BRB No. 09-0705 BLA

EMILY BOLLING (Widow of OWEN BOLLING)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 06/16/2010
INDIAN MOUNTAIN COAL COMPANY	)	
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 Supplemental Order Awarding Attorneys' Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

W. William Prochot and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Supplemental Order Awarding Attorneys' Fees (2005-BLA-05307) of Administrative Law Judge Pamela Lakes Wood regarding a survivor'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 submitted a fee petition to the administrative law judge for legal services, in the amount of $2,575, performed from March 7, 2008 to November 11, 2008, and reimbursement of costs totaling $3,747. After considering employer's objections, counsel's response, and the evidence presented, the administrative law judge determined that the requested attorneys' fees actually totaled $2,995 and allowed all of the hours and costs requested. Accordingly, the administrative law judge awarded claimant's counsel $2,995 in attorneys' fees and $3,747 in costs.[2]

On appeal, employer argues that the administrative law judge's fee award should be vacated because claimant's counsel failed to support his fee petition with "market evidence." Employer's Brief at 4-5. In addition, employer asserts that it is unclear what bases the administrative law judge relied on to set the fees. Further, employer states that the administrative law judge erred in not requiring claimant's counsel to establish the reasonableness of the hours claimed and in shifting the payment for expenses to employer. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has responded to employer's appeal.

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. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*).

Initially, employer argues that the administrative law judge did not explain the basis for her determination of the applicable market rate for claimant's counsel. In this regard, employer argues that the administrative law judge abused her discretion by relying on the Altman & Weil survey of attorneys' fees, contending that: the survey lists average rates; does not identify the type of work performed; and "says nothing about the rates for black lung litigation in the Norton, Virginia area where counsel practices."

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[1] On March 30, 2010, the Board issued an order granting the parties the opportunity to submit briefs regarding the potential effects of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010. *Bolling v. Indian Mountain Coal Co.*, BRB No. 09-0705 BLA (Mar. 30, 2010)(unpub. Order). Employer filed a supplemental brief, asserting that, based on the filing date of the instant claim, the amendments do not apply. Upon consideration of this issue, we agree with employer that the recent amendments do not apply to the present claim, as it was filed prior to January 1, 2005.

[2] Claimant's counsel requested a reimbursement of fees regarding time billed by himself, Joseph E. Wolfe, another attorney, Ryan C. Gilligan, and a legal assistant.

Employer's Brief at 9. In addition, employer asserts that the administrative law judge erroneously relied on the individuals' customary rates and prior awards, without requiring any evidence, in violation of 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), 30 U.S.C. §932(a). Further, employer challenges the administrative law judge's reliance on *O.R.H.* [*Hogston*] *v. Blue Star Coal Corp.*, BRB No. 07-0124 BLA (Oct. 30, 2007)(unpub.), and her "general knowledge or familiarity with the market" to justify the rates. Employer's Brief at 10.

We hold that employer's arguments regarding the attorneys' fees have merit. 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 regulation governing fees provides, in part, that:

> Any fee approved . . . 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 fee requested.

20 C.F.R. §725.366(b).

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. Delaware 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.

In reviewing the appropriateness of counsel's requested hourly rate, the administrative law judge acknowledged that the Altman & Weil survey was "not a controlling measurement of appropriate attorneys' fees." Supplemental Order at 3. The administrative law judge also determined that she was not bound by previous awards she made to claimant's counsel, and his legal assistants. *Id*. However, the administrative law

judge concluded that claimant's counsel established that the claimed rates are reasonable because they are based upon counsel's customary billing rate. *Id*.

We agree with employer that, on the facts of this case, the administrative law judge's award of attorneys' fees cannot be affirmed. Subsequent to the issuance of the administrative law judge's award of attorneys' fees, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, --- BLR --- (4th Cir. 2010), that an administrative law judge erred by determining a reasonable hourly rate in the absence of satisfactory specific evidence of the prevailing market rates. The court detailed the fee applicant's burden, and appropriate sources of evidence, in establishing a reasonable hourly rate in the fee-shifting context. In this case, claimant's counsel failed to provide specific evidence of the prevailing market rates in the relevant community in which he seeks an award and, therefore, he failed to meet his burden of proof. *See Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990). Consequently, we vacate the administrative law judge's award of attorneys' fees and remand the case for the administrative law judge to determine a reasonable hourly rate in accordance with the Court's guidance in *Cox*.[3] *See Cox*, 602 F.3d at 290, n.12.

Employer further argues that the administrative law judge erred in discrediting the affidavit proffered to support its argument that the fees claimed are excessive. Employer also asserts that the administrative law judge removed counsel's burden of establishing the reasonableness of the hours claimed with respect to repeated reviews of the case by a legal assistant and an allegedly improper, *ex parte* conversation between claimant's counsel and a Department of Labor (DOL) official. Further, employer contends that the administrative law judge impermissibly granted expenses related to an expert witness who did not testify, and for expenses that lacked documentation.

[3] Counsel may submit evidence of the fees he has received in the past, as well as affidavits of other lawyers who might not practice black lung law, but who are familiar both with the skills of the fee applicant and, more generally, with the type of work in the relevant community. Further, in determining a reasonable prevailing rate, the administrative law judge is not limited to consideration of fees granted in black lung cases; rather, consideration of the fees granted in other administrative proceedings of similar complexity would also yield instructive information. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, --- BLR --- (4th Cir. 2010); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 245 (4th Cir. 2009); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994); *see also Bowman v. Bowman Coal Co.*, --- BLR ---, BRB No. 07-0320 BLA (Apr. 15, 2010)(Order); *Maggard v. International Coal Group*, --- BLR ---, BRB No. 09-0271 BLA (Apr. 15, 2010)(Order).

We find merit in employer's contention that the administrative law judge erred in rejecting the affidavit it proffered regarding the prevailing market rate. The administrative law judge noted that, while employer attached a sworn affidavit from an insurance supervisor to support its argument that the hourly rates claimed for the attorneys are excessive, she found the allegations and secondhand statements contained in the document to be hearsay and irrelevant to the matter at hand, and accorded it no probative weight. Supplemental Order at 3. Contrary to the administrative law judge's finding, the fact that evidence contains hearsay does not preclude its admission or consideration in an administrative hearing. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). Although the administrative law judge is not required to automatically accept hearsay evidence as credible, the administrative law judge did not explain, in violation of the APA, her determination in this case, that a sworn affidavit regarding what an insurance company pays attorneys who litigate Black Lung claims in southwestern Virginia, where claimant's counsel practices, is "not relevant to the matter at hand."[4] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1988); *Wenanski*, 8 BLR at 1-489. Therefore, on remand, the administrative law judge must reconsider admission of the affidavit and clearly explain her findings in compliance with the APA.

However, we reject employer's contention, that the legal assistant's review of the file was excessive. The administrative law judge acted within her discretion in finding that employer's assertions, concerning the amount of time it should have taken to monitor the case, were not valid as "a reasonable amount of monitoring is necessary, particularly where deadlines are involved." Supplemental Order at 4. Because employer did not demonstrate an abuse of discretion, we affirm the administrative law judge's determination regarding the legal assistant's time spent in review of the file. *Abbott*, 13 BLR at 1-16.

[4] The administrative law judge also indicated that during the time period covered by the attorney fee petition, the litigation was handled for employer by counsel in Washington, D.C., but that employer did not address its own rates in arguing that the fees claimed by claimant's counsel were excessive. Supplemental Order at 3 n.5. The administrative law judge did not explain, however, how the fees paid by employer in Washington, D.C., are relevant to the establishment of the prevailing market rate in southwestern Virginia, where claimant's counsel practices. Nevertheless, we hold that, contrary to employer's contention, the administrative law judge's statement does not prove hostility by the administrative law judge towards employer, and it does not prove bias by the administrative law judge in this instance. *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568 (1984).

We also reject employer's argument that the telephone call between claimant's counsel and a DOL official, regarding the status of the case, was impermissible and constituted a violation of the bar on *ex parte* communications in the APA. The administrative law judge stated that the DOL official's role is a bit confusing and it is "curious" that he would contact claimant's counsel regarding the case, rather than his own counsel, but that "the salient point is that he is affiliated with a party . . . and not with this tribunal," so the contact was not an *ex parte* communication with the tribunal under the APA or other pertinent regulations. Supplemental Order at 4; *see* 5 U.S.C. §557(d); 29 C.F.R. §18.38. Under the APA, an *ex parte* communication is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. §551(14), as incorporated into the Act by 5 U.S.C. §554(c), 33 U.S.C. §919(d), 30 U.S.C. §932(a). The APA further provides, however, that "requests for status reports on any matter or proceeding covered by this subchapter," do not constitute *ex parte* communications. *Id*. In addition, the APA does not treat a communication with a person who is not "involved in the decisional process of the proceeding" as *ex parte*. 5 U.S.C. §557(d)(1).

Based upon the relevant statutory language, we hold that the administrative law judge properly concluded that the communication between claimant's counsel and the DOL official, regarding the status of the case, did not fall within the APA's proscription against *ex parte* contacts. The communications did not concern the merits of the administrative law judge's proceedings, but rather constituted an inquiry regarding the status of the claim. *See* 5 U.S.C. §551(14); *Electric Power Supply Assoc. v. FERC*, 391 F.3d 1225, 1258 (D.C. Cir. 2004). In addition, the DOL official was not "involved in the decisional process" of the proceeding before the administrative law judge, nor is there any evidence that he spoke to any person at the Office of Administrative Law Judges who could be so classified. *See* 5 U.S.C. §557(d)(1)(A), (B). However, employer legitimately questions the necessity of the conversation for prosecuting claimant's case. Since only fees for establishing claimant's case are due from employer, we remand for the administrative law judge to determine whether this activity was a necessary part of prosecuting the case on claimant's behalf.

We also find no merit in employer's assertion that counsel is not entitled to recover fees for an expert witness who did not testify at the hearing. *See Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994). 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). Therefore, contrary to employer's contention, the administrative law judge acted within her discretion in determining, based on a consideration of the evidence, that the expert witness fees were properly recoverable. *See Jones*, 21 BLR at 1-108. Further, there is no merit to employer's

argument that there is no basis for shifting the expenses, as the regulations specifically mandate paying to counsel the reasonable and unreimbursed expenses incurred in establishing claimant's case. *See* 20 C.F.R. §725.366(c).

Accordingly, we vacate the administrative law judge's award of attorneys' fees, and remand this case for reconsideration. On remand, the administrative law judge must initially require claimant's counsel to provide evidence of an applicable prevailing rate. The administrative law judge must then reconsider counsel's fee petition in accordance with the criteria set forth at 20 C.F.R. §725.366. [5]

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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JUDITH S. BOGGS
Administrative Appeals Judge

[5] The administrative law judge should specifically address employer's allegations that there is no documentation to support the charges for the reports of Drs. Perper and Robinette, the x-ray reading from Professional Imaging, and the bills for x-rays from St. Mary's. *See* Employer's Brief at 13.