BRB No. 99-0227 BLA

DENNIS V. RACER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
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 Awarding Representative's Fees of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Gregory S. Feder (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Representative's Fees (90-BLA-2178) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).

Subsequent to the issuance of Administrative Law Judge Robert J. Feldman's Decision and Order awarding benefits, claimant's counsel submitted a fee petition to the administrative law judge, requesting $9,421.34 for 23.75 hours of services at $250 per hour, 17.25 hours of paralegal services at $75 per hour, and $2,190.09 in expenses. The administrative law judge found that the hourly rates requested were excessive, and consequently reduced counsel's hourly rate to $200 per hour, reduced the paralegal rate to $56 per hour, and awarded the full amount of the expenses requested, for a total fee of $7,906.09. Employer appealed both the award of benefits and the attorney fee award to the

Board, which issued a Decision and Order on May 31, 1995, vacating the award of benefits and remanding the case to the administrative law judge. The Board declined to address employer's arguments regarding the award of attorney fees as premature, and also vacated the Supplemental Decision and Order Awarding Attorney Fees. *Racer v. Peabody Coal Co.*, BRB No. 92-0936 BLA (May 31, 1995)(unpub.).

On remand, the case was assigned to Administrative Law Judge Robert G. Mahony, who issued a Decision and Order Awarding Benefits on August 26, 1997. On appeal, the Board affirmed the award of benefits. *Racer v. Peabody Coal Co.*, BRB No. 97-1855 BLA (Sept. 24, 1998)(unpub.). Subsequently, claimant's counsel submitted a fee petition to the administrative law judge, requesting $4,061.99 for 16.1 hours of services at $250 per hour, and $36.99 in expenses. On October 14, 1998, Administrative Law Judge Burke issued the Supplemental Decision and Order Awarding Representative's Fees and awarded claimant's counsel a fee of $3,220 for 16.1 hours of services at $200 per hour for the work performed before the administrative law judge on remand, but disallowed the request for $36.99 in expenses, finding that they were traditional clerical costs which are considered part of counsel's overhead. The administrative law judge also reinstated Judge Feldman's award of $7,906.09 for services rendered during the prior proceedings.

On appeal, employer challenges the number of hours, the hourly rate and the expenses awarded by the administrative law judge for services performed before Judge Feldman, and for the services provided on remand. Claimant responds, urging affirmance of the administrative law judge's fee award, and requesting an additional fee for work performed in response to this appeal. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The award of an attorney's fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.367(a), is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer contends that the administrative law judge's award of an hourly rate of $200 is excessive given that claimant's counsel's standard hourly rate, the rate paid by fee-paying clients in non-contingent litigation, is $150 per hour. Employer asserts that awarding counsel a rate higher than his standard hourly rate violates the holding in *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992), that enhancement of an award of attorney fees on the basis of contingency is not permitted under various fee-shifting statutes, including the Black Lung Act. We hold, however, that the administrative law judge did not enhance claimant's counsel's usual fee on the basis of contingency, but rationally found that $200 per hour was reasonable in light of the issues raised on remand and the services rendered. Moreover, employer's assertion that an hourly rate of $150 would be appropriate and more consistent with the rate obtained by the general legal community in this area of law is insufficient to meet employer's burden of proving that the rate awarded was excessive or that the administrative law judge abused his discretion in this regard. *See generally Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Accordingly, we affirm the award

of $200 per hour as a reasonable hourly rate.

Employer also contends that the administrative law judge erred by reinstating Judge Feldman's original award of attorney fees without independently evaluating the original fee petition, or addressing employer's objections and fully explaining his conclusions. We agree. The Supplemental Decision and Order Awarding Representative's Fees reinstated Judge Feldman's original award of fees without discussion of employer's objection to counsel's use of a fifteen minute minimum billing unit, which employer contends artificially inflates the number of hours billed, and also did not address employer's objection to the expenses awarded by Judge Feldman, even though Judge Burke disallowed similar expenses incurred on remand. As employer raised its objections to the fee petition prior to the fee award, the administrative law judge's failure to address employer's contentions is a violation of the Administrative Procedure Act[1]. Accordingly, remand is required to allow the administrative law judge to fully consider and discuss employer's arguments on remand, and provide a thorough rationale for his findings of fact and conclusions of law. *Abbott, supra; Ovies v.* D*irector, OWCP,* 6 BLR 1-689 (1983); *Barr v. Director, OWCP,* 7 BLR 1-367 (1984); *Marcum, supra; Busbin v. Director, OWCP,* 3 BLR 1-374 (1981).

In addition, employer contends that claimant's counsel may not receive compensation for notifying claimant of medical appointments, indexing files, and drafting letters for eight entries totaling 7.5 hours between January 24, 1991 and October 3, 1996. Employer contends that such tasks are better suited to a paralegal or secretary, and that since claimant's counsel often listed several activities in one entry, some of which employer asserts are compensable, and some of which are not, employer submits that the fee should be reduced by 7.5 hours to reflect the elimination of clerical tasks, or to compensate these tasks at paralegal rates. We reject employer's argument that claimant's counsel may not receive compensation for notifying his client of the status of his claim, or drafting letters, since such items may be included in the fee if the administrative law judge finds such expenses reasonable and necessary to establish entitlement, and such items are not excessive. Since the administrative law judge rationally determined that the services performed on November 15, 1995, June 24, 1996, August 16, 1996, August 28, 1996 and October 3, 1996 were reasonable and appropriate in establishing claimant's entitlement, this finding is affirmed. On remand however, the administrative law judge must address employer's specific challenges to the services performed on January 24, 1991, February 12, 1991, and March 22, 1991, and provide a thorough statement of his findings of fact and conclusions of law. *Gibson v. Director, OWCP,* 9 BLR 1-149 (1986); *Lenig v. Director, OWCP,* 9 BLR 1-147 (1986); *Lanning v. Director, OWCP,* 7 BLR 1-314 (1984); *Kovaly v. Director, OWCP,* 7 BLR 1-383 (1984); *Miller v. Director, OWCP,* 4 BLR 1-640 (1982); *Picinich v. Lockheed Shipbuilding,* 23 BRBS 128 (1989).

Lastly, claimant's counsel has requested an attorney fee for work performed before the Board

[1]The Administrative Procedure Act, 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).

on the instant appeal pursuant 20 C.F.R §802.203. Counsel requests a fee of $250.00 for 1.25 hours at an hourly rate of $200.00. Employer has not submitted any objection to claimant's counsel's fee request. The Board finds the requested fee to be reasonable in light of the services performed, and hereby approves a fee of $250.00, to be paid directly to claimant's counsel by employer. 33 U.S.C.§928; 20 C.F.R §802.203.

Accordingly, the Supplemental Decision and Order Awarding Representative's Fees is affirmed in part, and vacated in part, and the instant case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge