).

Because it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's approval of the requested hourly rates for Mr. Wolfe, his co-counsel, and his legal assistants in this case.

**Allowable Hours**

Employer also objects to the administrative law judge's calculation of allowable hours. Once a service has been found to be compensable, the adjudicating officer must decide whether the amount of time expended by the attorney in performance of the service is excessive or unreasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

Employer specifically contends that the number of hours claimed in this case is excessive, based on counsel's use of the quarter-hour billing method. Employer's Brief at 9. We disagree. Quarter-hour billing is permissible, as long as the total amount of time is reasonable. *Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127. The administrative law judge initially considered employer's contentions that the number of hours requested in the fee petition is "excessive on its face" and that the time charges disclose ". . . gross inefficiency, failure to exercise billing judgment, duplication of effort, and charges for clerical work." Supplemental Decision and Order at 4, *quoting* Employer's Motion to Deny Fee Petition at 6. The administrative law judge found that, because this case remained before the Office of Administrative Law Judges for over two years, and resulted in a forty-page decision, employer's blanket assertion that the fee petition was excessive lacked merit. Supplemental Decision and Order at 4. The administrative law judge further addressed employer's specific objections to the number of hours billed, and determined whether each charge was "reasonable." Supplemental Decision and Order at 4. The administrative law judge reduced the 174.7 hours of requested time by 31.4 hours, for a total of 143.2 hours of compensable time. Supplemental Decision and Order at 4-12. As the administrative law judge acted within his discretion in finding the remaining hours claimed to be reasonable, in light of the services performed, we reject employer's assertion that the administrative law judge erred in approving claimant's counsel's use of quarter-hour billing. *Bentley*, 552 F.3d at 666-67, 24 BLR at 2-127; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); Supplemental Decision and Order at 4.

Employer next asserts that a number of services performed by counsel and his legal assistants were clerical in nature, and, therefore, should have been disallowed. Employer's Brief at 10 n.5. Clerical services are considered part of overhead expenses and are figured into the hourly rate. *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-218

(1986). In this case, the administrative law judge agreed with employer that claimant's counsel was not entitled to compensation for forty-one entries documenting time spent on clerical tasks. Supplemental Decision and Order 5-8. Consequently, the administrative law judge disallowed a total of 10.75 hours performed by counsel and his staff for these activities. Supplemental Decision and Order 5-8. The administrative law judge further found, however, that "[a] substantial number" of employer's objections related to time charges "which include both administrative and non-administrative tasks." Supplemental Decision and Order at 5 n.2. In addition to clerical tasks, these entries involve compensable work including: client contact; file review, analysis, and organization; preparation of discovery; review of x-ray readings; and correspondence with the Office of Administrative Law Judges, medical experts, and opposing counsel. The administrative law judge explained that he approved these charges, as the time entries were for a quarter hour and included non-administrative tasks. Supplemental Decision and Order at 5 n.2. The administrative law judge further explained that he considered employer's remaining objections, and found that the challenged charges were not clerical in nature, and thus, were compensable. *Id.* We affirm the administrative law judge's allowance of these entries, as within his discretion. *See Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Abbott*, 13 BLR at 1-16; *Lanning*, 7 BLR at 1-316.

Employer also asserts that the administrative law judge "failed to address" employer's objections to the numerous hours charged by counsel and his staff for "repeatedly reviewing and summarizing the evidence" and "analyz[ing] the file." Employer's Brief at 9-10, incorporating by reference Employer's Motion to Deny Fee Petition, Tables B & C. Employer further contends that there is no evidence that the file analysis required any legal work, and argues that the claimed service is "vague and duplicative." Employer's Brief at 10. Contrary to employer's contention, the administrative law judge stated that he "considered each of the extensive objections" raised by employer's counsel, and agreed with employer that a total of thirty-four claimed entries, representing 14.75 hours of work, were for duplicative activities performed by counsel and his staff. Supplemental Decision and Order at 8-11. With respect to the remaining entries, the administrative law judge found, as was within his discretion, that the "charged tasks were sufficiently separated in time and nature, and thus not duplicative." Supplemental Decision and Order at 8 n.3. We affirm the administrative law judge's allowance of these entries, since the administrative law judge applied the proper standard to these requested hours, and did not abuse his discretion in allowing these entries. *Abbott*, 13 BLR at 1-16.

**Allowable Expenses**

Employer next asserts that claimant is not entitled to recover Dr. DePonte's expert witness fees because Dr. DePonte did not appear at the formal hearing. Employer's Brief at 11. We disagree. Section 28(d) of the Longshore Act, 33 U.S.C. §928(d), as

incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), permits the recovery of fees for medical experts who do not attend the hearing. *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001); *see Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994). Further, although employer is correct in noting that case law from the United States Court of Appeals for the Seventh Circuit does not constitute binding precedent in this case arising within the jurisdiction of the Fourth Circuit, the standard of review of an administrative law judge's findings regarding an attorney's fee petition, namely, whether the administrative law judge's findings are arbitrary, capricious, or an abuse of discretion, is uniform throughout the circuits. *See Cox*, 602 F.3d at 282, 24 BLR at 2-279; *Robinson v. Equifax Info. Serv., LLC*, 560 F.3d 235, 243 (4th Cir. 2009); *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 804, 21 BLR 2-631, 2-636 (4th Cir. 1999); *Hawker*, 326 F.3d at 902, *aff'g Hawker*, 22 BLR at 1-180; *Jones*, 21 BLR at 1-108.

In this case, the administrative law judge specifically considered employer's objections to the expenses for Dr. DePonte's services and determined, as was within his discretion, that the services provided by Dr. DePonte were reasonable and necessary litigation expenses, and that the fees charged were reasonable in light of the services she performed.[5] *See* 20 C.F.R. §725.366(c); *Branham*, 19 BLR at 1-4; Attorney Fee Order at 2. The test for whether an expense is reimbursable is whether the attorney, at the time

[5] Counsel claimed litigation expenses totaling $2,135.65 for two depositions, court reporter fees, chest x-ray and computerized tomography (CT) interpretation fees, and mileage reimbursement, associated with Dr. DePonte. The administrative law judge noted that Dr. DePonte interpreted multiple chest x-rays, CT scans, and a PET scan, which were all "placed into evidence and represented significant evidence for the Claimant." Supplemental Decision and Order at 13-14. The administrative law judge further explained his determination to approve Dr. DePonte's fees:

> Since the stability of the pulmonary mass demonstrated in a series of radiographic studies obtained over the course of years was an important consideration regarding etiology, a deposition of a principle [sic] radiologist in this case was neither unnecessary nor unreasonable. To the contrary, considering Dr. DePonte's demonstrated expertise as a dual qualified radiologist and her numerous radiographic interpretations admitted into evidence, I find deposing her for litigation preparation to be a reasonable and necessary litigation expense.

Supplemental Decision and Order at 14. The administrative law judge, however, declined to approve costs associated with Dr. DePonte's second deposition, as claimant's counsel failed to establish its necessity. Supplemental Decision and Order at 14.

work was performed, could have reasonably regarded it as necessary to establish claimant's entitlement. *Lanning*, 7 BLR at 1-316-17; Supplemental Decision and Order at 13-14. That a physician's opinion did not ultimately prove definitive has no bearing on whether, at the time claimant's counsel obtained the physician's services, he could reasonably regard them as necessary. *See Lanning*, 7 BLR at 1-316. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused his discretion, in finding that the requested charges were reasonable. *See* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning*, 7 BLR at 1-316-17; *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989).

We similarly reject employer's contention that the administrative law judge erred in approving, as reasonable, travel expenses incurred for claimant to attend his examinations and evaluations by Drs. DePonte[6] and Cohen.[7] Employer asserts that, contrary to the administrative law judge's finding, employer should not be held liable for claimant's travel costs associated with the examinations by Drs. DePonte and Cohen, as claimant was not traveling for the purpose of treatment, as provided for by 20 C.F.R. §725.705(a) but, rather, for the purpose of obtaining a medical evaluation. Employer's Brief at 11. Employer asserts that it is unfair to allow claimant to travel three hundred miles round trip to see Dr. DePonte, and twelve hundred miles round trip to see Dr. Cohen, at employer's expense, when there are medical experts closer to claimant's home, and when employer may not request that claimant travel more than one hundred miles from his home to be examined. Employer's Brief at 11-12.

The administrative law judge properly determined that claimant is entitled to reimbursement of travel expenses associated with the examinations of Drs. DePonte and Cohen. *See* 20 C.F.R. §725.366(a), (c). The administrative law judge explicitly addressed and rejected employer's contention regarding its liability for examinations by Drs. DePonte and Cohen, finding that the applicable regulation specifically provides for reasonable and unreimbursed expenses incurred in establishing a claimant's case. 20 C.F.R. §725.366(a), (c); Supplemental Decision and Order at 14-15. As the administrative law judge examined all of claimant's claimed expenses associated with

[6] Claimant's counsel claimed expenses totaling $142.40 for claimant's mileage associated with claimant's examination by Dr. DePonte. Supplemental Decision and Order at 14.

[7] Counsel claimed expenses totaling $1,035.22 for claimant's mileage, lodging, and tolls associated with claimant's examination by Dr. Cohen. The administrative law judge disallowed $48.65 for meals, as food is not a reimbursable expense. Supplemental Decision and Order at 15.

claimant's travel to see Drs. DePonte[8] and Cohen,[9] and found them to be recoverable as reasonable and necessary unreimbursed litigation costs, we affirm the administrative law judge's conclusion that counsel is entitled to reimbursement for these expenses.

Because we have rejected all contentions of error raised by employer, we affirm the administrative law judge's attorney's fee award. As noted, this fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman*, 18 BLR at 1-17.

[8] The administrative law judge found that "[c]onsidering the significance of Dr. DePonte's assessments, [he] consider[ed] [claimant's] July 2006 trip for a direct radiographic study by that radiologist following his [Department of Labor] examination a necessary and reasonable litigation expense." Supplemental Decision and Order at 14.

[9] The administrative law judge rejected employer's contention that claimant should have selected a physician closer to home than Dr. Cohen:

> [Claimant's] selection of Dr. Cohen as a principal litigation medical specialist in his case was not a frivolous and unnecessary choice considering the vast, and conflicting, array of radiographic and biopsy evidence, as well as diverse medical opinion [sic] that produced an extensively contested issue regarding the presence of complicated pneumoconiosis.

Supplemental Decision and Order at 15. The administrative law judge further found that the regulation preventing employer from imposing lengthy travel on claimant for pulmonary evaluations does not limit claimant's ability to choose a specialist beyond one hundred miles from his home, provided the evaluation is necessary. Supplemental Decision and Order at 15, *referencing* 20 C.F.R. 725.414(a)(3)(i). Finally, the administrative law judge specifically considered the claimed hotel charges and found that $189.00 per night for a Marriott in the Chicago medical district, plus $28.00 for parking, and city and state taxes, was not unreasonable. Supplemental Decision and Order at 15.

Accordingly, the administrative law judge's Supplemental Decision and Order – Partial Award of Attorney Fees is affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge