

BRB No. 12-0643 BLA

LOUELLA E. SWINEY)
(Widow of DONALD SWINEY))
)
Claimant-Respondent)
)
v.)
)
DONALD SWINEY MINING) DATE ISSUED: 07/19/2013
)
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 Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees (2009-BLA-5676) of Administrative Law Judge Lystra A. Harris in connection with a survivor's claim filed pursuant to the

provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ Claimant's counsel (counsel) submitted an itemized fee petition requesting a total fee of \$13,256.25, representing 28.75 hours of legal services performed by Joseph E. Wolfe at an hourly rate of \$300.00, 1.25 hours of legal services performed by Ryan C. Gilligan at an hourly rate of \$225.00, 4.75 hours of legal services performed by W. Andrew Delph at an hourly rate of \$200.00, 12.5 hours of legal services performed by Micah S. Blankenship at an hourly rate of \$150.00, and 15.25 hours of services performed by counsel's legal assistants at an hourly rate of \$100.00. Counsel's fee petition also requested reimbursement of necessary expenses in the amount of \$2,500.00. Counsel indicated that the services were provided while the case was pending before the administrative law judge from August 8, 2008 through April 10, 2012. The administrative law judge considered counsel's fee petition and employer's objections thereto, and awarded counsel a total fee of \$11,636.00 for services rendered to claimant by counsel and his staff,² and also ordered employer to reimburse claimant \$2,500.00 for the miscellaneous expenses incurred.

On appeal, employer contends that the administrative law judge's Order does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because she did not determine the prevailing market rate and she did not explain why she rejected the fee information submitted by it. Employer also challenges the administrative law judge's allowance of the expenses claimed. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded in this appeal.

¹ Claimant filed a survivor's claim on November 8, 2007. In a Decision and Order dated March 19, 2012, the administrative law judge awarded benefits. Employer appealed the administrative law judge's Decision and Order to the Board, and by decision dated March 26, 2013, the Board affirmed in part, vacated in part, and remanded the case to the administrative law judge for further consideration. *Swiney v. Donald Swiney Mining*, BRB No. 12-0336 BLA (Mar. 26, 2013)(unpub.). This survivor's claim is currently pending before the Office of Administrative Law Judges.

² In addressing employer's objections to the requested number of hours of services performed, the administrative law judge disallowed 3.0 hours of legal services performed by Joseph E. Wolfe and .75 hours of legal services performed by Ryan C. Gilligan as being either clerical in nature or relating to the living miner's claim, which was not before the administrative law judge. Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees (Order) at 4, 6. Additionally, the administrative law judge disallowed 7.0 hours of services performed by the legal assistants as being clerical in nature, or duplicative. *Id.* at 3-6.

The amount of an attorneys' 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, or an abuse of discretion.³ 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 attorneys' 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).

Hourly Rate

In determining the amount of attorneys' fees to award 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. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008). 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 administrative law judge considered employer's challenge to the rates billed by claimant's attorneys. The administrative law judge stated, "I find that these rates are well-supported by the nature of the case; each person's level of knowledge and experience; and the prevailing market rates." Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees (Order) at 2. Therefore, she allowed the rates requested by counsel.

Employer contends, however, that the administrative law judge's attorneys' fee award should be vacated because "[i]t is impossible to determine what, if anything, the

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); *Swiney v. Donald Swiney Mining*, BRB No. 12-0336 BLA (Mar. 26, 2013)(unpub.).

[administrative law judge] relied on in awarding the rates requested.” Employer’s Brief at 3. Employer also argues that prior awards do not establish attorneys’ rates, and that the administrative law judge did not explain why she rejected the fee information submitted by it.⁴ We disagree.

The administrative law judge indicated that she considered the level of knowledge and relative experience of each of the attorneys who participated in the representation of claimant, as well as prevailing market rates.⁵ In *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010), the United States Court of Appeals for the Fourth Circuit recognized that evidence of attorneys’ fees received in the past is an appropriate factor to take into account when establishing a market rate. Further, the administrative law judge’s decision to award the respective hourly rates of \$300.00, \$225.00, \$200.00, and \$150.00 was based on consideration of the attorneys’ relative experience. Order at 2. This is a relevant factor that an administrative law judge may consider in determining a reasonable hourly rate. *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. The administrative law judge’s findings are, therefore, sufficient under the APA, and she did not abuse her discretion in determining that the requested hourly rates were reasonable and reflected the prevailing market rates. Order at 2; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 n.8 (2010) (Order), *appeal docketed, Bowman Coal Co. v. Director, OWCP [Bowman]*, No. 12-1642 BLA (4th Cir. May 16, 2012); *Maggard v. Int’l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010). We, therefore, affirm the administrative law judge’s approval of the requested hourly rates.⁶

⁴ In support of its objection to the hourly rate, employer submitted claimant’s counsel’s (counsel’s) response to employer’s Request for Admissions in an unrelated case, wherein counsel responded to questions concerning the calculation of hourly rates, as well as copies of unrelated cases wherein counsel, and other attorneys, were awarded fees based on hourly rates less than \$300.00, in cases before the various district directors and in the Office of Administrative Law Judges. *See Employer’s Opposition to Fee Petition.*

⁵ Counsel’s fee petition included citations to twenty-nine cases where Joseph E. Wolfe was awarded an hourly rate of at least \$300.00. In addition, counsel’s summary of these cases lists the hourly rates allowed for other attorneys and legal assistants in his office. *See Claimant’s Fee Petition.*

⁶ We affirm, as unchallenged on appeal, the administrative law judge’s approval of 51.75 hours of 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).

Allowable Expenses

Employer next asserts that the administrative law judge erred in relying on the holding of *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), a case arising within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, in allowing the expenses claimed by counsel.⁷ We disagree. Section 28(d) of the Longshore Act, 33 U.S.C. §928(d), as incorporated into the Act by 30 U.S.C. §932(a), permits the recovery of fees for medical experts who do not attend the hearing. *Hawker*, 326 F.3d at 902, *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR at 1-180; *see Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994). Employer is correct in noting that case law from the Seventh Circuit does not constitute binding precedent in this case arising within the jurisdiction of the Sixth Circuit. The standard of review of an administrative law judge's award of attorneys' fees is, however, uniform throughout the circuits, namely, whether the administrative law judge's award is arbitrary, capricious, or an abuse of discretion. *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 noted employer's objection to the \$2,500.00 in expenses claimed by counsel, arguing that the "[Act] only shifts costs for necessary witnesses who testify at a hearing." Order at 6, *quoting* Employer's Opposition to Fee Petition at 10. The administrative law judge found that "it is proper for [e]mployer to pay the fees of [c]laimant's medical experts, regardless of whether they attend the hearing, were deposed, or merely submitted reports for consideration." Order at 6. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, in finding that the requested expenses were reasonable. *Branham*, 19 BLR at 1-3-4; *see* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984); *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989). Therefore, we reject employer's contention that the administrative law judge erred in approving, as reasonable, the expenses claimed by counsel.

⁷ Counsel claimed expenses totaling \$2,500.00, representing fees paid for the preparation of Dr. Perper's report. *See* Claimant's Fee Petition.

Accordingly, the administrative law judge's Order Granting in Part and Denying in Part Claimant's Petition for Attorneys' Fees is affirmed, but modified to reflect a total fee of \$11,487.50 and reimbursement of \$2,500.00 in expenses.⁸ As noted, a fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *Coleman*, 18 BLR at 1-17.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁸ Because the administrative law judge approved counsel's hourly rate, as well as the rates of his staff, and approved a total of 51.25 hours of services, it is clear that the administrative law judge's decision contains a clerical error in the computation of the total fee. The administrative law judge calculated the total fee as \$11,636.00; however, based on the approved hourly rates and number of hours of services approved, the appropriate total fee is \$11,487.50. Consequently, we modify the administrative law judge's award to reflect the correct calculation of the attorneys' fee. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993), citing *Johnson v. Director, OWCP*, 7 BLR 1-206 (1984).