

BRB No. 10-0546 BLA

HERBERT L. HONEYCUTT)
)
 Claimant-Respondent)
)
 v.)
)
 TAMMY ANNE, INCORPORATED) DATE ISSUED: 06/29/2011
)
 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 Attorney Fee Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney Fee Order (2006-BLA-05209) of Administrative Law Judge Larry S. Merck, rendered in connection with a miner's subsequent 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). Following an award of benefits issued in this case, claimant's counsel, Joseph E. Wolfe, submitted a fee petition requesting \$17,523.75 for legal services performed by his firm from September 6, 2005 through November 5, 2009, before the Office of Administrative Law Judges. The fee petition is based on 88.30 hours of work, specifically, 42.40 hours of work performed by Mr. Wolfe, at the hourly rate of \$300.00, 2.85 hours of work performed by another attorney, Ryan C. Gilligan, at the hourly rate of \$175.00, and 43.05 hours of work performed by legal assistants, at the hourly rate of \$100.00. In support of the fee petition, Mr. Wolfe referenced his education and years of experience, his Martindale-Hubbell ratings, his commitment to assisting coal miners, as well as Mr. Gilligan's education and years of experience. He also submitted a copy of a page from the 2006 Survey of Law Firm Economics published by Altman & Weil (Altman & Weil survey) to support his assertion that the hourly rates requested were reasonable.

Employer filed a motion to deny the fee petition, arguing that claimant's counsel was required to submit specific evidence of the prevailing market rate in counsel's geographic area. Employer argued that the page of the Altman & Weil survey provided by Mr. Wolfe did not establish the market rate for black lung or similar work in the relevant market. Employer submitted several documents as evidence of lower market rates.¹ Employer maintained that the hourly rates warranted in this case were: \$150.00 for Mr. Wolfe; \$100.00 for Mr. Gilligan; and \$50.00 for the legal assistants. Employer also challenged the reasonableness of the hourly rates requested and the number of hours claimed.

¹ Employer submitted the following: a copy of an award of attorney's fees granted to Joseph E. Wolfe, in a different case, at an hourly rate of \$200.00; a fee order of the district director, dated June 18, 2008, awarding an hourly rate of \$200.00 to Mr. Wolfe in an unrelated case; a 2008 declaration by William Prochot, of the law firm of Greenberg Traurig, Washington, D.C., stating that, generally, \$150.00 per hour is the maximum hourly rate charged by attorneys in Eastern Kentucky and Southwestern Virginia, a declaration by Christine Terrill of Old Republic Insurance Company, stating that the company pays Eastern Kentucky attorneys up to \$150.00 per hour and legal assistants up to \$85.00 per hour for defending black lung claims; fee petitions from Mark L. Ford of the Ford Law Offices, Harlan, Kentucky, James L. Hamilton of the law firm of Hamilton & Stevens, PLLC, Pikeville, Kentucky and Mr. Yonts of the law firm of Brent Yonts, P.S.C., Greenville, Kentucky, requesting an hourly rate of \$150.00 in unrelated cases; an award of attorney's fees issued by the district director to John Anderson of Barbourville, Kentucky, at an hourly rate of \$100.00 in an unrelated case; and a copy of a Supplemental Award from the district director, approving a reduced hourly rate of \$100.00 to Mr. Anderson.

After consideration of employer's objections to the fee petition, the administrative law judge determined that employer's evidence failed to establish that the market rate in claimant's counsel's geographic region is no greater than \$150.00 per hour. The administrative law judge found that the requested hourly rates of \$300.00 for Mr. Wolfe, \$175.00 for Mr. Gilligan, and \$100.00 for the legal assistants were reasonable, but reduced the number of compensable hours. The administrative law judge approved a total of 34.1 hours for Mr. Wolfe, 2.85 hours for Mr. Gilligan, and 36.65 hours for the legal assistants. Accordingly, the administrative law judge awarded attorney fees in the amount of \$14,393.75.

On appeal, employer contends that the administrative law judge erred in awarding hourly rates that are not supported by evidence of a market rate, and that he did not address all of employer's objections to the fee petition. Employer maintains that the recent amendments to the Act, which became effective on March 23, 2010, are not implicated in this case. Counsel for claimant responds, urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal, but agrees with employer's position that, because the appeal in this case addresses only the award of an attorney's fee, the amendments to the Act do not affect this appeal. Employer has also filed a reply brief, citing additional case law and administrative decisions in support of its position.

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.² *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, 1-108 (1998) (*en banc*).

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. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Court has held that a 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); *see generally B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 663, 24 BLR 2-106, 2-121

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

(6th Cir. 2008) (defining “reasonable hourly rate” as “the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record”). 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.

Furthermore, the regulation at 20 C.F.R. §725.366(b) states that “[a]ny fee approved under . . . this section shall be reasonably commensurate with the necessary work done and 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 finding that the hourly rates requested by Mr. Wolfe, Mr. Gilligan and the legal assistants, were reasonable, the administrative law judge stated that he relied upon his consideration of “the nature of the issues involved in this case, the experience and expertise of Mr. Wolfe and the members of his firm in this specialized area of the law, Mr. Wolfe’s high Martindale-Hubble rating, the surveys of hourly rates for the geographic area, and other relevant factors,” including an award of \$300.00 per hour issued to Mr. Wolfe in an unrelated case. Attorney Fee Order at 5, citing, *inter alia*, *L.A.C. [Cox] v. Westmoreland Coal Co.*, BRB No. 08-0313 BLA (Jan. 27, 2009) (unpub.).³ As employer asserts, however, the administrative law judge did not explain how this evidence supported his determination that \$300.00 per hour is the applicable market rate for claimant’s counsel, in light of employer’s assertions that (1) the Altman & Weil survey of attorney fees submitted by claimant’s counsel lists average rates; (2) the survey does not identify the type of work performed; 3) the survey does not address the relevant geographic market; and (4) claimant’s counsel provided no other market evidence to support the hourly rates requested. Moreover, claimant’s counsel has failed to include evidence pertaining to the customary billing rates for each person performing the work listed in the fee petition, as required by 20 C.F.R. §725.366(a).

Additionally, subsequent to the issuance of the administrative law judge’s fee order, the United States Court of Appeals for the Fourth Circuit held, in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289-90, 24 BLR 2-269, 290 (4th Cir. 2010), that an

³ The United States Court of Appeals for the Fourth Circuit subsequently vacated *L.A.C. [Cox] v. Westmoreland Coal Co.*, BRB No. 08-0313 BLA (Jan. 27, 2009) (unpub.), wherein the Board had affirmed of an award of attorney fees issued to Mr. Wolfe, based on an hourly rate of \$300.00, as discussed *infra*. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289-290, 24 BLR 2-269, 2-290 (4th Cir. 2010).

administrative law judge “erred by determining a reasonable hourly rate in the absence of ‘satisfactory specific evidence of the prevailing market rates.’” *Id.*, quoting *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990). The Fourth Circuit detailed the fee applicant’s burden, and appropriate sources of evidence, in establishing a reasonable hourly rate in the fee-shifting context. *Cox*, 902 F.2d at 277, 24 BLR at 2-290. In this case, although Mr. Wolfe submitted a page from the Altman & Weil survey of attorney fees for “New England,” “Middle Atlantic” and “South Atlantic” regions, he failed to provide “satisfactory specific evidence” of the prevailing market rates in the relevant community for the type of work for which he seeks an award, and the customary billing rates for the persons performing the work and, thus, failed to satisfy his burden of proof. *See Plyler*, 902 F.2d at 277. We, therefore, vacate the administrative law judge’s Attorney Fee Order and remand the case for the administrative law judge to determine a reasonable hourly rate in accordance with 20 C.F.R. §725.366. *See Bentley*, 522 F.3d at 663, 24 BLR at 2-2-121; *Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 (2010).

We reject, however, employer’s assertion that the administrative law judge erred in not accepting employer’s evidence as dispositive of the prevailing market rate. As noted by the administrative law judge, employer submitted copies of fee petitions, prepared by other attorneys representing other claimants in black lung claims, and affidavits to support its assertion that experienced lawyers, in the relevant geographic area, earn no more than \$150.00 per hour for litigating black lung claims. Attorney Fee Order at 5. The administrative law judge correctly observed, however, that “[a]lthough some attorneys in Kentucky have requested hourly rates of \$150.00, many attorneys practicing in the same area have been awarded \$200 to \$300 for their representation of claimants, which the Board has affirmed.” Attorney Fee Order at 5, *citing* multiple unpublished Board decisions. He concluded that the “fee petitions attached by [e]mployer are no more probative than those submitted by other attorneys in Kentucky and Virginia,” who were awarded greater fees than those cited by employer. *Id.* Because the administrative law judge reasonably found that employer’s evidence does not establish that the prevailing market rate for counsel’s region is, *at most*, \$150.00 per hour, we affirm that finding. *See Bentley*, 522 F.3d at 665, 24 BLR at 2-124; Attorney Fee Order at 5.

Lastly, employer argued below that the fee petition was excessive because it included 12.65 hours of time spent by legal assistants and 5.0 hours of time spent by Mr. Wolfe performing clerical duties, which are not compensable. *See Renewed Motion to Deny Fee Petition* at 6. In considering employer’s objection, the administrative law judge agreed that “sending faxes and mailing documents (5/19/06, 9/6/07, 10/19/07), scanning documents (1/23/09, 2/13/09), requesting copies of reports (10/29/07), issuing checks (11/20/07), and billing [c]laimant for expenses (11/27/07, 12/13/07, 01/11/08),” were primarily clerical. The administrative law judge, therefore, disallowed 2.75 hours of time spent by the legal assistants performing these tasks. Attorney Fee Order at 6. We

agree with employer, however, that the administrative law judge has not explained, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), the bases for his decision not to disallow all of the time alleged by employer to be clerical. Employer's Brief in Support of Petition for Review at 9. On remand, we instruct the administrative law judge to address employer's assertion that an additional 9.9 hours of work charged by legal assistants⁴ and 5.0 hours of work charged by Mr. Wolfe,⁵ were clerical in nature and must be disallowed. *See Renewed Motion to Deny Fee Petition* at 6 n.4, 5.

In summary, we vacate the administrative law judge's award of attorney's fees, and remand this case for further consideration. On remand, the administrative law judge must, as a starting point to his fee analysis, require Mr. Wolfe to provide satisfactory specific evidence of the prevailing market rate for the work performed in the relevant geographic area.⁶ *See Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126. The administrative

⁴ The administrative law judge is instructed to address whether the following entries for work performed by paralegals are clerical in nature: sending facsimiles and performing discovery on September 30, 2005 and September 27, 2006; scheduling and confirming appointments on October 12, 2005, January 5, 2006, July 29, 2006, October 7, 2006, November 14, 2006, November 27, 2006, December 1, 2006, December 13, 2006, September 5, 2007, July 18, 2008, August 26, 2008, October 27, 2008 and October 28, 2008; binding and organizing exhibits on December 27, 2005, November 5, 2007 and October 22, 2008; hand-delivering films on December 28, 2005; logging-in mail on May 12, 2006; docketing due dates on July 22, 2007 and July 11, 2008; calling for and making copies on October 18, 2007, October 27, 2007, November 2, 2007 and October 31, 2008; and scanning documents on January 19, 2009. *See Employer's Brief in Support of Petition for Review* at 9.

⁵ Employer maintains that 5.0 hours billed by Mr. Wolfe for time he spent scheduling appointments, drafting transmittal letters and forwarding releases and evidence, are clerical in nature. *See Renewed Motion to Deny Fee Petition* at 6 n.5

⁶ In the absence of evidence of a prevailing market rate, based on a relatively large number of similarly experienced attorneys in the same geographic practice area, 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. *B&G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122 (6th Cir. 2008). Further, in determining a reasonable prevailing market 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

law judge must also reconsider counsel's fee petition in accordance with applicable law and the criteria set forth at 20 C.F.R. §725.366. The administrative law judge is further instructed to address whether there are additional clerical charges in the fee petition that must be disallowed. In determining the amount of the fee award on remand, the administrative law judge is instructed to explain the bases for his findings in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1988).

Accordingly, the administrative law judge's Attorney Fee Order is affirmed in part, vacated in part and this case is remanded for further consideration consistent with this opinion.

similar complexity would also yield instructive information. *Id.*; *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010)(Order); *Maggard v. Int'l Coal Group*, 24 BLR 1-172 (2010) (Order).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge